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Feeding the Squeeze! National Food Labelling Legislation in a WTO World: Case Studies from France, Canada and Ghana

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Feeling the Squeeze !
National Food Labelling Legislation in a WTO World :
Case Studies from France, Canada and Ghana

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Ça coince !
La co-existence de la réglementation nationale de l'étiquetage alimentaire sous l'ombre de l'OMC : Trois cas d'études - la France, le Canada et le Ghana

Donald E. BUCKINGHAM

Doctoral Thesis submitted jointly to the
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Feeling the Squeeze!
National Food Labelling Legislation in a WTO World: Case Studies from France, Canada and Ghana

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List of Abbreviations and Acronyms / La liste des abréviations et des acronymes

1992 General Rules	*Ghana Standards Board (Food, Drugs and Other Goods) General Labelling Rules, 1992*
1992 Ghana Standard	*Ghana Standard GS 46: 1992 Packaged Food – Labelling Requirements*
Accord SPS	*Accord sur les mesures sanitaires et phytosanitaires* (WTO)
Accord TBT	*Accord sur les obstacles techniques au commerce* (WTO)
AOC	appellation d'origine contrôlée (France)
AOP	appellations d'origine protégées (Communauté européenne)
BSP	Breastfeeding substitute products (Ghana)
CAC	Codex Alimentarius Commission
CAPA	*Canada Agricultural Products Act* (Canada)
CPLA	(Canada) *Consumer Packaging and Labelling Act*
CFIA	Canadian Food Inspection Agency
Code comm.	*Code de la consommation* (France)
[the] Codex	Collection of international adopted food standards of the CAC also known as the Codex Alimentarius
DGCCRF	Direction général de la concurrence, du commerce et de la répression des fraudes (France)
DG-SANCO	Direction générale Santé et Protection des consommateurs (Communauté européenne)
DLC	date limite de consommation (France)
DLUO	date limite d'utilisation optimale (France)
DSB	Dispute Settlement Body of the World Trade Organization
FAO	Food and Agriculture Organization of the United Nations
FDA	(Canada) *Food and Drugs Act*
FDL, 1992	(Ghana) *Food and Drugs Law, 1992*
FIA	*Fish Inspection Act* (Canada)
GATT 1947	*General Agreement on Tariffs and Trade, 1947*

GATT 1994	*General Agreement on Tariffs and Trade 1994* in *Annex 1A: Multilateral Agreements on Trade in Goods* (WTO)
GFDB	Ghana Food and Drugs Board
GS	Ghana Standard
GSB	Ghana Standards Board
IGP	indications géographiques protégées (Communauté européenne)
INAO	Institut national des appellations d'origine (France)
MIA	(Canada) *Meat Inspection Act*
MFN	Most-favoured nation [treatment or status or obligation]
nprPPM	non-product-related production and processing method
OMC	Organisation mondiale du commerce
PDP	Principal Display Panel (Canada)
PPM	production and processing method
prPPM	product-related production and processing method
SPS Agreement	*Agreement on the Application of Sanitary and Phytosanitary Measures in Annex 1A: Multilateral Agreements on Trade in Goods* (WTO)
TBT Agreement	*Agreement on Technical Barriers to Trade in Annex 1A: Multilateral Agreements on Trade in Goods* (WTO)
TRIPS Agreement	*Trade-Related Aspects of Intellectual Property Rights Agreement* (WTO)
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WTO	World Trade Organization
WTO Agreement	*Marrakesh Agreement Establishing the World Trade Organization*

Abstract of Dissertation / Le résumé de la these

Dissertation Abstract

Legal regulation shapes the form and content of food labels. Whether in developed or developing countries, national laws outline obligations for labelling that reflect a combination of safety, commercial, and proprietary objectives based on a country's unique circumstances. This dissertation mines one particular dimension of the interplay between national and international law. While focusing on the narrow issue of food labelling legislation, it canvasses the national and international obligations affecting food labels that arise from intellectual property law, trade regulation and consumer protection.

National food labelling regimes share some similar legislative provisions. French, Canadian, and Ghanaian law all recognize three categories of food labelling elements for pre-packaged foods: (1) mandatory labelling elements; (2) prohibited elements; and (3) reserved elements. As well, failure to comply with food labelling laws can result in criminal or civil liability, although implementation varies from country to country, with "food-centred" cultures more apt to vigorously enforce food labelling laws.

Yet, it not simply national law that dictates the final form of food labels. International legal obligations increasingly play a pivotal role. While early international agreements were driven by States' desires to harmonize certain commercial and intellectual property laws, a shift occurred with the *GATT 1947*. This *Agreement* did not look to harmonize private law regimes amongst trading partners, but rather it set out general obligations that prohibited certain national measures which inhibited trade. The pendulum has swung even further with the establishment of the WTO. National governments, in light of their WTO obligations, must now (a) undertake positive law reform; (b) make national measures WTO-compatible; and (c) submit to compulsory trade dispute resolution, all of which can affect national food labelling laws.

Clear international obligations established to address commercial or health concerns permit States to maintain national measures while still pursuing trade liberalization. However, international obligations applied to discipline national measures like the marking of food quality and the provision of new consumer information tread on national cultural sensitivities. Until further consensus evolves concerning how international obligations should be applied to such national food labelling measures, significant conflicts between national and international obligations will continue.

Le résumé de la thèse

La réglementation des denrées alimentaires détermine la forme et le contenu des étiquettes alimentaires. Que ce soit dans des pays développés ou en voie de développement, les législations nationales exposent un ensemble d'obligations relatives à l'étiquetage qui reflètent une combinaison d'objectifs intimes, commerciaux et relatifs à la propriété intellectuelle, basés sur les situations uniques de chaque pays. Cette thèse aborde une dimension particulière de l'entremêlement du droit national et international. Tout en se concentrant sur la question étroite de la législation relative à l'étiquetage alimentaire, elle soulève les obligations nationales et internationales qui affectent l'étiquetage alimentaire et qui ressortent du droit de la propriété intellectuelle, de la réglementation du commerce et de la protection du consommateur.

Les régimes d'étiquetage alimentaire nationaux partagent cependant des caractéristiques juridiques communes. La législation française, canadienne et ghanéenne reconnaît trois catégories des caractéristiques de l'étiquetage alimentaire pour les produits préemballés : les mentions obligatoires, prohibés, et réservés. De plus, le non-respect des lois sur l'étiquetage alimentaire peut entraîner la responsabilité criminelle ou civile, bien que l'application de ces lois varie d'un pays à l'autre. Les pays dont la culture est axée sur la nourriture sont plus aptes à appliquer rigoureusement les lois sur l'étiquetage alimentaire.

Les lois nationales ne sont pas les seules à dicter la forme que prendront les étiquettes alimentaires. Les obligations juridiques internationales jouent un rôle de plus en plus important. C'est le désir des États d'harmoniser certaines lois sur le commerce et sur la propriété intellectuelle qui a donné naissance aux premiers accords internationaux. Cependant, un changement s'est produit avec l'arrivée du *GATT 1947*. Cet *Accord* ne visait pas à harmoniser les régimes de droit privé entre partenaires commerciaux, mais plutôt à établir des obligations générales prohibant certaines mesures nationales défavorables au commerce. Le balancier a oscillé plus loin encore avec l'entrée en vigueur de *l'Accord de l'OMC*. À la lumière de leurs obligations en vertu de l'OMC, les gouvernements nationaux doivent maintenant : (a) entreprendre une réforme de leur droit positif ; (b) rendre les mesures nationales compatibles avec l'OMC ; et (c) se soumettre aux méthodes obligatoires de règlement de différends commerciaux.

Les obligations internationales établies pour remplir les objectifs de protection de la santé et de réglementation du commerce permettent aux États d'adopter les mesures nationales tout en suivant la libéralisation du commerce international. Cependant, les obligations internationales appliquées aux mesures nationales en ce qui concerne le marquage des produits de qualité ou le renseignement des consommateurs menacent les sensibilités nationales. Jusqu'au moment où le consensus international se codifiera à propos de l'application des obligations internationales à ces mesures nationales, les conflits entre les obligations nationales et internationales continueront.

Dissertation Keywords / Les mots clés de la thèse

Dissertation Keywords

food law; food labelling law, France; Canada; Ghana, food safety, food quality, commercial practices, intellectual property law, international food law, World Trade Organization (WTO); *Agreement on Technical Barriers to Trade* (TBT); *Agreement on Sanitary and Phytosanitary Measures* (SPS); *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS); World Intellectual Property Organization (WIPO); World Intellectual Property Organization (WIPO); Codex Alimentarius Commission, *Codex Alimentarius*; food labelling enforcement; prevention of fraud; nutritional labelling; geographical indications, trade marks, organic foods; eco-labels; and, labelling of foods made from genetically modified organisms (GMOs).

Les mots clés

droit de l'alimentation; droit de l'étiquetage des denrées alimentaires; France; Canada; Ghana; salubrité des denrées alimentaires, qualité des denrées alimentaires, pratiques commerciales, droit de la propriété intellectuelle, droit alimentaire international; Organisation mondiale du commerce (OMC); *Accord sur les obstacles techniques au commerce* (TBT); *Accord relatif aux mesures sanitaires et phtyosanitaires* (SPS); *Accord relatif aux aspects des droits de propriété intellectuelle qui touchent au commerce* (ADPIC); Organisation mondiale de la propriété intellectuelle (OMPI); Commission de Codex Alimentarius, *Codex Alimentarius*; exécution de l'étiquetage des aliments, prévention de la fraude, étiquetage nutritionnel, indications de provenance, marques de commerce, aliments biologiques, éco-étiquettes et l'étiquetage des aliments faits avec organismes génétiquement modifiés (OGMs).

Acknowledgements / Les remerciements

Words of Thanks

[Ce même texte se trouve en version française ci bas.]

Everyone who completes a mammoth project knows that it cannot be completed alone. Like a marathon runner, there is one person who crosses the line because so many others have been there helping and cheering all the way along the route to the finish line.

Over the past four years I have often felt like a marathon runner, wondering if I would find the end of this project, encountering another hill when I thought the last hill was the "last hill". Through it all, I have keenly felt the support and encouragement from so many in so many different ways. I want to thank some of you by name below but in doing so my fear is that I will neglect to mention all the others whose support was so vital. For those I fail to mention below, please accept my thanks and my apologies. Your efforts and assistance was most appreciated.

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Marchiaro and Prof. McRae, it became a truly international project through a co-tutelle arrangement concluded between the two universities. Besides their tireless administrative efforts to get this project up-and-running, both have provided me with endless insights, encouragements and concrete suggestions as to how my dissertation could be improved.

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Garden of Eden had been labelled, whether Eve and Adam might have so readily believed the snake's account of its attributes. How world history might have been changed.

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[The same text is set out in its English version above.]

Chaque personne qui achève un immense projet sait qu'il est difficile de le mener à bien seul. Tout comme dans le cas d'un marathonien, une personne ne peut franchir la ligne d'arrivée que parce que plusieurs autres personnes l'ont aidé et l'ont encouragé tout, au long du chemin jusqu'à la ligne d'arrivée.

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INTRODUCTION: MUCH DEPENDS ON FOOD LABELLING

[Ce même texte se trouve en version française ci bas.]

Since Eve ate apples, much depends on dinner.
Lord Byron, *Don Juan*, 1819

Much depends on food labelling because much depends on food. Food is an ordinary commodity of daily trade and consumption. Stating the obvious, it is essential for every living being's continuing existence and so access to, and acquisition of, food is an important and inevitable part of the human condition. On the one hand then, food can be viewed as a simple commodity, like many others which are produced and sold in millions of commercial transactions around the world everyday.

Yet our relationship with food is infinitely more complex than the mere meeting of our daily physiological needs and the completion of ordinary commercial transactions. Psychological, social and spiritual consequences flow from what we choose to eat. We experience a palette of emotions—comfort, pleasure, prestige, spiritual fulfillment and sometimes even disgust, nausea, and pain—because of what we put into our mouths and stomachs.

As well as being a necessary act, eating food is an intimate, and often social, act. Very few of our actions, and very few indeed that take place on a daily basis, involve the intimacy of eating. What we eat becomes part of us. After all, "you are what you eat".[1] We allow food to penetrate our bodies on such a regular basis that we sometimes take the selection and consumption of food for granted. But like other highly invasive acts that involve violation of our bodies—activities like sex, body piercing and medical intervention—when we consume food we explicitly or implicitly contemplate the risks and benefits involved in consenting to such an intimate act. Often however, we are poorly placed to assess and quantify all elements of the risk involved, and as a result, we undertake or forego the act based on the information we can collect, on our general tolerance to risk and on our trust of others who offer us some assessment of the risk involved in consummating the act.

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[1] For a discussion of this expression, see Paul Rozin, "Cultural Approaches To Human Food Preferences" in John E. Morley *et al.*, eds. *Nutritional Modulation of Neural Function* (San Diego: Academic Press, 1988) p. 139 at 149-150.

Some Preliminary Considerations

Why Food Labels Are Important

Food labels play a vital role in allowing us to gather information, assess risks and develop trust in others who can tell us about the nature and attributes of the food we eat. Labels are the principal means of communication between those who consume food and those who produce, process and market it.

Labelling food matters. It matters to marketers of food products because the label provides the perfect vehicle for them to highlight the qualities of their product. It matters to consumers because the information transmitted by the label allows consumers to better understand the nature of what they are about to purchase and what effect the consumption of it may have upon them. With consumers now distant from the actual producer of foods and with food processing becoming increasingly complex, consumers must rely on food labels for essential information about the food they buy. In most cases, consumers can no longer simply ask food producers because they are not present at the point of retail sales, nor can consumers consult food vendors as they will often not know exactly how, or even by whom, the food they sell was produced.

What labels communicate, of course, depends on what the label's creator includes on the label and the ability of the label's reader to interpret the information provided. At a basic level though, labels are primarily meant to communicate information about the product to which they are attached. Honest food labels tell us what the food is, what it is made of, who made it and when it is likely to no longer be safe for consumption. Food labels have all kinds of marks, images and words which can tell us whether a product has met governmental standards or religious law, or whether it originates with a particular manufacturer whose trade mark we recognize and trust.

When Food Labels Become Problematic

The food label, however, can also have a dark side. As a powerful tool of communication, the food label can be used to speak truth or deception to the consumer. Empty claims, half-truths or deceptive elements on food labels manipulate consumer tastes and preferences without providing the consumer with information he or she seeks. Such labels, sometimes considered the result of clever marketing tactics, only serve to undermine consumer trust, to cause economic loss to consumers and honest merchants and, in extreme cases, to imperil human health.

State Intervention in Food Labelling

It should come as no surprise then that given the power of the simple food label to inform as well as to deceive, the development of food labelling has never been left solely as a matter to be resolved between seller and buyer of food products. Instead, food labelling has long been a subject of State regulation.

State regulation most commonly takes the form of legal enactments which set out rules for food labelling. These enactments are often supported by various executive and judicial means of enforcement. While States could choose not to regulate food labelling and simply leave the matter to be resolved between vendor and consumer, the traditional roles of the State as the guardian of public health and safety, as overseer of the fair and equitable operation of markets and as arbiter of property rights, impose a heavy responsibility on it to regulate food labels and their use.

Thus, the "simple food label" is really not that simple after all, but rather a complex and highly regulated document that has been shaped over the years by two primary forces: (1) a market-oriented force exercised generally by food producers, processors and sellers to label their products to attract and inform consumers; and, (2) a regulatory force generally exercised by the State to regulate the content and form of food labels so as to achieve certain objectives including market stability, protection of consumer health, the recognition of intellectual property and the provision of consumer information.

The interaction of these two forces creates a dynamic tension that contributes to the eventual content and presentation of food labelling. What was once prohibited may later be permitted or even required to appear on food labels. Debates about the contents of food labelling are not a straight-forward and uncontroversial matter. "All aspects of the food label have, at one time, been controversial. They have forced regulators and government authorities to consider the role of the food label and the nature of consumer choice, as well as the science about safety and the role of nutrition in good health."[2]

National food labelling rules as barriers to trade

State intervention in the labelling of food, however, raises its own challenges. In a bygone era where food was locally produced and the vast majority of it traded within national borders, regulation of food labels was strictly a domestic matter. Producers, vendors and even consumers of food could, if they so wished, lobby a centralized State government for changes to labelling laws.

The days of localized production and consumption of food are gone. Today, staggering quantities of food products flow across national borders on a daily basis.[3] While trade in food products has always been a feature of human societies,[4] the world continues to witness phenomenal growth in food trade flows.[5] Authors, referring to the developments of the XIXth and XXth century as "internationalization"[6] or "globalization,"[7] note that few

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[2] Christine J. Lewis, "Harmonization, Mutual Recognition and Equivalence: Labelling and Nutritional Requirements – How Much Information is Necessary?" *Conference on International Trade Beyond 2000: Science-Based Decisions, Harmonization, Equivalence and Mutual Recognition Held in Melbourne, Australia 11-15 October 1999* (Rome: FAO, 1999), online: FAO <http://www.fao.org/docrep/meeting/X2673E.htm> para. 32.

[3] In 2003 trade in food and food animals exceeded $700 billion (USD). FAO, "Agricultural Data – FAOSTAT" (Rome: FAO, 2004), online: FAO <http://faostat.fao.org/faostat/collections?version=ext&hasbulk=0&subject=agriculture>.

[4] See especially Felipe Fernández-Armesto, *Food: A History* (London: Pan Macmillian 2001), chapter 6 The Edible Horizon: Food and the Long-range Exchange of Culture; and Yves Péhaut, "The Invasion of Foreign Foods", Chapter 34 in Jean-Louis Flandrin & .Massimo Montanari, *Histoire de l'alimentation* with Albert Sonnenfeld for the English edition *Food: A Culinary History from Antiquity to the Present* (New York: Columbia University Press, 1999).

[5] Note, for example, the almost 20 fold increase in the worldwide food trade from 1961 ($40 billion USD) to 2003 ($700 billion USD). FAO, "Agricultural Data – FAOSTAT" (Rome: FAO, 2004), online: FAO <http://faostat.fao.org/faostat/collections?version=ext&hasbulk=0&subject=agriculture>.

[6] Tim Lang & Michael Heasman, *Food Wars* (London: Earthscan, 2004).

aspects of every day life have been left unaffected by the sweeping effects of global interaction. Trade has been facilitated by innovations in transportation, communication and science so as to fundamentally change the way in which food (and all other commodities) are produced, processed, manufactured, distributed and sold.

> Nous sommes passés, en quelques millénaires de la vie clanique à la vie provinciale, puis nationale et enfin internationale et même « planétaire », du temps où les aliments non produits chez soi l'étaient chez un voisin ou achetés sur le marché local où l'on connaissait les producteurs-vendeurs et où l'observation directe était possible. Mais avec l'accroissement de la population en général et de l'urbanisation en particulier, nous sommes passés à de nouveaux systèmes de commercialisation.[8]

These new systems of commercialization affect every aspect of food production and consumption including the labelling of food. What was once an exercise between producer, consumer and overseeing State is now often an exercise which involves several players many of which are not located within the same State. International trade thus complicates the regulation of food labels. The rules of one State may be different from those of the next. Thus products required to carry certain information in one country may be denied access to other national markets which have different food labelling rules. A simple example is the requirement for food labelling to be in a language understood by the majority in a particular State. With over 200 States and thousands of languages spoken in those States, it is not possible to produce one food product label which could meet the language requirements for more than a few States. Moreover, there are many national labelling requirements, such as grading and marking standards, product characteristics, lists of ingredients, and quality standards, all of which create a complex web of requirements for any food product to cross international borders.

States have come to recognize the potential of national food labelling measures to impede trade flows. "In general, labelling requirements tend to be not trade restrictive or less trade restrictive than many other regulatory measures. Nonetheless, depending on its

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[7] Alessandro Bonanno *et al.*, eds. *From Columbus to ConAgra : Globalization of Agriculture and Food* (Lawrence, Kansas: University of Kansas Press, 1994).

[8] Pierre-Marie Vincent, *Le droit de l'alimentation - Que sais-je?* vol. 3103 (Paris: Presses Universitaires de France, 1996) at 15.

content, scope and nature, including its mandatory or voluntary character, labelling may have a significant impact on trade."[9]

The regulation of food labels is not, therefore, confined only to statutes and regulations promulgated by State legislatures. Instead, international organizations also have become venues for the recognition and enforcement of legal obligations that affect food labelling. A third force, then along with those of private parties and individual State governments, ultimately contributes to the overall landscape that defines the legal regulation of food labelling. This third force—regulatory oversight by international organizations through the creation of international legal obligations—now requires close attention from States as they maintain and renovate their national food labelling regimes. Increasingly, "[l]es règles d'étiquetage nationales et internationales sont étroitement imbriquées entre elles."[10]

A Dissertation Examining Food Labelling Law As A Contribution To Legal Knowledge

A considerable amount of literature documenting world food production, distribution and consumption has appeared in both English and French in the last three decades. Many popular works have explored every imaginable aspects of food.[11] Academically-orientated volumes have explored the history of food,[12] food's impact on the development of cultures,[13] and the economic and political dimensions of food production and trade.[14]

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[9] WTO, *Labelling*, Submission by the European Communities, G/TBT/W/175; WT/CTE/W/212, 12 June 2002 at para. 3.

[10] Antoine de Brosses, *L'Etiquetage des denrées alimentaires, t. 1 : Mentions obligatoires, Mentions interdites* (Paris: RIA, 2002) at 10.

[11] Books of general interest include Margaret Visser, *Much Depends on Dinner* (Toronto: Harper Perennial 2000; first edition 1986); Frances Moore Lappé, *Diet for a Small Planet* (New York: Ballantine 1991; first edition 1971); Stephen H. Webb, *Good Eating* (Grand Rapids: Brazos Press 2001); Jean-Anthelme Brillat-Savarin, *Physiologie du Goût* (Paris: Belley 1948; première edition 1825); John Tarrant, *Farming and Food* (Oxford: Oxford University Press 1991); Henri Dupin, *Les Aliments* (4e éd) (Paris: Presses Universitaires de France 1990; première edition 1973); Edmond Neirinck & Jean-Pierre Poulain, *Histoire de la cuisine et des cuisiniers: Techniques culinaires et pratiques de table, en France, du Moyen-Age à nos jours* (Cachan, France: Jacques Lanore, 2000); QA International & Chavot, Pierre. *Le Guide des Aliments* (Cologne: Québec Amérique Inc.-Könemann, 1999).

[12] See especially Reay Tannehill, *Food in History - New and Updated Edition* (London: Review 2002; first edition 1973); Kenneth F. Kiple and Kriemhild Coneè Ornelas, *The Cambridge World History of Food* (Cambridge: Cambridge University Press 2000; Maguelonne Toussaint-Samat, *Historie Naturelle et Morale de la Nourriture* (Paris, Larousse 1997; première edition 1987); Felipe Fernández-Armesto, *Food: A History* (London: Pan Macmillian 2001); Jean-Louis Flandrin & Massimo Montanari, *Histoire de l'alimentation* with

Considerably fewer books, however, have been devoted to any legal analysis of food. European lawyers have been the most active in this endeavour, producing food law books which treat the subject generally[15] or specific dimensions[16] of food law. As well, Europeans have created specialized academic looseleaf services and journals,[17] associations and research centres,[18] and even an annual conference[19] exclusively devoted to the examination of current topics in European food law.

Academic literature on food law in the United States,[20] although most often linked also with the regulation of drugs, is quite abundant although less so than in Europe. A premier legal journal[21] published by the Food and Drug Law Institute in Washington D.C.

Albert Sonnenfeld for the English edition *Food: A Culinary History from Antiquity to the Present* (New York: Columbia University Press, 1999).

[13] Jared Diamond, *Guns, Germs, and Steel* (New York: W.W. Norton 1999; first edition, 1997).

[14] Geoff Tansey & Tony Worsley. *The Food System: A Guide* (London: Earthscan, 1995); Anthony Winston, *The Intimate Commodity: Food and the Development of the Agro-Industrial Complex in Canada* (Toronto: Garamond Press, 1993); Tim Lang & Michael Heasman, *Food Wars* (London: Earthscan, 2004).

[15] General volumes on food law in Europe include: Pierre-Marie Vincent, *Le droit de l'alimentation - Que sais-je?* vol. 3103 (Paris: Presses Universitaires de France, 1996); Jean-Paul Branlard, *Droit et Gastronomie: Aspect juridique de l'alimentation et des produits gourmands* (Paris: Gualino, 1999); Raymond O'Rouke, *European Food Law*, 2nd ed. (Copenhagen : Palladian & the Copenhagen Business School Press, 1999).

[16] Volumes that treat specific issues relating to food law, particularly food labelling issues include: Antoine de Brosses, *L'Etiquetage des denrées alimentaires, t. 1 : Mentions obligatoires, Mentions interdites ; t. 2 : Valoriser le produit, Pratique de l'étiquetage* (Paris: RIA, 2002); Agra Europe, *Eurofood Monitor* (London: Agra Europe, 1990-); Norbert Olszak, *Droit des appellations d'origine et indications de provenance* (Paris: Tec & Doc, 2001). An interesting volume that compares European and American food labelling regulation is found in J. Ralph Blanchfield, ed., *Food Labelling* (Cambridge: Woodhead, 2000).

[17] Legal journals and looseleaf services include: World Food Law Monthly (U.K.); EU Food Law Weekly (U.K.); The European Food Law Review (Belgium), Food & Drink Law Monthly (U.K.); Revue de Droit Rural (France) and the German Food Law Review.

[18] The European Food Law Association located in Brussels with national sections in Italy, Spain, the United Kingdom, Germany and France; Research Centre of German and European Food Law, Universität Bayreuth, Bayreuth, Germany.

[19] The most recent such conference was the 13th European Food Law Conference held in Brussels on the 29-30 of June 2004.

[20] The standard American legal texts include Peter Barton Hutt & Richard A. Merrill, *Food and Drug Law: Cases and Materials*, 2nd ed. (New York, Foundation Press, 1991); Peter Barton Hutt & Richard A. Merrill, *Food and Drug Law*, 2nd ed. (New York, Foundation Press, 2004); Michael S. Schumann et al., *Food Safety Law* (Indianapolis: John Wiley, 1997). Peter Barton Hutt has also published a separate volume on the specific subject of food labelling law entitled, *Guide to U.S. Food Labeling Law* (Washington: Thompson, 1991). See also J. Ralph Blanchfield, ed., *Food Labelling* (Cambridge: Woodhead, 2000), a volume that compares European and American food labelling law.

[21] The Food and Drug Law Journal. Topical issues and cases on food law are also collected in the Food Drug and Cosmetic Law Reporter, the Food Drug Cosmetic Law Quarterly and occasionally in the Drake Journal of Agricultural Law. The newest journal on the subject, called the Journal of Food Law and Policy, was launched in 2004 by the University of Arkansas.

also features important developments in the area of U. S. food and drug regulation. As well, there are a handful of American universities and institutes that deal with the issue of food law.[22]

Outside of Europe and the United States, however, there exists very little legal literature written in French or English on food law, and even less on food labelling law. This is particularly the case in Canada.[23] Given the importance of food in everyday life and its long history as a heavily regulated commodity, intimately connected to the human condition, it is time for Canadian legal academics to join their European and American colleagues in examining the subject of food labelling. It is to begin the work of filling this lacuna that this dissertation seeks to make its contribution to academic legal literature.

The Dissertation's Problematique and its Limitations

The Problematique[24]

National food labelling rules have evolved in countries around the world to respond to the unique circumstances found in those States. With spectacular increases in trade in food products internationally, States increasingly agree to international legal obligations which, while facilitating trade, impose limits on their ability to legislate nationally on issues relating to food labelling.

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[22] Two interesting programs of note are the International Food Law Certificate Program offered by the Institute for Food Laws and Regulations at Michigan State University and the ongoing work of Professor Peter Barton Hutt at Harvard Law School, where since 1994 he has collected his students papers on various subjects concerning food and drug law and published them as "Food and Drug Law – An Electronic Book of Student Papers" online: <http:www.law.harvard.edu/faculty/hutt/book_index.html>.

[23] Some legal volumes exist on subjects related to food production and agriculture such as R. Fuller and D. Buckingham, *Agriculture Law in Canada* (Toronto: Butterworths 1999); Donald Purich, *Canadian Farm Law – A Guide for Today's Farmer* (Saskatoon: Western Producer Books, 1982); Marjorie Benson, *Agricultural Law in Canada 1867-1995 – With Particular Reference to Saskatchewan* (Calgary: Natural Resources Institute, 1996). However, none of these works deals in any depth with issues relating to food law in general or food labelling regulation in particular. It is important to note that at least one institute, the Guelph Food Technology Centre at the University of Guelph, has started to offer training in certain aspects of Canadian food law, including aspects of food labelling. See online: GFTC <http:www.gftc.ca>.

[24] An essential discipline for a doctoral dissertation is limiting its scope. Delineating the narrow topic of this study evolved over almost four years. For a discussion of the evolution of the study, please refer to Annex 3: "Notes on the Evolution of the Dissertation" located at the end of this dissertation.

This dissertation examines the interaction of the national and international law in the development of national food labelling regimes in three countries. The Problematique, simply stated, consists of two questions:

(1) What internal influences have shaped the development of national food labelling regimes in the particular country examples of France, Canada and Ghana?

and

(2) What impact has international law's increasing focus on trade liberalization had on the national food labelling legal regimes of France, Canada and Ghana?

The legal analysis required to address the Problematique proceeds in two Parts. The first Part examines the legal basis and content of three national food labelling law regimes. It addresses why and how States regulate food labels. By examining the evolution and current content of food labelling legislation in three states—France from the "Old World", Canada from the "New World" and Ghana from the "Third World"— this dissertation argues that the legal matrix of food labelling rules arises from a unique blend of social, cultural and historic developments that vary from country to country. National legal regulation of food labelling is well developed in each of the study countries. In each case, the long history of food labelling legislation has evolved from the government pursuing objectives to fulfill its diverse roles as market referee, as protector of public health and safety and arbiter of property rights. While some common rules exist under the rubrics of criminal and quasi-criminal law, intellectual property law, and competition law, the substantive obligations and enforcement mechanisms used vary widely, even among just the three states under examination.

The second Part examines the development and content of international law that affects food labelling law. Unlike national laws where one can find statutes specific to food labelling obligations, no international treaties specifically set out food labelling standards. On the other hand it would be unwise to assume that international legal obligations do not exist that affect food labelling. Quite the contrary. International law before 1995 had a

modest impact upon States' ability to legislate food labelling requirements. That, however, has changed with the establishment of the World Trade Organization (WTO).[25]

The third Part of the dissertation draws on the analysis of the first two Parts to respond to the question posed in the Problematique. The dissertation argues in its conclusions that international law is indeed having an increasingly important impact upon the national food labelling regimes of France, Canada and Ghana. These effects are of two distinct varieties: (1) general effects that are felt across all three countries (and thus likely to be felt by all WTO Member States); and (2) specific effects that are felt particularly in one country given its national priorities and legislative framework for food labelling.

Recent international trade disputes over hormones found in beef,[26] the trade description of sardines,[27] market access for genetically modified foods,[28] and permitted uses of geographical indications for food products[29] only underscore the importance of WTO obligations and dispute resolution and the "squeeze" that national regulators are experiencing in the articulation of national food labelling laws. Reconciling national objectives for more appropriate and more informative food labelling must increasingly be reconciled with the international community's interest in reducing national barriers to trade and eliminating protectionism.

The Dissertation's Limitations

Examining both national and international dimensions of food labelling law precludes an examination of other aspects of food labelling. The dissertation limits the scope

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[25] *Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement),* April 15, 1994 in GATT Secretariat & World Trade Organization, *The Legal Texts: Results of the Uruguay Round of Multilateral Trade Negotiations* iii (Geneva: GATT Secretariat/WTO 1994) [the Legal Texts], online WTO : <http://www.wto.org>.

[26] *European Communities – Measures Concerning Meat and Meat Products* (WT/DS26/AB/R), Report of the Appellate Body, 16 January 1998 *(EC-Beef Hormones).*

[27] *European Communities – Trade Description of Sardines* (WT/DS231/AB/R), Report of the Appellate Body, 26 September 2002 *(EC-Sardines).*

[28] *European Communities – Measures Affecting the Approval and Marketing of Biotech Products* (WT/DS291/1 (US); WT/DS292/1 (Canada); WT/DS291/1 (Argentina)), Panel Report due Summer 2005 *(EC-GMOs).*

[29] *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs* (WT/DS174/R), Report of the Panel, 15 March 2005 *(EC-GIs).*

if its inquiry in two ways. First, as an analysis of the legal dimensions of food labelling, the dissertation does not investigate in any sustained manner the economic and sociological aspects of food labelling. Thus non-legal issues relating to food labelling, such as the economic and private marketing dimensions of food labelling that arise out of private actor decisions to label food, and studies in consumer attitudes and responses to food labels are beyond the scope of this study. However, occasionally throughout the dissertation cultural, historical and political considerations from particular States are examined where they are relevant to situating a particular legal aspect of food labelling in a national legal regime. This dissertation does not, however, pretend to undertake any rigorous analysis of the general cultural and anthropological aspects of food and food labelling.

Second, the dissertation does not exhaustively examine all legal aspects of food labelling. Three areas of legal inquiry are beyond the scope of the dissertation: the regulation of non-prepackaged foods, the regulation of alcoholic beverages and water, and the detailed national standards found in regulations relating to product-specific labelling laws.

The fine line: non-prepackaged food

Most food labels are obvious. They may be signs, letters, marks and images actually printed on the food itself as is the case with a meat inspection stamp, inked onto a particular carcass or cut of meat. Usually, though, food labels are the signs, letters, marks and images that appear on the material that covers food and food products.

Under each of the laws of France, Canada and Ghana, most legislation outlining food labelling obligations arises in relation to "pre-packaged" food. The dissertation's focus is thus limited to the laws relating to the food labelling laws for pre-packaged food products. In all three countries there is significantly less regulation of food labelling for food sold in bulk, in outdoor and farmers' markets, in restaurants, or as street food. The majority of food purchased in developed countries is pre-packaged and is therefore subject to food labelling obligations. In Canada, for example, approximately 80% of all food purchased by the

average Canadian is prepackaged.[30] This figure may be somewhat lower in other developed countries, such as France, where local outdoor markets are still an important venue for food transactions. It may be again lower in developing countries, such as Ghana, where local markets, bulk sales and subsistence economies reduce the incidence of labelled food offered for sale. In every country of the world, the food label remains an important feature of the food system and its regulation a regular feature of national legal instruments.

The wet line: alcoholic beverages and water

A significant history of labelling has arisen from the world's alcoholic beverage industry. The Romans labelled wine and other spirits and so has every other culture since. The cultural, religious and commercial implications of alcohol have led to countries enacting intricate and sophisticated legislation regulating it around the world. Particular aspects of such regulation include the labelling of alcoholic beverages, especially wines, and so it is not surprising that a specialized legal literature on the subject has emerged.[31] However, the intricacies of the legislation surrounding the labelling of wine and spirits merits their own study and will not be undertaken here.

Although much later in time, the bottling of still and mineral waters, as well as juices and other beverages also has been the subject of significant national and international regulation. This dissertation, however, bases its analysis and structures its arguments for the more general aspects of food labelling and thus does not examine the specialized labelling regimes for bottled water and alcohol beverages.

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[30] Author's calculation from data in Statistics Canada, "Food Consumption in Canada, Appendix B: Annual Food Expenditures per Person, by Province, Canada" in "Food Expenditure in Canada 2001". Catalogue no. 62-554-XIE. The remainder of food purchases occur in restaurants, in bulk or at outdoor or farmers' markets. Fresh fruits and vegetables account for the majority of commodities that are sold unlabelled.

[31] Office international de la vigne et du vin, *Norme internationale pour l'étiquetage des vins et des eaux-de-vie d'origine viti-vinicole (International standard for labelling of wines and spirits of viti-vinicultural origin)* (Paris : O.I.V. 1995); Jean Rozier et Eugène Gardia, *L'étiquetage des vins : réglementations française et communautaire* (Paris : Librairies techniques (Litec Droit), 1979); Jérôme Lizet, *L'étiquetage des vins tranquilles français* (Mémoire de D.E.S.S, Droit de la vigne et du vin, Aix-Marseille 3, 1993) [unpublished]; Stéphane Gatto. *L'étiquetage des vins et le commerce international : l'étiquette universelle*, (Mémoire de D.E.S.S, Droit de la vigne et du vin, Aix-Marseille 3, 1996) [unpublished]; Francois Deschamps, Le nom géographique dans la réglementation communautaire sur l'étiquetage en matière viti-vinicole (Mémoire de D.E.S.S, Propriété industrielle, Paris 2, 1988) [unpublished]; Christophe Bayle, *Les délits de tromperie et de publicité mensongère : de la protection pénale du consommateur à travers l'étiquetage des vins* (Mémoire de D.E.S.S, Droit économique et gestion de la filière viti-vinicole, Bordeaux 4, 1997) [unpublished].

The bottom line: the "horizontal" breadth and the "vertical" depth of food labelling law

The focus of this dissertation is an analysis of the legal treatment of a banal and common item of everyday life: the food label. We see hundreds of them daily. Sometimes we read them in detail, sometimes we ignore them completely. Yet from a legal perspective, food labels are legally complex.

The Problematique demands that the dissertation's analysis of food labelling law necessarily focus on the general aspects of food labelling law that apply to all, or almost, food products. In industry jargon, these aspects are referred to "horizontal regulation" or "horizontal rules" because they apply across all food products. "Vertical regulation" and "vertical rules" apply to specific food products, cheeses for example but not to potatoes. The volume of vertical rules for food labelling is truly staggering and very technical. For the most part, this dissertation will make only occasional forays into the deep crevices of "vertical" food labelling regulations. No doubt several other doctoral dissertations could be written which analyze the importance and development of vertical food labelling regulation.

The Dissertation's Methodology and Structure

The Methodology

The dissertation's problematique proposes to investigate the impact of international legal instruments on the development of national food labelling law in three countries. The methodology adopted to respond to the problematique consists of a sequence of five research steps.

Step 1 – formulating and refining the problematique

A broad-ranging review of general and academic literature concerning food and its regulation was the starting point for the formulation of the Problematique and initial research. Many of these volumes, some which are referenced in footnotes in the main body

of this work and others only in my bibliography,[32] were influential on the conceptualization of food and food labelling as objects of legal inquiry.[33]

After further research of secondary sources[34] and discussions with doctoral directors, the Problematique solidified into the one found above. To determine how countries regulated food labelling and if a "baseline" for the contents of national food labelling law existed, three study countries were selected in an effort to determine points of convergence and divergence amongst national food labelling regimes. Examining three study countries, rather than just one, would also permit the drawing of conclusions as to whether, and to what degree, international legal initiatives affect different national labelling regimes.

Step 2 – collecting national and international data on food labelling regulations

A second stage required the collection of primary source material—legislation and jurisprudence—and a more in-depth examination of secondary sources in each of the three study countries. The 2001-2002 academic year was spent in Canada researching Canadian materials and the 2002-2003 academic year in France researching French and European materials. A first field trip to Ghana to collect Ghanaian materials was completed in the spring of 2003. The remainder of field research for Canada was completed in the 2003-2004 academic year with a second field trip to Ghana in the spring of 2004. The majority of the primary and secondary source material concerning the international regulation of food labelling was accessible in hard copy at the University of Ottawa and the Université de Montpellier 1 or electronically, although a brief visit to the offices of the Codex Alimentarius in Rome in the spring of 2003 was also very helpful.

The data collection process involved the collection, review and cataloguing of a sizeable number of documents. Not only was it necessary to examine and review materials relating directly to food labelling but, to obtain a complete picture, the research net had to be

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[32] See section of Bibliography entitled "General Non-Legal Works".
[33] The initial Problematique was quite different from the one which appears above. It did not contemplate a review of international legal instruments. Nor did it contemplate any comparative aspects. See infra, Annex 3 "Notes on the Evolution of the Dissertation".
[34] Especially those found in the section of the Bibliography entitled "Topical Legal Books" and "Journal Articles".

cast broadly enough to review legal instruments, jurisprudence and secondary literature in the areas of general food law, competition law, trade law, and intellectual property law as it might impact upon food labelling. Consulting non-legal literature was occasionally necessary, as in Part I-Title 1 below, where economics literature was essential to understand the nature of and reasons for food labelling.

Step 3 – personal interviews with key officials responsible for making and implementing food labelling law

The third step of the investigation was the completion of several interviews with key officials involved in food labelling activities in each of the three study countries. These interviews, over 50 in total, were conducted simultaneously with the collection and review of primary and secondary source materials. Experts provided valuable insight into the content and evolution of food labelling laws in their countries as well as how their laws were actually implemented and enforced.

Step 4 – analysis and synthesis of data

A formidable amount of legislation, jurisprudence and secondary literature was yielded by the data collection in Stage 2 and the personal interviews completed in Stage 3 above. Several months were spent cataloguing and organizing the material from which initial drafts of section of this dissertation evolved.[35]

Step 5 – formulation of arguments and conclusions

Having completed the national law cases studies and the analysis of international law's treatment of food labelling, a response to the Problematique could be formulated.

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[35] The documenting of the historical evolution of the food labelling regimes in each of the study countries was a most interesting and rewarding task. Like no other part of the dissertation process, this historical evolution teaches appreciation for the importance of historical and cultural factors in the formulation of food labelling law. In fact, the discovery was much more profound in that these same cultural and historical events often were of such significance that they deeply affected developments in the legal traditions of each of the study countries. The outcome of the Battle of the Plains of Abraham in 1763 irrevocably changed the cultural and legal landscape of Canada. The French Revolution of 1789 changed the social and economic organization of France. The independence of Ghana in 1957 liberated Ghanaians to choose a new post-colonial path to development, one which is clearly still ongoing. Each of these events had profound effects on the people and legislators of the country, effects that trickled down even to matters such as the labelling of food products.

The Structure

Language and formal requirements of the dissertation

This dissertation is prepared for the joint degree of Doctorate in Law (LL.D.) at the University of Ottawa and le Doctorat de l'Université de Montpellier 1 under the auspices of a co-tutelle agreement.[36] This arrangement is a pioneering effort between the two institutions and would have been impossible without the goodwill and cooperation of advisors, administrators and senior university executives at both universities. It is hoped that the successful completion of this project will pave the way for more such collaborative projects.

Completing a doctorate jointly at two universities, in two different countries in two languages has not been without its trials. Decisions about the standards and formal requirements have been set out "dans les grandes lignes" in the co-tutelle agreement. A number of other requirements and arrangements have resulted from the negotiation and agreement between two very knowledgeable and very patient doctoral co-directors, Professor Don McRae at the University of Ottawa and Professor Régis Marchiaro at l'Université de Montpellier 1.

General requirements for the language of the dissertation are set out in the co-tutelle agreement which indicate that the materials concerning France and Europe will be drafted in French and other materials will be in English. This requirement has become more difficult in the final form of the dissertation as the analysis of the French and European materials is no longer exclusively located in one separate section. As far as possible, the dissertation keeps the historical and current regulatory framework for France and Europe in one section[37] which has been drafted in French. The analysis of the Canadian, Ghanaian and international regulatory regimes affecting food labelling have been drafted in English as have the conclusions to both Part I and Part II. This "Introduction", as well as the final section "Response to the Problematique" is presented in both languages for the ease and

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[36] Reproduced in Annex 2.
[37] *Infra*, Partie I, Titre 2, Chapitre 1 - La France.

convenience of the examining committee and for future readers whether francophones or anglophones.

Following the advice and agreement of the doctoral co-directors, the dissertation follows the formal French style for doctoral dissertations and general academic works as far as possible to respect "the rule of twos"—two major parts, two sub-parts, two sub-sub parts and so on. This approach—also largely followed by francophone Canadians trained in the civil law tradition—is departed from only where absolutely necessary as in Part I, Title II, where there are three chapters rather than only two, one for each of the three study countries.

With respect to bibliographic and footnoting styles, after consultation with and agreement from the doctoral co-directors, the *Canadian Guide to Uniform Legal Citation* (5th Edition)[38] has been adopted for all materials consulted or referred to in this dissertation with two exceptions.[39]

The dissertation's constituent parts

To address the basic questions outlined in the problematique, this dissertation must cover a large legal landscape. It examines the law of three countries as well as the international law which affects, or potentially could affect food labelling regulations. The dissertation is, therefore divided into two Parts, each of which contains a section at its end entitled "Conclusions". Part I provides the reader with an analytical understanding of the reasons for and the constituent elements of food labels (Title 1). Title 2 of Part I presents, in successive chapters, a comprehensive review of the laws of France, Canada and Ghana and how each has come to regulate food labels. Part I outlines four major conclusions about national food labelling regimes to be drawn from the country studies.

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[38] (Toronto: Carswell, 2002).

[39] First, rather than adopting the French conventions from the *Canadian Guide to Uniform Legal Citation* for those parts of the dissertation written in French and for French quotations and English conventions for those parts written in English and for English quotations, the author has adopted the English footnoting and referencing style throughout the dissertation. Second, the author uses one convention not found in the Guide. For sources that are referred to frequently in the text and footnotes of the dissertation, the author provides the full citation of the work when it first appears and then offers a short form title of the work when it is referred to later in the dissertation . The first instance of the use of this convention is found in footnotes 80 and 82.

Food labelling law is also increasingly subject to international regulation (Part II). The historical development of such regulation issues from three distinct streams—international accords to protect intellectual property; international agreements to liberalize international trade; and international standards to protect consumers and promote trade (Title 1). These three diverse streams have been brought together for the first time under one legal rubric of the *World Trade Organization Agreement* (Title 2). This consolidation of international obligations affecting food labelling is now an important consideration in determining the compatibility of national food labelling measures with international legal obligations.

The last section of the dissertation entitled "Final Conclusions and the Future of Food Labelling Regulation", presents the major conclusions of this study. The first is that legal obligations flowing from the operation of the *World Trade Organization Agreement* are increasingly restricting the general ability of States to enact food labelling legislation that does not conform to the international standards set out by the Codex Alimentarius Commission. The second is that different States feel different impacts from international legal obligations because each State pursues its own unique mix of producer/consumer objectives. When the State "mix" of objectives does not mesh with the current direction of international priorities, conflicts arise. France's legislation with respect to food quality labelling has not generally been endorsed by the international community and as a result, some of its labelling provisions may be construed by trading partners as unnecessary barriers to trade rather than legitimate labelling concerns. Thus in areas that are particularly sensitive in some national cultures (and hence in their legal systems), international regulatory attempts are destined to either fail or to bring about unsettling results.

Thus, a major challenge facing national regulators of food labelling for the future is how to balance the need for new labelling regulations, particularly ones demanded by unique historical and cultural perspectives of a particular country, with international legal obligations that require such regulations not to create unnecessary obstacles to international trade.

[the next English section follows at page 23 after the French version of the above]

L'INTRODUCTION : L'IMPORTANCE DE L'ETIQUETAGE DES ALIMENTS

[This same text is set out in its English version above.]

Dis-moi ce que tu manges : je te dirai ce que tu es.
- Jean-Anthelme Brillat-Savarin, *Physiologie du Goût*, 1825

Plusieurs choses dépendent de l'étiquetage alimentaire parce que plusieurs choses dépendent de la nourriture. La nourriture est une commodité ordinaire du commerce quotidien et de la consommation. Il est évident que la nourriture est nécessaire à l'existence continue de chaque être vivant, et que l'accès à la nourriture et l'acquisition de cette nourriture sont des parties importantes et inévitables de la condition humaine. D'autre part, on peut considérer les aliments comme des simples commodités, comme plusieurs autres, qui sont produites et vendues dans des millions de transactions commerciales à travers le monde à tous les jours.

Toutefois, notre relation avec la nourriture est infiniment plus complexe que le simple fait de rencontrer nos besoins physiologiques quotidiens et la conclusion de transactions commerciales ordinaires. Des conséquences psychologiques, sociales et spirituelles découlent de ce que nous choisissons de manger. Nous ressentons une palette d'émotions – le confort, le plaisir, le prestige, le raffinement spirituel et parfois même le dégoût, la nausée, et la douleur – causés par ce que nous mettons dans nos bouches et dans nos estomacs.

En plus d'être un acte nécessaire, manger de la nourriture est un acte intime et souvent social. Très peu d'actes, surtout au niveau de nos actes quotidiens, impliquent le même niveau d'intimité que le fait de manger. Ce que nous mangeons fait partie de nous. Après tout, « nous sommes ce que nous mangeons.»[40] Nous permettons que la nourriture pénètre dans nos corps si régulièrement que nous tenons souvent pour acquis le choix de la nourriture et la consommation de celle-ci. Mais comme pour les autres actes qui impliquent une violation de nos corps – des activités comme le sexe, le perçage et les interventions médicales – nous contemplons, explicitement ou implicitement, les risques et les bénéfices associés à de tels actes intimes. Souvent, par contre, nous sommes mal placés pour pouvoir évaluer et apprécier tous les éléments du risque associés à nos choix, et comme résultat final, nous entreprenons l'acte ou renonçons à celui-ci en nous basant sur l'information que nous pouvons repérer, sur notre tolérance générale face au risque, et sur la confiance que nous

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[40] Pour plus d'informations sur cette expression, voir Paul Rozin, « Cultural Approaches to Human Food Preferences » dans John E. Morley et al., éds. *Nutritional Modulation of Neural Function* (San Diego : Academic Press, 1998) à la p. 139 aux para. 149-150.

accordons aux gens qui nous offrent leurs évaluations des risques associés à la réalisation de l'acte.

Quelques considérations préliminaires

Les raisons pour lesquelles les étiquettes alimentaires sont importantes

Les étiquettes alimentaires jouent un rôle essentiel en nous permettant de repérer des informations, d'évaluer des risques et de développer de la confiance en ceux qui peuvent nous informer sur la nature et sur les attributs de la nourriture que nous consommons. Les étiquettes sont le principal moyen de communication entre ceux qui consomment la nourriture et ceux qui la produisent, qui la conditionnent, et qui la mettent en marché.

L'étiquetage alimentaire est de grande importance. Il est important pour les négociants de produits alimentaires parce que l'étiquette leur fournit le moyen idéal pour souligner les qualités de leurs produits. Il est important pour les consommateurs parce que l'information transmise sur l'étiquette permet aux consommateurs de mieux comprendre la nature de ce qu'ils s'apprêtent à acheter et l'effet que la consommation de ce produit pourrait avoir sur eux. Puisque les consommateurs sont éloignés des entreprises de production alimentaire, et puisque la transformation de la nourriture devient de plus en plus complexe, les consommateurs doivent se fier aux étiquettes alimentaires pour obtenir de l'information essentielle sur les aliments qu'ils achètent. Dans la plupart des cas, les consommateurs ne peuvent plus tout simplement poser des questions aux producteurs alimentaires puisque ceux-ci ne sont pas présents au moment des transactions commerciales, et ils ne peuvent pas consulter les commerçants puisque ceux-ci ne sauront habituellement pas exactement comment, et même par qui, les aliments qu'ils vendent ont été produits.

Évidemment, ce que communiquent les étiquettes dépend de l'intention du créateur d'une étiquette et sur l'interprétation qu'en fait sont lecteur. Tout d'abord, les étiquettes ont comme objectif principal de communiquer de l'information au sujet des produits sur lesquels elles sont apposées. Les étiquettes alimentaires honnêtes nous indiquent ce qu'est

la nourriture que nous consommons, de quoi elle est composée, qui l'a préparée, ainsi que la date à laquelle cette nourriture risque de ne plus être comestible. Les marques, les images et les mots reproduits sur des étiquettes nous indiquent si le produit rencontre des normes gouvernementales ou religieuses, ou si le produit provient d'un fabricant particulier qui appartient à une marque de commerce que nous reconnaissons et en laquelle nous avons confiance.

Lorsque les étiquettes alimentaires deviennent problématiques

L'étiquette alimentaire peut aussi, cependant, avoir une portée négative. En tant qu'outil de communication efficace, elle peut être utilisée pour communiquer la vérité ou pour induire le consommateur en erreur. Les demi vérités et les mentions mensongères et déceptives sur les étiquettes manipulent les goûts et les préférences des consommateurs sans leur fournir des informations utiles sur le produit alimentaire. Les étiquettes trompeuses, parfois considérées comme une simple tactique ingénieuse de marketing, compromettent la confiance des consommateurs, causent des pertes économiques aux consommateurs et aux commerçants honnêtes, et risquent même, dans des cas extrêmes, de mettre en péril la santé humaine.

L'intervention de l'État au niveau de l'étiquetage alimentaire

Étant donné le pouvoir de l'étiquette alimentaire d'informer et d'induire en erreur, il n'est pas surprenant que le développement de l'étiquetage des denrées alimentaires n'ait jamais été une question sujette à être résolue entre un vendeur et un acheteur seulement. La question de l'étiquetage alimentaire est depuis longtemps réglementée par l'État.

La réglementation étatique prend le plus souvent la forme de projets législatifs qui établissent le fondement de l'étiquetage alimentaire. Ces outils législatifs sont souvent soutenus par plusieurs instruments d'application exécutifs et judiciaires. Bien que les gouvernements puissent choisir de ne pas réglementer l'étiquetage des aliments et choisir de laisser la question entre les mains des commerçants et des consommateurs, les rôles traditionnels établissent que les gouvernements sont les gardien de la santé et de la sécurité publique, les surveillants de la juste et équitable opération des marchés, et les arbitres des

droits relatifs aux biens. Ceci leur impose une responsabilité importante de réglementer les étiquettes alimentaires et leur utilisation.

Ainsi, l' « étiquette alimentaire simple » n'est pas aussi simple qu'elle peut le paraître. Elle est plutôt complexe et est un document hautement réglementé qui a été moulé à travers les années par deux forces principales : (1) une force volontaire, axée sur le marché et généralement exercée par les entreprises de production alimentaire et les commerçants indépendants, qui étiquettent leurs produits afin d'attirer et d'informer les consommateurs; et (2) une force réglementaire, généralement exercée par les gouvernements, dans le but d'établir des normes dans le domaine de l'étiquetage afin d'atteindre certains objectifs, tels que la stabilité du marché, la protection de la santé du consommateur, la reconnaissance de la propriété intellectuelle et la fourniture d'informations à l'intention des consommateurs.

L'interaction entre ces deux forces crée une tension dynamique qui contribue à la création de normes régissant le contenu et la présentation des étiquettes alimentaires. Ce qui était prohibé pourrait éventuellement être permis ou même requis sur les étiquettes alimentaires. « Tous les aspects de l'étiquette alimentaire ont, à un moment donné, été controversés. Ils ont obligé les législateurs et les autorités gouvernementales à considérer le rôle de l'étiquette alimentaire et la nature du choix du consommateur, ainsi que la science de la sécurité et le rôle de la nutrition dans le maintien d'une bonne santé [notre traduction].»[41]

Les règlements nationaux sur l'étiquetage alimentaire comme barrières au commerce

L'intervention étatique au niveau de l'étiquetage alimentaire soulève ses propres défis. À une époque aujourd'hui révolue, basée sur les systèmes locaux de production alimentaire, et où les aliments étaient principalement vendus sur le territoire national, la réglementation des étiquettes alimentaires était strictement une question à caractère national. Les producteurs, les commerçants et même les consommateurs d'aliments pouvaient, s'ils le

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[41] Christine J. Lewis, « Harmonization, Mutual Recognition and Equivalence : Labelling and Nutritional Requirements – How Much Information is Necessary ? » *Conference on International Trade Beyond 2000: Science-Based Decisions, Harmonization, Equivalence and Mutual Recognition Held in Melbourne, Australia 11-15 October 1999* (Rome: FAO, 1999), internet: FAO <http://www.fao.org/docrep/meeting.X2673E.htm> au para. 32.

désiraient, faire du lobbying auprès un gouvernement national centralisé pour que certains changements soient apportés aux lois sur l'étiquetage alimentaire.

L'époque de la production et de la consommation locales est passée. De nos jours, d'énormes quantités de produits alimentaires traversent les frontières nationales quotidiennement.[42] Bien que le commerce des produits alimentaires est depuis toujours une caractéristique importante des sociétés humaines,[43] le monde continue à témoigner d'une croissance étonnante au niveau du commerce des produits alimentaires.[44] Certains auteurs, en parlant des XIXe et XXe siècles comme étant une époque d'« internationalisation »[45] ou de « globalisation, »[46] notent que peu d'aspects de la vie quotidienne ne sont pas touchés par la portée très large de l'interaction globale. Le commerce a été rendu plus facile par des innovations au niveau du transport, des communications et de la science, qui ont fondamentalement changé la de façon dont les aliments (ainsi que les autres commodités) sont produits, fabriqués, distribués et vendus.

> Nous sommes passés, en quelques millénaires de la vie clanique à la vie provinciale, puis nationale et enfin internationale et même « planétaire », du temps où les aliments non produits chez soi l'étaient chez un voisin ou achetés sur le marché local où l'on connaissait les producteurs-vendeurs et où l'observation directe était possible. Mais avec l'accroissement de la population en général et de l'urbanisation en particulier, nous sommes passés à de nouveaux systèmes de commercialisation.[47]

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[42] En 2003, le commerce de denrées alimentaires et animales dépassait $700 billion (USD). FAO, "Agricultural Data – FAOSTAT" (Rome: FAO, 2004), online: FAO <http://faostat.fao.org/faostat/collections?version=ext&hasbulk=0&subject=agriculture>.

[43] Voir surtout : Felipe Fernández-Armesto, *Food: A History* (London: Pan Macmillian 2001), Chapter 6 The Edible Horizon: Food and the Long-range Exchange of Culture; and Yves Péhaut, "The Invasion of Foreign Foods", Chapter 34 in Jean-Louis Flandrin & .Massimo Montanari, *Histoire de l'alimentation* with Albert Sonnenfeld for the English edition *Food: A Culinary History from Antiquity to the Present* (New York: Columbia University Press, 1999).

[44] Le commerce mondiale en denrées alimentaires augmentais 20 fois entre 1961 ($40 billion USD) et 2003 ($700 billion USD). FAO, "Agricultural Data – FAOSTAT" (Rome: FAO, 2004), online: FAO <http://faostat.fao.org/faostat/collections?version=ext&hasbulk=0&subject=agriculture>.

[45] Tim Lang & Michael Heasman, *Food Wars* (London: Earthscan, 2004).

[46] Alessandro Bonanno *et al.*, eds. *From Columbus to ConAgra : Globalization of Agriculture and Food* (Lawrence, Kansas: University of Kansas Press, 1994).

[47] Pierre-Marie Vincent, *Le droit de l'alimentation - Que sais-je?* vol. 3103 (Paris: Presses Universitaires de France, 1996) à la p. 15.

Ces nouveaux systèmes de commercialisation affectent chaque aspect de la production alimentaire et de la consommation, incluant l'étiquetage alimentaire. Le modèle commercial qui impliquait auparavant le producteur, le consommateur et l'État, dans son rôle de surveillant, implique souvent aujourd'hui un grand nombre acteurs, dont plusieurs ne sont pas sur le même territoire. Le commerce international complique alors la réglementation des étiquettes alimentaires. Les règlements d'un pays peuvent être différentes des règlements d'un autre pays. Or, les produits devant contenir des étiquettes reflétant certaines informations dans un pays pourraient se voir refuser l'accès au marché national d'un autre pays qui a des règlements d'étiquetage alimentaire différents. À titre d'exemple simple, considérons l'obligation de répondre à l'exigence de produire des étiquettes alimentaires dans une langue qui est comprise par la majorité des habitants d'un État particulier. Puisqu'il existe plus de 200 États et des milliers de langues parlées à travers le monde, une seule étiquette alimentaire pourrait seulement répondre aux exigences imposées par quelques États. De plus, il existe plusieurs autres exigences relatives à l'étiquetage, telles que les normes de classement et de commercialisation, les normes sur les caractéristiques des produits, les normes sur les listes d'ingrédients, ainsi que les normes de qualité. Toutes ces exigences créent un réseau complexe de règles qui doivent être rencontrées afin qu'un produit puisse traverser des frontières internationales.

Les États reconnaissent maintenant le potentiel qu'ont les mesures régissant l'étiquetage alimentaire national d'entraver le flot du commerce. « En général, les exigences relatives à l'étiquetage alimentaire tendent à ne pas restreindre le commerce ou à être moins restrictives que plusieurs autres mesures réglementaires. Néanmoins, dépendant de son étendue et de sa nature, incluant son caractère obligatoire ou volontaire, l'étiquetage peut avoir un impact important sur le commerce [notre traduction].»[48]

La réglementation des étiquettes alimentaires n'est donc pas réservée aux lois et aux règlements promulgués par les corps législatifs étatiques. Les organisations internationales ont aussi pris sur elles la reconnaissance et l'application des obligations de nature juridique

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[48] WTO, *Labelling*, Submission by the European Communities, G/TBT/W/175; WT/CTE/W/212, 12 June 2002 au para. 3.

qui affectent l'étiquetage alimentaire. Une troisième force, en coopération avec les collaborateurs privés et les gouvernements nationaux, contribue à l'ensemble du paysage de la réglementation juridique de l'étiquetage alimentaire. Cette troisième force -- soit la surveillance réglementaire par les organisations internationales à travers la création d'exigences juridiques internationales – requiert que les États lui prêtent attention lorsqu'ils entretiennent et améliorent leurs régimes nationaux d'étiquetage alimentaire. De plus en plus, « les règles d'étiquetage nationales et internationales sont étroitement imbriquées entre elles. »[49]

Une thèse sur le droit relatif à l'étiquetage des denrées alimentaires comme contribution au savoir juridique

Une documentation abondante sur la production, la distribution et la consommation de la nourriture au niveau international a été publiée en anglais et en français au cours des trois dernières décennies. Plusieurs ouvrages populaires ont exploré tous les aspects imaginables relatifs à la nourriture.[50] Des ouvrages académiques ont étudié l'histoire de la nourriture,[51] l'impact de la nourriture sur le développement culturel,[52] ainsi que les dimensions économiques et politiques de la production et du commerce de la nourriture.[53]

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[49] Antoine de Brosses, L'Etiquetage des denrées alimentaires, t. 1 : Mentions obligatoires, Mentions interdites (Paris: RIA, 2002) à la p. 10.

[50] Ouvrages d'intérêt général incluent : Margaret Visser, *Much Depends on Dinner* (Toronto: Harper Perennial 2000; première édition 1986); Frances Moore Lappé, *Diet for a Small Planet* (New York: Ballantine 1991; première édition 1971); Stephen H. Webb, *Good Eating* (Grand Rapids: Brazos Press 2001); Jean-Anthelme Brillat-Savarin, *Physiologie du Goût* (Paris: Belley 1948; première édition 1825); John Tarrant, *Farming and Food* (Oxford: Oxford University Press 1991); Henri Dupin, *Les Aliments* (4e éd) (Paris: Presses Universitaires de France 1990; première édition 1973); Edmond Neirinck et Jean-Pierre Poulain, *Histoire de la cuisine et des cuisiniers: Techniques culinaires et pratiques de table, en France, du Moyen-Âge à nos jours* (Cachan, France: Jacques Lanore, 2000); QA International & Chavot, Pierre. *Le Guide des Aliments* (Cologne: Québec Amérique Inc.-Könemann, 1999).

[51] Voir surtout : Reay Tannehill, *Food in History* - New and Updated Edition (London: Review 2002; première edition 1973); Kenneth F. Kiple et Kriemhild Coneè Ornelas, *The Cambridge World History of Food* (Cambridge: Cambridge University Press 2000); Maguelonne Toussaint-Samat, *Historie Naturelle et Morale de la Nourriture* (Paris, Larousse 1997; première édition 1987); Felipe Fernández-Armesto, *Food: A History* (London: Pan Macmillian 2001); Jean-Louis Flandrin et Massimo Montanari, *Histoire de l'alimentation* avec Albert Sonnenfeld pour l'édition anglaise: *Food: A Culinary History from Antiquity to the Present* (New York: Columbia University Press, 1999).

[52] Jared Diamond, *Guns, Germs, and Steel* (New York: W.W. Norton 1999; première edition, 1997).

[53] Geoff Tansey & Tony Worsley. *The Food System: A Guide* (London: Earthscan, 1995); Winston, Anthony. *The Intimate Commodity: Food and the Development of the Agro-Industrial Complex in Canada* (Toronto: Garamond Press, 1993); Tim Lang et Michael Heasman, *Food Wars* (London: Earthscan, 2004).

Très peu d'ouvrages, cependant, ont été consacrés à l'analyse juridique de la nourriture. Les avocats européens ont été les plus actifs dans l'étude du droit aux denrées alimentaires en produisant des ouvrages sur le droit de l'alimentation qui traitent du sujet selon une perspective générale[54] ou qui étudient des dimensions spécifiques[55] de ce domaine du droit. De plus, les Européens ont créé des services et des revues académiques spécialisées,[56] des associations et des centres de recherche,[57] et même une conférence annuelle,[58] entièrement consacrée à l'étude des questions d'actualité dans le domaine du droit de l'alimentation européen.

Les écrits académiques sur le droit de l'alimentation aux États-Unis,[59] bien qu'ils soient habituellement associés à la réglementation sur les drogues, sont suffisamment nombreux, mais toutefois moins abondants que les écrits européens. Une revue juridique de premier rang,[60] publiée par la *Food and Drug Law Institute* à Washington D.C. renferme aussi de l'information pertinente sur les développements importants dans le domaine de la

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[54] Les ouvrages généraux sur le droit alimentaire en Europe incluent : Pierre-Marie Vincent, *Le droit de l'alimentation - Que sais-je?* vol. 3103 (Paris: Presses Universitaires de France, 1996); Jean-Paul Branlard, *Droit et Gastronomie*: Aspect juridique de l'alimentation et des produits gourmands (Paris: Gualino, 1999); Raymond O'Rouke, *European Food* Law, 2nd ed. (Copenhagen : Palladian & the Copenhagen Business School Press, 1999).

[55] Les ouvrages qui traitent de questions spécifiques sur le droit alimentaire, particulièrement les questions sur l'étiquetage des aliments incluent : Antoine de Brosses, *L'Étiquetage des denrées alimentaires*, t. 1 : *Mentions obligatoires, Mentions interdites* ; t. 2 : *Valoriser le produit*, Pratique de l'étiquetage (Paris: RIA, 2002). O'Connor, Bernard. *Geographical Indications*. ([Brussels : O'Connor Pub. 2004]) Agra Europe, Eurofood Monitor (London: Agra Europe, 1990-); Norbert Olszak, *Droit des appellations d'origine et indications de provenance* (Paris: Tec & Doc, 2001). Un ouvrage intéressant qui compare la réglementation alimentaire européenne et américaine est J. Ralph Blanchfield, ed., *Food Labelling* (Cambridge: Woodhead, 2000).

[56] Les revues juridiques incluent: *World Food Law Monthly* (U.K.); *EU Food Law Weekly* (U.K.); *The European Food Law Review* (Belgium), Food & Drink Law Monthly (U.K.); *Revue de Droit Rural* (France).

[57] Association européenne pour le droit de l'alimentation située à Bruxelles avec des centres nationaux en Italie, en Espagne, au Royaume-Uni, en Allemagne et en France; Le Centre de recherche en droit de l'alimentation allemand et européen, Universität Bayreuth, Bayreuth, Germany.

[58] La conférence la plus récente a été la 13e Conférence sur le droit de l'alimentation qui a eu lieu à Bruxelles les 29 et 30 juin 2004.

[59] Les ouvrages juridiques américains standards incluent: Peter Barton Hutt et Richard A. Merrill, *Food and Drug Law: Cases and Materials*, 2e éd. (New York, Foundation Press, 1991); Peter Barton Hutt & Richard A. Merrill, *Food and Drug Law*, 2e éd. (New York, Foundation Press, 2004); Michael S. Schumann et al., *Food Safety Law* (Indianapolis: John Wiley, 1997). Peter Barton Hutt a aussi publié un ouvrage séparé sur le sujet du droit de l'étiquetage des aliments intitullé *Guide to U.S. Food Labeling Law* (Washington: Thompson, 1991). Voir aussi : J. Ralph Blanchfield, éd., *Food Labelling* (Cambridge: Woodhead, 2000), un ouvrage comparant le droit de l'étiquetage des aliments européen et américain.

[60] *The Food and Drug Law Journal*. Des questions thématiques et des causes sur le droit de l'alimentation sont aussi rassemblées dans le *Food Drug and Cosmetic Law Reporter*, le *Food Drug Cosmetic Law Quarterly* et parfois dans le *Drake Journal of Agricultural Law*. La revue la plus récente sur le sujet est appelée *Journal of Food Law and Policy*, lancée en 2004 par la University of Arkansas.

réglementation de la nourriture et des drogues aux États-Unis. De plus, quelques universités et institutions américaines traitent de la question du droit de l'alimentation.[61]

À l'extérieur de l'Europe et des États-Unis, cependant, il existe très peu d'écrits juridiques, rédigés en français ou en anglais, sur le droit de l'alimentation, et encore moins sur le droit de l'étiquetage des denrées alimentaires. Ceci est particulièrement vrai au Canada.[62] Étant donné l'importance de la nourriture dans la vie quotidienne et la longue histoire de la réglementation des produits alimentaires, qui sont si intimement liés à la condition humaine, il est temps que les juristes universitaires canadiens se joignent à leurs collègues européens et américains dans l'étude de l'étiquetage des denrées alimentaires. C'est dans l'intention de commencer à combler cette lacune que la présente thèse cherche à contribuer aux écrits académiques de nature juridique.

La problématique de la thèse et ses limites

La problématique[63]

Les règlements nationaux sur l'étiquetage alimentaire ont évolués sur une échelle globale en réponse aux circonstances uniques présentes dans chacun des pays dans lesquels ils se sont développés. À cause de l'augmentation étonnante dans le commerce des produits alimentaires au niveau international, les États se conforment de plus en plus aux obligations

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[61] Deux programmes intéressants qui méritent d'être notes sont le *International Food Law Certificate Program* offert par *la Institute for Food Laws and Regulations* à la Michigan State University ainsi que le projet du professeur Barton Hutt à la *Harvard Law School*. Depuis 1994, le professeur rassemble les travaux que ses étudiants produisent en matière du droit sur les aliments et du droit sur les drogues et les publie dans le « Food and Drug Law – An Electronic Book of Student Papers » qui se trouve sur Internet : <http:www.law.harvard.edu/faculty/hutt/book_index.html>.

[62] Quelques ouvrages existent sur des sujets relies à la production des aliments et à l'agriculture tells que: R. Fuller and D. Buckingham, *Agriculture Law in Canada* (Toronto: Butterworths 1999); Donald Purich, *Canadian Farm Law – A Guide for Today's Farmer* (Saskatoon: Western Producer Books, 1982); Majorie Benson, *Agricultural Law in Canada 1867-1995 – With Particular Reference to Saskatchewan* (Calgary: Natural Resources Institute, 1996). Cependant, aucun de ces ouvrages ne touche aux questions les plus profondes sur le droit des aliments, en général, ou, plus particulièrement, sur la réglementation de l'étiquetage alimentaire. Il importe de noter qu'au moins une institution, la Guelph Food Technology Centre, à la University of Guelph, a commencé à offrir un programme de formation sur certains aspects du droit de l'alimentation canadien, incluant certains aspects de l'étiquetage alimentaire. Voir en ligne : GFTC <http:www.gftc.ca>.

[63] La formulation du problematique est un travail qui prendre de la patience et de la réflexion. L'évolution du problematique est discutée dans l'Annexe 3.

internationales qui, tout en facilitant le commerce, imposent des limites sur leur habileté de légiférer au niveau national sur des questions relatives à l'étiquetage alimentaire.

Cette thèse étudie l'interaction du droit national et international dans le développement de régimes nationaux d'étiquetage alimentaire dans trois pays. La problématique, dans sa forme la plus simple, consiste en deux questions :

> ***(1) Quelles influences internes ont façonnées le développement des systèmes d'étiquetage alimentaire dans les trois pays étudiés, soit la France, le Canada et le Ghana ?***
>
> ***(2) Quel impact l'importance accrue, accordée par le droit international à la libéralisation du commerce, a-t-elle sur les systèmes juridiques nationaux de l'étiquetage alimentaire en France, au Canada et au Ghana ?***

L'analyse juridique nécessaire pour adresser la problématique se divise en deux parties. La première partie étudie le fondement juridique et le contenu de trois systèmes nationaux d'étiquetage alimentaire. Elle aborde les raisons pour lesquelles les États réglementent le contenu des étiquettes alimentaires ainsi que les méthodes utilisées pour mettre en place une telle réglementation. En étudiant l'évolution et le contenu actuel de la législation réglementant l'étiquetage alimentaire dans trois états – la France, représentant l' « Ancien Monde », le Canada, représentant le « Nouveau Monde », et le Ghana, représentant le « Tiers Monde » -- cette thèse soutient que la structure juridique des règles de l'étiquetage alimentaire relève d'une combinaison unique de développements sociaux, culturels et historiques qui varient d'un pays à l'autre. La réglementation nationale sur l'étiquetage alimentaire est bien développée dans les trois pays étudiés. Dans chacun des cas, la longue histoire du développement de la législation sur l'étiquetage des denrées alimentaires a évoluée à partir de la recherche d'objectifs par le gouvernement, qui cherchait à rencontrer ses responsabilités traditionnelles en tant que surveillant de la juste et équitable opération des marchés, gardien de la santé et de la sécurité publique et arbitre du droit des biens. Bien que certaines règles existent en vertu des rubriques du droit pénal ou quasi-pénal, du droit de la propriété intellectuelle et du droit de la concurrence, les obligations substantives et les outils d'application de mesures législatives qui sont utilisés varient beaucoup entre pays, même au niveau des trois pays étudiés.

La deuxième partie de la thèse étudie le développement ainsi que le contenu du droit international qui affecte le droit de l'étiquetage alimentaire. À la différence de la législation nationale, où l'on peut retrouver des dispositions spécifiques se rattachant aux obligations de l'étiquetage alimentaire, les traités internationaux n'établissent pas expressément les normes de l'étiquetage alimentaire. D'autre part, il ne faudrait pas croire qu'il n'existe aucune obligation juridique internationale se rattachant à l'étiquetage alimentaire, car c'est le contraire. Avant 1995, le droit international avait un impact discret sur la compétence des États de légiférer sur la question des exigences relatives à l'étiquetage alimentaire. Cela a changé avec la création de l'Organisation mondiale du commerce (OMC).[64]

La troisième partie de cette thèse se fonde sur l'analyse effectuée aux deux premières parties afin de répondre à la question posée dans la Problématique. La thèse soutient, dans sa conclusion, que le droit international a un impact de plus en plus important sur les systèmes d'étiquetage alimentaire en France, au Canada et au Ghana. Le droit international influence ces systèmes à deux niveaux : (1) Certains effets généraux sont présents dans les trois pays (ce qui nous permet de considérer qu'ils sont présents chez tous les États membres de l'OMC). (2) D'autres effets, de nature plus spécifique, peuvent être présents dans un pays, en particulier, étant donné les priorités nationales de ce pays et son cadre législatif se rattachant à l'étiquetage alimentaire.

Les différends internationaux récents concernant des hormones trouvées dans la viande bovine,[65] la description des sardines pour la vente au détail,[66] l'accès aux marchés pour les aliments génétiquement modifiés[67] et l'utilisation des indicateurs géographiques,[68]

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[64] *Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement)*, April 15, 1994 in GATT Secretariat & World Trade Organization, *The Legal Texts: Results of the Uruguay Round of Multilateral Trade Negotiations* (Geneva: GATT Secretariat/WTO 1994) [the Legal Texts], online WTO : <http://www.wto.org>.

[65] *European Communities – Measures Concerning Meat and Meat Products* (WT/DS26/AB/R), Report of the Appellate Body, 16 janvier 1998.

[66] *European Communities – Trade Description of Sardines* (WT/DS231/AB/R), Report of the Appellate Body, 26 septembrer 2002.

[67] *European Communities – Measures Affecting the Approval and Marketing of Biotech Products* (WT/DS291/1 (US); WT/DS292/1 (Canada); WT/DS291/1 (Argentina)), Report of Panel, attendue pour l'été 2005.

soulignent l'importance des exigences établies par l'OMC, de la résolution des différends et des pressions que connaissent les législateurs nationaux de créer de la législation portant sur l'étiquetage alimentaire. Les objectifs nationaux visant à établir un système d'étiquetage alimentaire plus adéquat et plus instructif doivent, de plus en plus, être réconciliés avec les intérêts de la communauté internationale qui vise à réduire les barrières nationales au commerce et qui tentent d'éliminer le protectionnisme.

Les limites de la thèse

L'étude des dimensions nationales et internationales du droit de l'étiquetage alimentaire, limite l'étude des autres aspects de l'étiquetage des aliments. La thèse restreint l'étendue de ce sujet de deux façons. Premièrement elle fait uniquement une analyse des dimensions juridiques de l'étiquetage sans étudier en profondeur les aspects économiques et sociologiques touchant cette question. En conséquence, les questions qui touchent l'étiquetage des aliments mais qui sont de nature non juridique (telles que les questions sur les dimensions économiques et du marché privé ressortant de décisions d'acteurs sur l'étiquetage des aliments, et les études sur les attitudes des consommateurs face aux étiquettes alimentaires) ne sont pas abordées dans cette étude. Cependant, occasionnellement, cette thèse fait référence à certaines observations de nature culturelles, historiques et politiques, provenant de l'étude de certains États, pour permettre l'encadrement d'une question juridique particulière sur un système juridique national. Cette thèse ne prétend pas entreprendre une analyse rigoureuse des questions culturelles et anthropologiques générales concernant les aliments et l'étiquetage alimentaire.

Deuxièmement, cette thèse n'étudie pas tous les aspects de l'étiquetage alimentaire en profondeur. Trois champs d'étude juridique dépassent la portée de cette dissertation : la réglementation des aliments non préemballés, la réglementation des breuvages alcoolisées et de l'eau, et les normes nationales détaillées qui se retrouvent dans les règlements relatifs aux exigences d'étiquetage propres à un produit.

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[68] *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs* (WT/DS174/R), Report of the Panel, 15 mars 2005.

« La ligne est mince ! » : les aliments non préemballés

La plupart des étiquettes alimentaires sont évidentes. Il peut y avoir des signes, des lettres, des marques et des images imprimées sur la nourriture elle-même, comme dans le cas de l'estampille de l'inspection des viandes, qui est une empreinte encrée sur une carcasse ou sur un morceau de viande particulier. Cependant, habituellement, les étiquettes alimentaires sont des signes, des lettres, des marques et des images qui apparaissent sur le matériel qui recouvre l'aliment ou le produit alimentaire.

En vertu des lois de la France, du Canada et du Ghana, la majeure partie de la législation qui souligne les exigences relatives à l'étiquetage se rapporte aux aliments « préemballés ». L'objet de la thèse vise seulement les lois sur l'étiquetage alimentaire pour les denrées alimentaires préemballées. Dans chacun des trois pays, il existe beaucoup moins de réglementation face à l'étiquetage pour les aliments vendus en vrac, dans les marchés en plein air et dans les marchés d'agriculteurs, dans les restaurants et par des vendeurs de nourriture ambulants. En majorité, les aliments achetés dans les pays industrialisés sont préemballés et sont sujets à des obligations d'étiquetage alimentaire. Au Canada, par exemple, à peu près 80% des aliments achetés par les Canadiens sont préemballées.[69] Il est possible que ce taux soit moins élevé dans d'autres pays industrialisés, tels qu'en France, où l'on achète toujours plusieurs aliments dans des marchés en plein air. Ce taux risque aussi d'être moins élevé dans des pays en voie de développement, tel qu'au Ghana, où les marchés locaux, les ventes en vrac et les économies de subsistance réduisent la vente d'aliments préemballés. Néanmoins, dans tous les pays du monde, l'étiquette alimentaire demeure un aspect important du système alimentaire et sa réglementation souligne régulièrement l'importance des outils juridiques nationaux.

« La ligne mouillée » : les breuvages alcoolisés et l'eau

Une ligne historique importante en matière de l'étiquetage est ressortie de l'industrie mondiale des breuvages alcoolisés. Les Romains étiquetaient les vins ainsi que les

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[69] Nos calculs du Statistics Canada, "Food Consumption in Canada, Appendix B: Annual Food Expenditures per Person, by Province, Canada" dans "Food Expenditure in Canada 2001". Catalogue no. 62-554-XIE. Les denrées qui restent sont achetées dans les restaurants ou en gros, ou bien dans les marchés. Les fruits et les légumes sont les denrées vendues le plus souvent sans étiquettes.

spiritueux, et chaque culture le fait depuis. L'importance de l'industrie de l'alcool aux niveaux de la culture, de la religion, du commerce et même de la fierté nationale, a produit une législation complexe et sophistiquée sur l'étiquetage partout dans le monde. Ce domaine de l'étiquetage a pris de l'ampleur et s'est développé en une sphère d'examen intellectuel et juridique indépendante.[70] Les particularités de la législation sur l'étiquetage des vins et des spiritueux méritent qu'on en fasse une étude séparée et le domaine ne sera pas abordé dans ce travail.

Plus récemment, la mise en bouteille de l'eau plate ou non gazeuse et de l'eau minérale, ainsi que la mise en bouteille des jus et des autres breuvages a aussi été sujette à une réglementation nationale et internationale importante. L'analyse et la structure des arguments de cette thèse, par contre, touchent les aspects plus généraux de l'étiquetage des denrées alimentaires et n'étudient pas les systèmes spécialisés de l'étiquetage de l'eau en bouteille et des boissons alcoolisées.

« La ligne de base – Bilan » : saisir l'ampleur et la profondeur du droit de l'étiquetage des denrées alimentaires

L'objet de cette thèse est de faire l'analyse du traitement juridique d'un article banal et commun de la vie quotidienne : l'étiquette alimentaire. Nous voyons des centaines d'étiquettes alimentaires à tous les jours. Parfois nous les lisons en détail et parfois nous les ignorons complètement. Toutefois, selon une perspective juridique, les étiquettes alimentaires sont complexes.

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[70] Office international de la vigne et du vin, *Norme internationale pour l'étiquetage des vins et des eaux-de-vie d'origine viti-vinicole (International standard for labelling of wines and spirits of viti-vinicultural origin)* (Paris : O.I.V. 1995); Jean Rozier et Eugène Gardia, L'étiquetage des vins : réglementations française et communautaire (Paris : Librairies techniques (Litec Droit), 1979); Jérôme Lizet, *L'étiquetage des vins tranquilles français* (Mémoire de D.E.S.S, Droit de la vigne et du vin, Aix-Marseille 3, 1993) [unpublished]; Stéphane Gatto. *L'étiquetage des vins et le commerce international : l'étiquette universelle*, (Mémoire de D.E.S.S, Droit de la vigne et du vin, Aix-Marseille 3, 1996) [unpublished]; Francois Deschamps, Le nom géographique dans la réglementation communautaire sur l'étiquetage en matière viti-vinicole (Mémoire de D.E.S.S, Propriété industrielle, Paris 2, 1988) [unpublished]; Christophe Bayle, *Les délits de tromperie et de publicité mensongère : de la protection pénale du consommateur à travers* l'étiquetage des vins (Mémoire de D.E.S.S., Droit économique et gestion de la filière viti-vinicole, Bordeaux 4, 1997) [unpublished].

La Problématique exige que l'analyse effectuée dans cette dissertation sur le droit de l'étiquetage alimentaire se concentre sur les aspects généraux du droit de l'étiquetage alimentaire qui peuvent être appliqués à tous, ou à presque tous, les produits alimentaires. Dans le langage technique et spécialisé, on appelle ces aspects la « réglementation horizontale » ou les « règles horizontales » parce qu'elles sont appliquées à tous les produits alimentaires. La « réglementation verticale » ou les « règles verticales » sont appliquées à des produits alimentaires spécifiques, au fromage, par exemple, mais pas aux pommes de terre. Le nombre des règles verticales est époustouflant et très technique. En général, cette thèse ne fera qu'occasionnellement certaines razzias dans la profonde crevasse de la réglementation « verticale » de l'étiquetage alimentaire. Sans aucun doute, plusieurs autres thèses doctorales pourraient être écrites pour analyser l'importance et le développement de la réglementation verticale de l'étiquetage alimentaire.

La structure et la méthodologie de la thèse

La méthodologie

La problématique de la thèse propose d'étudier l'étendue de la force des outils juridiques internationaux sur le développement du droit national sur l'étiquetage des denrées alimentaires. La méthodologie adoptée pour répondre à la problématique consiste en une séquence de cinq étapes de recherche.

Étape 1 – formuler et raffiner la problématique

Comme point de départ pour l'élaboration de ma problématique et de ma recherche, j'ai fait une étude très large des ouvrages généraux et académiques sur la nourriture et sur la réglementation de celle-ci. Plusieurs de ces ouvrages, dont certains sont indiqués en notes de bas de page dans ce travail tandis que les autres sont incorporés à la bibliographie,[71] ont influencé ma façon de penser et de conceptualiser le sujet de la nourriture pour une étude

[71] Voir la partie de la Bibliographie intitulée « Ouvrages généraux non juridiques ».

juridique générale et pour une étude plus spécifique sur l'étiquetage des denrées alimentaires.[72]

Après avoir effectué une recherche plus approfondie à partir de sources secondaires[73] et après avoir discuté de mon sujet avec mes conseillers pédagogiques, j'ai réussi à préciser ma problématique, soit celle qui est mentionnée ci haut. Afin de découvrir comment les pays réglementent l'étiquetage alimentaire et pour découvrir s'il existe un fondement régissant le contenu du droit de l'étiquetage alimentaire national, j'ai choisi d'analyser l'état du droit dans trois pays pour me permettre d'apprécier les points de convergence et de divergence entre les systèmes d'étiquetage alimentaires nationaux. Le fait d'étudier trois pays, plutôt qu'un seul pays, me permettrait de formuler des conclusions préliminaires face à la question de savoir si les initiatives juridiques internationales ont des effets distincts sur les divers systèmes nationaux réglementant l'étiquetage des aliments. Dans l'affirmative, je chercherais aussi à évaluer l'entendu de ces effets.

Étape 2 – collecte de données nationales et internationales sur la réglementation de l'étiquetage des denrées alimentaires

Une fois l'étude initiale des sources secondaires complétée et après avoir formulé une problématique préliminaire, la prochaine étape dans le processus était la collecte de sources matérielles primaires – législation et jurisprudence – ainsi qu'une étude plus approfondie des sources secondaires dans chacun des trois pays étudiés. J'ai passé l'année académique 2001-2002 au Canada afin d'effectuer une recherche sur les sources canadiennes et j'ai ensuite passé l'année académique 2002-2003 en France afin de faire l'étude de sources françaises et européennes. J'ai suis allé au Ghana pour la première fois au printemps 2003. J'ai complété ma recherche sur le terrain pour le Canada pendant l'année académique 2003-2004 et j'ai fait un deuxième voyage au Ghana au printemps 2004. La majorité des sources primaires et secondaires concernant la réglementation internationale de l'étiquetage des aliments était disponible en copies papier à l'Université d'Ottawa et à l'Université de Montpellier 1, ou en version électronique, bien que ma brève

[72] Voir Annexe 3 : "L'évolution de la thèse".
[73] Surtout celles trouvées dans la partie de la Bibliographie intitulée « Ouvrages juridiques thématiques » et « articles de revues ».

visite au bureau du Codex Alimentarius à Rome au printemps 2003 m'a aussi aidé dans ma recherche.

Le processus de collecte des données a compris la collecte, l'étude et le catalogage de nombreux documents. Non seulement était-il nécessaire d'étudier et de réviser les sources se rattachant à l'étiquetage des denrées alimentaires, mais afin de bien comprendre le contexte global, j'ai effectué une recherche suffisamment large pour pouvoir examiner des outils juridiques, de la jurisprudence, ainsi que des sources secondaires dans les domaines du droit de l'alimentation général, du droit du commerce et du droit de la propriété intellectuelle, afin de saisir l'impact de ces domaines sur l'étiquetage alimentaire. Il m'était parfois nécessaire de consulter des ouvrages de nature non juridique, tel que pour la rédaction de la Partie I, Titre I, ci-dessous, lorsque j'ai fait l'étude d'ouvrages sur l'économie afin de comprendre la nature et les raisons derrière l'étiquetage alimentaire.

Étape 3 – entrevues personnelles avec des fonctionnaires clés, responsables pour la création et la mise en vigueur du droit de l'étiquetage des denrées alimentaires

La troisième étape a compris plusieurs entrevues avec des fonctionnaires clés impliqués dans les activités relatives à l'étiquetage des denrées alimentaires dans chacun des trois pays étudiés. Ces entrevues (plus de 50 au total), ont été effectuées conjointement avec ma collecte et mon étude de sources primaires et secondaires. Ces entrevues, effectuées avec des individus très connaisseurs et spécialisés, ont été inappréciables, me permettant d'approfondir ma compréhension du contenu et de l'évolution des règlements de l'étiquetage alimentaire ainsi que leur mise en vigueur et leur l'application dans chacun des trois pays étudiés.

Étape 4 – analyse et synthèse des données

Un montant important de législation, de jurisprudence de sources secondaires a résulté de la collecte de données à l'étape 2 et des entrevues personnelles complétées à l'étape 3, tel que décrit ci-dessus. Pendant plusieurs mois, il m'a été nécessaire de cataloguer et d'organiser le matériel à partir duquel les ébauches préliminaires des sections de cette thèse ont évolué.

Étape 5 – formulation des arguments et des conclusions

Après avoir complété les études de cas sur l'application des lois nationales ainsi que l'analyse de l'impact du droit international sur l'étiquetage alimentaire, il a été possible de formuler une réponse à la problématique.

La structure

La langue et les exigences formelles de la thèse

Cette thèse est produite pour obtenir les grades, en collaboration, de Doctorat en droit (LL.D.) à l'Université d'Ottawa et le Doctorat de l'Université de Montpellier 1, sous les auspices d'une entente de cotutelle conclue entre les deux universités.[74] Cet arrangement est un effort de pionnier entre les deux institutions, et j'ai grandement bénéficié de la bonne volonté et de la coopération des conseillers académiques, des administrateurs et des cadres de direction aux deux universités. J'espère que cette entente tracera la voie pour de futurs projets effectués en collaboration.

Compléter un doctorat conjoint à deux universités, dans deux pays différents et dans deux langues n'a pas été une tâche sans défis. Les décisions concernant les standards et les exigences formelles ont été établies dans les grandes lignes de l'entente de cotutelle. Plusieurs autres exigences et arrangements ont résultés de la négociation et d'ententes entre mes conseillers académiques très savants et patients, le professeur Don McRae de l'Université d'Ottawa et le professeur Régis Marchiaro de l'Université de Montpellier 1.

Les exigences langagières de la dissertation sont décrites dans l'entente de cotutelle qui indique que la matière concernant la France et l'Europe sera rédigée en français et que toute autre matière sera rédigée en anglais. Cette exigence est devenue plus difficile à respecter dans la rédaction des versions finales de la thèse puisque l'analyse de la matière française et européenne n'est plus restreinte à une seule partie de la thèse. J'ai tenté de

[74] Reproduite dans l'Annexe 2.

garder les références à l'histoire et à la réglementation actuelle pour la France et l'Europe dans une section,[75] que j'ai rédigée en français. L'analyse des systèmes de réglementation canadienne, ghanéenne et internationale affectant l'étiquetage des denrées alimentaires a été rédigée en anglais, tout comme l'ont été les conclusions des Parties I et II. Cette « Introduction », ainsi que la dernière partie, intitulée « Les conclusions finales et le futur de la réglementation de l'étiquetage des denrées alimentaires », sont présentées dans les deux langues pour offrir la convivialité et l'accessibilité au comité de l'examen, ainsi qu'aux futurs lecteurs, qu'ils soient francophones ou anglophones.

Suivant les recommandations et l'entente de mes conseillers académiques, j'ai adopté le style formel français pour les thèses doctorales et j'ai présenté ce travail, autant que possible, d'une façon qui respecte « la règle de deux » – qui comporte deux parties principales, deux sous-parties, deux sous-parties aux sous-parties, et ainsi de suite. Cette approche – souvent suivie aussi par les franco-Canadiens de formation civiliste – est respectée que lorsqu'il est essentiel de la mettre de côté comme, par exemple, dans la Partie I, Titre II, où il y a trois chapitres, plutôt que seulement deux, soit un chapitre pour chaque pays visé par l'étude.

En ce qui a trait aux styles bibliographique et aux notes de bas de page, suite à une consultation avec mes conseillers académiques et suivant une entente entre eux, j'ai choisi de me conformer au *Manuel canadien de la référence juridique* (5e édition)[76] pour signaler toutes les sources consultées ou citées dans cette thèse sauf dans deux situations.[77]

Les parties constitutives de la thèse

Afin d'adresser les questions préliminaires présentées dans la problématique, cette thèse doit couvrir un large paysage juridique. Elle étudie le droit de trois pays, ainsi que le

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[75] *Infra*, Partie I, Titre 2, Chapitre 1 « France ».

[76] Revue de droit de McGill, *Manuel canadien de la référence juridique*, 5e éd. (Toronto: Carswell, 2002).

[77] En premier, au lieu d'appliquer les conventions françaises pour les parties écrites en français et les conventions anglaises pour les parties écrites en anglais, j'utilise les conventions anglaises pour la thèse en entier. Deuxièmement, j'utilise une convention qui ne se trouve pas dans le *Manuel canadien de la référence juridique.* Pour toutes les références souvent utilisées, je note la citation complète de l'oeuvre seulement la première fois et la donne un titre court qui sera utilisé pour toutes les références à cette même oeuvre plus tard dans la thèse. Les références numérotées 80 et 82 sont les premières à employer cette convention dans la thèse.

droit international qui affecte, ou qui risquerait d'affecter, la réglementation de l'étiquetage des denrées alimentaires. À cette fin, la thèse est divisée en deux parties chacun qui se termine par une partie intitulée « Conclusions ». La Partie I vise à fournir au lecteur un raisonnement analytique de ce qui sous-tendent la création d'étiquettes alimentaires et une explication des éléments constitutifs de telles étiquettes (Titre 1). Le Titre 2 de la Partie I présente, dans les chapitres qui suivent, un examen approfondi de la législation de la France, du Canada et du Ghana afin d'expliquer comment chacun des pays réglemente les étiquettes alimentaires. La Partie I souligne quatre conclusions principales concernant les systèmes nationaux d'étiquetage alimentaire qui ressortent de l'étude de ces pays.

Le droit de l'étiquetage des aliments est aussi de plus en plus sujet à la réglementation internationale (Partie II). Le développement historique de questions relatives à la réglementation forme trois courants distincts – les accords internationaux pour la protection de la propriété intellectuelle ; les accords internationaux qui visent à libéraliser le commerce international ; et les standards internationaux pour la protection des consommateurs et la promotion du commerce (Titre 1). Ces trois courants distincts ont été réunis pour la première fois sous la rubrique de *l'Accord sur l'Organisation mondiale du commerce* (Titre 2). L'effet de cette consolidation est actuellement une considération importante dans la détermination de la compatibilité des mesures nationales d'étiquetage alimentaire avec les exigences juridiques internationales.

La dernière partie de cette thèse, intitulée « Conclusions finales et le futur de la réglementation de l'étiquetage alimentaire », présente les conclusions principales de cette étude. La première de celles-ci soutient que les exigences de nature juridique qui découlent de l'application de *l'Accord de l'Organisation mondiale du commerce* restreignent de plus en plus la possibilité des États de mettre en vigueur de la législation visant l'étiquetage alimentaire qui n'est pas conforme aux normes internationales établies par la Commission du Codex Alimentarius. La deuxième conclusion souligne que les exigences juridiques internationales ont des effets différents sur chaque État, puisque chaque État cherche à établir son propre ensemble d'objectifs régissant la relation producteur-consommateur. Lorsque cet « ensemble » d'objectifs établit par l'État ne concorde pas avec la direction

contemporaine des priorités internationales, un conflit surgit. La législation française concernant l'étiquetage visant à assurer la qualité des aliments n'a pas généralement été appuyée par la communauté internationale et, par conséquent, certaines des dispositions sur l'étiquetage pourraient être interprétées comme étant des barrières inutiles au commerce, plutôt que des questions légitimes touchant l'étiquetage. Ainsi, dans des champs d'application de nature particulièrement sensible au sein de certaines cultures nationales (et, conséquemment, dans leurs systèmes juridiques), les tentatives visant la réglementation internationale sont destinées soit à échouer, soit à mener à des résultats déformés.

Ainsi, un défi principal que doivent adresser les législateurs nationaux de l'étiquetage alimentaire est la question à savoir comment concilier le besoin d'établir de nouveaux règlements sur l'étiquetage, particulièrement ceux qui sont exigés par les perspectives historiques et culturelles uniques d'un pays en particulier, avec les exigences juridiques internationales qui exigent qu'une telle réglementation évite de créer des obstacles au commerce international.

PART I : FROM FOOD LABELS TO FOOD LABELLING LAW – DEVELOPING AN ANALYTICAL FRAMEWORK AND APPLYING IT TO THE REGULATION OF FOOD LABELS IN FRANCE, CANADA AND GHANA

La destinée des Nations dépend de la manière dont elles se nourrissent.
- Jean-Anthelme Brillat-Savarin, Physiologie du Goût, 1825

PARTIE I : LES ETIQUETTES DES DENREES ALIMENTAIRES ET LE DROIT DE L'ETIQUETAGE – UN ENCADREMENT APPLIQUE AUX SYSTEMES DE L'ETIQUETAGE DES DENREES ALIMENTAIRES DANS LA FRANCE, LE CANADA ET LE GHANA

"The destiny of nations depends on what they eat" said the eighteenth century professor, jurist and epicurean Brillat-Savarin. Given the increasingly difficult task of determining what we eat, our destiny is indeed uncertain. Industrial food processes have become complex[78] and marketing tactics so sophisticated that consumers are not always sure of exactly what they are eating. Of course today, as in the past, consumers have little difficulty in identifying sound fresh fruits and vegetables and other unprocessed products. They are able to avoid moldy tomatoes and meat that smells "off". They experience considerably more difficulty, however, in determining the composition of processed foods, the nutritional value of highly refined foods presented in fancy packaging, and have almost no way of knowing whether a product which claims to be "organic" really comes from a farm that practices organic production methods. Consumers are increasingly dependent on others to tell them about the attributes of the products they are buying. And processors and marketers are eager to tell them too. Food labels have become the direct and primary means of disseminating such information. Thus, the role of the State remains pivotal in balancing producer and consumer interests.

Part I of this dissertation explores the foundations of law's role in the regulation of food labelling and proposes a general framework for the analysis of national food labelling legal regimes (Title 1). Yet no two national regimes are exactly alike. Individual States develop food labelling regulations that are appropriate to their own unique history and politics, food culture, commercial practices and legal traditions (Title 2). Part I concludes with a critical assessment of points of convergence and divergence of national food labelling regimes in France, Canada and Ghana.

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[78] Élisabeth Vierling, *Aliments et boissons : Filières et produits* (Paris: Doin, 1999); Élisabeth Vierling, *Aliments et boissons : Technologies et aspects réglementaires* (Paris: Doin, 1998).

Title 1 : La Mise en Place - Preparing Food Labels for Legal Analysis

Product labeling and information disclosure requirements act as an interface between government requirements, manufacturer response, and consumer demand...
-Eliza M. Mojduszka, *The Cambridge World History of Food*, 2000

Titre 1 : La mise en place - d'une étiquette à une loi sur l'étiquetage

Every food label communicates several "pieces" or "elements"[79] of information between producer and consumer. Analyzing legal obligations affecting food labels and the pieces of information found on them requires a preliminary preparation, "une mise en place". In order to analyze food labelling law, one must first examine how food labels function from a theoretical perspective and what motivates producers, consumers and State regulators to become involved in the labelling of food products (Chapter 1).

The food label is a highly regulated commercial document because consumers depend on labels to find the foods they want, but also because producers depend on labels to sell their products. When new food issues arise or when current food labelling fails to meet expectations, both consumers and producers look to State regulators to "solve the problem". The solution sought is often new regulatory measures. Food labelling legislation, at the national level at least, is attractive as a solution because it creates binding obligations on labellers to meet certain legislative requirements. Determining what those obligations are requires a careful examination and interpretation of the legislation. Determining what they should be requires an examination of which objectives are being championed and by whom. In order to understand food labelling laws one must be comfortable with the types of objectives that underlie the call, from producers and consumers, for food labelling laws. With an appreciation of the objectives underlying food labelling, can one then proceed to the construction of a framework for the analysis of food labelling legal regimes (Chapter 2). It is this framework that is employed to catalogue, analyze and compare three national food labelling legal regimes in Title 2 of this Part I and the international legal regime in Part II of this study.

[79] "Element" is the generic word selected by the author to describe any and all "pieces" of information contained on a food labels. The French word—éléments—conveys a similar generic meaning.

Chapter 1 – Why And How Foods Are Labelled

Why are food products labelled (Section 1)? Can the contents of food labels be explained in terms of the objectives that underlie the motivation of producers and consumers in seeking State regulation of food labels (Section 2)? Answers to these basic questions provide the foundation for why States employ legal mechanisms to regulate the labelling of food.

Section 1 – The theory of food labelling and a taxonomy of "elements" found on food labels

Paragraph 1 – Why is food labelled: a theoretical dimension of food labelling

Developing theories as to why food products are labelled is a subject of intellectual inquiry for economists,[80] if not for lawyers.[81] Leading economists on the subject argue that food products are labelled to provide information to consumers which they are unable to gather upon a simple inspection of the product itself.[82] Caswell suggests that information presented on food labels falls into three categories—search attributes, experience attributes and credence attributes.[83] Search attributes are those that consumers can determine in a

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[80] Julie A. Caswell & Daniel I. Padberg, "Toward a More Comprehensive Theory of Food Labels" (1992) 74(2) American Journal of Agricultural Economics 460; Julie A. Caswell, "Uses of Food Labelling Legislation", Document number OCDE/GD(97)150, (OECD: Paris, 1997); Neal H. Hooker & Julie A. Caswell, "Regulatory Targets and Regimes for Food Safety: A Comparison of North American and European Approaches", in Julie A. Caswell, ed. *Economics of Reducing Health Risk from Food* (Storrs, CT: Food Marketing Policy Centre 1996 [check]) at p. 3-17; Neal H. Hooker, "Food Quality Regulation Under Trade Agreements: Effects on the Supply of Food Safety and Competitiveness", Ph.D. Dissertation, University of Massachusetts, Amherst, 249 pp. (1997); Elise Golan et al., "Economics of Food Labelling" (Agricultural Economic Report No. 793) (Washington: Economic Research Service, U.S.D.A. 2000); Carol S. Kramer and Julie A. Caswell, "Food Quality: Safety, Nutrition and Labeling", in M.C. Hallberg et al., eds. *Food, Agriculture, and Rural Policy into the Twenty-First Century* (Boulder, Co.: Westview Press 1994) pp. 167-183; and Gilles Grolleau & Sandoss BenAbid, "Fair Trading in Markets for Credence Goods: An Analysis Applied to Agri-food Products" (2001) July/August 2001 Intereconomics 208.

[81] Some academic lawyers have, however, completed work on even more basic questions regarding food and other consumer products. For an interesting discussion of the notion of what constitutes a "product", see Daniel Mainguy, "Reflexions sur la notion de produit en droit des affaires" (1999) 52(1) Revue Trimestrielle de Droit Commercial et de Droit Economique. 47.

[82] Caswell & Padberg, "Toward a More Comprehensive Theory of Food Labels" at 460.

[83] Caswell, "Uses of Food Labelling Legislation" at 8.

product before they buy it by examining or researching the product (ex. the ripeness of tomatoes).[84] Experience attributes are those that consumers cannot determine until they buy and use the product (ex. taste of tomatoes).[85] Credence attributes are those that consumers cannot determine even after they buy and consume the product (ex. pesticide residues on tomatoes).[86]

Consumers do not generally need the assistance of a food label to help them ascertain the search attributes of products. On the other hand, experience and credence attributes are more difficult for consumers to ascertain without considerable time, experience and expense. The food label, though, can turn experience and credence attributes into search attributes through the mechanism of food labelling. For example, a consumer could taste a particular brand of canned tomatoes every time he buys them to ensure that every can will meet his satisfaction. On the other hand, he could simply taste the brand a few times and then be content that this brand of tomatoes will meet his satisfaction. He need not taste each can but will use the brand or trade mark as his "search" attribute rather than relying on a subsequent tasting to inform him of an "experience" attribute. In a similar fashion, "mandatory labelling changes an a priori credence characteristic like nutritional composition into a search characteristic...."[87]

The work of Caswell and others suggests that food labels have a tremendous potential to transform what is unseen into tangible consumer-friendly information that will assist a consumer in his purchases. Of course, misuse of that potential has been, and continues to be, a constant temptation to unscrupulous vendors. Grolleau and BenAbid describe the theoretical nature of the problem. "For credence attributes, consumers cannot check quality, even after purchase. The previous mechanisms, i.e. information sharing, repeated purchases and signalling are inefficient. Indeed their efficiency is reliant on consumers' ability to detect a cheat after the purchase."[88] Consumers are ill placed to detect such "cheats" and dispute resolution between private parties is often impractical and

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[84] Caswell, "Uses of Food Labelling Legislation" at 8.
[85] Caswell, "Uses of Food Labelling Legislation" at 8.
[86] Caswell, "Uses of Food Labelling Legislation" at 8.
[87] Grolleau & BenAbid, "Fair Trading in Markets for Credence Goods" at 209.
[88] Grolleau & BenAbid, "Fair Trading in Markets for Credence Goods" at 212.

expensive when such behavior is uncovered. As well, dishonest trading undermines consumer confidence generally and results in market distortions between honest and dishonest merchants. The obvious solution to curtailing the misuse of power by labellers is to regulate the food label itself and to enforce compliance on all food labellers. "To (re)establish market effectiveness, outside intervention is necessary to allow consumers to choose products that correspond to their preferences and honest producers to credibly signal their products. ... The intervention of public authorities is necessary to guarantee fair trading on a market for products with credence characteristics."[89]

Paragraph 2 – What appears on food labels: a taxonomy of food label "elements"

State intervention in food labelling has not been limited to credence characteristics.[90] Indeed, food labelling regulation has a long history of regulating what the economists now refer to as "experience" and "search" characteristics. Legislation requiring the labelling of food with its common name or with its weight clearly deals with product attributes that a consumer could "search" out. Early food labelling marks from producer associations and government inspectors permitted the consumer to forego a constant "degustation du produit" and simply make his purchase on the basis of a quality mark such as exists under the French system of "appellation d'origine contrôlée (AOC)". While the above theory provides insight into why food is labelled and the need for public authority regulation of its use, it does not explore exactly what kind of information is presented on a food label. Nor does it suggest whether different kinds of information will or should attract different kind of regulatory responses.

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[89] Grolleau & BenAbid, "Fair Trading in Markets for Credence Goods" at 212, 214.

[90] The economics literature cited above would agree with this statement. However, the most difficult characteristics to regulate, however, are credence attributes, and thus much of the academic economics literature focuses on the theory and effective regulation of credence attributes. For an excellent discussion of why States choose to regulate beyond credence characteristics, see Golan et al., "Economics of Food Labelling".

A. food product "attributes"

The information that may be presented on a food label is incredibly diverse because food and the characteristics producers and consumers use to describe food are so varied. To create a taxonomy of possible elements that might appear on a food label, one might begin with Caswell and Hooker's "bundle of characteristics" of a food product.[91] They argue that this bundle contains five distinct attribute subsets: food safety attributes; nutrition attributes; value attributes; package attributes and process attributes.[92] Under each subset of attributes, specific food product characteristics can be listed as set out in Table 1 below.

Table 1 - Classification of food attributes by Caswell and Hooker[93]

1. Food Safety Attributes (foodborne pathogens, heavy metals, pesticide residues, food additives, naturally occurring toxins and veterinary residues)
2. Nutrition Attributes (fat content, calories, fibre, sodium, vitamins, and minerals)
3. Value Attributes (purity, compositional integrity, size, appearance, taste, convenience of preparation)
4. Package Attributes (packaging materials, labelling, other information provided)
5. Process Attributes (animal welfare, biotechnology, environmental impact, pesticide use, worker safety)

The five subsets of attributes identified by Caswell and Hooker contain several elements that often appear on food labels. From the food safety attributes, labels list food additives. From the nutrition attributes, some labels list fat content, calories, fibre, sodium, vitamins and minerals. From the value attributes, labels list ingredients, size of package and may include instructions for preparation and use. From the subset of process attributes, labels sometimes list process claims like "organically produced" or "fair trade product". Yet this classification is incomplete for the purposes of creating a taxonomy of food labelling elements. Several common food label elements do not appear under any of the Caswell and Hooker subsets of product attributes. For example a common mandatory food labelling requirement is for the setting out of the common name of the product, as well as for the

[91] Caswell, "Uses of Food Labelling Legislation" at 5.
[92] Caswell, "Uses of Food Labelling Legislation" at 6.
[93] Caswell, "Uses of Food Labelling Legislation" at 6, Table 1 which acknowledges the co-authorship of Caswell and Hooker.

listing of all ingredients in the final product. Another approach is necessary to fully capture all the elements that appear on food labels.

B. a taxonomy of food labels elements from the "inside out"

Another method of classifying the various elements that appear on food labels would be to consider all possible characteristics of a product and then organize separate elements together according to their nexus to the physical food product they describe, as depicted in the graphic illustration (Figure 1) below. Included in Category A are food labelling elements which declare or describe only the essential, physical or compositional nature of the food product. Each of these elements could be scientifically determined or would arise from cultural common linguistic conventions, such as the common name of a food. Category B consists of label elements that no longer describe the physical or essential nature of the food product but describe other aspects or characteristics relating to the product's use. Positive and negative health outcome claims for use of the product would be included in this category for example. Category C elements relate to the manner in which and the conditions under which the food product was made. These "upstream" considerations of the product's lifecycle are commonly referred to production and processing method (PPM) claims. Category D is for all other elements found on food labels that do not fit in any other category.

Table 2 below provides a subset of specific elements that would be included under each principal category. A number of observations are already possible from a presentation of groups of elements in this manner. This taxonomy, like the previous one, assists in the exercise of identifying the elements that appear on a food label but offers more in that all food labelling elements are set out. It thus permits one to examine a particular food label and exhaustively situate each and every element of the food label on a grid. Second, the "inside-out" taxonomy allows one to see that some claims relate more closely to the product itself and are likely to be more meritorious of public authorities'

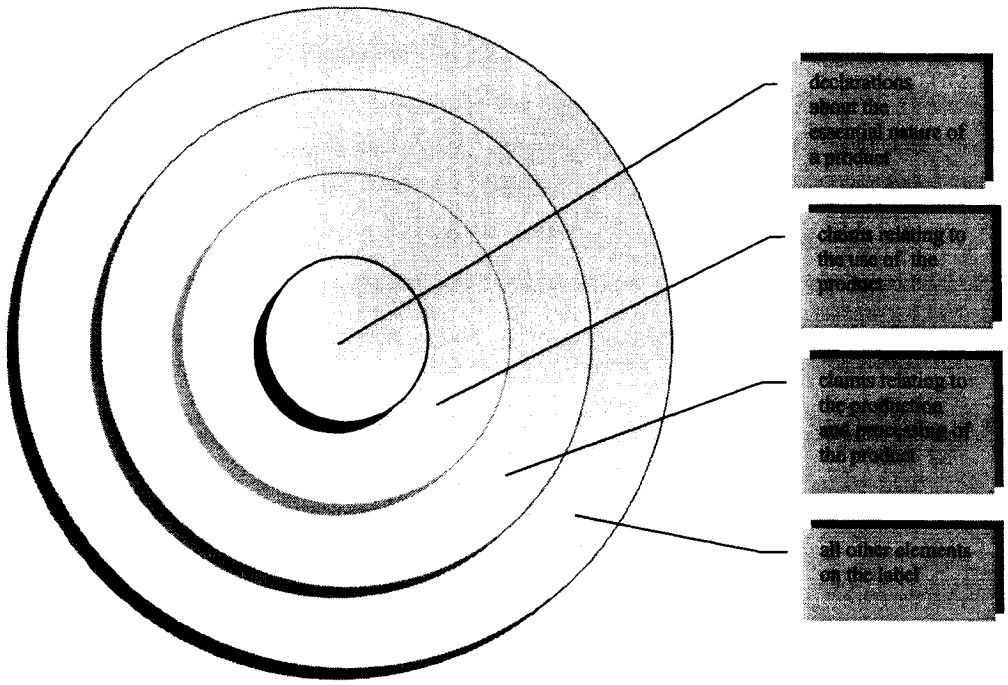

Figure 1 – The "inside-out" taxonomy of food label elements

protection than other claims "further out from the centre" (for ex. the claims in Category D). Finally, this taxonomy offers a view of labelling issue hotspots that other taxonomies do not. The issue of labelling allergens would arise under Category A. The issue of the labelling of new health claims would fall under Category B and of eco-labelling under Category C. If one were to find that States already follow certain practices for creating labelling legislation for specific elements in a given category, this might shed light on how other labelling issues that fall under each category should be regulated.

Table 2 - Categories of food label elements from the "inside-out"

Category A	**Declarations about the essential nature of the product**[94]
A1	common name
A2	ingredients including processing aids, additives, flavourings and preservatives
A3	nutritional facts
A4	weight or volume

[94] En français, les mentions concernant la nature essentielle du produit.

Category B	**Claims relating directly to the product itself**[95]
B1	qualifiers to the common name
B2	composition and presentation claims
B3	health claims
B4	nutrition claims
B5	claims concerning the absence or inadvertent presence of certain ingredients
B6	best before date
B7	storage and use instructions
Category C	**Claims relating to the production and processing of the product**[96]
C1	production date
C2	batch or lot number
C3	indications of origin
C4	name and contact info of producer, manufacturer, processor or retailer
C5	trade or other private mark of quality or branding
C6	inspection, grading or mark of quality or branding endorsed by State
C7	inspection, grading or mark of quality or branding by private third party
C8	other claims relating to production or processing of product
Category D	**All other elements on the label**[97]
D1	Universal Product Code (UPC) bar code
D2	promotional commentary, activities and contests
D3	prizes, awards and distinctions product has received
D4	disposal information for product packaging
D5	proofs of purchase

C. applying the "inside-out" taxonomy to real food labels

The "inside-out" taxonomy can be employed to examine a typical food product label to assess the kinds of written or pictorial information or "elements"[98] that appear on labels in

[95] En français, les allégations à propos de produit lui-même.
[96] En français, les allégations à propos de la manière de production du produit.
[97] En français, tous autres éléments sur l'étiquette.
[98] There are many other names for what is found on a label. These include: words, particulars, trade marks, brand names, pictures, legends, imprints, stamps, brands, designs, indications, representations, claims, attributes, characteristics, identifiers, marks, signs, symbols, and names. Unless there is a specific reason to

this dissertation's study countries of France, Canada and Ghana. A food label from each country has been selected for analysis[99] and the elements of each are situated within the "inside-out" taxonomy. The results are set out in Table 3 below.

Table 3 - Label elements from three food product specimens (specimens in Annex 1)

FOOD PRODUCT	**maple syrup**[100]	**fromage Roquefort**[101]	**chocolate spread**[102]
PART I – Elements on the label			
Category A: Declarations about product's essential nature			
A1. common name[103]	[Maple] syrup/ sirop [d'érable]	fromage [Roquefort]	[Chocolate] spread
A2. ingredients list	No	No	Yes; sugar, vegetable oil, peanut butter,milk powder, cocoa powder, stablizer, lecithin, vanilla, flavour. Cocoa solids:10% min. Milk solids: 15% min.
A3. nutritional facts table	No	non; mais des informations suivantes sont indiquées: M.G. 52%	Yes; with values for serving size, servings per tub, calories, fat calories, total fat, sat. fat, cholest., sodium, total carb., fibre, sugars,

employ one of these more precise, technical terms, the general term "element" will be used to describe an actual item or "element" on food labels. En français les termes qui peuvent s'employer sont les mentions, les allégations, les symboles, les marques, les labels, les noms, les indications, les caractéristiques, les attribues, et les signes.

[99] A copy of the label of each product has been included for reference in Annex 1—Label 1 Maple Syrup (Canada); Label 2 Roquefort Cheese (France); Label 3 Chocolate Spread (Ghana).

[100] See Annex 1 – Label 1.

[101] See Annex 1 – Label 2.

[102] See Annex 1 – Label 3.

[103] The common name of a product can sometimes be problematic. Is the common name only the generic name "syrup" or must the common name include the qualifier "maple". Whether the common name of a particular variety of cheese is "cheese" or "Roquefort cheese" depends on cultural as well as legal prescriptions. The same would be true for "syrup" and "maple syrup" and "spread" and "chocolate spread".

			protein, vitamin A, vitamin C, calcium, iron.
A4. weight or volume	375 ml	Poids net à l'emballage 100 g E	350 g
Category B: Claims relating directly to the product itself			
B1. qualifiers to common name	Pure/pur; maple/d'érable	Roquefort; fromage à pâte persillée au lait cru entier de brebis	Chocolate
B2. composition and presentation claims	None	produit issu de l'agriculture biologique, une ovale avec le mot « organic »	Premium (x2), Ghana (x2), Cocoa (x2)
B6. best before date	20/04/05	18 03 05	01 05
B7. storage and use instructions	None	A conserver au froid entre: +0° +8°C +32°+46°F	Store in a cool, dry place, Do not refrigerate
Category C: Claims relating to the production and processing of the product			
C1 production date	Récolte 2004 Harvest	néant	None
C2. batch or lot number	None	34404 / 030540	BB 01 05 01 28 A
C3. indication of origin	Canada [as part of grade of syrup]	France [comme partie de l'adresse du producteur]	Ghana [as a qualifier to the word "cocoa"]
C4. producer/ processor name and contacts	[L'Epoque] Route 317, Ripon, QC, J0V 1V0	Roquefort Fromageries PAPILLON 12250 Roquefort Soulzon France	Cocoa Processing Company Ltd.Tema, Ghana, Tel:23322212153/4 Fax: 23322206657
C5. trade mark or brand name	Les produits de l'érable pur ens. L'EPOQUE Pure Maple Products	ROQUEFORT PAPILLON, depuis 1906 [avec image d'un	Choco Delight (x3), GoldenTree (x2)

	Ref	papillion]	
C6. State grading mark or sign	Canada No.1 Medium, No. Enr. 3017	un cercle avec un barre et les mots « Appellation d'Origine Contrôlée Roquefort INAO » ; un ovale avec « F 12 203 26 CEE » ; un carré avec « AB certifié agriculture biologique »	None
C7. third party mark of conformity	None	certifié ECOCERT S.A.S. F.32 600 100% ; ovale avec le garanti d'origine et de qualité des producteurs de fromage Roquefort	None
Category D: All other elements on the label			
D1. UPC bar code	Yes	oui	Yes
D2. promotional commentary, pictures or images not part of other marks	Yes, picture of collection of maple syrup, picture of award banner	néant	Choco Delight spread is nutritious and a delicious complement to your favourite bread and pastry at any time of the day! Apply Choco Delight evenly on toast, biscuits or cakes; picture of traditional Kente woven cloth, picture of knife spreading product onto a slice of bread
D3. prizes, awards and distinctions	Sticker indicating prizes awarded; Medaille Argent 2003 Silver Medal, Medaille Bronze 1998 BronzeMedal, Mérite Agricole,	Roquefort officiel du Bocuse d'Or 2003	None

	Agricultural Award		
D4. Disposal information	None	deux cercles avec des flèches de recyclage	None
Number of label elements	14	18	18
Approximate number of words	44	150	132
Total number of numbers	9	26	35
Total number of images	2	6	7
PART II – Formal aspects of the label			
Label langages	English and French except grade of syrup is in English only	le français, l'anglais, l'italien, l'espagnol, l'allemand, le néerlandais pour la plupart des éléments	English only
Total label size	75 cm^2	188 cm^2	180 cm^2
Label shape and size	3 piece label; 6cm x 8cm (oval), 3cmx 3cm (circle), 1cm x 2cm (rect.)	étiq. en 2 partie; 13cm x 11cm (carré), 8cm x 6cm (carré)	3 piece label; 10cm x 10cm (circle), 3cm x 12 cm (rect.) (x 2)
Label location	front, back and bottom of glass jug	le devant et le derrière du paquet en plastique	top and sides of plastic container

The "inside-out" taxonomy provides a method to organize and categorize label elements. This is useful in determining what label elements exist on food products. One might ask however, is each one of these elements subject to State regulation? Are some elements more highly regulated than others? The answer is yes to both questions, as will be seen in the country studies in Title 2 of this Part. Why some elements are subject to more regulatory overview than others depends on the emphasis that a particular State puts on some policy objectives over other competing ones. "As with any policy, the costs and benefits of government intervention must be weighed, and the sometimes conflicting

demands of economic efficiency, consumer and producer concerns, public opinion, political expediency, and current events must be sorted and evaluated."[104]

Section 2 – Objectives of food labelling

State intervention in food labelling has a long history.[105] The State can impose obligations on its citizens simply for its own purposes. More often, however, the State intervenes in the private matters of its citizens in the pursuit of some goal or objective identified as appropriate for legislative action.

Objectives used by States to enact food labelling regulation are varied and no definitive list exists.[106] Economists, health experts and lawyers have cited several objectives that underlie food labelling regulations. In her article, "The Economics of Food Labelling", Golan argues that State intervention pursues four main objectives: (1) to ensure fair competition among producers, (2) to increase consumers' access to information, (3) to reduce risks to individual consumer health and safety, and (4) to influence individual consumption choices to align them with social objectives.[107] On the other hand, Caswell proposes that food labelling regimes pursue two main objectives: (1) to provide a minimum standard of information concerning certain important quality attributes, and (2) to prevent consumer deception.[108] Dr. Lewis, a nutritional expert, is more pragmatic. She argues food labelling objectives are really about two issues: (1) ensuring consumer protection (2) without unnecessarily restricting trade and the movement of food.[109]

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[104] Golan et al., "Economics of Food Labeling" at 1.
[105] For an interesting general chronology of food labelling regulation dating back to Roman times, see Peter Barton Hutt and Peter Barton Hutt II, "A History of Government Regulation of Adulteration and Misbranding of Food" (1984) 39 Food Drug Cosm. L. J. 2. See also Eliza M. Mojduszka, "Chapter VII.5 – Food Labelling" in Kenneth F. Kiple, Kenneth F. & Coneè Kriemhild Ornelas, eds. *The Cambridge World History of Food* (Cambridge: Cambridge University Press, 2000) 1621.
[106] See, for example, Valerie Saint, "Objectives and purpose of consumer information in Community legislation" (1997) 8 European Food Law Review 377.
[107] Golan et al., "Economics of Food Labeling" at 1.
[108] Caswell, "Uses of Food Labelling Legislation" at 7.
[109] Lewis, "Harmonization, Mutual Recognition and Equivalence" at para. 2.

The French food labelling legal expert de Brosses posits that « les deux principaux objectifs des règles d'étiquetage sont d'éviter la tromperie de l'acheteur et d'assurer une concurrence loyale entre les professionnels. »[110] He implicitly mentions a third objective of food labelling which is to enhance or protect the value of particular food products.[111]

While there is no agreement on a comprehensive list of objectives that States rely upon for the promulgation and implementation of food labelling law, there seems to be a strong consensus that States pursue food labelling legislation to satisfy both producer-oriented and consumer-oriented objectives.

Paragraph 1 - Producer-oriented objectives

A robust system of exchange of food products requires stability, predictability and a functioning market place. Producers rely on a market that protects property, honours contracts, and prevents activities that undermine the proper functioning of the exchange of goods. To produce such an environment the State pursues at least four objectives which affect food labelling: (1) the prohibition of marketplace fraud; (2) the establishment of the market standards and the facilitation of trade; (3) the recognition and protection of property rights; and (4) the regulation of use of novel labelling claims. These objectives can be grouped together under two broad categories: objectives relating to trade and commerce and objectives relating to property and quality of food products.

A. trade and commerce

Objective 1: prohibiting marketplace fraud

While merchants would generally seek minimal State regulation of their trading activities, they realize that the State must act to prevent market fraud. This objective is a

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[110] de Brosses, Antoine. *L'Etiquetage des denrées alimentaires*, t. 1 (Paris: RIA, 2002) at 10.
[111] "L'élaboration d'une étiquette a deux fonctions: se mettre en conformité avec la réglementation et valoriser au mieux le produit. " de Brosses, Antoine. *L'Etiquetage des denrées alimentaires* at 10.

primary one of food labelling and is essential for producers to compete fairly amongst one another. Food labelling rules issuing from this objective also provide beneficial effects for consumers. This objective can be achieved in two different ways. First, the State may seek to simply enact general legislation which subjects all elements on the label to the requirement that it be truthful and not misleading. Second, the State might pursue the objective of prohibiting marketplace fraud by "managing the market" and requiring that food products meet certain standards and be labelled to show that they meet such standards.

Objective 2: setting market standards and facilitating trade

Sometimes however, "market management" by the State goes beyond the objective of the prohibition of market fraud. The market may also be regulated for the protection of the honest seller against unscrupulous competitors by the setting of marketplace standards, either to regularize transactions in the name of marketplace order and fairness, or through the reduction, elimination and prohibition of unnecessary obstacles to trade. There is always, however, an uncomfortable tension between regulating the market to make it fairer and keeping regulation to a minimum to make the market more efficient. This tension plays itself out in food labelling legislation as well.

States use this objective as their rationale for food labelling requirements for standardizing weights and measures and requiring the marking of such on all food products. Standards for product composition and lists of ingredients that reflect such composition standards are also, in part, examples of food legislation designed to pursue the objective of regularizing transactions in the marketplace.

On the other hand, greater regulation of food labelling may adversely affect market efficiency. Increasing mandatory labelling requirements increase production costs and can impede new entrants to the marketplace. The efficiency of domestic markets, therefore, can be impaired by over-regulation. At the international level, the setting of market standards is subsumed in the larger objective of the elimination of unnecessary national barriers to trade.

Pursuant to international agreements, States undertake to ensure that their national measures, including food labelling do not unnecessarily restrict cross-border trade.

B. property and value

Objective 3: establishing property rights for food marks and signs

Another objective of food labelling law may be for States to establish a regime for the protection of intellectual property relating to the goodwill and intangible property associated with certain foods, often foods of quality that command market premiums. The State may recognize and enforce the use of certain quality attributes through the creation of legal regimes for public and quasi-public marks, legends, and signs. These regimes create certain private property rights in "trade marks", "geographical indications", "certification marks", "indications of origin", and "distinctive products" and the right to use such terms on food labels. The State is implicated in the recognition of such marks usually through the establishment of system of registration of such marks. In some cases, the State can also take an active role in the monitoring of unauthorized use of such marks and prosecution of unauthorized users. States also provide grading, inspection and other marks on product labels to indicate that they have met some sort of standard. This mark may add value to the product (ex. a superior grade stamp) or it may be required for the product to gain entry into the market (ex. meat inspection stamp.)

Objective 4: regulating the use of novel labelling claims

States have also chosen to regulate food labelling to control the extent to which producers and manufacturers are allowed to promote certain claims that relate not to the product itself, but rather to other attributes of the product that would not be immediately

apparent to the consumer at the time of purchase or that could not even be determined by a physical or chemical analysis of the product.[112]

There is probably no other area of food labelling law that creates as much controversy as the subject of labelling for pre-consumption attributes for food products. Such regulation is commonly referred to as production and processing methods (PPMs) regulation and would include the French system of AOC. Objectives underlying the AOC system therefore include both the protection of intellectual property and the signalling of PPMs that producers and consumers desire to know about from the information relayed on food labels.

There are however, some PPM attributes that do not affect the physical attributes of the final product. These include the social and environmental conditions under which production and processing of a product take place. Some labelling that appears on food products to inform consumers of the PPMs used to produce the food product do not relate to food quality but to other social goals and objectives,[113] labour conditions[114] or environmental conditions.[115]

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[112] Category B or Category C claims under the "inside-out" taxonomy, *supra*, Table 2.

[113] Consider labelling to indicate animal welfare issues (veal and egg production). There is also a quality dimension to these PPMs that is detectable in the final product. For example, labelling eggs as free-range eggs might for some consumers be a product preference (darker yolks are preferred to lighter non-free-range eggs) or as an animal welfare issue (free-range chickens are happier chickens).

[114] Consider "fair-trade coffee". A "fair trade" coffee label does not speak to the quality of the coffee bean per se but rather to the social and environmental conditions under which the beans were grown and harvested. See Caoimhín MacMaoláin, "Ethical Food Labelling: The Role of European Freetrade in Facilitating International Fairtrade" (2002) CML Rev. 295.

[115] Consider organic production. Here again some consumers buy food with organic labels because the PPM notification assures them in their minds at least of a safer food (less pesticides and chemical fertilizers) and thus the PPM label informs them of a product characteristic, while other consumers buy organic because of the overall favourable sustainability footprint of organic production systems. However are such labels related to food quality considerations of the product itself—lower or no pesticides should mean a higher quality food—or a non-food quality aspect arising from the PPM used to produce the food—lower use of pesticides is better for the environment and human health generally?

Paragraph 2 - Consumer-oriented objectives

The consumer movement has become increasingly important as an influence in food labelling in the latter half of the XXth century[116] although its origins go back much further.[117] Today consumer-oriented objectives can be roughly divided into three groups: those relating to food safety and human health issues, those relating to marking food quality, and all other requests for information about the food product or the conditions under which it was made.

A. safety and health

Objective 5: ensuring food safety and promoting consumer health

When one thinks of a State's role in food labelling, the objective of the protection of human health is often one of the first that pops to mind today. While there have been several examples over the past three or four centuries where labelling regulation has been enacted in pursuance of this objective, the current preoccupation with food labelling as a means to inform consumer choice so that they can be informed about health information is relatively new.[118] This is due to two factors: the rise of the consumer movement in the 1960s and 1970s and to advances in science.[119]

Several of the initiatives taken under national and international food labelling regimes relate to a description of the composition and chemical analysis of the food product. Legislation still exists however which used this objective of protecting human health to

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[116] See for example, Catherine Humphries, "Labelling to Meet Consumer Needs" (Presentation to the 12th Annual European Food Law Conference – Food Safety and Consumer Protection, Brussels, 25-26 June 2003).
[117] Luc Bihl & Luc Willette, *Une histoire du mouvement consommateur: Mille ans de luttes* (Paris: Editions Aubier Montaigne, 1984).
[118] As the historical development of each of France, Canada and Ghana demonstrate, see *infra*, Part I, Title 2. See also Caswell, "Uses of Food Labelling Legislation" at 19.
[119] Two important advances in science that changed what could be presented on a food label were: (1) discoveries concerning how to detect and measure a food's composition and (2) advances in science dramatically increasing the dynamics of the ingestion of certain food components and their effects, both short-term and long, on human health.

establish compositional requirements for certain foods. Early XXth century thought was to the effect that the "genuine" product which promoted human health would be the only product that could be marketed and thus positive health outcomes would result. These laws, often referred to as "pure food" laws, are responsible for statutory definitions of foods like "milk" and "butter."[120]

The mandatory listing of ingredients is likely the oldest form of health information provided to consumers on food labels. The mandatory listing of ingredients allows consumers to identity products that they wish to consume for both health-related and non-health-related reasons.

Mandatory nutritional labelling allows a State to pursue its objective of safeguarding health, by requiring food producers to supply detailed information presented in a consistent format for consumers. The nutritional elements that States select for the mandatory reporting will be those that they believe correlate with proven negative or proven positive health outcomes in most people. Thus a State may choose to require the mandatory nutritional labelling of elements which if consumed with too great a frequency will pose negative health consequences (ex. fat, salt, sugar) or which if consumed will produce positive health consequences (ex monounsaturated fats, fibre).

States may opt not to require mandatory nutritional labelling but instead regulate how nutrient and health claims can be used. Nutrient claims would include terms like "low-fat", "light or lite", or "high fibre". Health claims would include "helps reduce colon cancer", "reduces hypertension". Often the nutrient claim and the health claim are linked by the producer on the product label to induce the consumer to buy the product for its health benefit (ex. high fibre—studies show a diet high in fibre reduces the chances of colon cancer").

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[120] Undoubtedly, in certain cases powerful lobby groups were able to secure legislative definitions for products that provided them significant economic advantage rather than a clear health benefit for consumers. See Bruce H. Lauer, *The Rage for Cheapness: Food Adulteration in the United Canadas and in the Dominion 1850-1920* (Masters of Arts Thesis, Carleton University, 1993) [unpublished].

B. quality and information

Objective 6: signalling food quality and responding to consumer demands for more information

In all cultures, consumers can and do recognize differing qualities of food.[121] The selection and consumption of certain quality foods can enhance and indicate prestige and superior social standing or lavish treatment of a guest or family member. Some States have identified the objective of recognizing quality foods as part of the role of food labelling.

The manner in which cultures, and consequently States, view "quality" varies. In some States food labelling that signals quality is very important. In France, for example, quality is an overarching concept which includes "l'ensemble des propriétés et caractéristiques d'un produit ou service qui lui confère l'aptitude à satisfaire des besoins exprimés ou implicites."[122] Nested within the concept of quality are the four S's : « santé », « sécurité », « satisfaction », and « service. »[123] In others States, like Canada, food safety and food quality are seen as largely distinct, the former as relating more to the essential nature of the product (Category A of the "inside-out" taxonomy) and the latter as relating more to information about the product's use or PPM history (Category B or C of the "inside-out" taxonomy).[124]

Quality is something consumers want and in many cases are willing to pay for. For this reason, quality is regulated and information about it is permitted to be presented on food labels for the mutual benefit of vendor and consumer. It is quite another situation when the

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[121] See Marsha Echols, A. *Food Safety and the WTO* (The Hague: Kluwer Law International, 2001), particularly "Chapter 2 – Food as Culture".
[122] Norbert Olszak, *Droit des appellations d'origine et indications de provenance* (Paris: Tec & Doc, 2001) at 104.
[123] Le Rapport Mainguy (sur "la qualité dans le domaine agroalimentaire") (Paris : Ministère de l'Agriculture et de la Forêt, 1989) ; and see Olszak, Norbert. *Droit des appellations d'origine* at 104.
[124] Thus in Canada's new government initiative to renew Canadian agriculture, the Agricultural Policy Framework (APF), food safety and food quality are expressed as separate concepts within one of the five pillars of the APF. See (Ottawa, Agriculture and Agri-Food Canada, 2004).
online: AAFC <http://www.agr.gc.ca/cb/apf/index_e.php>.

consumer wishes to avoid a product and the vendor wants to sell that product. In some ways, this represents a reverse-quality problem. Of course, if the product is harmful, the State will be motivated to regulate the product by banning its production and sale. If on the other hand, there is scientific uncertainty about the safety of the product, or there is a consumer fear about the safety of the product even in light of scientific evidence to the contrary, States might consider it their responsibility, under the rubric of informing consumers about the nature of the product they are about to buy, to require an element to appear on the label to alert consumers about certain aspects of the product. This objective has been at the centre of the world-wide debate over genetically-modified foods and whether mandatory labelling should be required. If there is no human health risk posed by genetically-modified foods, a State could still enact legislation for the mandatory labelling of such products under this objective, which is sometimes given the shorthand tag of the "the consumer's right to know."[125]

The objectives that underlie food labelling legislation and their interaction demonstrate the complexity that States face when trying to decide on appropriate food labelling laws. "The decision [by a State] of when to label and when to use another form of regulation, or no regulation at all, depends on the interaction among a complicated set of political, legal, social and scientific objectives and considerations."[126] However, "[c]ultural differences bring to bear a variety of perspectives on what should be done for consumers, what consumers should be allowed to do for themselves, and how new and developing technologies should be allowed to impact on the food supply."[127]

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[125] See for example, Taiwo A. Oriola, "Consumer Dilemmas: The Right to Know, Safety, Ethics and Policy of Genetically Modified Food" (2002) Sing. J. Legal Stud. 514; and Isabel Segura i Roda. "The Right to Know" (1997) 8 European Food Law Review 389.
[126] Golan et al., "Economics of Food Labeling" at 18.
[127] Lewis, "Harmonization, Mutual Recognition and Equivalence: Labelling and Nutritional Requirements – How Much Information is Necessary?".

Chapter 2 – How Food Labelling Is Regulated: The Role Of Law

Food labelling is regulated primarily through the creation of legal obligations. Such legal obligations can arise at both the domestic and the international levels. However, the impact of regulation issuing from the two levels is quite different. National legislation pursues national policy objectives and is directly applicable to private individuals who label food. When a State wishes to create new obligations, amend existing rules or repeal old laws, it may do so by passing new legislation or new regulations.

International legal obligations are agreed to by States and solemnized through international treaties. International obligations generally do not create obligations for private individuals. International law creates obligations and expectations for States. For example, international obligations affecting the labelling of food can arise under the TRIPS Agreement.[128] States have agreed under this international agreement to establish national legislative provisions for the protection of trade marks.[129] States have a duty to create and implement legal reforms as are necessary to honour this obligation. At the same time, States have an expectation that other States will be creating reciprocal systems, so that when nationals ship food products into another Member State's territory, their products will benefit from similar legal protection for trade marks. Unlike national law, however, international legal obligations cannot be changed by the stroke of a centralized national legislative pen. Changes occur more incrementally and only through negotiation and concessions.

Section 1 – First things first: defining "food label" and "food labelling"

Before beginning the analysis of the national food labelling regimes for France, Canada and Ghana, there is an important preliminary legal matter to consider. What is a food label, legally speaking?

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[128] *Agreement on Trade-Related Aspects of Intellectual Property Rights*, being Annex 1C of the *World Trade Organization Agreement.*

[129] *TRIPS Agreement*, Part II, Section 2, Articles 15-26.

Paragraph 1 – A dictionary meaning of "food label"

"Food" is defined as "any substance that can be taken into the body to maintain life and growth; nourishment."[130] "Label" is defined as "a, usually small, piece of paper, card, cloth, metal, etc. attached to or beside an object, item of food, etc., giving its name, information about it, instructions for use, etc."[131] A dictionary definition of "food label" would be therefore, "a small piece of paper, card, cloth or metal, etc. beside or attached to any substance that can be taken into the body to maintain life or growth that gives the name and other information about that substance".

Several features of this definition merit attention. First, the definition of "food" requires a physical substance be "taken into the body". This definition excludes products such as those applied to the skin from being considered "food". Sun screen lotion, shaving products and fingernail polishes would obviously be excluded. However, would this definition also exclude candy-flavoured lip gloss, chewing gum or toothpicks? Second, "food" must be "taken into the body to maintain life and growth". Products that are ingested that perform neither of these functions, and might instead threaten life and growth or in some way alter it, such as drugs or poisons, would not be considered "food". What is one to do however with specially designed products with particular nutritional characteristics, such as body building protein supplements, or with ordinary food products that have been fortified with chemical compounds to achieve specific effects on human metabolism? Are they "food" or something else? As a preliminary consideration then, national food labelling law must address the issue of what is included in the term "food."[132]

With respect to the definition of "label", it is important to note three essential characteristics. First, the label must be a physical object, "a slip". Under this definition, representations concerning a product communicated verbally from vendor to consumer or as part of media advertisements would not constitute part of that product's label, unless of course those representations were recorded on the product's "slip". Second, the physical slip

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[130] *Canadian Oxford Dictionary*, 2d ed., *s.v.* "food".
[131] *Canadian Oxford Dictionary*, 2d ed., *s.v.* "label".
[132] See *infra*, Part I, Title 2, Chapitre 1 – La France; Chapter 2 – Canada; Chapter 3 – Ghana.

must be "attached to an object". It cannot be detached from it, as would be the case of a nearby poster or sign describing or alluding to the product. Nor would this dictionary definition seem to permit information about the product provided at some remote location, such as an internet site or a producer-financed customer assistance telephone number, to form part of a product's label.

Finally, information contained in the slip attached to the product must "give some information about it". Thus advertisements for other products or events that might be included on the slip would not, under this definition, form part of the label. Contests, cross-selling advertisements and other promotional materials not giving information about the product itself would not be considered as part of the label. This aspect of the dictionary definition for labelling has also been subject to legislative scrutiny in national food labelling regimes.

Paragraph 2 – Legal definitions of "food label" and "food labelling"

Legal definitions in national legislation offer definitions of food "labels" or "labelling" or both, depending on the jurisdiction. In France, the *Code de la consommation (Code comm.)*,[133] in Article R112-1(3), defines "labelling" as follows:

> Etiquetage : les mentions, indications, marques de fabrique ou de commerce, images ou signes se rapportant à une denrée alimentaire et figurant sur tout emballage, document, écriteau, étiquette, bague ou collerette accompagnant ou se référant à cette denrée alimentaire. [134]

The French definition has two requirements: (1) that the claim, representation, manufacturing name or trade mark, the image or sign relate to the food product; and (2) that any of these elements be placed on the packaging, document, notice, label, ring or collar

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[133] 8e ed., (Paris: Dalloz 2003).

[134] The term "label" is not defined in French law. The definition for "étiquetage" has been adopted for all member states of the European Union as the definition comes from *Directive 2000/13/EC of the European Parliament and the Council on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs.* Article 1(3) defines "labelling" as "any words, particulars, trade marks, brand name, pictorial matter or symbol relating to a foodstuff and placed on any packaging, document, notice, label, ring or collar accompanying or referring to such foodstuff." All labels are therefore part of labelling, but the reverse is not necessarily the case.

which accompanies or refers to the food product. Thus, the definition includes not only any elements relating to the product that are placed on the product but also any elements that are set out in materials accompanying the foodstuff or set out in materials referring to such foodstuff. The French definition permit the inclusion of food labelling elements that need not necessarily be attached to the food product. Instead, it is possible that elements that are expressed on the materials not attached to the product can become part of that product's labelling. Words and materials in documents in close proximity to, or even physically distant from, the product would also qualify as part of the product's labelling so long as the document sets out elements relating to the product. Thus, nearby signs or promotional literature about the product could well be included as part of the product labelling as would representations made on internet sites and customer service documentation that was not attached to the product.

In Canada, four federal acts contain definitions for the term "label". Section 2 of the *Food and Drugs Act* (*FDA*)[135] defines a "label"[136] as including "any legend, word or mark attached to, included in, belonging to or accompanying any food, drug, cosmetic, device or package."[137] Definitions for "label" can also be found in other Canadian statutes regulating food. Under section 2 of the *Consumer Packaging and Labelling Act* (*CPLA*),[138] a "label" means "any label, mark, sign, device, imprint, stamp, brand, ticket or tag". Under this Act, all labels must be "applied" to the products they describe. The Act therefore defines "apply" to mean "in respect of a label, to attach to, imprint on, include in or cause to accompany in any other way a product." The *Meat Inspection* Act (*MIA*)[139] defines "label" in section 2(1) to include "any legend, word, mark, symbol, design, imprint, stamp, brand, ticket or tag or any combination thereof that is or is to be applied or attached to or included in, or that accompanies or is to accompany, any meat product, package or animal." Finally, section 2 of the *Canada Agricultural Products Act* (*CAPA*)[140] defines "label" as "a label, legend, word, mark, symbol, design, imprint, stamp, brand, ticket or tag or any combination thereof that is,

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[135] R.S.C. 1985, c. F-27.
[136] "Labelling" is not a defined term in any Canadian legislation regulating food.
[137] "Package" under the same section of the Act, means "any thing in which any food, drug, cosmetic or device is wholly or partly contained, placed or packed".
[138] R.S.C. 1985, c. C-38.
[139] R.S.C. 1985, c. 25 (1st Supp.).
[140] R.S.C. 1985, c. 20 (4th Supp.).

or is to be, applied or attached to an agricultural product or a container or that accompanies or is to accompany the product or container".

The Canadian legal definitions for "label" are similar in that they all have two dimensions. First, there is the question as to which groups of elements are specifically included in each definition as forming part of the "label". The *FDA* definition provides only such three groups (legends, words, or marks) while the *CPLA*, the *MIA* and the *CAPA* offer nine, ten and eleven groups of elements that can appear on a "label", respectively. With the eleven offered by the *CAPA*, it appears clear under that Act at least, that every conceivable element--be it a symbol, an image or words--is covered by the term "label". The less descriptive *FDA* definition would have be interpreted broadly to include symbols and images as part of a food label, but one can make the argument that these elements are included in the generic term "mark" or "legend"..

The second dimension of the Canadian definitions is that the food label must be attached to the product, or be in very close proximity to the product for it to be considered as part of the "label". Under the *FDA*, the label must be "attached to", "included in", "belonging to" or "accompanying" the food or the food's package. The *CPLA* also adds the phrase "to imprint on". The *MIA* and the *CAPA* add phraseology that would allow their provisions to apply before a label was actually applied to a food product. Thus these Acts acknowledge regulatory competence over a label that has been printed but that is not yet on a food product as their definitions includes a label that "is or is to be applied or attached to or included in, or that accompanies or is to accompany" a food product. This interpretation would be very difficult to extend to the definition found in either the *FDA* or the *CPLA*.

The Canadian definitions do not appear to lend themselves to an interpretation that a food "label" can extend to elements that are not in the immediate proximity of the food product. Essentially, the "label" and the product must be physically one. The words "attached", "imprinted", "applied" necessitate an actually physical contact between label and product with the other adjectives "included in" and "attached to" also carrying a connotation of physical or very near physical contact between label and product. Only the

word "belonging to" found in the *FDA* lends itself to an interpretation that the label elements need only "belong to" but not necessarily be "proximate with" the product. In light of the other definitions, it seems unlikely that any Canadian court would conclude that labelling elements could be located at a location other than in the very immediate proximity of the product described. Internet sites, customer service information, even information panels and signs close to food products would not likely be held to form part of a Canadian food "label". In this way, the Canadian definition of "label" is clearly more restricted than the French one explored above.

In Ghana, both "label" and "labelling" are terms defined by legislation. The exact definition of "label" and "labelling" is muddied by the fact that Ghanaian legislation contains three slightly different definitions in three different instruments. "Label" is defined in only one statute. Section 51 of the Ghanaian *Food and Drugs Law, 1992 (FDL, 1992)*[141] defines "label" as "any legend, work or mark attached to, included in, belonging to or accompanying any food, drug, cosmetic, device or chemical substance." This definition resembles with some slight variations that of the Canadian *FDA*. Only two small differences exist between the two.[142]

Two regulatory instruments, the *Ghana Standards Board (Food, Drugs and Other Goods) General Labelling Rules, 1992*,[143] and the *Ghana Standard GS 46: 1992 Packaged Foods - Labelling Requirements* (an instrument with an indeterminate legal status)[144] also contain relevant definitions. Under the *Ghana Standards Board (Food, Drugs and Other Goods) General Labelling Rules, 1992* in section 2, a "label" includes "any tag, brand, mark, pictorial or other descriptive matter, written, printed, embossed or impressed on or attached to the item or inserted in its container." Finally, the *Ghana Standard* offers the only

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[141] *Food and Drugs Law, 1992* (P.N.D.C.L. 305B).
[142] The Ghanaian definition uses "work" whereas the Canadian definition uses "word". This may, however, simply be a typographical error in the legislation. The Ghanaian definition concludes with the words "or chemical substance" whereas the Canadian definition concludes "or package".
[143] *Ghana Standards Board (Food, Drugs and Other Goods) General Labelling Rules, 1992* (L.I. 1541).
[144] See discussion *infra*, Part I, Title 2, Chapter 3 - Ghana.

regulatory definition for "labelling" as "the marking of a product by a label and any written, printed or graphic matter relating to an[d][145] accompanying the product."

Although the Ghanaian definition is somewhat less elaborate than the definition of "label" in Canadian law, the Canadian and Ghanaian definitions bear a significant resemblance. Both include two dimensions—a name for what will be included as a label (Ghanaian instruments list a minimum of three and a maximum of five such terms while Canadian statutes list a minimum of three and a maximum of eleven) and the requirement that the elements of the label be in immediate physical proximity to the food product.[146] Neither country's legislation lends much support for the argument that elements of the food label could be located at some remote location. Even a slight physical separation between a claim about the product and the product itself would seem to be enough to make that claim something other than part of that product's label under both Canadian and Ghanaian law.

Internationally developed definitions of the terms "label" and "labelling" as they apply to food has been developed by the Codex Alimentarius Commission (CAC). These definitions, like all of the definitions and standards adopted by the Codex, are not of direct legal effect in Member States, but their general importance and persuasiveness as a guide to interpreting national law is becoming more apparent.[147] The Codex Standard 1 "General Standard for the Labelling of Prepackaged Foods"[148] contains definitions of both "label" and "labelling":

> "label" means any tag, brand, mark, pictorial or other descriptive matter, written, printed, stenciled, marked, embossed or impressed upon, or attached to, a container of food; and

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[145] The official copy of the instrument has no "d" after the word "an" but it is assumed that this is only a typographical error and the true intention of the language to be used was "and" and not "an" as is found in the current text.

[146] Ghanaian legal instruments use the words "attached to; included in; belonging to; accompanying; written, printed, embossed or impressed on; or attached to; or inserted with" the food product while Canadian statutes use the words "be attached to; included in, belonging to; accompanying; applied to; and to imprint on the food product".

[147] See discussion *infra*, Part II, Title 1, Chapter 3 - Codex.

[148] Codex Alimentarius Commission, Joint FAO/WHO Food Standards Programme. "Codex General Standard for the Labelling of Prepackaged Foods Codex Stan 1-1985 (Rev. 1 -1991)" *Codex Alimentarius, Vol. 1A: General Requirements*, 2nd ed. (Rome: FAO and WHO, 2000) 25-35. This instrument, adopted in 1985 by Codex Alimentarius' 170 Member States, sets out standards for all aspects of labelling for prepackaged foods. See discussion infra, Part II, Title 1, Chapter 3 "Codex".

> "labelling" includes any written, printed or graphic matter that is present on the label, accompanies the food, or is displayed near the food, including that for the purpose of promoting its sale or disposal.

Both definitions require a substantive content ("tag, brand, mark, pictorial or other descriptive matter" or "any written, printed or graphic matter on the label") and a physical proximity of that information to the product itself. A "label", however, requires a more proximate relationship of content to object than does "labelling". A "label" requires that content be "written, printed, stenciled, marked, embossed or impressed upon, or attached to" a container of food while "labelling" simply requires that the content be present on the label, accompany the food, or be displayed near the food, including that for the purpose of promoting its sale or disposal. Thus the definition of "labelling" encompasses a broader context than that of a "label", as content of the "label" must be physically attached to the product whereas content of "labelling" need only be displayed near the food. Thus promotional signs near supermarket shelves and brochures containing additional product information could be included as part of that product's labelling.[149]

Why the necessity of both definitions under Codex Standards? It is not immediately clear. However, one explanation might be that under the Codex Standard 1, mandatory elements must be set out for the "labels" of all food products,[150] whereas additional general labelling requirements need only be set out in the "labelling" of the food product.[151] As well, the principles in Codex Standard 1 which forbid false, misleading and deceptive labelling and misbranding of food products apply to all "labelling" not just "labels" and therefore have a larger reach for the preventing fraudulent labelling activities relating to food products.

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[149] Codex definitions align more fully with the France/EU definitions than to those found in either Ghana or Canada.

[150] Article 4 which includes name of food, list of ingredients, net contents and drained weight, name and address of manufacturer, country of origin, lot identification, date marking and storage instructions, and instructions for use.

[151] Article 5 sets out quantitative labelling of ingredient requirements that become mandatory once specific claims have been.

Given these national and international definitions what conclusion can be drawn as to what constitutes a food "label"? All of the above definitions support the proposition, that at the very least, a food label includes any mark, symbol, image or words on the food itself, attached to food, on the wrapper or packaging of the food or attached to the wrapper or packaging of the food. This minimalist definition requires both a substantive content and an immediate physical touching of the content and the product.

Information contained in locations and in documents not physically touching the product are less likely to be considered part of the label in Canada or Ghana than under French law or under the Codex Standard 1. For Canada (which has no definition of "labelling" but only "label") it seems improbable to extend the notion of a "label" to include elements located away from the product itself. While one might try to advance the argument that the words "belonging to" under the FDA definition could extend the reach of a food label, such an argument is, at best, tenuous. Such an interpretation is equally strained under Ghanaian law, particularly since the more authoritative definition found in the Ghanaian FDL, 1992 mirrors the Canadian definition of "label". While the other two Ghanaian definitions in delegated legislation resemble the Codex Standard 1 definition of "label,"[152] none of these definitions permits the label content to be physically separated from the product. On the other hand, such separation does seem to be contemplated by the Codex Standard 1 definition for "labelling" with its reference to substantive content about a food that is displayed near it, but not attached to it, forming part of the product's "labelling."[153] The French definition (and the EU regulation) is even more expansive of what can constitute the labelling of a food product. The definition of "labelling" contained in the French *Code comm.* is broad enough to include not only the information imprinted on or attached to the food product itself, but also other sources simply "referring to" the product. Such sources could conceivably include promotional materials not in physical proximity to the product

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[152] Those found under the *Ghana Standards Board (Food, Drugs and Other Goods) General Labelling Rules, 1992* and under the *Ghana Standard* GS 46: 1992 Packaged Foods - Labelling Requirements.

[153] In Canada or Ghana, although such information is not part of the product label, it might be subject to regulation under advertising or other consumer protection laws, both of which are beyond the scope of this study.

itself such as claims in advertisements, website resources, or consumer information brochures.[154]

The definition of what constitutes a food label thus limits or expands the amount of information that can be displayed on the food label. The narrower definitions of Canada and Ghana mean that the substantive content of "labelling" is limited to what physically fits onto the product itself. This has the advantage of clearly separating those elements that are included on the label from those which do not. Broader definitions such as the one found in French law, will not provide such certainty. However, the broader definition may also have its advantages. Countries with narrower definitions of what constitutes a food label are able to regulate only the content and presentation of that physical "label" attached to the food product. On the other hand, countries with more expansive definitions of "labelling" will have a broader regulatory reach which can prove to be an important power when controlling and suppressing false, misleading and fraudulent food labelling activities. Whatever the legal definition of "labelling" and "label", manufacturers and retailers will expend considerable time, energy and expense to provide consumers with product information via the food label. Given its finite physical space, at least under Canadian and Ghanaian law, what kind of information will manufacturers and retailers seek to present to consumers?

Section 2 – A framework for legal analysis: from food labelling objectives to food labelling law

National as well as international legal obligations affecting food labelling issue from the six objectives listed above. Just as different States have different priorities to enact laws advancing one objective over the other, the same is true at the international level. The particular direction that food labelling regulation takes, at the national or international level is strongly influenced by the historical development of the law as well as the current forces that might be pushing food labelling law in one direction or another.

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[154] Although one author posits that the definition really only extends to all documents accompanying the product. "L'étiquetage couvre à la fois l'étiquette au sens strict figurant sur l'emballage du produit mais aussi tout document accompagnant ce produit." Elisabeth Vierling , *Aliments et boissons : Technologies et aspects réglementaires* (Bordeaux : Centre régional de documentation pédagogique d'Aquitaine, 1998) at 29.

The first step in the development of the legal analysis of food labelling law both for studies of national systems and for obligations issuing from international agreements is to explore the historical development of the regulation of food labelling law. When did it begin in each jurisdiction? What gave rise to early food labelling legislation?

A second step in the development of the legal analysis of food labelling law is to examine the current content of national and international legislation. Structuring that analysis could adopt either of two traditional approaches. For national case studies, one could take a simple legislative approach: (1) identify all legislation that pertains to food labelling; (2) present the contents of such legislation, and (3) draw conclusions about its robustness or consistency as a system of regulatory law. A second approach would be to analyze food labelling laws as part of various traditional national and international sub-disciplines of law including (1) constitutional law; (2) competition law; (3) commercial law; (4) intellectual property law; (5) tort law; (6) criminal law, and (7) trade law. Neither of these two approaches is entirely satisfactory. The first is purely descriptive and provides very little opportunity for analysis of the legal provisions as part of a larger legal system. The second approach while sound in its doctrinal purity would likely fail to fully reveal the overall impact of law on food labelling as the analysis required would be chopped up into several slivers of legal analysis.

This study adopts an analytical framework which combines aspects of the above two approaches. The study proposes a multi-layered analysis of how food labelling is regulated by law, and ultimately how international obligations are affecting the evolution of national food labelling regimes. To achieve this analysis, it is important to adopt an approach which has a practical orientation but which can still identify, organize and critically assess the specific obligations food labelling regulation creates for private individuals and for States.

This analytical approach is designed to be insightful for both the legal practitioner and the legal academic. On the practical side, it reviews the body of statutes (national level) and of international obligations (international level) that regulate food labelling. In this regard, it divides food labelling obligations into three groups: (1) labelling regulation

prohibiting certain elements from appearing on food labels (prohibited elements); (2) labelling regulation requiring certain elements to appear on food labels (mandatory elements); (3) labelling regulation requiring that when a certain element is used that it be used in a particular way (restricted elements).[155]

The final legal element necessary to complete the analysis of food labelling regulation as it is evolving both at the national and international levels is to examine the implementation, dispute resolution and enforcement of food labelling regulation. As Caswell notes, "[o]nce standards are set, labelling policies require certification and/or enforcement programs to ensure compliance. Certification programs may be private or public, while some public enforcement mechanism is required to assure the overall integrity of the labelling program."[156] This final step then is essential in ensuring that the labelling regulations enacted by the State actually are operating effectively to achieve their objectives.

An analytical framework examining the above elements will be applied to food labelling legislation in France, Canada and Ghana in Title 2 of Part I and to international legal regulation affecting food labelling in Part II. A tabular representation of this framework can be summarized in the following Table 4:

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[155] Here the author would like to acknowledge his indebtedness to Antoine de Brosses who uses the first two of these categories in his comprehensive analysis of French food labelling law. The third group is the author's formulation.

[156] Julie A. Caswell, "Uses of Food Labelling Legislation", Document number OCDE/GD(97)150, (OECD: Paris, 1997) at 15.

Table 4 - Framework of analysis for national and international food labelling regulation

A. historical development of regulatory initiatives for food labelling

1. producer concerns
    a. trade and commerce (prohibiting marketplace fraud; setting market standards and facilitating trade)
    b. property and quality (establishing property rights for food marks and signs; regulating use of novel labelling claims including PPMs)
2. consumer concerns
    a. safety and health (ensuring food safety and promoting consumer health)
    b. quality and information (signalling food quality and responding to consumer demands for more food information)

B. analysis of current regulatory regime

1. regulation governing food labelling
    a. legislation for prohibited elements
    b. legislation for mandatory elements
    c. legislation for restricted claims
    - general restrictions for marketplace integrity (competition, fraud, and novelty)
    - specific restrictions (protecting IP, health and safety, quality and information)
2. implementation, dispute settlement, and enforcement
    a. preventative measures
    b. dispute settlement
    - national judicial systems (civil and criminal actions)
    - international level : WTO dispute settlement system
    c. enforcement

Title 2 : Sourcing The Origins Of National Food Labelling Legislation in France, Canada and Ghana - An Amalgam Of History, Culture, Laws And Institutions

Le Diable a neuf filles qu'il a mariées :
- l'hypocrisie aux moines
- la rapine aux chevaliers
- la fraude aux marchands...
- Chanson de XIIe siècle

Nous ne croyons cependant pas qu'elle [la législation] amène la disparition complète de la fraude, parce que, surtout à une époque comme la nôtre, où la « lutte pour la vie » est devenue si rude, où l'inégalité des conditions et des situations empêche le libre jeu de concurrence, la fraude est un moyen bien tentant pour permettre aux uns de soutenir la lutte et rapporter aux autres des bénéfices impossibles à réaliser dans un commerce honnête.

-Thèse doctoral de René Vincent (Université de Caen, 1909),
De la répression des fraudes et falsification de denrées alimentaires

Titre 2 : Remontant aux sources de la réglementation nationale français, canadienne, et ghanéenne des étiquettes des denrées alimentaires - l'histoire, la culture, les lois et les institutions

Un simple camembert...un peu mou, bien rond, emballé dans du papier blanc dans son petit cylindre de bois sur lequel est écrit des informations utiles : « appellation d'origine contrôlée », « fabrication traditionnelle au lait cru avec moulage à la louche », « 45% de matière grasse », « camembert de Normandie ». Le voilà le vrai camembert, l'étiquette le dit ... ou peut-être pas? La qualité ou la fraude?

Les marques, les signes de qualité, les informations sur le poids et les valeurs nutritives, même la simple dénomination du produit figurent sur l'étiquette de ce camembert. Parmi les éléments qui sont représentés sur l'étiquette des denrées alimentaires aujourd'hui, plusieurs sont la conséquence des impératifs législatifs. Mais d'où viennent ces obligations et comment ont-elles évoluées pour devenir la réglementation de l'étiquetage que l'on connaît aujourd'hui?

Ce Titre 2 examinera le développement du droit de l'étiquetage des denrées alimentaires du droit positif national dans trois pays, chacun avec son histoire, sa culture, ses institutions et ses traditions juridiques bien variées. Dans les trois chapitres (Chapitre 1 « la France »; Chapitre 2 « le Canada »; et Chapitre 3 « le Ghana ») qui suivent, un format constant sera utilisé. Dans une première Section de chaque chapitre, nous creuserons les perspectives historiques du développement du droit de l'étiquetage dans le pays en question. Dans une seconde Section, nous explorerons le droit positif national sur l'étiquetage à l'heure actuelle dans chacun des trois pays.

Chaque pays est fortement influencé par sa propre histoire. Ces influences pénètrent profondément dans tous les aspects de la vie quotidienne, y compris la réglementation de la nourriture. Cependant, en ce qui concerne l'étiquetage, les lois ont participé petit à petit à la construction du droit positif. Le développement des marchés et des foires, l'épanouissement de l'agriculture, la spécialisation dans la production des denrées alimentaires a contribué à une nouvelle économie de la nourriture.[157] En outre les surproductions d'aliments

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[157] G. Duby & A. Wallon, *Histoire de la France rurale, Vol. 2 : de 1340 à 1789* (Paris : Editions du Seuil, 1975) ; F. Braudel (S. Reynolds (trans)), *Civilization & Capitalism, Vol. 2 : The Wheels of Commerce* (London : Fontana Press, 1985).

augmentaient la quantité des produits agricoles destinés au marché.[158] Néanmoins, l'élan dans le commerce des produits alimentaires posait aussi des défis aux instances politiques.[159]

Comment gérer les marchés et les marchands? Comment imposer des taxes et autres contrôles sur les denrées vendues? De plus, comment freiner la tentation de certains de chercher des profits illicites, notamment par la falsification de la nourriture, ou par la tromperie sur sa véritable nature.[160] Ces derniers problèmes seront le sujet des efforts législatifs entrepris en Europe dès le 14ième siècle, dans le Nouveau Monde dès le 18ième siècle et aux 19ième siècle en Afrique. Ces initiatives précoces donnent naissance aux lois sur l'étiquetage des denrées alimentaires que nous connaissons aujourd'hui.

Pour commencer l'étude sur le développement historique de la réglementation des étiquettes concernant les produits alimentaires il est nécessaire de remonter au Moyen Age où nous voyons les premiers actes législatifs traitant de la vente des denrées alimentaires.[161]

Le droit se fait toujours dans son encadrement politique. Alors, sur le plan politique, la période du XIIIe au XVIIIe siècles représente en France, au moins, une grande époque de pouvoir royal--François 1er et Louis XIV ne sont que des exemples du pouvoir suprême rayonnant de cette époque. Avec ce pouvoir, on voyait l'envie chez des rois de la découverte, de la conquête, et de l'expansion dans les Amériques, en Afrique, et dans l'Orient. La Nouvelle-France est donc fondée, au nom du roi de France par Samuel de Champlain au XVIIe siècle. Les villes de Montréal et de Québec deviennent des centres importants pour le commerce de « queues de castors » et d'autres articles destinés à la France. Cependant, la paix en Europe et en Amérique est fragile. Les guerres en Europe (et sur les Plaines d'Abraham en Nouvelle-France) au XVIIIe siècle produiraient des événements bouleversants sur le plan social et politique des deux côtés de l'Atlantique, même qu'en Afrique et dans l'Asie.

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[158] F. Braudel, *Civilisation, Economie et Capitalisme (XVe - XVIIIe siècle) Les structures du quotidien : le possible et l'impossible* (Paris : Armand Colin, 1979); surtout chapitre 2 : Le pain de chaque jour, et chapitre 3 : Le superflu et l'ordinaire : nourritures et boissons.
[159] Luc Bihl & Luc Willette, *Une histoire du mouvement consommateur: Mille ans de luttes* (Paris: Editions Aubier Montaigne, 1984) à la p. 19 et suivants.
[160] Jacques Vivez, *Les Fraudes, Que sais-je?* vol. 839 (Paris: Presses Universitaires de France, 1970).
[161] Bihl & Willette, *Une histoire du mouvement consommateur* aux pp. 38-49.

Sur le côté de l'Amérique, la carte change complètement. La Nouvelle-France devient un territoire anglais en 1763. Plus tard, ce même territoire, géré par les Anglais mais gardant son droit privé napoléonien, est nommé « le Bas Canada ». En 1841, il est lié avec des possessions anglaises dans « le Haut Canada » pour former « l'Union des Canadas », une colonie de la Reine de l'Angleterre. De l'autre côté de l'Atlantique, la France survie aux grandes guerres européennes du XVIIIe siècle mais subit finalement sa plus grande transformation non pas par des pouvoirs de l'extérieur, mais par ceux de l'intérieur. En 1789 la révolution populaire touche à tous les aspects de la vie française y compris la vie politique, la gestion du commerce et même, plus particulièrement, la réglementation des aliments. Au XIXe siècle, la France continue de se redéfinir avec les tensions populaires, aristocratiques et militaires tous présentes.[162]

Pendant ce même période, le Canada, pays du « Nouveau Monde », continue de s'exprimer sur le plan culturelle et même juridique avec les influences franco-britanniques. Mais ces influences coloniales ne sont plus les seules qui sont importantes. Les économies de l'Amérique de Nord commencent de s'intégrer. Ces réalités géopolitiques auront des influences sur l'évolution de son droit de l'étiquetage au Canada.

En Afrique, la lutte pour les territoires s'intensifiait, surtout entre les Britanniques, les Français et les Portugais, mais d'autre pays s'y mêlaient aussi.[163] Dans l'Afrique de l'Ouest, les Français et les Anglais se bousculaient pour l'accès aux produits de commerce, comme de l'or, des esclaves, et plus tard, des produits agricoles comme le cacao, les fruits tropicaux et les arachides. Le commerce national et envers l'Europe des colonies épanouissait et aussi certaines « règles de commerce internationale » voient le jour.[164]

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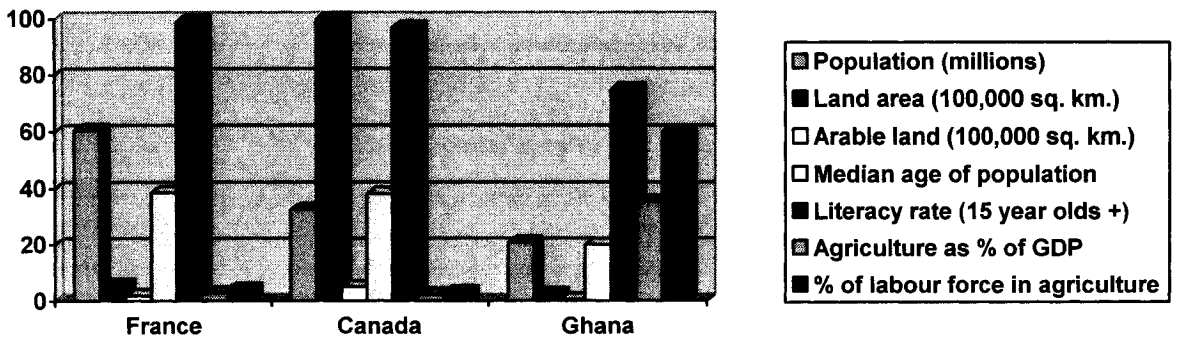
[162] Bihl & Willette, *Une histoire du mouvement consommateur* à la p. 189 et suivants.
[163] Thomas Pakenham, *The Scramble for Africa: white man's conquest of the dark continent from 1876 to 1912* (London: Weidenfeld and Nicolson. 1990) ; L. C. A. Knowles, *Economic Development in the Nineteenth Century : France, Germany, Russia and the United States* (London : George Routledge, 1932) aux pp. 306-322.
[164] Knowles, *Economic Development in the Nineteenth Century* aux pp. 3-13.

Déjà au XIXe siècle, le commerce des produits agricoles et des aliments connaissait de la réglementation, même au niveau de l'étiquetage sur le plan national et international.[165] L'allure de la réglementation des étiquettes des denrées alimentaires augmente considérablement dans le XXe siècle. Les lois traitant de l'étiquetage des denrées alimentaires au Ghana, pays en voie de développement et premier pays de l'Afrique sub-saharienne à « gagner » son indépendance des pouvoirs coloniaux, voient le jour sous la lumière des influences cosmopolites. On verra l'évolution de ces lois sur l'étiquetage dans un pays du « Tiers Monde » à travers les obstacles tels que les conflits internes et la pénurie des ressources financières.

Aujourd'hui, voila trois pays—la France de « l'Ancien Monde », le Canada du « Nouveau Monde », et le Ghana du « Tiers Monde »—tous avec des aspects géophysiques, économiques, culturels et historiques uniques (voir le Figure 2 ci-dessous).[166] Produit de tous ces facteurs, chaque pays a développé un système juridique très sophistiqué pour gérer le contenu et le contrôle des étiquettes de denrées alimentaires. Cependant, la réglementation en place dans chacun des trois pays n'est pas, évidement pareil.

Figure 2 - Les statistiques socio-économiques sélectives des trois pays



[165] René Vincent, *De la répression des fraudes et falsification de denrées alimentaires* (Thèse du doctorat, Université de Caen, Faculté de Droit, 1909) (Caen: Imprimerie Charles Valin, 1909) aux pp. 28-37.

[166] Les calculs de l'auteur d'après des statistiques comparatives viennent du United States Central Intelligence Agency, « The World Factbook » online :
pour la France <http://www.cia.gov/cia/publications/factbook/geos/fr.html;
pour le Canada <http://www.cia.gov/cia/publications/factbook/geos/ca.html; et
pour le Ghana <http://www.cia.gov/cia/publications/factbook/geos/gh.html. Voir aussi Béatrice Didiot & Serge Cordellier, eds. *L'état du monde: Annuaire économique géopolitique mondial 2005* (Montreal: Editions La Découverte & Editions du Boréal, 2004).

La Partie I terminera avec une discussion des axes de convergence et de divergence entre les aspects du droit de l'étiquetage des denrées alimentaires dans les trois pays. Cette analyse formera le point de départ de la prochaine étape de l'étude, qui formera le corps de la Partie II. Dans cette deuxième Partie de la thèse, nous étudierons les effets du droit international public sur le droit positif national de l'étiquetage en France, au Canada et au Ghana.

Commençons avec la France, pays du « Ancien Monde » avec sa longue tradition de l'appréciation de la nourriture.[167] Il faut quoi sur une étiquette d'aliment pour garder cette tradition?

[167] Cette notion centrale dans le droit de l'alimentation en France n'est pas nécessairement partagée avec d'autre pays même parmi ceux au sein de l'Union européenne. « [I]l existe un clivage majeur entre l'Europe du Nord et celle du Sud, entre pays anglo-saxons et latins, voire entre protestants et catholiques. Pour ces premiers, la qualité correspond avant tout à un bon niveau sanitaire et à la sécurité du produit, donc à une « qualité seuil », tandis que pour les seconds il faut s'intéresser à la saveur et à la typicité, à la « qualité spécifiante » de denrées traditionnelles enracinées dans les terroirs, qui pourraient êtres menacées par une standardisation ou une banalisation industrielles. » Norbert Olszak, *Droit des appellations d'origine et indications de provenance* (Paris: Tec & Doc, 2001) aux pp. 104-105.

Chapitre 1 – La France

Ce chapitre examinera le développement historique du droit positif de l'étiquetage des denrées alimentaires (Section 1) aussi bien que « l'état de lieu » des obligations juridiques en France à l'heure actuelle à propos de l'étiquetage pour les aliments (Section 2).

Section 1 – Les Perspectives Historiques

En ce qui concerne l'histoire de l'étiquetage des denrées alimentaires en France, on discerne trois périodes distinctes. Dans une première période du début du XIVe siècle à 1789 (Paragraphe 1), nous observons la naissance de la réglementation de la nourriture et les premiers efforts pour réglementer l'étiquetage. Dans une seconde période de 1789 à 1850 (Paragraphe 2), nous constatons l'importance des bouleversements sociaux dans le développement d'une liberté du marché qui sera « corrigée » dans un troisième temps avec les lois du 27 mars 1851 et du 1 août 1905 sur la répression des fraudes dans la vente de marchandises et des falsifications des denrées alimentaires et des produits agricoles (Paragraphe 3).

Paragraphe 1 – La naissance de la réglementation des étiquettes des denrées alimentaires

C'est peu de temps après que les lois de la France aient été écrites en langue française, que les premiers actes législatifs portant sur la réglementation des denrées alimentaires ont été promulgué. La première loi de ce genre date de 1305.[168] Entre cette date et 1789, les lois royales ont touché plusieurs aspects de la réglementation des marchés et des produits qui y étaient vendus. Même si les métiers des fabricants des produits de base comme le pain, le vin, le fromage et le beurre sont réglementés dès le XIVe siècle en France,

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[168] *Ordonnance n° 411 de Roi Philippe IV, Paris, 1305 « Règlement pour les boulangers de Paris »* dans I. Isambert *et al., Recueil Général des Anciennes Lois Françaises depuis l'an 420 jusqu'à la révolution de 1789* (Paris: Belin-Leprieur, 1824), t. 2, (1270-1308) 828. Notre « traduction » du 14ème siècle français des deux articles de cette loi en français moderne est la suivante: (1) Si les talemeliers [boulangers] de Paris ne font pas leur pain suffisant, toute leur fournée sera forfaite, et ils seront encore punis par le prévôt de Paris. (2) Toute personne de Paris, ou demeurant à Paris, peut faire du pain en sa maison, et le vendre en payant les droits accoutumés.

la réglementation des denrées alimentaires elles-mêmes (A), et la protection contre la fraude et la falsification des denrées (B) commencent un peu plus tard.

A. la progressive réglementation de la production des denrées alimentaires

En ce qui concerne la production et la vente de pain, en 1439 une loi royale, « *Lettres portant règlement sur le poids et le prix du pain à Paris, et les meuniers* »[169] a été promulguée. Cette loi oblige les boulangers à faire un pain « bien cuit, froid et essuyé » qui pèse un poids défini et qui se vend à un prix fixe. S'ils ne faisaient pas un tel pain, des sanctions étaient prévues.

Plus tard en 1546, une ordonnance du prévôt de Paris exigeait : « que le pain fût sans mixtions dangereuses destinées à le faire lever (telle que l'alum et le vitriol), qu'il fût bien élaboré, fermenté et boulangé, bien cuit et essuyé, froid et paré au moins à six ou sept heures du matin. »[170]

La loi du 30 mars 1635 obligeait, quant à elle, les boulangers à marquer leur pain sous peine d'amende.

> « Est enjoint aux maistres boulangers du petit pain de cette ville de Paris de cuire journellement, tenir leurs maisons, ouvreiers et fenestres toujours garnies de trois sorties de pains, de qualité, blancheur et poids ordonné par les anciennes ordonnances: sçavoir le pain de chablis pesant après ca cuisson douze onces; le pain de chapitre, dix; et le pain bourgeois bis blanc, sieize onces; et outre du pain plus bis, appellé anciennement pain de brodde, du poids de quatorze onces, le tout du prix de douze deniers chacun, dont ils seront tenues faire des demis, qui seront vendus à proporition dudit prix; *et marqueront lesdits boulangers lesdits pain de leur marque particulaière:* tiendront poids et balances en leurs boutiques; le tout à peine d'estre déchus de la maistrise, et de plus grande peine s'il y echet. (nos italiques). »[171]

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[169] *Ordonnance n° 120 de Roi Charles VI, Paris, 19 septembre 1439*, « Lettres portant règlement sur le poids et le prix du pain à Paris, et les meuniers » dans I. Isambert *et al., Recueil Général des Anciennes Lois Françaises depuis l'an 420 jusqu'à la révolution de 1789* (Paris: Belin-Leprieur, 1825), t. 9, (1438-1460) 53.

[170] *Ordonnance du prévôt de Paris, 23 novembre 1546*, dans D. Dalloz & A. Dalloz, *Jurisprudence Générale du Royaume. Répertoire méthodique et alphabétique de législation, de doctrine et de jurisprudence*, t. 6, (Paris: Bureau de la Jurisprudence Générale du Royaume, 1847) 374.

[171] *Ordonnance n° 267 de Roi Louis XIII – Richelieu, Paris, 30 mars 1635, « Ordonnance du lieutenant civil sur la police générale de Paris de Charles VI - Règlement général de police pour la juridiction de prévôt des*

Et voilà, les premières « étiquettes » obligatoires sur une denrée alimentaire en France, il y a presque 400 ans!

Une autre denrée fortement réglementée dès le XIVe siècle était le vin. Le problème de l'appellation des vins fait déjà l'objet d'une loi de 1350. Peut-être le germe du futur système d'appellation d'origine contrôlée, cette loi du XIVe siècle obligeait les taverniers à ne pas nommer ou vendre sous un nom à vin « d'aucun pays, que celuy dont il sera creu, sur peine, de prendre le vin, et de l'amende. »[172] La tendance à définir le nom sous lequel le vin pouvait se vendre continuait à s'élaborer au début du XVe siècle. En 1415, la loi a séparé nettement les appellations de Bourgogne de celles du reste de la France.[173]

Les droits de dénomination et de production des denrées alimentaires de qualité touchaient aussi, au début de XVe siècle, certains fromages. Les actes royaux protégeaient, par exemple, le fromage Roquefort et ses producteurs dès 1407.[174]

Une autre catégorie de réglementation des denrées alimentaires se compose des lois visant la réglementation, la standardisation et la vérification des poids et mesures. On constate également dans ce domaine une longue histoire interventionniste du pouvoir royal en France. Successivement les rois, comme Charlemagne, Philippe le Long, Louis XI, François Ier, Charles IX, Henri III, Henri IV, et Louis XIV ont essayé de mettre en place un

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marchands et échevins de Paris » dans I. Isambert *et al., Recueil Général des Anciennes Lois Françaises depuis l'an 420 jusqu'à la révolution de 1789* (Paris: Belin-Leprieur, 1829), t. 16, (1610-1643) 424.

[172] *Ordonnance n° 161 du Roi Jean, Paris, 30 janvier 1350 « Ordonnance concernant la police du royaume »* dans I. Isambert *et al., Recueil Général des Anciennes Lois Françaises depuis l'an 420 jusqu'à la révolution de 1789* (Paris: Belin-Leprieur, 1824), t. 4, (1327-1357) 585.

[173] *Ordonnance n° 626 de Charles VI, Paris, février 1415 « Règlement général de police pour la juridiction de prévôt des marchands et échevins de Paris, et établissement de plusieurs offices pour la surveillance des ports et marchés de la même ville »* dans I. Isambert et al., *Recueil Général des Anciennes Lois Françaises depuis l'an 420 jusqu'à la révolution de 1789* (Paris: Belin-Leprieur, 1825), t. 8, (1414-1437) 439, art. 46.

[174] Jean-Paul Branlard, *Droit et gastronomie: Aspect juridique de l'alimentation et des produits gourmands* (Paris: Gualino, 1999) à la p. 20. « En 1407, une lettre patente de Charles VI, protège le produit [Roquefort] et ses producteurs. Le 15 septembre 1457, une charte de Charles VII accueille une requête des manants et habitants de lieu de Roquefort en pays de Roumergue, pour leur maintenir le droit de percevoir une redevance sur les fromages que « tous les pays d'environ... ont accoutumé en temps d'este appourter esdites caves et cavernes esquelles les dites fromaga se font et deviennent bons et savoureux. » Un premier arrêt du parlement de Toulouse, en date du 31 janvier 1666, confirmé par un second arrêt, du 31 janvier 1785, pose le principe d'une amende de mille livres à l'encontre de ceux qui venait, en gros ou en détail, pour « véritable Roquefort » des fromages qui n'en sont pas. »

système d'uniformisation des poids et mesures.[175] Toutefois, il a fallu attendre le début de la période révolutionnaire pour voir la mise en place d'un système vraiment uniforme en France.[176] Avec les lois du 8 mai 1790,[177] du 1 août 1793,[178] et du 18 Germinal, An III (7 avril 1795),[179] le système métrique étaient reconnu et élaboré comme le seule système de poids et de mesures valable en France. A partir de 1790, toute accusation de falsification des poids ou de tromperie sur la quantité vendue d'un produit font exclusivement référence au système métrique des poids et mesures.

Sur les marchés des produits alimentaires, les soucis portaient non seulement sur le système de poids et mesures qui était en place mais aussi sur le fait que ce système utilisé soit juste et honnête. Partout en France, il existait depuis longtemps des lois, qui d'une manière générale, interdisaient la fraude en utilisant des poids et des mesures,[180] mais il fallait attendre encore quelques décennies avant que la loi cible directement la répression des fraudes des denrées alimentaires.

B. la protection embryonnaire contre la fraude et la falsification

Descendant de la tradition juridique romaine, la France connaît depuis longtemps les lois contre les falsifications et les tromperies.[181] À la même époque qu'apparaissaient les

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[175] D. Dalloz & A. Dalloz, *Jurisprudence Générale. Répertoire méthodique et alphabétique de législation, de doctrine et de jurisprudence,* t. 35, (Paris: Bureau de la Jurisprudence Générale, 1855) 977 *s.v.* « Poids et Mesures », para. 2.

[176] Dalloz, & Dalloz, *Jurisprudence Générale,* t. 35, *s.v.* « Poids et Mesures », para. 2.

[177] *Décret concernant l'unité des poids et mesures en France du 8 mai 1790* dans Dalloz & Dalloz, *Jurisprudence Générale*, t. 35, *s.v.* « Poids et Mesures - Tableau de la législation relative aux poids et mesures » 980.

[178] *Décret qui établit l'uniformité et le système général des poids et mesures du 1 août 1793* dans Dalloz & Dalloz, *Jurisprudence Générale,* t.35, *s.v.* « Poids et Mesures - Tableau de la législation relative aux poids et mesures » 980-981.

[179] *Décret relatif aux poids et mesures en France du 18 Germinal, An III (7 avril 1795)* dans Dalloz & Dalloz, *Jurisprudence Générale,* t. 35, *s.v.* « Poids et Mesures - Tableau de la législation relative aux poids et mesures » 981-982.

[180] Dalloz & Dalloz, *Jurisprudence Générale,* t. 35, *s.v.* « Poids et Mesures » 979 para. 10.

[181] D. Dalloz et A. Dalloz, *Jurisprudence Générale. Répertoire méthodique et alphabétique de législation, de doctrine et de jurisprudence,* t. 43, (Paris: Bureau de la Jurisprudence Générale, 1858) 1047 *s.v.* « Vente de substances falsifiées-tromperies » para. 2. « Les falsifications et les tromperies sur le poids étaient rangées par la législation romaine dans la classe des infractions les plus sévèrement punies. » Dans le discussion du projet de loi de 27 mars 1851 sur à la répression plus efficace de certaines fraudes dans le débit des marchandises, M. Riché constate que les lois romaines, les lois anciennes confondait tous ces faits sous la dénomination commune et vague de faux, même de vols. Voir aussi Dalloz, D. *et al. Jurisprudence Générale. Recueil*

premières lois pour réglementer les fabricants de produit de base, surgissaient également des lois générales afin d'éviter la fraude sur les marchés.

En 1321, sous Charles IV, il y avait l'ordonnance « touchant la vente au détail et au poids des épiceries et autres marchandises, et le sequestre dans les mains du posseurs de choses votées ». L'article 2 de cette loi prévoyait:

> « Que nul n'achètera, ni fera acheter aucune marchandise, en quoy il sache, qu'il ayt aucune fraude, pour grant marché que l'en li face. Ainçois soit chascun par son serement tenu de faire savoir, tantost comme il vendra à leur cognoissance, la fauscité de leur mestier, et marchandise au prevost de Paris, pour faire punition de ce meffait. Et en aura ledit prevost execution, appellez les maistres doudit mestier, et ceuls qui verra qui seront à appeler ».[182]

Il existait, en outre, d'autres mesures législatives bien précises, prises ultérieurement pour combattre la fraude, la falsification et la tromperie sur des aliments. Citons, à titre d'exemple, une ordonnance d'importance pour l'étiquetage qui vit le jour en 1735, qui imposait aux bouteilles l'indication de leur contenance.[183]

Paragraphe 2 - Les bouleversements sociaux et les effets sur l'étiquetage : liberté, égalité et criminalité

Les bouleversements de la Révolution de 1789 touchaient tous les aspects de la vie française, des plus hautes sphères politiques aux plus petits détails de la vie quotidienne comme la vie des marchés de fruits et de légumes.

Prenons, à titre d'exemple, les lois qui ont appliqué le système métrique à travers toute la France. Ces changements ont certainement posé plus de soucis au niveau de la vie quotidienne que l'arrivée de l'euro en France en 2002! Toutefois, après la Révolution, comme auparavant, les fabricants et les marchands de nourriture étaient responsables de la vente de bons produits et de juste quantité. La loi sanctionnait toujours les contrevenants par

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périodique et critique de jurisprudence, de législation et de doctrine, Année 1851 (Paris: Bureau de la Jurisprudence Générale, 1851) 61, para 16.

[182] *Ordonnance n° 600 de Charles IV, Paris, février 1321 « Ordonnance touchant la vente au détail et au poids des épiceries et autres marchandises, et le séquestre dans les mains du poseurs de choses votées »* dans I. Isambert *et al., Recueil Général des Anciennes Lois Françaises depuis l'an 420 jusqu'à la révolution de 1789* (Paris: Belin-Leprieur, 1824), t. 3, (1308-1327) 289.

[183] Commentaire sur *la loi de 27 mars 1851*, dans Dalloz *et al., Jurisprudence Générale,* Année 1851, 62, para 34.

des poursuites. Sur la première page du journal *Gazette Nationale*, on trouve en 1791 une procédure contre un boulanger coquin:

> « Ce tribunal [de police] vient de rendre un jugement qui ordonne l'exécution des ordonnances et règlements de police, concernant le poids du pain; et pour y être contrevenu par le frieur Walmès, maître boulanger, le condamne en cent livres d'amende; lui fait défense de recidiver, sous plus grande peine; ordonne l'impression et l'affiche ».[184]

La période révolutionnaire a été marquée par deux périodes distinctes: d'abord par la protection de la liberté des marchands et des marchés et l'application des légères sanctions pour contourner le fraude (A) et plus tard, par une robuste réglementation de nature pénale ciblant des activités illicites des marchands (B). Cette approche garantissait de nombreuses poursuites contre des contrevenants, soit presque 3 par jour juste à Paris au milieu de XIXe siècle![185]

A. les denrées alimentaires et la liberté du marché

Sous l'Ancien Régime, la réglementation des métiers, y compris les métiers de ravitaillement comme les boulangers, les bouchers, et autres marchands de vins était liée au « patronage ». Grâce à la Révolution, cette réglementation fut abrogée. On voyait avec la déréglementation du marché une nouvelle liberté d'exercer les métiers du ravitaillement sans le fardeau de la surveillance royale et les obligations de suivre des « ordres royales », et ses obligations, par exemple du marquage du pain.

Mais avec la déréglementation, le contrôle « préventif » n'était plus possible et les abus de la liberté du marché apparaissaient: les faux poids, les produits mal décrits ou les biens vendus avec un avis trompeur ou une étiquette trompeuse. La fraude était « partout ».[186] Évidement, il fallait mettre en œuvre un mécanisme pour surveiller les marchés et la vente des produits. La loi du 16 août 1790 donnait des pouvoirs à la police

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[184] *Gazette Nationale [ou le Moniteur Universel].* "Ce Tribunal vient de rendre un jugement" (3 juillet 1791 - Seconde Année de la Liberté) à la p.1.
[185] Prenons par exemple, la statistique criminelle de 7535 poursuites seulement à Paris pour la période 1845 à 1850 dans le domaine de fraudes dans le débit des marchandises. D. Dalloz & A. Dalloz, *Jurisprudence Générale. Répertoire méthodique et alphabétique de législation, de doctrine et de jurisprudence,* t. 43, (Paris: Bureau de la Jurisprudence Générale, 1858) 1049 *s.v.* « Vente de Substances Falsifiées » para. 12.
[186] Bihl & Willette, *Une histoire du mouvement consommateur* à la p. 203.

municipale pour surveiller les marchés.[187] L'article 4 du Titre XI de cette loi donnait à la police municipale le pouvoir d'inspection « sur la fidélité du débit des denrées qui se vendent au poids, à l'une ou à la mesure, et sur la salubrité des comestibles exposées en vente publique. »[188] La loi du 16 août 1790 aussi donnait le droit au maire de Paris d'interdire la falsification de certaines espèces de pain, comme insalubres et dangereuses pour la santé publique.[189] Cependant, des auteurs constatent que les lois de surveillance des marchés contre la falsification et la tromperie étaient beaucoup moins strictes dans les premières années suivant la Révolution que sous l'Ancien Régime.[190]

B. l'élaboration des codes et le contrôle des abus du marché

Avec l'élaboration des premiers Codes après la Révolution, certains articles interdisaient les actes falsificateurs. Le *Code des délits et des peines* du 3 Brumaire, An 4 (25 octobre 1795) imposait des peines de simple police[191] pour « ceux qui exposent en vente des comestibles gâtés, corrompus ou nuisibles ».[192] On ajoutait dans le *Code pénal* de 1810, une autre mesure pour lutter contre la fraude sur les marchés. Cependant, les articles du Code de 1810, traçaient le même chemin que ceux de la loi du 19 juillet 1791, avec des peines seulement pour les falsifications de boissons. Les dispositions du Code de 1810 ne concernaient pas les falsifications d'autres produits, ni les tentatives ou les tromperies sur des produits. Plus tard, dans le *Code pénal* de 1832, cette lacune fut comblée avec les articles interdisant la vente de tout produit falsifié (art. 475) et la tromperie sur le consommateur (art. 423).[193]

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[187] *Décret sur l'organisation judiciaire du 16 août 1790 du Assemblée Nationale Constituante, Titre XI « Des juges en matière de police »* dans J.-B. Duvergier, *Collection Complète des Lois, Décrets, Ordonnances, Règlements, Avis du Conseil-d'Etat*, t. 1, 2e éd, (Paris, A. Guyot et Scribe, 1834) 310 à la page 330.
[188] *Décret sur l'organisation judiciaire du 16 août 1790 du Assemblée Nationale Constituante, Titre XI « Des juges en matière de police »* dans Duvergier, *Collection Complète des Lois*, t. 1, 310 à la page 330.
[189] *Loi du 16 août 1790 sur le pain, sa production et sa vente* dans D. Dalloz & A. Dalloz, *Jurisprudence Générale du Royaume. Répertoire méthodique et alphabétique de législation, de doctrine et de jurisprudence*, t. 6, (Paris: Bureau de la Jurisprudence Générale du Royaume, 1847) 374-376 *s.v.* « Boulanger » tit. 11, art. 3.
[190] Dalloz & Dalloz, *Jurisprudence Générale*, t. 43, 1047 s.v. « Vente de substances falsifiées-tromperies » para. 9; Bihl & Willette, *Une histoire du mouvement consommateur*aux aux pp. 203-204.
[191] Les peines de simple police consistent dans une amende de la valeur de trois journées de travail ou au-dessous, ou dans un emprisonnement qui n'excède pas trois jours, la moindre peine sous le Code.
[192] *Loi du 3 Brumaire, An 4* (25 octobre 1795), *« Livre III, Titre I, Article 605, paragraphe 5 »* dans J.-B. Duvergier, *Collection Complète des Lois, Décrets, Ordonnances, Règlements, Avis du Conseil-d'Etat*, t. 8, 2e éd, (Paris: A. Guyot et Scribe, 1835) 434.
[193] Voir aussi art. 476-14, 477, et 479 du *Code pénal de 1832*.

Dans le *Code pénal* de 1832, la distinction entre la falsification et la tromperie devient un peu plus claire. L'art. 423 réprime les tromperies d'un acheteur sur la nature d'un produit, tandis que l'art. 475 punit de peines de simple police ceux qui avaient vendu des boissons falsifiées nuisibles ou non pour la santé. Mais en ce qui concerne la tromperie sur la qualité, l'origine, ou d'autres attributs d'un produit, l'art. 423 ne les traite toujours pas.[194] En outre, les dispositions du Code trouvées dans l'art. 475 visaient à prévenir de la falsification des boissons et ne traitaient même pas des falsifications de denrées alimentaires. Avec toutes ces dispositions dans le *Code pénal*, il est bien évident que le droit pénal devient l'instrument de choix pour contrôler des abus de marché.

Paragraphe 3 - La floraison des règles de l'étiquetage dans le XIXe et XXe siècle

Avant 1850, la réglementation des étiquettes alimentaires est due, en grosse partie, aux initiatives trouvées dans les lois pénales ou bien dans les lois très précises sur les aliments bien particulières comme le pain, le vin, et le fromage. Cette tradition est transformée avec trois lois importantes qui visent directement à réglementer le contenu et la véracité des étiquettes des denrées alimentaires. Les lois du 27 mars 1851 et du 1 août 1905 pour la répression des fraudes des aliments (A), les lois pour établir le système de signes de qualités (B), les lois qui rendent les étiquettes obligatoires (C), et l'intégration de la France dans les communautés européennes (D), vont changer totalement le droit positif français de l'étiquetage entre 1850 et 2000.

A. les étiquettes et la vérité – la répression des fraudes

Le 27 mars 1851 demeure une date importante dans la réglementation des denrées alimentaires en France. Cette date marque l'entrée en vigueur de la « loi tendant à la répression plus efficace de certaines fraudes dans la vente des marchandises ». Vu les lacunes des codes pour lutter contre la falsification et la tromperie des aliments, cette loi visait à réglementer, d'une manière compréhensive non seulement d'une manière générale,

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[194] Dalloz & Dalloz, *Jurisprudence Générale,* t. 43, 1073 *s.v.* « Vente de substances falsifiées-tromperies » para. 121.

toutes sortes de marchandise mais plus précisément la vente de substances alimentaires et médicamenteuses.[195]

Cette loi marquait pour la première fois la répression de la fraude sur les aliments. En outre, elle ajoutait des articles interdisant la tromperie dans le domaine des ventes de denrées alimentaires. La loi était très brève avec seulement neuf articles au total et avait pour but de combler les lacunes de l'art. 423 de *Code pénal*. La loi essayait de mettre en vigueur des articles qui condamneraient non seulement la simple tromperie sur la quantité des marchandises (une action qui n'était pas touché par l'art. 423) mais aussi la tromperie sur la qualité des marchandises.[196]

La loi a connu un succès initial impressionnant et a eu une portée très large même en ce qui concerne l'étiquetage. A peine huit mois après l'entrée en vigueur de cette loi, une décision de la cour d'Orléans indiquait que: « L'omission intentionnelle de la marque peut, lorsqu'elle a eu pour but de rendre possible un gain illicite sur l'acheteur, devenir un élément du délit de tentative de tromperie sur la quantité. »[197] En plus, on appliquait la loi du 27 mars 1851 de façon rigoureuse contre les contrevenants. En 1856, il y a eu 10 789 poursuites correctionnelles uniquement à Paris.[198]

Dans les cinquante ans qui ont suivi l'entrée en vigueur de la loi du 27 mars 1851, on s'est rendu compte des lacunes de celle-ci. La loi ne prévoyait pas la prévention des fraudes et des tromperies. « Ces lois [de 1851 et 1855] avaient un vice capital, surtout en pareille matière, celui de n'être nullement préventives. Aucune de leurs dispositions n'entravait le

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[195] René Vincent, *De la répression des fraudes et falsification de denrées alimentaires* (Thèse du doctorat, Université de Caen, Faculté de Droit, 1909) (Caen: Imprimerie Charles Valin, 1909) aux pp. 37-42.
[196] M. Riché, rapporteur de la commission chargée d'examiner et de proposer cette loi, a dit que la mixtion d'un nuit à sa nature et peut constituer une falsification qui peut être condamner. Commentaire sur la loi de 27 mars 1851, dans Dalloz *et al. Jurisprudence Générale. A*nnée 1851, 61, para 18.
[197] *Orléans, 11 novembre 1851, Boulangers d'Orléans*, D. P. 52.2.228 dans D. Dalloz *et al., Jurisprudence Générale. Recueil périodique et critique de jurisprudence, de législation et de doctrine*, Année 1867 (Paris: Bureau de la Jurisprudence Générale, 1867) 142 *s.v.* « boulanger », para. 119.
[198] Dalloz & Dalloz, *Jurisprudence Générale,* t. 43, 1049 *s.v.* « Vente de substances falsifiées-tromperies » para. 12.

libre exercice de la fraude et ne mettait en garde l'acheteur. »[199] En outre, bien que les lois du 27 mars 1851 et du 5 mai 1855 présentaient un réel progrès par rapport a ce qui existait auparavant dans le *Code pénal*, c'était insuffisant pour lutter contre la fraude sur les marchés des aliments.

Le grand élan dans la lutte contre la fraude arriva au XXe siècle et prit naissance dans la loi du 1er août 1905. Non seulement cette loi était une codification de l'article 423 du *Code pénal* et des lois de 1851-55, mais elle introduisait aussi des innovations qui auront des conséquences importantes pour l'étiquetage des denrées alimentaires. Certains disent que la loi du 1er août 1905 relative à « la répression des fraudes dans la vente des marchandises et les falsifications de denrées alimentaires et des produits agricoles » était une charte du commerce honnête[200] qui, avec l'aide de la science, allait « fixer la limite entre les opérations loyales et celles qui ne le sont pas. »[201] D'autres disent que la loi, adoptée à la demande des industriels pour les protéger contre les fraudeurs, est devenu le droit pénal du marché.[202] Au moins, « la promulgation de la loi du 1er août 1905 ... a été cause d'un grand émoi dans le monde commercial. »[203]

La loi du 1er août 1905 a interdit les tromperies sur tous les biens vendus, comme c'était le cas avec l'article 423 du *Code pénal* auparavant, mais aussi elle a interdit la falsification des denrées alimentaires sur la nature et sur les qualités de ces biens. Cependant, selon un auteur, c'était l'article 11 de la nouvelle loi qui était la plus innovatrice des dispositions. Selon Mme. Toubeau, « c'est, en effet, moins par les lacunes qu'elle a

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[199] M. Griolet, M. & C. Verge, *Dalloz. Répertoire pratique de législation, de doctrine et de jurisprudence,* t. 11, (Paris: Librairie Dalloz, 1925) 485 *s.v.* « substances falsifiées, tromperie » para. 3.
[200] Maxime Tombeau, *Fraudes et Falsifications : Une lutte d'un demi-siècle* (Paris: Berger-Levrault, 1964) à la p. 15.
[201] Tombeau, *Fraudes et Falsifications* à la p. 15.
[202] P. Goni, « La responsabilité pénale de l'agricultueur du fait de ses produits » (1999) 276 Revue de Droit Rural 456 aux pp. 456-462.
[203] Valentin Richard. *La nouvelle législation sur la répression des fraudes dans la vente des marchandises et des falsifications des denrées alimentaires et des produits agricoles* (Thèse de doctorat, Université d'Aix-en-Provence, 1908) [non publiée] à la p. 10.

comblées ... que par les pouvoirs nouveaux conférés en matière de fraude à l'administration, que la loi du 1er août 1905 a réalisé un progrès considérable. »[204]

> « L'article 11 prévoyait des nouveaux pouvoirs de règlements d'administration publique sur les mesures à prendre pour assurer l'exécution de la loi elle-même, y compris « les inscriptions et marques indiquant soit la compositions, soit l'origine des marchandises, soit les appellations régionales et de crus particuliers que les acheteurs pourront exiger sur les facteurs, sur les emballages ou sur les produits elle-même, à titre de garantie de la part des vendeurs, ainsi que les indications extérieures ou apparentes nécessaires pour assurer la loyauté de la vente et la mise en vente. »[205]

Cet article 11 donnait alors pouvoir à l'administration (le Service de la répression des fraudes) de réglementer une définition officielle sur des produits naturels auxquels étaient réservés un droit exclusif à une dénomination déterminée. Ces règlements prohibaient, en termes généraux, toute manipulation de ces produits et de leur état naturel dans le but de tromper l'acheteur.[206] L'article 13 créait une peine uniquement pour les infractions aux prescriptions de règlements d'administration publique permises par l'article 11. Cette peine était moins sévère (16-50 francs; pas de prison) que celles prévues en cas de tromperie ou de falsification (100-5000 francs; 3-12 mois au prison).

La loi du 1er août 1905 était une amélioration de la loi du 6 août 1851 en ce qui trait à deux aspects majeurs. D'abord, cette loi punissait non seulement la falsification de la nourriture et la tromperie de la quantité vendue, mais aussi la tromperie sur la nature, les qualités substantielles, la composition, l'espèce, et l'origine des denrées alimentaires. Avec ces dispositions, une tromperie sur les « qualités » au sens large d'une denrée alimentaire était punie. Non seulement la « nature » d'un produit, mais aussi ses « qualités substantielles», « sa composition », « sa teneur en principes utiles », « son espèce », « son origine », « sa quantité » et « son identité », devraient être fidèlement attribués au produit, y

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[204] Maxime Toubeau, *La législation répressive des fraudes et falsifications sur les produits alimentaires* (Thèse du doctorat, Université de Paris, Faculté de Droit, 1908) (Paris: Libraire Nouvelle de Droit et de Jurisprudence, 1908) à la p. 36.

[205] L'article 11, *la loi du 1er août 1905.*

[206] Quelques unes de ses définitions existait auparavant telle que le beurre dans *la loi du 16 avril 1897*, ou après 1905, comme pour les huiles et les graisses dans *le décret du 11 mars 1908*, et le vin définit dans plusieurs loi après la loi de 1905, y compris *la loi du 22 janvier 1919 sur les fraudes et les vins* et *la loi du 1 janvier 1930 sur les vins.*

compris sur son étiquette et son emballage. Deuxièmement, la loi de 1905 introduisait les pouvoirs de formuler des règlements d'administration publique sur les mesures à prendre pour assurer que les étiquettes indiquaient les éléments « nécessaires pour assurer la loyauté de la vente et de la mise en vente. »[207] Les définitions et les obligations relatives à l'étiquetage prévues par cet article « indiquent où commencent la tromperie, la falsification, le délit sous toutes ses formes et ou s'arrête le droit de vendeur »[208], mais toujours par rapport à une orientation plutôt de droit pénal.

B. l'arrivée d'un schème juridique pour les signes de qualité

Même avant le XIXe siècle, la France prenait conscience de la « qualité des aliments » dans son système juridique. Comme on a déjà remarqué, au XIVe siècle, les premières lois sur la qualité étaient promulguées pour la protection d'une seule espèce de produit par rapport à d'autres produits de qualité inférieure. Il fallut attendre jusqu'au XVIIe siècle pour que le grand architecte de l'infrastructure français, Colbert, soit le premier à mentionner la « Qualité » comme élément valorisant pour la production et le commerce. Dans cette voie, en 1670 Colbert a fait passé les lois « renforçant le système des corporations afin d'assurer la conformité des marchandises, la défense contre la fraude et la promotion de la qualité. »[209] Même un siècle plus tard, quand les lois des Révolutionnaires aboliront les corporations et instaureront la liberté du commerce, les grands concepts juridiques de la « Qualité » resteront sans changement dans le droit du système agro-alimentaire français.

Déjà dans le XIXe siècle, il existe en France la protection pour les marques privées. La loi du 28 juillet 1824 sur le concept juridique du nom commercial et la réglementation de ces noms et des appellations d'origine augmentait la protection des marques privées et était

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[207] *Loi du 1 août 1905 sur la répression des fraudes dans la vente des marchandises et des falsifications des denrées alimentaires et des produits agricoles* dans J.-B. Duvergier et al., *Collection Complète des Lois, Décrets, Ordonnances, Règlements, Avis du Conseil-d'Etat*, t. 105, Année 1905, (Paris: L. Larose & L. Tenin, 1905) 478.

[208] Tombeau, *Fraudes et Falsifications* à la p. 37.

[209] Pierre-Marie Vincent, *Le droit de l'alimentation, Que sais-je?* vol. 3103 (Paris: Presses Universitaires de France, 1996) à la p. 18.

essentielle à la cristallisation de la loi positive française sur la qualité.[210] Cette loi réprimait les inexactitudes des noms et des indications d'origine sur tous produits[211] et punissait ceux qui apposaient sur un produit le nom d'un fabriquant autre que celui qui en était l'auteur. Plus tard, la loi du 23 juin 1857 sur la répression de l'usurpation et l'imitation des marques commerciales était promulguée.[212] La loi du 1er août 1905 aussi interdisait l'appropriation des marques privées.[213] La protection des marques de commerce, bien entendu non spécifiques aux denrées alimentaires continue d'être appliquer aujourd'hui.[214]

Cependant, le régime législatif pour protéger la qualité en dehors des marques privées trouve sa naissance dans les premières décennies de XXe siècle. La répression des fraudes et les tromperies sur les attributs de produits alimentaires, plus que d'autres, était très importantes pour les produits de qualité. La loi du 1er août 1905 ajoutait des protections importantes pour des producteurs et vendeurs des produits de la qualité. La loi réprimait les tromperies sur les qualités « des espèces », « des origines » et « de la désignation de l'espèce ou de l'origine faussement attribuées aux marchandises ». Ces tromperies avaient lieu souvent à propos d'une fausse appellation d'origine ou d'une fausse indication de provenance appliquée à un produit.[215] Toubeau constate que « les groupements professionnels sont intéressés à réprimer les pratiques de nature à discréditer l'ensemble des producteurs ou des intermédiaires qu'ils représentent. »[216]

La loi du 1er août 1905 ajoutait aussi des outils de répression aux producteurs de produits de qualité. Déjà par la loi du 21 mars 1884, les syndicats professionnels pouvaient

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[210] Vincent, *Le droit de l'alimentation* à la p. 50.
[211] Jacques Vivez, *Les Fraudes, Que sais-je?* vol. 839 (Paris: Presses Universitaires de France, 1970) à la p. 20.
[212] Vincent, *Le droit de l'alimentation* à la p. 50; Toubeau, *La législation répressive* à la p. 32.
[213] Jacqueline Fages, *L'étiquetage des produits offerts aux consommateurs* (Thèse de docteur d'état en droit, Université de Montpellier I, 1981) [non publiée] à la p. 511. D'autres lois plus récentes continuent de définir la portée de la loi sur les marques prives. Par exemple, la loi du 24 juin 1928 érigeait une infraction pénale pour supprimer or altérer un marque privé, surtout quand le consommateur est intentionnellement induit en erreur par la suppression d'une marque. Ce droit de protection est renforcé dans la loi du 31 décembre 1964 qui prononce que le dépôt du signe réserve ce signe exclusivement pour les produits inscrits dans le dossier de demande de marque. Aujourd'hui les marques privées sont réglementées par le *Code de Propriété Intellectuelle.*
[214] *Code de la propriété intellectuelle.* Pour le rôle des marques dans la protection des consommateurs, voir, Passa, Jérôme. "Droit commun des marques et protection du consommateur" dans *Mélanges en l'honneur de Jean Calais-Auloy* (Paris : Dalloz 2004) 779.
[215] Vivez, *Les Fraudes* à la p. 28.
[216] Toubeau, *La législation répressive* à la p. 167.

déposer une plainte si ils étaient lésés directement par un délit. Cependant, la loi du 1er août 1905 a augmenté ces droits. Avec cette loi, les syndicats avaient un insert direct à la répression des fraudes et falsifications qui causent un préjudice certain à l'ensemble de la profession représentée par ce syndicat.[217]

Avant que l'encre de la loi du 1er août 1905 ne soit complètement sèche, de gros problèmes chez des producteurs de vin du Midi de la France virent le jour. La mévente des vins déstabilisa cette région en mettant en présence des vins de qualité inférieure avec d'autres vendu comme de vins de qualité supérieure. Il s'en suivit de « terribles émeutes » [218] demandant au gouvernement d'agir et de protéger les producteurs. Les révoltes du Midi avaient été provoquées notamment par la présence et la concurrence persistante des vins fabriqués ou « sophistiqués ».[219] Il fallait donc une autre loi pour compléter celle du 1er août 1905, qui interdisait déjà la tromperie sur l'origine.

Dans la loi du 5 août 1908, l'Administration avait le droit de recevoir des requêtes pour la délimitation des régions qui peuvent bénéficier d'une certaine appellation pour valoriser les produits de qualité. Mais, ce travail était difficile et non sans controverse. En Champagne, par exemple, il fallut l'intervention de l'armée à deux reprises en 1911 pour restaurer l'ordre dans la région parce que la délimitation des régions étaient contestée.[220]

A la fin de la Première Grande Guerre une solution était trouvée avec la loi du 6 mai 1919.[221] Cette loi « relative à la protection des appellations d'origine », avait trois objectifs principaux. En premier lieu, la loi a changé la façon d'après laquelle une appellation était reconnue. « A la législation antérieure, qui attribuait à l'Administration le droit de déterminer, d'après la situation géographique, les dénominations à adopter pour les produits naturels, elle substitue, en cas de contestation, les décisions judiciaires établies sur des

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[217] Toubeau, *La législation répressive* à la p. 170.
[218] Norbert Olszak, *Droit des appellations d'origine et indications de provenance* (Paris: Tec & Doc, 2001) à la p. 6.
[219] Olszak, *Droit des appellations d'origine* à la p. 7.
[220] Olszak, *Droit des appellations d'origine* à la p. 8.
[221] Modifiée en dernier lieu par *la loi n°. 90-558 du juillet 1990.*

usages locaux, loyaux et constants. »[222] En deuxième lieu, la loi protégeait des appellations d'origine en prévoyant des actions civiles et correctionnelles contre les personnes qui utilisaient une appellation d'origine sans avoir le droit. La loi donnait aux personnes ou aux syndicats qui souffraient un préjudice direct ou indirect contre leur droit à un produit naturel ou fabriqué contrairement à l'origine de ce produit » le droit d'aller en justice pour faire interdire l'usage de l'appellation douteuse.[223] La loi prévoyait aussi, les actions correctionnelles pour toute personne qui apposait ou vendait des produits qui portaient des appellations d'origine inexacte.[224] Son troisième objectif était d'établir un système plus déterminé pour la délimitation des appellations viticoles, particulièrement pour les eaux-de-vie et pour les vins mousseux.[225] Dans cette loi on voit des définitions pour le « champagne », « le vin mousseux », et « le vin mousseux gazifée», et l'obligation de mettre sur chaque bouteille une étiquette avec le bon nom.[226]

Déjà, cette loi du 6 mai 1919 reconnaît l'aspect dualiste de protection des « appellations d'origine ». Dalloz observa que « Le but que l'on se proposait était d'assurer aussi rigoureusement que possible la protection des appellations d'origine, c'est-à-dire de défendre les producteurs de toute région intéressée contre les usurpations de nom et, en même temps, de protéger l'acheteur contre les tromperies concernant l'origine des produits. »[227] Pour mieux défendre les intérêts économiques du producteur et de l'acheteur, on a légiféré la loi du 22 juillet 1927 qui exclut les hybrides des vins d'appellation et établit que les tribunaux doivent se prononcer sur la région géographique aussi bien que sur les cépages qui seront autorisé pour un vin de cette région. Le décret de codification du 1er décembre 1936 établit le « Code du Vin » qui définit les produits et les appellations permis dans le domaine viticole.

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[222] D. Dalloz et al., *[Dalloz] Jurisprudence Générale. Recueil Périodique et Critique de Jurisprudence, de Législation et de Doctrine, Dalloz Jurisprudence Générale,* Année 1922 (Paris: Jurisprudence Générale Dalloz, 1922) à la p. 60.
[223] Art. 1, *la loi du 6 mai 1919.*
[224] Art. 8, *la loi du 6 mai 1919.* Art. 9 donne le droit à toute personne lésée par le délit prévu par de l'Art. 8 de se constituer partie civile dans l'action correctionnelle.
[225] La loi du 26 juillet 1925 sur le fromage Roquefort donne des spécificités exactes pour le premier produit non viticole « d'appellation d'origine contrôle ».
[226] Art. 20 et 21, *la loi du 6 mai 1919.*
[227] Dalloz et al. *[Dalloz] Jurisprudence Générale.* Année 1922 à la p.61.

D'autres lois compléteront le cadre juridique de la protection des signes de qualités pour les produits alimentaires. Citons la loi du 26 mars 1930 réprimant les fausses indications d'origine des marchandises,[228] les lois qui définissaient les critères pour des produits spécifiques, telles que les lois du 29 mai 1934 et 2 juillet 1935 sur les produits laitiers, la loi du 29 mai 1934 sur le commerce des fruits et légumes et sur les pâtes alimentaires. Puis la loi no. 55-1533 du novembre 1955, modifiée par celle no. 73-1096 du 12 décembre 1973 instituant un régime de définition des appellations d'origine des fromages par décrets.[229]

Sur le plan administratif, un décret-loi du 30 juillet 1935 a créé le Comité national des appellations d'origine des vins et eaux de vie qui est devenu l'Institut National des Appellations d'Origine (INAO) en 1947. Etablie exclusivement au début, pour gérer les appellations d'origine contrôlé (AOC) pour les produits viticoles, cette institution publique avait le pouvoir d'indiquer toutes les conditions relatives pour que un produit puisse bénéficier d'une AOC, y compris le lieu géographique, les cépages, le rendement à l'hectare, le degré alcoolique, et la culture et la vinification du produit. La loi du 28 novembre 1955 établira, au sein de l'INAO, un Comité national des appellations d'origine des fromages.[230]

Dans les années 1960, la formalisation d'un seconde signe de qualité a été promulgué. La loi no. 60-808 du 5 août 1960, est une loi avec le noble but d'établir la parité entre l'agriculture et les autres activités économiques. Une des mesures prévu pour valoriser la production agricole en France, était un nouveau système de « label agricole » au niveau national. L'article 28, prévoyait sous le Titre V « Organisation de la production et des marchés », une obligation pour l'Administration de promulguer « Un décret [qui] devra préciser avant le 1er janvier 1961 les conditions de délivrance des certificats de normalisation et des labels d'exportation, et énumérer les produits visés par ces disposition. » La loi continuait avec la définition du label agricole comme le suivant: « une marque

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[228] Fages, *L'étiquetage des produits offerts aux consommateurs* à la p. 95.
[229] C'est ainsi qui Roquefort reçut son appellation d'origine du décret de 29 décembre 1986 [J.O. 1er jan. 1987] même si ce fromage célèbre était parmi les premiers denrées de bénéficier d'une protection comme produit de qualité déjà au XIV siècle. Voir aussi Jean-Paul Branlard, *Droit et gastronomie: Aspect juridique de l'alimentation et des produits gourmands* (Paris: Gualino, 1999) à la p. 21.
[230] Olszak, *Droit des appellations d'origine* aux pp. 10-11.

collective qui s'applique aux produits agricoles, attestant que le produit qui en bénéficie possède un ensemble distinct de qualités et de caractéristiques spécifiques. »

La même loi précise que seulement des produits possédant les qualités prescrites peuvent utiliser le label en question. Toute fausse représentation sera punie par les peines prévues par l'article 1er de la loi du 1er août 1905. Le système de label agricole envisageait, alors, l'homologation des produits définis par un décret pour chaque label et les organismes indépendants de vérification.[231]

C. l'étiquetage des denrées alimentaires devient obligatoire

Les premiers exemples des lois légiférant en matière d'étiquetage obligatoire remonte, comme on l'a vu, aux XVIIe siècle pour le marquage des pains[232] et aux XVIIIe siècle pour l'indication des contenances des bouteilles.[233] Cependant, c'est l'élan donné par les avances des technologies alimentaires qui redoublent pendant le XIXe et le XXe siècle[234], qui vont pousser aussi bien les producteurs que les consommateurs à demander que l'étiquetage obligatoire se généralise. Doucement au début, on exigea des étiquettes obligatoires pour quelques nouveaux produits. La loi du 16 avril 1897 sur la production du beurre et de la margarine, obligeait que la margarine ne soit vendue que dans les récipients ne renfermant que la margarine et portant sur toutes leurs faces, en caractères apparents et indélébiles, le mots « margarine » ou « oléo-margarine ».[235] Egalement, tous les éléments entrant dans la composition de la margarine devaient être indiqués par des étiquettes et par des factures des fabricants et débitants. Voila, pour la première fois dans le droit positif français, une liste d'ingrédients qui devient obligatoire. Finalement, l'étiquette sur la

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[231] D. Dalloz et al., *Recueil Dalloz de Doctrine, de Jurisprudence et de Législation*, Année 1960, 2e semestre (Paris: Jurisprudence Générale Dalloz, 1960) 290. Voir aussi Pierre-Marie Vincent, *Le droit de l'alimentation, Que sais-je?* vol. 3103 (Paris: Presses Universitaires de France, 1996) à la p. 54.

[232] *Ordonnance n° 267 de Roi Louis XIII – Richelieu, Paris, 30 mars 1635, « Ordonnance du lieutenant civil sur la police générale de Paris de Charles VI - Règlement général de police pour la juridiction de prévôt des marchands et échevins de Paris »* dans I. Isambert *et al., Recueil Général des Anciennes Lois Françaises depuis l'an 420 jusqu'à la révolution de 1789* (Paris: Belin-Leprieur, 1829), t. 16, (1610-1643) 424.

[233] *Ordonnance de 1735*, Commentaire sur *la loi de 27 mars 1851*, dans D. Dalloz *et al., Jurisprudence Générale. Recueil périodique et critique de jurisprudence, de législation et de doctrine*, Année 1851 (Paris: Bureau de la Jurisprudence Générale, 1851) 62, para 34.

[234] Felipe Frenåndez-Armesto, *Food : A History* (London : Pan 2002), voir Chapter 8 "Feeding the Giants : Food and Industrialization in the Nineteenth and Twentieth Centuries".

[235] Art. 9, *la loi de 16 avril 1897*, modifiée par *la loi du 23 juillet 1907.*

margarine portera d'autres indications obligatoirement, telles que le nom et l'adresse du vendeur.

Avant 1945, il n'existait pas de loi qui exigeait l'étiquetage obligatoirement pour tous les produits alimentaires. Ceci est changé avec l'*Ordonnance n°. 45.1483 du 30 juin 1945 relative aux prix*. Pour la première fois, il y avait une obligation de marquage de tous les produits avec au moins une mention: le prix de la denrée. L'article 33 ordonne que: « La publicité des prix soit assuré à l'égard du consommateur par voie de marquage, d'étiquetage, d'affichage ou par tout autre procédé approprié. »[236] Certes, l'obligation de marquer le prix sur tous produits, y compris les denrées alimentaires, était la première loi horizontale [237]de l'étiquetage, mais elle ne porte que sur une seule mention.

Il fallut attendre encore presque trente ans pour qu'une loi rende obligatoire l'étiquetage de plusieurs éléments d'information. Cette fois, l'action politique qui demandait une telle loi est venue des mouvements de consommateur. La vraie naissance du mouvement consommateur en France et dans d'autre pays européenne, prend son élan avec l'organisation de mouvement coopératif ouvrier dans la deuxième moitié de XIXe siècle qui cible la défense du consommateur.[238] Mais Vincent note que le stade du « consumérisme actif » date de 1950 à 1959 en France avec la naissance des organisations de consommateurs et même la création d'un laboratoire coopératif.[239] La presse se rend compte de ce mouvement, ainsi que le gouvernement qui crée d'abord un Bureau de la consommation au ministère de l'Economie et par la suite un Comité national de la consommation (1960), l'Institut national de la consommation (1970) et enfin en 1981 le ministère de la Consommation.[240] Or, ce mouvement consommateur n'était pas la seule raison des changements qui se sentait dans le droit de l'alimentation y compris le droit sur l'étiquetage durant les années 1960 et 1970, mais il était une force très importante.

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[236] Cette Ordonnance était modifiée par l'*Arrêté no. 25-921 du 16 septembre 1971 modifiant l'Ordonnance n°. 45-1483 du 30 juin 1945 relative aux prix, marquage, étiquetage et affichage des prix*, J.O. Bulletin officiel des services des prix, 1971, 200.

[237] Voir, *infra,* à la page 98 pour une discussion sur les définitions de lois « horizontales » et de lois « verticales ».

[238] Vincent, *Le droit de l'alimentation* à la p. 22.

[239] Vincent, *Le droit de l'alimentation,* à la p. 59.

[240] Vincent, *Le droit de l'alimentation,* à la p. 60. Le ministère n'existe plus.

En même temps que ces pressions par les organisations de consommateurs, il y avait deux grandes réorientations de ce droit, un général et un spécifiquement sur le droit de l'étiquetage. D'abord, dans la deuxième moitie du XXe siècle, la politique de "répression" des fraudes commençait à évoluer. « La mission « répressive » de contrôleur se transforme ainsi en un système préventif qui, réalisé en parfaite entente avec le fabricant, acquiert une valeur pédagogique. »[241] Cette approche avait plusieurs avantages. D'abord, il ne fallait pas attendre que les produits se trouvent sur le marché pour les vérifier. En fait, le mouvement consommateur demandait plus d'informations sur les aliments qu'ils achetaient. Deuxième, les vérifications des produits sur le marché occupent un personnel important, mais avec un système préventif, les vérifications peuvent se faire avec moins de personnel aux sources de production ou de transformation. Il fallait alors une réglementation préventive pour équilibré la concurrence parmi les vendeurs.

Pour la réglementation d'un étiquetage obligatoire compréhensif, il fallut attendre le *Décret no. 72-937 du 12 octobre 1972* sur l'application de la loi du 1er août 1905 sur la répression des fraudes.[242] Cette loi répond aux demandes des associations consommateurs pour plus d'informations sur les aliments qu'ils achetaient. La France fut en 1972 le premier pays d'Europe à promulguer une loi horizontale sur l'étiquetage des denrées alimentaires. Comme constate Vincent, « la plupart des pays ont généralisé un étiquetage informatif, et la France fut pionnière en la matière: son premier texte remonte à 1972, il fut repris dans la directive européenne de 1978. »[243]

Le *Décret no. 72-937 du 12 octobre 1972* s'appliquait à toutes denrées alimentaires préemballées et prévoyait une obligation positive d'information de l'acheteur final. Ce décret obligeait à la fois les vendeurs de denrées alimentaires préemballées à ne pas tromper le

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[241] Vincent, *Le droit de l'alimentation* à la p. 45.
[242] *Décret no 72-937 du 12 octobre 1972 portant application de la loi du 1er août 1905 sur la répression des fraudes en ce qui concerne les conditions de vente des denrées, produits et boissons destinés à l'alimentation de l'homme et des animaux, ainsi que les règles d'étiquetage et de présentation de celles de ces marchandises qui sont préemballées en vue de la vente au détail*, J.O., 14/10/1972, 10811.
[243] Vincent, *Le droit de l'alimentation,* à la p. 43-44.

consommateur (Art. 1), à lui donner quelques caractéristiques du produit en vente (Art. 3) et précisait la forme sous laquelle il fallait présenter ces informations (Art. 2).

Le décret prononce des interdictions plus strictes sur les fraudes. Allant plus loin que la loi du 1er août 1905, dès 1972 tout mode de présentation ou d'étiquetage est interdit qui s'il crée « une confusion dans l'esprit de l'acheteur, notamment sur la nature, la composition, les qualités substantielles, la teneur en principes utiles, le mode de fabrication, le volume, le poids ou l'origine de ces marchandises. » En plus, est interdite toute référence à des propriétés curatives ou préventives à l'égard des maladies humaines ou animales.

Cependant, la grande innovation du décret du 12 octobre 1972 vient du fait que l'étiquetage de toutes denrées alimentaires se met en place avec au moins cinq mentions obligatoires et une forme de l'étiquette prévu par les dispositions du décret. D'abord, notons la forme de l'étiquette. Elle doit être rédigée en langue française en caractères facilement visibles et lisibles dans les conditions habituelles de présentation. Le contenu de l'étiquette de tout denrée doit obligatoirement comprendre cinq éléments: (1) la dénomination de vente, indépendante de la marque de commerce ou de fabrique ou de la dénomination de fantaisie; (2) le nom et l'adresse de la personne, soit de la fabrication, soit du conditionnement, soit de la commercialisation de la marchandise; (3) le poids net ou le volume net de la marchandise; (4) soit une date de péremption accompagnée de l'indications des conditions d'entreposage y compris la température à respecter pendant la conservation dans le cas des produits altérables, soit une date limite d'utilisation accompagnée d'une indication permettant d'identifier le lot de fabrication pour tous autres produits; et (5) l'énumération, par ordre d'importance décroissante, des composants de la marchandise et, lorsque la dénomination du produit se réfère à un composant, la proportion de ce composant contenue dans le produit.[244] Dans certains cas, il faut ajouter trois éléments supplémentaires: (6) l'énumération des différentes catégories de produits d'addition contenus dans la marchandise, si il y en a; (7) le nom du pays d'origine de la marchandise au cas où son omission serait susceptible de créer

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[244] *Le décret du 9 décembre 1984* exige une liste plus détaillée des ingrédients et des additifs. Voir Vincent, *Le droit de l'alimentation,* à la p. 60.

une confusion sur l'origine réelle de celle-ci; et (8) si la denrée est emballée, une indication sur l'emballage permettant d'identifier le pré emballeur.[245]

En fin, le décret a créé deux infractions nouvelles. Il est interdit de vendre des produits avec une date postérieure à la date de péremption ou bien de détenir, de vendre ou de distribuer à titre gratuit des produits munis d'une date de préemption qui sont entreposés dans des conditions non conformes à celles qui sont prescrites sur leur étiquetage.

Le *Décret no. 72-937 du 12 octobre 1972* a totalement changé l'orientation du droit de l'étiquetage en France, replaçant une perspective libérale venant de l'époque des Révolutionnaires par un système d'information obligatoire sur les étiquettes afin de balançait les intérêts des consommateurs avec les libertés des commerçants.[246] La tendance à légiférer pour protéger le consommateur en France, a proliféré dans les années 1970 avec les lois telles que celle de 10 janvier 1978 relative à la protection et l'information des consommateurs[247] et celle de 21 juillet 1983 relative à « la sécurité des consommateurs ».[248] Elles rendent l'autocontrôle des aliments et autre biens obligatoires,[249] mais ces initiatives touchaient des champs d'activités plus large que juste les denrées alimentaires.

D. la France, l'intégration européenne, et l'étiquetage des denrées alimentaires

Bien que la France signe le *Traité de Rome du 25 mars 1957*[250] et devient État membre des Communautés européennes (CE), les préoccupations européennes à cette époque ne ciblaient pas les initiatives consuméristes, ni les initiatives d'étiquetage. Cependant, les intérêts des consommateurs deviennent plus importants dans les années 1960 avec la protection des consommateurs abordée sous l'angle de la libre circulation de la

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[245] Ces derniers éléments se trouvent dans l'Art. 6.
[246] Sur le plan politique, c'est peut-être intéressant de noter que ce auguste décret a été présente par le Premier ministre et sept ministres. Deux de ces sept ministres, plus tard, sont devenus Président de la République (à l'époque M. Jacques Chirac était le ministre de l'agriculture et du développement rural et M. Valéry Giscard d'Estaing était le ministre de l'économie et des finances).
[247] *Loi n° 78-23 du 10 janvier 1978 dite Scrivener sur la protection et l'information des consommateurs de produits et services*, J.O., 11/01/78, 301.
[248] *Loi n° 83-660 du 21 juillet 1983 relative à la sécurité des consommateurs et modifiant diverses dispositions de la loi du 1er août 1905*, J.O., 22/07/1983, 2262.
[249] Vincent, *Le droit de l'alimentation*, à la p. 58.
[250] *Traité instituant la Communauté européenne (signé à Rome le 25 mars 1957)* 298, UNTS II (1957).

marchandise.[251] Plus les États voyaient comment les normes nationales sur l'étiquetage pouvaient entraver la libre circulation des biens, plus ils cherchaient à harmoniser l'étiquetage. En 1978, la directive communautaire du 18 décembre[252] fut promulgué légiférant une base juridique harmonisée d'étiquetage pour les denrées alimentaires partout dans tous les États membres de CE. Chaque État membre avait l'obligation de transposer cette directive en droit national. Comme une grande partie de la directive était d'origine française,[253] la France au début n'eut pas grande chose à changer dans son droit. Mais progressivement, des directives communautaires supplémentaires[254] étaient légiférées et il fallut faire les modifications du droit positif français pour le synchroniser avec les obligations prévues par les directives communautaires.

Donc sur le plan national, et après plus de vingt ans d'action par les associations de consommateurs et les initiatives des juristes et de l'administration, c'est en 1992 que la France annonce la création d'un *Code de la Consommation.*[255] La loi du 26 juillet 1993[256]

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[251] Hélène Claret, "Etiquetage" *Juris-Classeur - Concurrence-Consommation*, vol. 3, (Paris : Juris-Classeur, 2002) Fasc. 874, para. 4.

[252] *Directive 79/112 du Conseil, du 18 décembre 1978, relative au rapprochement des législations des États membres concernant l'étiquetage et la présentation des denrées alimentaires destinées au consommateur final ainsi que la publicité faite à leur égard*, [1979] J.O. L. 33/1.

[253] Claret, "Etiquetage" *Juris-Classeur - Concurrence-Consommation*, vol. 3, Fasc. 874, para. 10.

[254] Telle que la *Directive 89/395 du Conseil du 14 juin 1989 portant modification de la directive 79/112 relative au rapprochement des législations des États membres concernant l'étiquetage et la présentation des denrées alimentaires destinées au consommateur final ainsi que la publicité faite à leur égard*, [1989] J.O. L. 186/17, qui augmente les éléments nécessaires d'être déclaré sur l'étiquette ; la *Directive 95/42 de la Commission, du 19 juillet 1995, modifiant la directive 93/102 portant modification de la directive 79/112 relative au rapprochement des législations des États membres concernant l'étiquetage et la présentation des denrées alimentaires destinées au consommateur final ainsi que la publicité faite à leur égard*, [1995] J.O. L. 182/20, qui réglemente la langue d'étiquetage, les dénomination de vente, la quantité des ingrédients ainsi qu'aux produits constitués d'un seul ingrédient ; et la *Directive 97/4 du parlement européen et du conseil du 27 janvier 1997 modifiant la directive 79/112 relative au rapprochement des législations des États membres concernant l'étiquetage et la présentation des denrées alimentaires ainsi que la publicité faite à leur égard*, [1997] J.O. L. 43/21, qui apporte des changements importantes, notamment la quantité des ingrédients qui figure dans la dénomination de produit. Voir aussi Claudine Yédikardachian, "Réglementation des produits/Qualité/Répression des fraudes" *Lamy-Dehove*, t. 3, (Paris : Lamy 2000) para. 280.15.

[255] Cependant, le projet du Code remonte à 1982 quand le ministre de la Consommation institua une commission chargée de cette tache. Jean Calais-Auloy, "La projet français de Code de la consommation." (1990) Revue Européenne de la consommation 177 à la p. 178. Voir aussi Etienne Petit, Etienne. "La codification du droit français de la consommation" (1993) Revue Européenne de Droit de la Consommation 213.

[256] Code de la Consommation (partie législative), loi n° 93-949 du 26 juillet 1993, J.O. 171, 27 juillet 1993.

donne vie à ce Code. Depuis cette date, c'est le Code qui regroupe presque tout le droit positif d'origine française et communautaire pour l'étiquetage des denrées alimentaires.[257] Le Code (avec quelques dispositions du *Code rural* et du *Code propriété intellectuelle*) regroupe les lois nationales et européennes sur toutes les dispositions générales de conformité et sur l'étiquetage des denrées alimentaires et aussi les dispositions sur la valorisation de produits y compris, les signes de qualités.

Section 2 – L'actualité

La France est un pays de taille moyenne, un des 25 pays de l'Union européenne.[258]

Figure 3 - La carte de la France

[257] Le Code abroge beaucoup de lois y compris celui du 1er août 1905 : Nicole Coutrelis, "The Marketing of Foodstuffs in France" (1998) 53 Food & Drug L.J. 543 à la p. 543; Claret, "Etiquetage" *Juris-Classeur - Concurrence-Consommation*, vol. 3, Fasc. 874, para. 10.

[258] Cette carte est grâce au United States Central Intelligence Agency, « The World Factbook » online : CIA <http://www.cia.gov/cia/publications/factbook/geos/fr.html>.

Un peu plus que ses voisins—L'Angleterre, le Belgique, le Luxembourg, l'Allemagne, la Suisse, l'Italie, et l'Espagne—la France est riche en terres agricoles avec à peu près un tiers de ses 547,000 kilomètres carrées disponible pour les exploitations agricoles.

Le secteur agro-alimentaire est très forte et fait de la France le pays le plus grand exportateur de produits agro-alimentaires au monde. Mais, de moins en moins des Français vivent à la ferme. Seulement 3,6% de la population active vivent de l'agriculture en 2003, un chiffre qui est tombé de 8,6% en 1980.[259] Parmi les 60 millions d'habitants, environs 75% habite en ville.[260] Cependant, les liens entre les gens du milieu urbain et les agriculteurs restent très étroits et un grand respect pour les producteurs, les fabricants, et les restaurateurs est toujours très évident dans ce pays. Pour sauvegarder l'intégrité de cette activité importante, le secteur agro-alimentaire continue de connaître une réglementation importante. Un aspect de cette réglementation générale est la réglementation de l'étiquetage des denrées alimentaires en France.

On abordera dans cette section trois grands thèmes : le marché français et les grandes lignes des « règles de jeu » de l'étiquetage en France (Paragraphe 1); le droit positif français de l'étiquetage en tant qu'État membre de l'Union européenne (Paragraphe 2), la mise en marche du droit de l'étiquetage des denrées alimentaires en France à l'heure actuelle (Paragraphe 3). Bien entendu, il faut non seulement des règles, mais aussi des contrôles et des sanctions pour leur méconnaissance. Depuis 100 ans, le droit positif français est très particulièrement fort sur cet aspect.

Le système agricole et agro-alimentaire se transforme considérablement en France depuis 1851. À cette époque, 50% des Français vivaient de l'agriculture. En 1950, environs 25% travaillaient les exploitations agricoles, tandis que aujourd'hui il n'y a qu'environs 5% de la population totale qui vivent dans des ménages agricoles.[261] Voilà donc, un grand

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[259] Béatrice Didiot, & Serge Cordellier, eds. *L'état du monde: Annuaire économique géopolitique mondial 2005* (Montreal: Editions La Découverte & Editions du Boréal, 2004) à la p. 498.
[260] Microsoft, « Microsoft Encarta Interactive World Atlas 2001 » (Seattle : Microsoft, 2001).
[261] L'Institut National de la Statistique et des Etudes Economiques (INSEE), "L'agriculture n'est plus un état mais une profession", No. 420, (INSEE, Paris: Janvier 1996) ; Didiot & Cordellier,, eds. *L'état du monde* à la p. 498.

mouvement des gens des fermes vers les villes où on achète sa nourriture dans les marchés et même le plus souvent dans les hypermarchés.

Les statistiques montrent aussi que les Français dépendent de moins en moins de l'autoconsommation des denrées alimentaires. Ce phénomène est très marqué chez les ménages agricoles qui ont diminué les hectares de jardin personnel nettement dans les derniers cinquante ans mais aussi chez les familles non agricoles.[262]

L'agriculture française devient plus performante sur moins d'espace depuis la Seconde Guerre Mondiale. Les économies d'échelle et l'organisation des exploitations, la sélection génétique, les techniques de l'élevage, des engrais et des pesticides ont joué un grand rôle dans l'augmentation de rendements des récoltes, en moyen trois fois plus élevés depuis cinquante ans. [263] Les échanges extérieurs en produits agroalimentaires restent très importants avec un excédent en 2003 de produits agricoles de 1,8 milliards d'euros et de produits transformés par les industries agroalimentaires de 6,9 milliards d'euros.[264]

Depuis quarante ans, la consommation des ménages montre que les Français dépensent moins de leur fonds sur l'alimentation qu'auparavant. Même si la plus grande partie du budget (41%) des ménages continue à être utilisée pour les dépenses alimentaires et le logement, ceci a diminué de 48.8% en quarante ans. Les montants dépensés pour l'alimentation et dans les restaurants ou cafés ont diminués de 29.7% en 1960 à 17.4% en 2000.[265]

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[262] De 1950 aux 1994, les jardins familiaux pour les familles agricoles ont passé de 225 000 hectares aux 44 000 hectares, tandis que pour les familles non agricoles la superficie des jardins familiaux est passées de 202 000 hectares aux 177 000 hectares. L'Institut National de la Statistique et des Etudes Economiques (INSEE), « Un demi-siècle d'agriculture » No. 466, (INSEE, Paris: Juin 1996).

[263] L'activité agricole s'étende sur 33 millions hectares aujourd'hui comparé à 39 millions hectares il y a 44 ans, mais le rendements de tous les récoltes ont au moins doublé et dans quelques cas comme le mais et les tomates ont quadruplé. L'Institut National de la Statistique et des Etudes Economiques (INSEE), « Un demi-siècle d'agriculture », No. 466.

[264] L'Institut National de la Statistique et des Etudes Economiques (INSEE), « L'agriculture en 2003 en Europe et en France », No. 974, (INSEE, Paris: Juin 2004).

[265] L'Institut National de la Statistique et des Etudes Economiques (INSEE), « La consommation des ménages depuis quarante ans », No. 832, (INSEE, Paris: Février 2002).

Comme les règles de l'étiquetage des produits préemballés vendus au consommateur sont plus strictes que pour les produits vendus aux institutions, on constate que de plus en plus les consommateurs achètent leur aliments préemballés dans les magasins, c'est-à-dire dans les épiceries, les supermarchés et depuis 1963, les hypermarchés.[266] Les statistiques démontrent que la grande distribution réalise aujourd'hui les deux tiers des ventes de produits alimentaires contre la moitie dix ans plus tôt.[267] Au moins 80% de la consommation alimentaire des ménages[268] sont des produits préemballés[269], dont 26% des produits préparés.[270]

Le comportement des consommateurs français (et européens) change aussi.[271] Aujourd'hui, la France connaît un taux d'alphabétisme de quasiment 100% et un taux de scolarisation de 2^{e} degré de 92,4%.[272] Les consommateurs veulent plus d'information sur leur alimentation. Avec l'urbanisation et la vie plus sédentaires, ils ont besoins de moins de produits traditionnels à forte valeur nutritive. En revanche, ils favorisent les produits élaborés, faciles et vite préparés. Mais ces mêmes consommateurs sont fortement influencés par les recommandations sanitaires et diététiques des médecins et par les crises alimentaires qui ont touchés l'Europe dans les dernières dix ans—vache folle, salmonellose, listériose, et dioxine.[273] Avec tous ces soucis sanitaires et la prédisposition historique et culturelle à la reconnaissance des produits de qualité, le consommateur devient encore plus vigilant vis-à-

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[266] L'Institut National de la Statistique et des Etudes Economiques (INSEE), « Grandes surfaces alimentaires : vers le modèle américain en matière de services », No. 686, (INSEE, Paris: Décembre 1999).
[267] L'Institut National de la Statistique et des Etudes Economiques (INSEE), « La consommation des ménages depuis quarante ans », No. 832, (INSEE, Paris: Février 2002).
[268] Cette statistique n'inclut pas la consommation des produits et des repas dans les restaurants et les hôtels.
[269] Nos calculs – la soustraction des produits pour lesquels le préemballage n'est pas courant, c'est-à-dire, les produits bruts traditionnels (pain, pomme de terre) et les fruits frais et les légumes frais). L'Institut National de la Statistique et des Etudes Economiques (INSEE), « La consommation alimentaires depuis quarante ans », No. 846, (INSEE, Paris: Mai 2002).
[270] L'Institut National de la Statistique et des Etudes Economiques (INSEE), « La consommation des ménages depuis quarante ans », No. 832.
[271] La littérature juridique augmente sur le sujet de droit de la consommation et sur le rôle juridique de la consommateur aussi. Par exemple, voir Thierry Bourgoignie, « Droit et Politique Communautaires de la Consommation » dans *Mélanges en l'honneur de Jean Calais-Auloy* (Paris : Dalloz 2004) 94 ; et Henri Temple, Henri. « Le droit de la consommation: est-il subversif? » dans *Mélanges en l'honneur de Jean Calais-Auloy* (Paris : Dalloz 2004) 1067.
[272] Didiot, Béatrice & Cordellier, Serge, eds. *L'état du monde: Annuaire économique géopolitique mondial 2005* (Montreal: Editions La Découverte & Editions du Boréal, 2004) à la p. 498.
[273] RadioFrance, reportage multimédia, « Notre santé sur l'étiquette » (Radio France : Lille, 17 janvier 2002) (online : RF <http://www.radiofrance.fr/reportage/repmul/?rid=939>).

vis de la qualité dans son choix des produits alimentaires.[274] L'étiquetage des denrées alimentaires y figure pour beaucoup.[275]

Paragraphe 1 - Un résumé du droit positif de l'étiquetage en France à l'heure actuelle

Etant donné le développement historique, le droit positif de l'étiquetage en France est devenu assez complexe. En plus, la France en tant que membre de l'Union Européenne (UE), la réglementation européenne a ajouté un autre niveau de complexité. Ce paragraphe propose un résumé du droit positif de l'étiquetage des denrées alimentaires en France passant d'abord par des considérations constitutionnelles et communautaires (A) avant d'élucider la matrice de réglementation des étiquettes d'aliments vendus en France (B). Pour la référence, on présente dans le Tableau 5 ci-dessous, les actes législatifs principaux pertinents au sujet de l'étiquetage des denrées alimentaires en France à l'heure actuelle.

Tableau 5 - La réglementation relative à l'étiquetage des denrées alimentaires en France (et dans l'UE)

Règles d'application générale pour tous produits (règles horizontales)[276]	**Union européenne**	**France**
	Directive 2000/13 (l'étiquetage)[277]	Art. L 121.1 et suivants ; Art. R 112.1 et suivants du *Code de la consommation*[278]
Règles d'application pour des produits précises (règles verticales)[279] ***(exemple)***		
	Directive 2000/36 (chocolat)[280]	Article L 112.7 du *Code de la consommation* (chocolat)[281]

[274] L'Institut National de la Statistique et des Etudes Economiques (INSEE), "La consommation alimentaires depuis quarante ans", No. 846.
[275] RadioFrance, reportage multimédia, « Notre santé sur l'étiquette ».
[276] Les règles d'application générale pour tous les produits.
[277] *Du Parlement européen et du Conseil du 20 mars 2000 relative au rapprochement des législations des États membres concernant l'étiquetage et la présentation des denrées alimentaires ainsi que la publicité faite à leur égard*, [2000] J.O. L. 109/29.
[278] Relative au l'étiquetage des denrées alimentaires.
[279] Il existe un très grand nombre de ces règles dites « verticales » qui ne s'appliquent qu'aux produits spécifiques en question. Bien entendu, ces produits sont aussi, assujettis aux règles d'application générale (règles horizontales).

Règles d'applications pour les produits de qualité		
	Règlement n° 2081/92 du Conseil, du 14 juillet 1992 (indications géographiques)[282]; *Règlement n° 2082/92 du Conseil, du 14 juillet 1992* (attestations spécifiques)[283]	Art. L 115.21 et suivants, *Code de la consommation* ; Art. R 712.3, *Code de la propriété intellectuelle* ; et, Art. L 643.1 et suivants, *Code rural*[284]
Règles d'applications pour les produits avec des caractéristiques précises)		
	Règlement n° 2092/91 du Conseil, du 24 juin 1991 (production biologique)[285] *; Règlement n° 1830/2003 du Parlement européen et du Conseil du 22 septembre 2003* (l'étiquetage des OGM)[286]; *Directive 90/496 du Conseil, du 24 septembre 1990* (l'étiquetage nutritionnel)[287]	Art. L 645.1, *Code rural* ; la *loi n° 98-565 du juillet 1998* ; la *loi n° 99-574 du juillet 1999* (production biologique) ; *Décret n° 93-1130 du 27 septembre 1993* ; et *l'Arrête d'application du 3 décembre 1993* (l'étiquetage nutritionnel) ; *Loi n° 85-30 du 9 janvier 1985* (montagne) [288]
Règles pour le contrôle de l'étiquetage		
	néant	Art. L 213.1 et suivants du *Code de la consommation*[289]

[280] *Du Parlement européen et du Conseil du 23 juin 2000 relative aux produits de cacao et de chocolat destinés à l'alimentation humaine*, [2000] J.O. L. 197/19.
[281] Réserve les dénominations « chocolat traditionnel » et « chocolat pur beurre de cacao » pour les produits avec des qualités spécifiques.
[282] *Relatif à la protection des indications géographiques et des appellations d'origine des produits agricoles et des denrées alimentaires,* [1992] J.O. L. 208/1.
[283] *Relatif aux attestations de spécificité des produits agricoles et des denrées alimentaires,* [1992] J.O. L.208/9.
[284] Relatif à la création du régime juridique des signes de qualité)
[285] *Concernant le mode de production biologique de produits agricoles et sa présentation sur les produits agricoles et les denrées alimentaires* [1991] J.O. L. 198/1.
[286] *Concernant la traçabilité et l'étiquetage des organismes génétiquement modifiés et la traçabilité des produits destinés à l'alimentation humaine ou animale produits à partir d'organismes génétiquement modifiés, et modifiant la directive 2001/18* [2003] J.O. L. 268/24.
[287] *Relative à l'étiquetage nutritionnel des denrées alimentaires* [1990] J.O. L. 276/40.
[288] *Relatif à l'attestation « montagne »* sur les étiquettes.
[289] Relative aux fraudes et falsifications commises par la voie de l'étiquetage.

A. les considérations constitutionnelles et communautaires

La France est une république avec une constitution adoptée le 28 septembre 1958. L'exécutif du pays est formé du chef de l'État, Président de la République, M. Jacques Chirac[290] et du chef du gouvernement, M. le Premier Ministre Dominique de Villepin.[291] Le Premier Ministre forme son gouvernement nommé par le Président sous la suggestion du Premier Ministre. Les Ministres sont responsables pour l'opération des divers Ministères et pour l'exécution des actes réglementaires. Le législatif est un Parlement bicaméral avec le Sénat de 321 membres élus pour les termes de neuf ans et l'Assemblé Nationale de 577 membres élus pour les termes de cinq ans. C'est évidement, le législatif qui vote les lois. Le judiciaire a deux branches : les juridictions judiciaires civiles et pénales avec comme organe suprême la Cour de Cassation ; les juridictions administratives avec comme organe suprême le Conseil d'Etat. Le Conseil Constitutionnel contrôle pour sa part la conformité des lois avec la Constitution. La France fait partie de l'Union européenne dont elle est un membre fondateur.

Cette structure judiciaire, constitutionnelle et communautaire donne à n'importe quelle question des dimensions assez complexes. Cela est le cas pour la formulation et la mise en application des règles de l'étiquetage en France. Du côté national, la Constitution Française dans l'article 34 donne au Parlement le pouvoir de légiférer dans les domaines touchant aux « principes fondamentaux…du régime de la propriété, des droits réels et des obligations civiles et commerciales » et aussi aux « programmes déterminant les objectifs de l'action économique et sociale de l'État. » Ceci est la base du pouvoir législatif, à partir duquel sont issue un nombre de lois sur l'étiquetage dont la loi du 1er août 1905, aujourd'hui incorporée dans le *Code de la consommation.*

De son coté, l'Art. 37, précise que, « les matières autres que celles qui sont du domaine de la loi ont un caractère réglementaire. » Dans le domaine de l'étiquetage, ceci

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[290] Elu par voie populaire pour une terme de cinq ans.
[291] Recommandé par l'Assemblé Nationale et nommé par le Président. M. Villepin est le Premier Ministre depuis 31 mai 2005.

signifie que les organes exécutifs peuvent réglementer, soit par décret pris après avis du Conseil d'État, soit par arrêté ministériel (ou interministériels selon la matière).[292]

La plupart des règles touchant à l'étiquetage viennent donc des dispositions réglementaires, citons la plus importante : la réglementation issue du *Code comm.*. La partie réglementaire du *Code comm.* établit les grandes lignes des obligations à suivre dans le droit de l'étiquetage, mais aussi des mentions plus spécifiques comme on le verra infra. En ce qui concerne les dénominations très spécifiques sur tel produit, il faut consulter également les arrêtés ministériels et interministériels. Ces instruments ont force obligatoire contrairement à certains avis ou à certaines circulaires.

A propos du droit communautaire, deux catégories d'actes sont prépondérantes : les règlements et les directives. Ces deux instruments exercent une pression très forte sur les règles françaises de l'étiquetage des denrées alimentaires. Les règlements sont d'application directe et immédiate sur le territoire français.[293] Dans le domaine de l'étiquetage, une minorité d'entre eux contiennent des dispositions de nature générale[294] alors que la majorité des autres règlements touchent plutôt à des produits spécifiques tels que les produits biologiques,[295] les produits génétiquement modifiés (ou nouveaux),[296] les produits qui se

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[292] Il existe aussi la possibilité des ordonnances de l'Art. 38 de la Constitution, où « Le Gouvernement peut, pour l'exécution de son programme, demander au Parlement l'autorisation de prendre par ordonnances, pendant un délai limité, des mesures qui sont normalement du domaine de la loi. Les ordonnances sont prises en Conseil des Ministres après avis du Conseil d'Etat. Elles entrent en vigueur dès leur publication mais deviennent caduques si le projet de loi de ratification n'est pas déposé devant le Parlement avant la date fixée par la loi d'habilitation. » Il existe très peu d'Ordonnance dans le domaine de l'étiquetage.

[293] Kaarin Goodburn, "Chapter 2 - EU institutions and the legislative process" dans Kaarin Goodburn, ed., *EU Food Law: A Practical Guide* (Cambridge: Woodhead Publishing 2001) 23.

[294] *Règlement n° 2826/2000 du Conseil du 19 décembre 2000 relatif à des actions d'information et de promotion en faveur des produits agricoles sur le marché intérieur* [2000] J.O. L. 328/2 est une exception.

[295] *Règlement n° 2092/91 du Conseil, du 24 juin 1991, concernant le mode de production biologique de produits agricoles et sa présentation sur les produits agricoles et les denrées alimentaires* [1991] J.O. L. 198/1 ; *Règlement n° 94/92 de la Commission, du 14 janvier 1992, établissant les modalités d'application du régime d'importation de pays tiers prévu au règlement n° 2092/91 concernant le mode de production biologique de produits agricoles et sa présentation sur les produits agricoles et denrées alimentaires,* [1992] O.J. L. 11/14.

[296] *Règlement n° 258/97 du Parlement européen et du Conseil du 27 janvier 1997 relatif aux nouveaux aliments et aux nouveaux ingrédients alimentaires* [1997] J.O. L. 43/1 ; *Règlement n° 1830/2003 du Parlement européen et du Conseil du 22 septembre 2003 concernant la traçabilité et l'étiquetage des organismes génétiquement modifiés et la traçabilité des produits destinés à l'alimentation humaine ou animale produits à partir d'organismes génétiquement modifiés, et modifiant la directive 2001/18* [2003] J.O. L. 268/24 ; *Règlement n° 50/2000 de la Commission, du 10 janvier 2000, concernant l'étiquetage des denrées et*

servent de signes distinctifs de qualité,[297] ou encore les graisses tartinables,[298] les viandes,[299] ou les volailles.[300]

Tableau 6 - Le schéma du droit de l'étiquetage en France (et dans l'UE)

Sources des obligations	Instrument juridique	Institution responsable	Exemple d'instrument en vigueur
Droit communautaire	Règlement	Conseil/Commission/Parlement	50/2000[301]
	Directive	Conseil/Commission/Parlement	2000/13[302]
	Arrêt	Cour de Justice des Communautés européennes	Geffroy et Casino[303]
Droit national	Loi	Parlement	*Code comm.* (législative)[304]
	Décret	Gouvernement (Conseil d'État)	*Code comm.* (réglementaire ou administrative)[305]

ingrédients alimentaires contenant des additifs et arômes génétiquement modifiés ou produits à partir d'organismes génétiquement modifiés, [2000] J.O. L. 6/15.

[297] *Règlement n° 2081/92 du Conseil, du 14 juillet 1992, relatif à la protection des indications géographiques et des appellations d'origine des produits agricoles et des denrées alimentaires*, [1992] J.O. L. 208/1 ; *Règlement n° 2082/92 du Conseil, du 14 juillet 1992, relatif aux attestations de spécificité des produits agricoles et des denrées alimentaires*, [1992] J.O. L.208/9 ; *Règlement n° 2301/97 de la Commission du 20 novembre 1997 relatif à l'inscription de certaines dénominations dans le «Registre des attestations de spécificité» prévu au règlement n° 2082/92 du Conseil relatif aux attestations de spécificité des produits agricoles et des denrées alimentaires.* [1997] J.O. L. 319/8; *Règlement n° 2400/96 de la Commission du 17 décembre 1996 relatif à l'inscription de certaines dénominations dans le «Registre des appellations d'origine protégées et des indications géographiques protégées» prévu au règlement n° 2081/92 du Conseil relatif à la protection des indications géographiques et des appellations d'origine des produits agricoles et des denrées alimentaires*, [1996] J.O. L. 327/11.

[298] *Règlement n° 2991/94 du Conseil, du 5 décembre 1994, établissant des normes pour les matières grasses tartinables*, [1994] J.O. L. 316/2.

[299] *Règlement n° 2772/1999 du Conseil, du 21 décembre 1999, prévoyant les règles générales d'un système d'étiquetage obligatoire de la viande bovine*, J.O. L. 334/1.

[300] *Règlement n° 1906/90 du Conseil, du 26 juin 1990, établissant des normes de commercialisation pour les volailles* [1990] J.O. L. 173/1.

[301] *Règlement n° 50/2000 de la Commission, du 10 janvier 2000, concernant l'étiquetage des denrées et ingrédients alimentaires contenant des additifs et arômes génétiquement modifiés ou produits à partir d'organismes génétiquement modifiés*, [2000] J.O. L. 6/15.

[302] *Directive 2000/13 du Parlement européen et du Conseil du 20 mars 2000 relative au rapprochement des législations des États membres concernant l'étiquetage et la présentation des denrées alimentaires ainsi que la publicité faite à leur égard*, [2000] J.O. L. 109/29.

[303] *Geffroy et Casino France SNC*, C-366/98 [2000], E.C.R. I-6579, [12 septembre 2000].

[304] *Code de la Consommation (partie législative) n° 93-949 du 26 juillet 1993*, J.O., 27 juillet 1993.

[305] *Code de la Consommation (partie administrative) n° 97-298 du 27 mars 1997*, J.O., 3 avril 1997.

	Arrêté	Gouvernement (Ministères)	Arrêté n° 25-921 du 16 sept. 1971[306]

Les directives du Conseil, bien que leurs objectifs soient obligatoires, n'ont d'effet direct sur le droit français que si elles sont transposées par l'administration. Ceci donne de la flexibilité à l'administration française pour harmoniser le droit national déjà en place avec les nouvelles initiatives dans les directives d'UE.[307] Les directives sur l'étiquetage sont transposées la plupart du temps par des dispositions nouvelles du *Code comm.*.

Dans le domaine des règles générales de l'étiquetage, l'UE a développé la pratique de légiférer par le biais des directives plutôt que par les règlements. Ceci dit, les initiatives communautaires dans le domaine de l'étiquetage se font de plus en plus par des règlements.[308]

Les deux directives les plus importantes qui touchent directement à l'étiquetage sont la directive 79/112 « relative au rapprochement des législations des États membres concernant l'étiquetage et la présentation des denrées alimentaires ainsi que la publicité faite à leur égard »[309] et sa directive remplaçante, la directive 2000/13 « relative au rapprochement des législations des États membres concernant l'étiquetage et la présentation des denrées alimentaires ainsi que la publicité faite à leur égard. »[310]

En outre les arrêts de la Cour de justice des Communautés européennes contribuent au renforcement de la législation en matière étiquetage comme le montre l'affaire *Geffroy et Casino France SNC*[311] où la Cour a décidé que la loi française devait admettre la possibilité

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[306] *Modifiant l'Ordonnance n°. 45-1483 du 30 juin 1945 relative aux prix.*
[307] Kaarin Goodburn, "Chapter 2 - EU institutions and the legislative process" dans Kaarin, Goodburn, ed., *EU Food Law: A Practical Guide* (Cambridge: Woodhead Publishing 2001) 23.
[308] Présentation du directeur de la Commission SANCO de l'UE à la conférence « European Food Law 2003 », Brussels 2003, une conférence pourtant sur le droit communautaire de la nourriture.
[309] *Directive 79/112 du Conseil, du 18 décembre 1978, relative au rapprochement des législations des États membres concernant l'étiquetage et la présentation des denrées alimentaires destinées au consommateur final ainsi que la publicité faite à leur égard*, [1979] J.O. L. 33/1.
[310] *Directive 2000/13 du Parlement européen et du Conseil du 20 mars 2000 relative au rapprochement des législations des États membres concernant l'étiquetage et la présentation des denrées alimentaires ainsi que la publicité faite à leur égard*, [2000] J.O. L. 109/29.
[311] *Geffroy et Casino France SNC*, C-366/98 [2000], E.C.R. I-6579, [12 septembre 2000].

qu'une autre langue que le français puisse figurer sur les étiquettes des produits alimentaires. Le *Code comm.* a alors dû être modifié afin d'intégrer cette décision.[312]

B. la matrice de la réglementation des étiquettes en France

Plusieurs ouvrages de référence présentent de manière claire le corpus des règles de l'étiquetage des denrées alimentaires en France et dans l'Union européenne.[313] D'autres ouvrages offrent des commentaires sur l'ensemble de ces règles dans le cadre plus large des obligations générales dues aux consommateurs.[314] Ce corpus des règles est vaste et considérablement détaillés. Par où commencer?

D'abord, cette thèse ne traitera pas de toutes les règles françaises de l'étiquetage.[315] Le traitement du corpus des règles de l'étiquetage, dans cette étude, se limitera largement à la réglementation « horizontale ». Qu'est-ce que c'est qu'un instrument « horizontale »? Une loi, ou bien une directive, est considérée « horizontale » si elle s'applique à tous les produits vendus sur le marché, tandis qu'une loi ou une directive ou un règlement est « verticale » si il s'applique seulement à une catégorie précise de produits vendus sur le marché.[316]

La plus grande partie de la réglementation des étiquettes des denrées alimentaires se trouve dans deux instruments d'application horizontale; le *Code comm.* français et la directive 2000/13 de la Commission européenne. Comme on a vu auparavant, les obligations trouvées dans le Code sont la transposition des obligations de la directive de la Commission.

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[312] *Décret no. 2002-1025 du 1er août 2002.*

[313] Antoine de Brosses, *L'Etiquetage des denrées alimentaires, t. 1 : Mentions obligatoires, Mentions interdites ; t. 2 : Valoriser le produit, Pratique de l'étiquetage* (Paris: RIA, 2002); Claret, "Etiquetage" *Juris-Classeur - Concurrence-Consommation*, vol. 3, Fasc. 874 ; Lamy Dehove, "Mentions obligatoires, mentions interdites" (Paris: Lamy Dehove Economique, 2003), Etude 280 ; Francis Lefebvre. *Droit des affaires: Concurrence Consommation 2002* (Paris : Editions Francis Lefebvre 2001), para. 1800-1838 ; Agriculture et Agroalimentaire Canada, Service d'exportation agroalimentaire, « Guide destiné aux exportateurs canadiens sur les exigences de l'Union européenne relatives à l'étiquetage et à l'emballages des aliments » (Ottawa : Agriculture et agroalimentaire Canada, 2000) (online : <http:atn-riae.agr.ca/europe/f1429002.htm>).

[314] Jean, Calais-Auloy & Frank Steinmetz, *Droit de la consommation*, (6è édition, 2003), Dalloz, Paris, 2003, para. 56 à 67, 125 à 132, 215 à 221, et 312 à 315.

[315] L'oeuvre de Antoine de Brosses, dans ses 700 pages, offre une étude très compréhensive des règles françaises de l'étiquetage.

[316] Pour un catalogue exhaustif de toutes les obligations portant sur chaque catégorie d'aliments, voir Lamy Dehove, "Mentions obligatoires, mentions interdites" Etude 280 et de Brosses, *L'Etiquetage des denrées alimentaires*.

De Brosses remarque qu'on considère maintenant que « les règles générales d'étiquetage qui existent en droit français sont, pour l'essentiel, issues de textes communautaires ».[317] Ceci dit, il existe tout de même une marge de liberté assez importante dans chaque État membre de la Communauté d'établir des règles plus précises surtout « dans le domaine des règles particulières à certaines catégories de denrées, qui ne font parfois l'objet d'aucun texte communautaire d'harmonisation ».[318] En plus, l'administration des règles est en grande partie laisser aux États membres et donc, l'administration française a la grande responsabilité de contrôler les étiquettes des denrées alimentaires.

Les règles d'étiquetage en France qui se trouvent dans le *Code comm.* sont de nature « horizontale » et donc s'attachent généralement à tous les produits alimentaires. Cependant, certaines dispositions du Code s'appliquent à une catégorie un peu plus circonscrite, les denrées alimentaires préemballées.[319] Ces règles réglementent les étiquettes en deux temps, la forme et le contenu.

Concernant la forme de l'étiquetage, le Code indique la manière dont les mentions doivent se présenter. En ce qui concerne la présentation des mentions, les règles concernent toutes les denrées alimentaires. Selon l'article R 112-8 du Code, toutes les mentions d'étiquetage doivent être:

- facilement compréhensibles
- rédigées en langue française
- sans autres abréviations que celles prévues par la réglementation ou les conventions internationales
- inscrites à un endroit apparent
- inscrites de manière à être visibles, clairement lisibles et indélébiles sans être dissimulées, voilées ou séparées par d'autres indications ou images

En toute circonstance les mentions concernant la dénomination de vente, la quantité nette, la date limite de consommation, et le cas échéant, le titre alcoométrique volumique s'il

[317] Antoine de Brosses, *L'Etiquetage des denrées alimentaires, t. 1,* para. 20.
[318] de Brosses, *L'Etiquetage des denrées alimentaires,* para. 20.
[319] Les règles sur les mentions obligatoires générales viennent principalement, au niveau communautaire, de la directive 2000/13 et au niveau national, du Code de la consommation, Partie réglementaire, Art. R 112-1 à R 112-33.

est supérieur à 1,2% alcool en volume doivent être regroupées dans le même champ visuel lorsqu'il s'agit de denrées préemballées présentées au consommateur final.[320]

Concernant le contenu, les obligations trouvées dans le Code peuvent se diviser en trois grandes catégories : les mentions et allégations « interdites », les mentions et allégations « obligatoires », et les mentions « réservées ».[321]

1. les mentions interdites

Le *Code comm.* français et le droit de l'Union européenne interdisent certaines mentions sur les étiquettes de toutes les denrées alimentaires. Il existe trois grandes catégories de mentions interdites :

> 1° les mentions attestant qu'une denrée alimentaire possède des propriétés de prévention, de traitement ou de guérison d'une maladie humaine;[322]
>
> 2° les mentions tendant à faire croire qu'une denrée alimentaire possède des caractéristiques particulières alors que toutes les denrées alimentaires similaires possèdent ces mêmes caractéristiques;[323]
>
> 3° les mentions de nature à créer une confusion dans l'esprit du consommateur, « notamment sur les caractéristiques de la denrée alimentaire et plus particulièrement sur la nature, l'identité, les qualités, la composition, la quantité, la durabilité, la conservation, l'origine ou la provenance, le mode de fabrication ou d'obtention. [324]

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[320] Les produits avec un préemballage dont la face la plus grande a une surface inférieure à 10 centimètres carrés et les bouteilles en verre destinées à être réutilisées, doivent porter les mentions de dénomination, de quantité nette, et de date limite de consommation; Art. R 112-10, alinéa 2. En plus, si la denrée préemballée n'est pas présentée au consommateur final, mais plutôt aux collectivités, ces mentions, peuvent ne figurer que sur les fiches, bons de livraisons ou documents commerciaux; Art. R 112-11.

[321] Antoine de Brosses fait son analyse sur juste deux de ces trois catégories—les mentions obligatoires et les mentions interdites. Voir *L'Etiquetage des denrées alimentaires, t. 1 : Mentions obligatoires, Mentions interdites* « Titre II : Les mentions obligatoires et interdites en droit françaises » p. 117 à 274. Cependant, nous avons choisi trois catégories d'analyse—les mentions obligatoires, les mentions interdites, et les mentions réservées—et par conséquence, nous allons conceptualiser les obligations d'étiquetage en ces trois catégories pour la France et pour les deux autres pays aussi.

[322] Art. R 112-7, alinéa 3.

[323] Art. R 112-7, alinéa 2.

[324] Art. R 112-7, alinéa 1.

1° les mentions concernant les propriétés de prévention, de traitement ou de guérison d'une maladie humaine

Cette mention prohibée paraît à première vue assez claire. En fait, avec cette interdiction, la loi tente de tracer une ligne entre nourriture et médicaments avec ces derniers assujettis à un autre régime réglementaire.[325] Donc des mentions telles que « bon pour protéger contre les infections pulmonaires » ou encore « limite les risques d'arthrite » sont interdites.

Mais de plus en plus, d'autres mentions sont aussi concernées par cette interdiction. Les producteurs des denrées alimentaires ont maintenant la technologie pour améliorer ces caractéristiques nutritives des aliments. « Additionné de calcium » est une allégation permise mais « Ce produit contient du calcium qui prévient les risques d'ostéoporose » ne l'est pas.[326] Entre les deux on a des allégations telles que « Ce produit contient du calcium impliqué dans la formation osseuse ». Il parait que cette allégation est permise, mais elle va rendre l'étiquetage nutritionnel pour ce produit obligatoire.[327] Alors toutes les mentions qui évoquent des conditions quelconques de la santé peuvent tomber sous le coup ce cette interdiction. Toutefois les mentions comme « bon pour toi » et « ceci te fera du bien » sont trop générales pour être considérées comme des mentions traitant de la santé, et ne sont pas concernées par cette interdiction.

2° les mentions faisant suggérant qu'une denrée alimentaire possède des caractéristiques particulières[328]

Parfois des conditionneurs de denrées alimentaires peuvent être tentés d'inclure sur l'étiquette une mention qui attire l'attention du consommateur sur un aspect du produit qui touche la sensibilité de ce dernier.

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[325] Voir la directive 65/65 du Conseil, du 26 janvier 1965, concernant le rapprochement des dispositions législatives, réglementaires et administratives, relatives aux spécialités pharmaceutiques.
[326] Antoine de Brosses, *L'Etiquetage des denrées alimentaires, t. 1* à la p. 132.
[327] Antoine de Brosses, *L'Etiquetage des denrées alimentaires, t. 1* à la p. 140 et suivantes.
[328] Art. R 112-7, alinéa 2.

Par exemple, le consommateur peut avoir des craintes avec les éléments génétiquement modifiés. On peut sur un sac de farine apposer la mention « ne contient pas du blé génétiquement modifié». Cette mention n'est pas permise parce qu'elle fait croire au consommateur qu'il peut exister sur le marché du blé génétiquement modifié, sans préciser au consommateur, qu'en fait, le blé génétiquement modifié n'existe pas actuellement dans le commerce.

Prenons encore l'exemple des mentions sur le taux de cholestérol dans les aliments. Bien entendu, le consommateur voudrait connaître la teneur en cholestérol du produit qu'il achète. Mais la mention sur un paquet de spaghetti disant « sans cholestérol » est interdite par l'article R 122-7 du *Code comm.*, alinéa 2 parce qu'il est impossible pour un spaghetti de contenir du cholestérol puisque seuls les produits d'origine animale peuvent en contenir.

3° les mentions génératrices de confusion dans l'esprit du consommateur

La loi de 1905 a créé cette interdiction proclamée dans le *Code comm.* à l'article R 112-7. Toute la jurisprudence de la loi de 1905 est toujours valable pour viser les situations qui peuvent créer la confusion dans l'esprit du consommateur. Il faut comprendre que cette obligation de « dire la vérité » sur l'étiquette est la plus violé des interdictions et s'applique également aux mentions obligatoires, aux mentions réservées et même aux mentions purement facultatives qui font partie de marketing du produit.

2. les mentions obligatoires sur toute étiquette de denrée alimentaire

En ce qui concerne les mentions obligatoires devant figurer sur les denrées alimentaires préemballées[329] mises à la vente, il faut examiner deux catégories. Il y a les mentions obligatoires qui doivent se trouver sur tout étiquette (les éléments d'application « horizontale ») et les mentions obligatoires qui s'attachent aux produits spécifiques (les éléments d'application « verticale »).

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[329] Les mentions 1° au 5° (voir la page suivante) doivent figurer sur toutes denrées alimentaires préemballées ou non.

a. les éléments horizontaux

1°	la dénomination de vente;[330]
2°	la liste des ingrédients;[331]
3°	la quantité de certains ingrédients ou catégories d'ingrédients;[332]
4°	la quantité nette;[333]
5°	la date jusqu'à laquelle la denrée conserve ses propriétés spécifiques[334]
6°	l'indication des conditions particulières de conservation;[335]
7°	le nom ou la raison sociale et l'adresse du fabricant ou du conditionneur ou d'un vendeur établi à l'intérieur du territoire de la Communauté européenne;[336]
8°	la mention de lot;[337]
9°	le lieu d'origine ou de provenance chaque fois que l'omission de cette mention est de nature à créer une confusion dans l'esprit de l'acheteur sur l'origine ou la provenance réelle de la denrée alimentaire;[338]
10°	le mode d'emploi chaque fois que sa mention est nécessaire à un usage approprié de la denrée alimentaire ainsi que, le cas échéant, les conditions particulières d'utilisation, notamment les précautions d'emploi;[339] et
11°	le prix.[340]

[330] Art. R 112-9, alinéa 1 pour les denrées préemballées, Art. R 112-31 pour les denrées non préemballées et Directive 2000/13, Art. 3.1.1 pour les deux.
[331] Art. R 112-9, alinéa 2 et Directive 2000/13, Art. 3.1.2.
[332] Art. R 112-9, alinéa 3 pour les denrées préemballées, Art. 112-31 pour les denrées non préemballées et Directive 2000/13, Art. 3.1.3 pour les deux.
[333] Art. R 112-9, alinéa 4 pour les denrées préemballées, Art. 112-31 pour les denrées non préemballées et Directive 2000/13, Art. 3.1.4 pour les denrées alimentaires préemballées.
[334] Art. R 112-9, alinéa 5 et Directive 2000/13, Art. 3.1.5.
[335] Art. R 112-9, alinéa 5 et Directive 2000/13, Art. 3.1.5.
[336] Art. R 112-9, alinéa 6 et Directive 2000/13, Art. 3.1.7.
[337] Art. R 112-5 définit le lot comme « un ensemble d'unités de vente d'une denrée alimentaire qui a été produite, fabriquée ou conditionnée dans des circonstances pratiquement identiques. » Art. R 112-27 pour les denrées préemballées et les denrées non préemballées et Règlement 178/2002 pour les deux.
[338] Art. R 112-9, alinéa 8 et Directive 2000/13, Art. 3.1.8.
[339] Art. R 112-9, alinéa 9 et Directive 2000/13, Art. 3.1.9.
[340] Art. L113-3. Cette mention est obligatoire pour tous les produits et pas spécifiques aux denrées alimentaires.

1° la dénomination de vente[341]

La dénomination d'un produit n'est pas toujours évidente. Un produit de conserve de viande, est-il un pâté, des rillettes ou une terrine? Si l'on a un produit fait non pas avec du lièvre mais avec du lapin, quelle est la bonne dénomination de vente? De plus, si le produit se fait avec du lièvre, du porc et du boeuf à parts égales, a-t-on toujours une terrine de lièvre?

En fait, la dénomination de vente du produit reste incontournable même si elle peut devenir très complexe. Elle est essentielle pour communiquer au consommateur la nature du produit à la vente. La dénomination de vente reste l'information la plus importante pour informer le consommateur et donc elle est certainement l'élément le plus réglementé par les règles de l'étiquetage.

La dénomination joue donc un très grand rôle dans les stratégies de vente des produits par les commerçants et dans les décisions d'achat chez les consommateurs. Quelquefois, le producteur/transformateur/vendeur veut une dénomination qui aidera à vendre le produit au consommateur. En outre, si les produits sont beaucoup transformés, il devient difficile de comprendre la nature réelle du produit final. Pour ces raisons, le droit de l'étiquetage avait besoin de nouvelles règles afin de parvenir à la bonne dénomination des denrées alimentaires.

C'est donc l'article R 112-14 du *Code comm.* qui donne une définition plus complète de « la dénomination de vente d'une denrée alimentaire » en précisant qu'elle sera :

- fixée par la réglementation en vigueur en matière de répression des fraudes, ou à défaut;
- par d'autres réglementations, ou

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[341] Antoine de Brosses, *L'Etiquetage des denrées alimentaires, t. 1,* para. 311-337 ; Claret, "Etiquetage" *Juris-Classeur - Concurrence-Consommation*, vol. 3, Fasc. 874 ; Lamy Dehove, "Mentions obligatoires, mentions interdites" Etude 280, para 5891 et suivants ; Francis Lefebvre. *Droit des affaires: Concurrence Consommation 2002* (Paris : Editions Francis Lefebvre 2001), para. 1800-1838 ; Agriculture et Agroalimentaire Canada, Service d'exportation agroalimentaire, « Guide destiné aux exportateurs canadiens sur les exigences de l'Union européenne relatives à l'étiquetage et à l'emballages des aliments ».

- par les usages commerciaux; ou à défaut de ces trois;
- par une description de la denrée alimentaire, et si nécessaire son utilisation.

Dans tous les cas, la dénomination de vente doit « être suffisamment précise pour permettre à l'acheteur d'en connaître la nature réelle et de la distinguer des produits avec lesquels elle pourrait être confondue. »[342] Aussi, la dénomination doit comporter une indication d'état physique dans lequel se trouve la denrée alimentaire ou du traitement spécifique qu'elle a subi tels que, notamment: en poudre, lyophilisé, surgelé, congelé, décongelé, pasteurisé, stérilisé, reconstitué, fumé.[343] Pour les produits traités par les rayons ionisants[344] ou conditionnés sous atmosphère protectrice[345], les exigences d'indication sur l'étiquette sont encore plus strictes.

Cette dénomination doit dans tous les cas être indépendante de la marque de commerce ou de fabrique ou de la dénomination de fantaisie.[346] Parfois, si la dénomination d'un produit est légalement commercialisée dans un des autres États membres de la Communauté européenne, elle sera acceptée en France sauf dans deux cas : si cette dénomination peut créer la confusion dans l'esprit du consommateur français ou si cette dénomination s'écarte considérablement de la denrée connue sous cette dénomination en France.[347]

Pour les denrées non préemballées, la dénomination ne se fait pas nécessairement par les étiquettes. « Toute denrée alimentaire présentée non préemballée sur les lieux de vente au consommateur final doit être munie sur elle-même ou à la proximité, sans risque de confusion, d'une affiche, d'un écriteau ou de tout autre moyen approprié comportant la dénomination de vente ».[348]

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[342] Art. R 112-14.
[343] Art. R 112-14, alinéa 3.
[344] Art. 7 du décret n° 2001-1097 du 16 novembre 2001.
[345] Art. R 112-9-1 2° du *Code comm.*
[346] Art. R 112-14, alinéa 2.
[347] Art. R 112-14-1.
[348] Art. R 112-31. Si le produit contient des sucres ajoutés ou des édulcorants, il faut que l'affiche le mentionne.

La dénomination de vente est un des thèmes de prédilection de la jurisprudence à tel point qu'elle représente une grosse partie des délits et contraventions constatés comme on le verra *infra.*

2° la liste des ingrédients[349]

Le Code définit le mot « ingrédient » comme : « toute substance, y compris les additives, utilisée dans la fabrication ou la préparation d'une denrée alimentaire et qui est encore présente dans le produit fini, éventuellement sous une forme modifiée. »[350] La première question qui se pose donc est d'identifier la totalité des ingrédients présents dans un produit[351] et par la suite, de rédiger une liste qui apparaisse sur l'étiquette du produit. Comme dans le cas de la dénomination du produit, la liste des ingrédients devient plus complexe, lorsque le produit est plus transformé. Cette liste devient tellement importante pour ceux qui souffrent d'allergies ou d'intolérances alimentaires.[352]

Cependant, le Code indique que certains produits utilisés dans la fabrication d'une denrée alimentaire ne sont pas considérés comme des « ingrédients » mais comme : des constituants réintégrés, des additifs de transfert, des solvants ou des supports d'additifs ou d'arômes et des auxiliaires technologiques.[353] Dans le premier cas, l'ingrédient est réintroduit dans le produit final, comme par exemple le gaz carbonique dans l'eau naturelle gazeuse. Mais dans les trois autres cas, on peut trouver un élément dans le produit final qui

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[349]Antoine de Brosses, *L'Etiquetage des denrées alimentaires, t. 1,* para. 341-390 ; Claret, "Etiquetage" *Juris-Classeur - Concurrence-Consommation,* vol. 3, Fasc. 874 ; Lamy Dehove, "Mentions obligatoires, mentions interdites" Etude 280, para 5891 et suivants ; Francis Lefebvre. *Droit des affaires: Concurrence Consommation 2002,* para. 1800-1838 ; Agriculture et Agroalimentaire Canada, Service d'exportation agroalimentaire, « Guide destiné aux exportateurs canadiens sur les exigences de l'Union européenne relatives à l'étiquetage et à l'emballages des aliments »..

[350] Art. R 112-2.

[351] Art. R 112-3, cependant, fait la liste des choses qui ne sont pas considérées comme des ingrédients tels que « les constituants d'un ingrédient qui, au cours du processus de fabrication, auraient été temporairement soustraits pour être réincorporés ensuite en quantité ne dépassant pas la teneur initiale. »

[352] Alain Soroste, "Etiquetage des aliments: allergènes et ingrédients", (2004) 223 Options Qualité 13.

[353] La nature exacte de ce que l'on entend par « auxiliaire technologique » est un point sensible dans le débat entre Européens et Américains, surtout dans le domaine des OGMs. En France, c'est le décret no. 2001-725 du 31 juillet 2001 qui définit le terme comme « toute substance non consommée comme ingrédient alimentaire en soi et volontairement utilisée dans la transformation des matières premières, des denrées alimentaires ou de leurs ingrédients, pour répondre à un objectif technologique déterminé pendant le traitement ou la transformation, et pouvant avoir pour résultat la présence non intentionnelle de résidus techniques inévitables de cette substance ou de ses dérivés dans le produit fini, et à condition que ces résidus ne présentent pas de risque sanitaire et n'aient pas d'effets technologiques sur le produit fini. »

n'est pas identifié comme ingrédient, et qui n'est pas présent dans le produit non fini. Dans les trois cas, on peut s'attendre à des résidus venant d'autres produits qui font partie de produit final, mais qui sont auxiliaires au produit principal. En fait, la liste des ingrédients qu'il faut mentionner sur l'étiquetage d'une denrée alimentaire, n'indique pas la totalité des éléments présents dans le produit.

Une fois que la liste des ingrédients obligatoires est déterminée, celle-ci est « constituée par l'énumération de tous les ingrédients de la denrée alimentaire[354] dans l'ordre décroissant de leur importance pondérale au moment de leur mise en œuvre.[355]

La tâche d'identification de tous les ingrédients dans un produit devient plus ardue du fait des progrès technologiques. Dès qu'un produit se fait à partir de plusieurs autres, comme par exemple un plat de viande préparé et présenté avec une sauce, la liste des ingrédients peut devenir très longue. Il existe alors des règles spéciales pour se dispenser, dans certains cas, de l'obligation d'identifier indépendamment tous les ingrédients dans le produit fini. Si le produit utilisé dans le produit final a une dénomination prévue par la réglementation ou est consacrée par l'usage, et ne compose pas plus de 25% du produit fini, on peut identifier le produit dans la liste des ingrédients simplement par sa dénomination. Prenons l'exemple des biscuits. La margarine est un produit déjà composé, reconnu par la réglementation. Toute seule, une boîte de margarine doit comporter sa liste d'ingrédients, mais si elle se trouve dans les biscuits à un niveau inférieur à 25% du produit fini, on peut, dans la liste des ingrédients des biscuits, faire figurer le seul mot de « margarine » et non pas l'ensemble des ingrédients qui la composent.

Quelques exceptions rendent obligatoires les mentions spécifiques venant de la composition d'un produit composé. Les additifs d'un produit composé doivent toujours être

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[354] Quelques denrées alimentaires sont dispensées de cette obligation, comme les fruits et légumes frais, les eaux gazéfiées, les vinaigres provenant d'un seul produit, et quelques fromages, beurre et crèmes fermentés, et produits faits d'un seul ingrédient que la dénomination de vente soit identique au nom de l'ingrédient; Art. R 112-15.

[355] Pour les produits composés, comme la margarine, sa place dans la liste sera déterminée par la totalité de son poids ou volume (y compris avec les additifs) par rapport au poids ou volume du produit fini.

mentionnés sur la liste des ingrédients du produit fini ainsi que les mentions des ingrédients ionisés[356] ou génétiquement modifié.[357]

3° la quantité des ingrédients

En plus de la liste des ingrédients, la quantité d'un ingrédient doit être, parfois, marquée sur l'étiquette. Il existe quatre situations où c'est le cas. Cependant, dans ces quatre cas, le producteur/ transformateur a le choix d'indiquer les quantités exprimées en pourcentage de trois manières différentes : soit dans la dénomination du produit, soit à la proximité immédiate de la dénomination, soit enfin dans la liste des ingrédients.

Selon l'article R 112-17, on doit indiquer la quantité des ingrédients si

-l'ingrédient ou la catégorie d'ingrédients dont il s'agit figure dans la dénomination de vente ou est généralement associé à la dénomination de vente par le consommateur ;

-l'ingrédient ou la catégorie d'ingrédients dont il s'agit est mis en relief dans l'étiquetage par des mots, des images ou une représentation graphique ;

-l'ingrédient ou la catégorie d'ingrédients dont il s'agit est essentiel pour caractériser la denrée alimentaire et la distinguer des produits avec lesquels elle pourrait être confondue en raison de sa dénomination ou de son aspect ;[358]

-il s'agit de l'étiquetage nutritionnel.

L'ensemble de ces règles oblige le conditionneur à bien réfléchir aux éléments essentiels du produit et à indiquer la quantité de chaque élément.[359] Si l'on mentionne un élément spécifique dans la dénomination de vente comme par exemple « à l'orange », il faut

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[356] de Brosses, *L'Etiquetage des denrées alimentaires, t. 1,* para 350.

[357] de Brosses, *L'Etiquetage des denrées alimentaires, t. 1,* para. 547.

[358] Cependant, l'Art. R 112-17-1 prévoit les situations où les règles de l'Art. R 112-17 ne sont pas applicables. Par exemple, on n'est pas obligé d'indiquer la quantité des ingrédients si les règlements communautaires créent une obligation de mettre la quantité des ingrédients sur l'étiquetage d'une denrée alimentaire ou tout en figurant dans la dénomination de vente, la proportion de produit qui ne déterminera ni le choix du consommateur, ni qui serait de nature à la distinguer d'autres produits similaires.

[359] En fait, « cette indication obligatoire de la quantité de l'ingrédient, qui constitue une transcription des dispositions communautaires, a fait l'objet d'une Communication interprétative de la Commission des CE no. III/5260-rev5/98 du 21 décembre 1998, dont les indications sont entièrement transposables en droit interne ...note sous le vocable QUID (quantity of ingredients)) ». Voir de Brosses, *L'Etiquetage des denrées alimentaires, t. 1,* para. 366.

donner dans la liste des ingrédients, la quantité d'orange dans le produit. Si l'on ne mentionne pas « à l'orange » dans la dénomination de vente mais on représente des oranges sur l'étiquetage du produit, il faut aussi indiquer la quantité d'orange dans le produit final.

Dans tous les cas mentionnés ci-dessus, la mention de quantité est obligatoire. Elle est également obligatoire si l'on choisit d'ajouter les mentions d'étiquetage nutritionnelles. Les allégations nutritionnelles ouvrent la porte à un grand nombre de règles supplémentaires pour les quantités sur les étiquettes, mais qui sont hors de propos ici.[360]

4° la quantité nette[361]

Toute denrée alimentaire préemballée doit obligatoirement porter sur son étiquette la quantité nette soit en poids pour les solides, soit en volume pour les liquides, et exceptionnellement, en unité.[362] Il existe des dérogations limitées à cette obligation pour les produits en petite quantité dont celle-ci est inférieure à 5 grammes ou 5 millilitres.[363] Cependant, s'il s'agit d'épices ou de plantes aromatiques, même en petite quantité, la quantité nette doit obligatoirement être présenté.

L'obligation de mentionner la quantité nette se soulève également des obligations générales sur la métrologie dans le droit positif français[364] pour les produits destinés aux consommateurs. Ces règles prescrivent les unités de mesures légales (gramme, litre) et la taille des caractères à utiliser selon la quantité de denrée vendue (exemple quantité nominale supérieure à 1000 gr ou 1000 ml : 6 mm).[365]

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[360] de Brosses, *L'Etiquetage des denrées alimentaires, t. 1,* para. 1221-1380.

[361] Souvent, on verra à coté de la quantité nette un symbole « e » qui n'est pas obligatoire, mais si il est utilisé signifie que la personne morale qui a effectué le pesage ou qui a mesuré le produit conforme aux critères météorologiques. Ceci aide beaucoup la libre circulation des biens au sein de l'UE. Bien entendu, l'utilisation frauduleuse du symbole « e » constituera une tromperie. Voir de Brosses, *L'Etiquetage des denrées alimentaires, t. 1,* para. 467-470.

[362] Pour les escargots ou pour les huîtres en coquille par exemple, voir l'art. 6 décret no. 78-166 et art. 7 de l'Arrêté du 7 décembre 1984.

[363] Art. R 112-19. Aussi, il faut mettre le poids net et le poids net égoutté pour toute denrée présentée dans un liquide de couverture; Art. R 112-20.

[364] Décret 78-166 du 31 janvier 1978; arrêté du 20 octobre 1978 et arrêté du 25 février 1980.

[365] Cette obligation vaut également pour les denrées alimentaires non préemballées, où la quantité nette doit être indiquée à la proximité du produit vendu. Il est strictement interdit de mentionner la quantité brut ou le poids brut, ce qui serait considéré comme un délit de tromperie. Voir de Brosses, *L'Etiquetage des denrées alimentaires, t. 1,* para. 455.

5° la date limite de consommation ou d'utilisation optimale

Le *Code comm.*, selon l'article R 112-22, requiert que toute étiquette d'une denrée alimentaire doive comporter l'inscription « d'une date jusqu'à laquelle la denrée conserve ses propriétés spécifiques dans des conditions appropriées. » Pour les produits très périssables ou pour lesquels une durée de conservation est fixée par la réglementation, il faut mettre une « date limite de consommation » (DLC). Pour toutes les autres denrées l'inscription de date sera une « date limite d'utilisation optimale » (DLUO). Quelques denrées cependant sont dispensées de date, comme les fruits et les légumes frais, les boissons alcoolisées, les vinaigres, le sel, le sucre à l'état solide, les doses individuelles de glaces alimentaires, et les produits qui seront utilisés dans un très bref délai par les collectivités.[366]

En clair, sur tout produit doit figurer une DLC ou une DLUO. Si on a un produit microbiologiquement très périssable, on doit mettre une DLC et non une DLUO. De même, il faut suivre le langage prévu et non pas par exemple, « à manger absolument avant le ... ». Tous les autres produits, alors, doivent porter la mention de DLUO. Si le conditionneur se trompe sur la mention qu'il faut, il se verra condamné à une contravention aux règles de l'étiquetages et ou à une contravention pour le délit de concurrence déloyale.[367]

Pour les plats complets congelés, avec plusieurs denrées en faisant parties, la mention pour l'ensemble du plat doit être celle qui correspond au produit le plus périssables.

S'il s'agit d'une mention de DLC, le droit français impose une contravention pour tous les produits exposés à la vente avec une DLC dépassée, tandis que les produits avec la mention DLUO peuvent rester en rayons après la date mentionnée au moins s'ils sont en bon état.

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[366] Art. R 112-23.
[367] de Brosses, *L'Etiquetage des denrées alimentaires, t. 1,* para. 427.

6° l'indication des conditions particulières de conservation

Pour les produits, soit très périssables avec une DLC, soit toutes les autres denrées avec une DLUO, la date doit être accompagnée par l'indication des conditions de conservation.[368]

7° le nom ou la raison sociale et l'adresse du fabricant ou du conditionneur ou d'un vendeur établi à l'intérieur du territoire de la Communauté européenne

Sur chaque denrée alimentaire, il faut indiquer le nom d'un responsable. Il ne faut pas oublier cette obligation de nommer un responsable pour la métrologie du produit,[369] même si souvent les responsables pour la métrologie, pour la production ou pour la mise sur le marché, sont les mêmes.

Le but de cette obligation d'étiquetage est de deux ordres. D'abord elle donne au consommateur un référent s'il a un problème avec ce produit. Aussi ce nom et cette adresse, (avec la mention du lot du produit) garantissent la traçabilité du produit dans le cas où un problème de santé ou de qualité apparaît.[370] Bien entendu, le responsable nommé ne reste pas le seul qui puisse être poursuivi pour insalubrité du produit ou même pour des délits ou des contraventions se rapportant à l'étiquetage. Les personnes qui peuvent être nommés sont le fabricant, le conditionneur ou le vendeur, mais seul ce dernier doit nécessairement se trouver à l'intérieur du territoire de la Communauté européenne.[371] En ce qui concerne les mentions exactes, il faut au moins le nom du responsable, une adresse (une boîte postale est acceptable) avec une commune, et son code postal ou géographique.

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[368] Art. R 112-22, alinéa 4.

[369] L'obligation vient du décret n° 78-166 modifiée du 31 janvier 1978 et l'arrêté modifié du 20 janvier 1978 et l'arrêté modifié du 20 octobre 1978. Quelques fois d'autres textes juridiques peuvent obliger la mention des responsables comme pour des marques de distributeur, des marques de salubrité, ou bien, l'établissement d'ionisation s'il y en a.

[370] Franéois Collart Dutilleul, "Le consommateur face au risque alimentaire" dans *Melanges en l'honneur de Jean Calais-Auloy* (Paris : Dalloz 2004) 309. Pour le cas spéciale des OGM, voir Laurence Boy, "Précaution, traçabilité et droits du consommateur" dans *Melanges en l'honneur de Jean Calais-Auloy* (Paris : Dalloz 2004) 129.

[371] de Brosses, *L'Etiquetage des denrées alimentaires, t. 1,* para. 398.

8° l'indication du lot

Selon l'article R 112-27 du *Code comm.*, toutes les denrées alimentaires[372] doivent être accompagnées d'une indication permettant d'identifier le lot auquel elles appartiennent. En cas de non respect de cette obligation, on pourra retenir la responsabilité d'une des quatre personnes suivantes: le producteur, le fabricant, le conditionneur ou le premier vendeur établi à l'intérieur du territoire de la Communauté européenne. Pour les denrées préemballées, l'indication du lot doit figurer sur le préemballage ou sur l'étiquette du produit tandis que sur les produits non préemballés, elle doit apparaître sur l'emballage ou le récipient contenant la denrée alimentaire ou sur les documents commerciaux s'y référant.

La mention du lot sert à protéger le consommateur et le fabricant. Si un produit pose problème, le lot en question peut être retiré du marché avec pour conséquence une limitation des dégâts pour la santé du consommateur et une limitation des pertes pour le fabricant du produit défectueux.

Le *Code comm.* définit le mot « lot » dans son article R 112-5 comme « un ensemble d'unités de vente d'une denrée alimentaire qui a été produite, fabriquée ou conditionnée dans des circonstances pratiquement identiques. » Cependant, c'est dans l'intérêt de fabricant de stocker des lots dont la quantité est limitée au cas où l'un ou plusieurs d'entre eux viendraient à être retirés du marché.

Il y a plusieurs façons d'indiquer le lot sur un produit. Les textes permettent par exemple d'intégrer la mention dans la date de durabilité du produit à condition qu'elle soit claire dans l'ordre suivant : jour, mois de DLC ou de DLUO.

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[372] Selon l'Art. R 112-29, quelques denrées alimentaires sont dispensées d'indication de lot comme les produits agricoles qui seront transformés, conditionnés ou acheminés vers des organisations de producteurs; mais aussi les aliments présentés au consommateur sans préemballages; ou encore les denrées alimentaires en emballage dont la face la plus grande a une surface inférieure à 10 centimètres carrés; enfin les doses individuelles de glace alimentaire.

9° le lieu d'origine ou de provenance chaque fois que l'omission de cette mention est de nature à créer une confusion dans l'esprit de l'acheteur sur l'origine ou la provenance réelle de la denrée alimentaire

La règle générale est que la mention du lieu d'origine ou de provenance[373] est facultative. Elle devient obligatoire seulement dans deux cas : premièrement lorsque les denrées sont expressément visées par un règlement comme c'est le cas pour les fromages ou les fruits de mer, et deuxièmement lorsqu'il existe un risque de confusion pour le consommateur dans le cas où la mention du lieu géographique ne figurerait pas sur l'étiquette.

Cette règle oblige de ne pas tromper le consommateur par des indications fallacieuses, qui peuvent être les mentions d'origine ou de provenance. Une étiquette « crêpes dentelles bretonnes » sur un paquet de crêpes qui sont fabriquées à Montpellier serait trompeuse, à moins que l'on indique sur le paquet le lieu ou les crêpes sont fabriquées.

10° le mode d'emploi chaque fois que sa mention est nécessaire à un usage approprié de la denrée alimentaire ainsi que, le cas échéant, les conditions particulières d'utilisation, notamment les précautions d'emploi

Il arrive souvent que le fabriquant donne des conseils quant à l'utilisation de son produit. Très peu de ces conseils sont, en fait, obligatoires. Dans notre exemple, à peu près tous les conseils sont facultatifs car pas une seule des mentions ne concerne l'usage approprié du produit ou les précautions d'emploi.

Seules les indications de prévention du consommateur quant aux risques d'usage inapproprié du produit (« ne pas cuire au four de micro-onde »), quant aux dangers d'utilisation ou quant aux conditions de conservation (« garder au froid une fois ouvert ») doivent figurer sur l'étiquette.

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[373] On peut distinguer entre « l'origine », qui signifie le site de production, de fabrication, ou de transformation, et « la provenance », qui veut dire le lieu géographique d'où la denrée a été expédiée. En réalité, il arrive souvent que les deux soient identiques. Voir de Brosses, *L'Etiquetage des denrées alimentaires, t. 1,* para. 506.

Il existe, cependant, pour certains produits des mentions obligatoires dans ce domaine. Tout produit surgelé doit porter une mention indiquant que le produit ne doit pas être recongelé après une première décongélation.[374] Quelquefois, les étiquettes doivent porter des mentions afin d'éviter une consommation trop forte du produit ou de ses ingrédients. On peut citer par exemple, les produits qui contiennent des polyols[375], de l'aspartame[376] ou des édulcorants.[377]

11° le prix

La mention obligatoire du prix n'est pas exclusivement réservé aux ventes des denrées alimentaires car elle s'applique également à la vente de tous les produits et services, comme l'indiquent les articles L113-3 et R113-1 du *Code comm.*. De plus, avec l'arrêté du 16 novembre 1999, certains produits préemballés comprenant de nombreuses denrées alimentaires,[378] doivent indiquer aussi le prix rapporté aux principales unités de volumes (kg, g, l, cl.) de ceux-ci.

Cependant, le prix ne doit pas nécessairement figurer sur l'étiquetage du produit vendu. Comme l'auteur De Brosse le note « tout vendeur de produits doit, par voie de marquage, étiquetage, ou par autre procédé approprié, informer le consommateur sur les prix ».[379] Le prix figure en général deux fois sur l'étiquetage d'une denrée : une fois sous la forme d'un code barre (plus ou moins clair pour le consommateur et qui ne répond pas au demeurant aux obligations du *Code comm.*) et une autre fois sous la forme d'un affichage indépendant sur l'étiquette ou sur un écriteau situé à proximité du produit dans le magasin de vente. Si le prix ne figure pas sur ou à proximité de la denrée d'une manière compréhensible pour le consommateur, le vendeur sera condamné, selon des peines prévues par l'article R113-1 du *Code comm.*.

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[374] Art. 6, Décret n° 64-949 du septembre 1964 modifié.
[375] Art. R 112-9 6°, *Code comm.*
[376] Art. R 112-9 5°.
[377] Art. R 112-9 3° et 4°.
[378] Pour la liste des denrées concernées, voir de Brosses, *L'Etiquetage des denrées alimentaires, t. 1,* para. 506.
[379] de Brosses, *L'Etiquetage des denrées alimentaires, t. 1,* para. 523.

b. les éléments verticaux

La liste des produits qui sont assujettis aux règles verticales est longue.[380] Dans la plupart de ces règlements, il existe des dispositions qui reconnaissent les dénominations exactes qui peuvent être utilisées pour l'étiquetage des denrées alimentaires en question, citons l'exemple du miel.

Afin d'illustrer de quelle manière les règles verticales peuvent inclure celles concernant l'étiquetage, prenons l'exemple de la directive 2001/110.[381] Sur les mentions obligatoires, les dénominations permises figurent principalement dans les règles verticales d'étiquetage. La dénomination « miel », par exemple ne peut être utilisée que pour un produit qui :« est la substance sucrée naturelle produite par les abeilles de l'espèce Apis mellifera à partir du nectar de plantes ou des sécrétions provenant de parties vivantes des plantes ou des excrétions laissées sur celle-ci par des insectes suceurs, qu'elles butinent, transforment en les combinant avec des matières spécifiques propres, déposant, déshydratant, entreposent et laissent mûrir dans les rayons de la ruche.»

De plus, les mentions « miel de fleurs », « miel de nectars », « miel de miellée », « miel en rayons », « miel avec morceaux de rayons », « miel égouttée », « miel centrifugé », « miel pressé », « miel filtré », et « miel destiné à l'industrie » sont toutes réglementées. Leur utilisation impose au producteur de suivre des méthodes de production bien particulières avant d'avoir le droit d'utiliser telle dénomination. Parfois certaines autres mentions obligatoires s'appliquent. Tout miel doit indiquer la provenance ou le pays d'origine.

En outre, tout « miel destiné à l'industrie » doit obligatoirement porter la mention « destiné exclusivement à la cuisson » à proximité immédiate de la dénomination du produit. Il est parfois prévu dans les règles verticales, des mentions interdites. Dans notre exemple, c'est le cas pour le miel « miel filtré » ou pour le « miel destiné à l'industrie ». L'étiquetage

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[380] Claret, "Etiquetage" *Juris-Classeur - Concurrence-Consommation,* vol. 3, Fasc. 874 à la para. 65, donne au moins 37 catégories de denrées alimentaires avec des règles verticales d'origine communautaire ou nationale.
[381] *Directive 2001/110 du Conseil du 20 décembre 2001 relative au miel,* [2001] J.O. L. 10/47.

de ces produits ne peut mentionner ni l'origine géographique ni l'origine botanique, pas plus que des critères de qualité spécifique. Ceci dit, il n'est pas surprenant de noter que dans le domaine de l'étiquetage, la réglementation verticale touche le plus souvent à la dénomination de vente des produits. Aussi, certaines mentions, comme celle de provenance par exemple, deviennent obligatoires à cause de ces règlements verticaux.

3. les mentions réservées

Dans la catégorie des mentions réservées, l'auteur encadre deux mentions spécifiques : les mentions réservées s'agissant des produits pour lesquels une marque de commerce est enregistrée ; et les mentions réservées pour un produit qui bénéficie d'un signe de qualité ou qui possède une caractéristique spécifique.

-les marques de commerce

Le *Code de la propriété intellectuelle* protège l'usage de tous les signes qui sont déposés comme marque de commerce. Pour être déposer, il faut que la marque proposée montrent deux caractéristiques—elles est une représentation graphique et a un caractère distinctif.[382] Il faut également que la marque ne soit pas déceptive ou contre la loi ou l'ordre publique.[383]

Ces marques ne garantissent pas la qualité du produit, ni son contenu mais indiquent au consommateur que ce produit a été fabriqué par ou avec le consentement de la société qui détient les droits de marque. Les marques qui sont enregistré deviennent la propriété exclusive de la personne qui l'enregistre. Donc, cette marque apparaîtra sur les étiquettes pour marquer pour le consommateur l'origine des produits. Si le consommateur reconnaît la qualité des produits de la société qui detient la marque de commerce, il serait prédisposé à acheter davantage de ses produits. Alors, cette marque qui tient de la valeur dans les yeux de consommateurs, est réservée exclusivement pour les détenteurs des droits à la marque. Si quelqu'un d'autre l'utilise, cette personne pourra engager sa responsabilité civile et/ou

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[382] de Brosses, *L'Etiquetage des denrées alimentaires, t. 1,* para. 1392 et suivants.
[383] *Code de la propriété intellectuelle,* Art. L 711.

pénale. Il n'y a pas de contrôle administratif sur l'utilisation des marques de commerce, mais le délit de contrefaçon pourra être invoqué devant les tribunaux pénaux et civils.

-les signes de qualité

Un signe officiel de qualité « est régi par un cahier des charges public, le produit en bénéficiant fait l'objet de contrôles officiels, les consommateurs participent à son attribution, et son utilisation fait l'objet d'un agrément des pouvoirs publics. »[384]

Le droit positif de la réglementation des signes de qualité a une longue et riche histoire en France comme on a vu *supra*.[385] Aujourd'hui le régime juridique des signes de qualité est géré par la loi d'orientation agricole du 9 juillet 1999[386] dans laquelle on distingue cinq signes de qualité différents. Chacun de ces signes comprend des caractéristiques uniques mais certains sont orientés plutôt sur la production ou la fabrication des produits[387] comme « le label »[388]; « le certificat de conformité »[389] ou la mention « agriculture biologique »[390] tandis que les autres sont plutôt orientés vers l'origine géographique de la production comme « l'appellation d'origine contrôlée (AOC) »[391] ou la mention « montagne ».[392]

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[384] Anne-Cécile Sadot, *L'étiquetage des denrées alimentaires: une difficile conciliation entre libre circulation des marchandises et protection du consommateur* (Thèse du D.E.A. de droit communautaire, Université Jean Moulin Lyon 3, 2002) [unpublished] à la p. 52.

[385] Voir aussi Paul Mathely, *Le droit français des signes distinctifs* (Paris: Librairie du journal des notaires et des avocats, 1984) ; et Norbert Olszak, *Droit des appellations d'origine et indications de provenance* (Paris: Tec & Doc, 2001).

[386] *Loi n° 99-574 du juillet 1999 sur l'orientation agricole*, J.O.158, 10/07/1999, 10231.

[387] Les signes s'attachent aux plusieurs sortes de produits. Pour le cas spécifique des viandes bovines, par exemple, voir Laurence Boy, "L'évolution des sources du droit de la qualité des produits agroalimentaires. L'exemple de la viande bovine" (2002) 305 Revue de Droit Rural 421.

[388] Les conditions d'octroi d'un label sont prévues aux Art. L 115-21 et suivants du *Code comm.* qui reproduit les Art. L 632-1 et suivants de *Code rural.*

[389] Les conditions d'octroi du certificat de conformité sont prévues à l'Art. L 632-5 du *Code rural.*

[390] Les conditions d'octroi de la mention agriculture biologique sont prévu par *Loi n° 88-1202 du 30 décembre 1988 relative à l'adaptation de l'exploitation agricole à son environnement économique et social,* J.O., 31/12/1988, 16741, à laquelle il faut ajouter *le règlement communautaire n° 2092/91 du 24 juin 1991*, plusieurs fois modifié depuis.

[391] Les conditions d'octroi d'une appellation d'origine contrôle sont prévues aux Art. L 115-1 et suivants du *Code comm.*

[392] Les conditions d'octroi de la mention « montagne » ont été créées par *Loi n° 85-30 du 9 janvier 1985 relatif à l'attestation « montagne*, modifiée par *la loi d'orientation agricole du 9 juillet 1999* et *le décret du 15 décembre 2000* ainsi que par l'Art. L 644-2 de *Code rural.*

Les labels attestent « qu'une denrée agricole ... possède un ensemble distinct de qualités et de caractéristiques préalablement fixées dans un cahier des charges et établissant un niveau de qualité supérieure à celle d'un produit de consommation courante ».[393] Au niveau communautaire, le système du « label » se traduit par une « attestation de spécificité ».[394] Cette mention protège certains produits et garantit aux consommateurs qu'un élément ou un ensemble d'éléments d'une denrée se distingue nettement d'autres produits ou denrées alimentaires similaires.[395]

La certification ne garantit pas une qualité supérieure mais en revanche atteste que la denrée alimentaire est conforme à des caractéristiques spécifiques figurant dans le cahier des charges. Ces caractéristiques peuvent concerner les méthodes de production, de fabrication, de transformation, de conditionnement ou même l'origine géographique des produits si cette origine est enregistrée comme indication géographique protégée.

Les produits biologiques, pour pouvoir porter la mention « agriculture biologique », doivent se conformer aux standards du cahier des charges de la production agricole biologique.

Les AOC garantissent « la dénomination d'un pays, d'une région ou d'une localité servant à désigner un produit qui en est originaire et dont la qualité ou les caractères sont dus au milieu géographique ».[396] Mais aussi, les facteurs naturels et humains figurent dans la détermination d'une AOC. En fait, les aspects de terroir et de qualité sont fortement liés à la notion d'AOC.[397] Tout producteur situé dans la zone AOC a le droit d'utiliser cette mention pour ses produits.[398]

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[393] Claret, "Etiquetage" *Juris-Classeur - Concurrence-Consommation*, vol. 3, Fasc. 874 à la para. 65.
[394] *Règlement n° 2082/92 du Conseil, du 14 juillet 1992, relatif aux attestations de spécificité des produits agricoles et des denrées alimentaires*, [1992] J.O. L.208/9.
[395] *Règlement n° 2082/92 du Conseil, du 14 juillet 1992, relatif aux attestations de spécificité des produits agricoles et des denrées alimentaires*, [1992] J.O. L.208/9, Art. 2.
[396] Art. L 115-1 du *Code comm.* Les AOC peut être définies par voie législative, réglementaire ou par jugement. Voir généralement Olszak, *Droit des appellations, Chapitres 2 et 3.*.
[397] Claret, "Etiquetage" *Juris-Classeur - Concurrence-Consommation*, vol. 3, (Paris : Juris-Classeur, 2002) Fasc. 874 à la para. 51.
[398] Le logo AOC est décidé par arrêté en conseil d'Etat et doit être utilisé pour tous les produits bénéficiant de cette mention.

Normalement, les produits ayant droit à une mention AOC ne sont pas assujettis à d'autres mentions obligatoires supplémentaires, c'est-à-dire des mentions au delà de celles prévues pour toutes denrées alimentaires. Cependant, ceci n'est pas toujours le cas, prenons l'exemple des fromages bénéficiant d'une AOC qui doivent obligatoirement indiquer le nom et l'adresse du fabricant.

Au niveau communautaire, le système des AOC se divise en deux mentions : les appellations d'origine protégées (AOP) qui, comme les AOC, garantissent le lieu et le terroir d'origine du produit et les indications géographiques protégées (IGP) qui garantissent que la qualité d'un produit est attribué au milieu géographique dont il est issu. La différence alors entre AOP et IGP est que les produits AOP sont liés au lieu géographique attestant que ces produits ont été fabriqués intégralement dans cette région, tandis que pour les IGP il n'est pas « nécessaire que l'intégralité du processus de fabrication ait lieu dans l'aire géographique délimitée » du moment que la qualité en question est bien présente dans la denrée alimentaire concernée.[399]

La mention « montagne » est réservée aux denrées alimentaires totalement élaborées (sauf pour les ingrédients qui ne peuvent êtres produits en montagne) en zone de montagnes dont l'altitude est supérieure ou égale à 400 mètres.[400]

Tous ces signes ont un caractère public et sont donc sujets à des contrôles que ce soit au stade de la création ou de la vérification. Donc, l'utilisation de toutes ces mentions sans avoir l'autorité de les utiliser sur l'étiquetage des denrées alimentaires peut entraîner à la fois des sanctions pénales et civiles.

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[399] Voir aussi, Axel Aron, *La jurisprudence des appellations d'origine et des indications géographiques protégées* (Mémoire de D.E.A de droit communautaire, Jean Moulin Lyon 3, 2001) [non publiée].
[400] Voir *Loi n° 85-30 du 9 janvier 1985 relatif à l'attestation « montagne »*.

Paragraphe 2 - L'administration du droit de l'étiquetage et de la contrôle des étiquettes en France

En gros, la formulation des règles générales de l'étiquetage se fait au niveau de la communauté européenne aujourd'hui. Si les règles viennent des règlements, ils s'appliquent directement dans tous les États membres. Si les règles viennent des directives, il faut les transposer par actes législatifs ou réglementaires dans chaque État membre. Au sein de la Communauté européenne, le développement de politique de l'étiquetage tombe surtout à la Direction générale Santé et Protection des consommateurs (DG-SANCO). Bien évidement les contenus des nouveaux règles ne se fait qu'après beaucoup de consultations des ministres pertinentes nationales (telle que l'agriculture, la pêche, la santé, la protection de consommateur) aussi bien que des associations communautaires et nationales.

Cependant, en dehors des autocontrôles, la vérification de l'étiquetage reste un travail exclusivement réservé au États membres de la Communauté européenne et non à la Communauté elle-même.[401] Alors les organes de l'État membre prennent responsabilité de la vérification de l'étiquetage (A) et développent les méthodes juridiques de réprimer des infractions faites par moyen des étiquettes (B).

A. la vérification de l'étiquetage en France

En premier lieu, il s'agit d'un autocontrôle des entreprises sur la qualité de leurs produits et sur la conformité de leur production aux obligations du *Code comm.*, comme par exemple le respect de l'étiquetage.[402] Au niveau gouvernemental, c'est la Direction Générale de la Concurrence, de la Consommation et de la Répression des Fraudes (DGCCRF), Service de la Répression des Fraudes qui est chargée de l'application, de la vérification de l'étiquetage des denrées l'alimentaires et en cas de méconnaissance, de la poursuite des infractions relevées.[403]

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[401] Entrevue avec Maître Antoine de Brosses, Paris, le 21 juillet 2003 ; Gayer, Colm. "The Need for Better Enforcement" (Presentation to the 12th Annual European Food Law Conference – Food Safety and Consumer Protection, Brussels, 25-26 June 2003).

[402] Article L 212-1, alinéa 2 du *Code comm.* Voir aussi de Brosses, *L'Etiquetage des denrées alimentaires, t. 1,* para. 52.

[403] Avant les poursuites pour les contraventions ou délits venant des activités des entreprises, il y a aussi la possibilité des discussions or une demande de l'Administration de DGCCRF avant qu'elle prépare un procès-

B. le cadre juridique pour la répressions des infractions de l'étiquetage en France

Il existe plusieurs articles dans le *Code comm.* traitant des infractions à l'étiquetage. Les étiquettes non conformes peuvent engendrer des sanctions pénales ou civiles à l'encontre des entreprises ou des individus responsables.[404] En fait, les sanctions peuvent relever de deux types d'infractions, soit l'étiquetage présente une information incomplète ou insuffisante, soit l'étiquetage présente une information déloyale ou inexacte. De plus, dans certains cas il existe des sanctions administratives, sanctions ayant de lourds effets sur l'activité des producteurs, des fabricants, des distributeurs et des vendeurs.

1. les sanctions pénales

La méconnaissance des règles d'étiquetage peut constituer une ou plusieurs des quatre infractions suivantes : le délit de publicité mensongère, celui de tromperie, celui contre les signes de qualités, enfin la contravention pour un manque des mentions obligatoires d'étiquetage.[405] Sur le plan de la responsabilité pénale, les trois premières infractions requièrent un élément moral. Elles sont les plus graves, et donnent lieu à de sévères peines d'amende et d'emprisonnement. Les contraventions, moins graves, sont poursuivies devant le tribunal d'instance ou le tribunal de police où les sanctions sont limitées à des amendes plus modestes ainsi qu'à des injonctions de correction des défauts d'étiquetage.[406]

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verbal pour commencer une poursuite. Pour une étude très poussée sur ce sujet voir, Jean-Marie Meffre, *Guide pratique de la répression des fraudes* (Paris : Litec, 2000).

[399] de Brosses, *L'Etiquetage des denrées alimentaires, t. 1,* para. 96 et suivant, « Chapitre 2 : La responsabilité pénale des défauts d'étiquetage » et para. 166 et suivant, « Chapitre 3 : La responsabilité civile des défauts d'étiquetage ».

[405] Il existe aussi d'autres catégories de sanctions pénales moins répandues comme les délits involontaires ou encore les infractions au code de la Santé Publique, également celles concernant l'altération de l'étiquetage ou la publicité comparative de l'étiquetage, voir de Brosses, *L'Etiquetage des denrées alimentaires, t. 1,* la schéma à la p. 56. D'autres infractions sont aussi précisées dans le *Code de la consommation* comme celle de Art. R 112-25, alinéa 1 ou il est interdit de mettre en vue de vente ou bien de vendre des denrées alimentaires comportant une date limite de consommation dès lorsque cette date est dépassé. Mais aussi dans l'Art. R 112-25, alinéa 2 il est interdit de mettre en vue de vente ou de vendre des denrées alimentaires entreposées dans des conditions non conformes à celles qui sont prescrites par l'étiquetage.

[406] Entrevue avec M. le Juge Jean Louis Reynaud, Président de Tribunal de Police de Montpellier, Montpellier, 29 juillet 2003.

Le délit de publicité mensongère s'applique à la vente de tout produit, y compris les denrées alimentaires. L'article L 121-1 du *Code comm.* interdit la publicité mensongère, y compris celle qui vient de l'étiquette ou de l'étiquetage de la denrée en question.

> « Est interdite toute publicité comportant, sous quelque forme que ce soit, des allégations, indications ou présentations fausses ou de nature à induire en erreur, lorsque celles-ci portent sur un ou plusieurs des éléments ci-après ; existence, nature, composition, qualités substantielles, teneur en principes utiles, espèce, origine, quantité, mode et date de fabrication, propriétés, prix et conditions de vente de biens ou services qui font l'objet de la publicité, conditions de leur utilisation, résultats qui peuvent être attendus de leur utilisation, motifs ou procédés de la vente ou de la prestation de services, portée des engagements pris par l'annonceur, identité, qualités ou aptitudes du fabricant, des revendeurs, des promoteurs ou des prestataires ».

Pour constituer l'infraction, il faut une publicité, un caractère mensongère ainsi qu'un élément moral. Une étiquette est considérée comme une publicité car elle permet au client de se faire une opinion sur le produit qui lui est proposé[407] ou sur les caractéristiques de ce produit.[408] Donc, une étiquette inexacte ou insuffisante, peut constituer la base du délit de publicité mensongère aussi bien que celui de tromperie, ou encore celui de contravention à l'étiquetage.

La publicité, pour constituer une infraction, doit tromper sur la qualité substantielle du produit[409] ce qui signifie sur un ou plusieurs éléments comme cela est prévu à l'article L 121-1. Par exemple, le cas de boîtes de glace contenant la mention « garanti sans colorant et sans produits chimiques », alors que des colorants et des monoglycérides, ont été trouvés dans l'atelier de production et utilisés[410], constitue une infraction au sens de l'article L 121-1.

A fin de retenir la responsabilité morale de l'auteur, il faudra en outre prouver l'existence de l'élément moral constitutif de l'infraction. Cet élément peut être constitué par la mauvaise foi du vendeur ou de l'auteur de l'étiquette qui a donc induit le consommateur en

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[407] Voir Crim. 12 nov. 1986 : Bull. crim. n° 861.
[408] Voir Crim. 14 oct. 1998 : Bull. crim, n° 262.
[409] de Brosses, *L'Etiquetage des denrées alimentaires, t. 1,* para. 104.
[410] Voir Paris, 7 janv.1998 : ev.sc. crim. 1999. 117, obs. Giudicelli.

erreur. Egalement une simple faute d'imprudence ou de négligence est suffisante pour établir l'élément moral.[411]

Selon l'article L 121-6 du *Code comm.*, les infractions prévues à l'article L121-1 sont punies par l'article L 213-1. Les sanctions pour le délit de publicité mensongère peuvent être sévères. D'abord, le responsable peut être condamné jusqu'à deux ans d'emprisonnement et à une amende de 37 500 euros.[412] Cette somme peut même être dépassé car le *Code comm.* permet au juge de majorer l'amende de 50% des dépenses engagées pour la publicité constituant le délit.[413] De plus, dans le cas où il s'agit d'une étiquette contenant une publicité mensongère, le juge peut ordonner que la publicité cesse immédiatement, que les produits associés à celle-ci soient retirés du commerce jusqu'à ce qu'ils soient revêtus d'une étiquette juste, et que le jugement soit publié.[414]

C'est l'article L 213-1 qui prévoit les sanctions pour les vendeurs de denrées alimentaires avec étiquettes trompeuses. Mais aussi, cet article souligne les éléments du délit.

> « Sera puni d'un emprisonnement de deux ans au plus et d'une amende de 37500 euros au plus ou de l'une de ces deux peines seulement quiconque, qu'il soit ou non partie au contrat, aura trompé ou tenté de tromper le contractant, par quelque moyen ou procédé que ce soit, même par l'intermédiaire d'un tiers :
> 1° Soit sur la nature, l'espèce, l'origine, les qualités substantielles, la composition ou la teneur en principes utiles de toutes marchandises ;
> 2° Soit sur la quantité des choses livrées ou sur leur identité par la livraison d'une marchandise autre que la chose déterminée qui a fait l'objet du contrat ;
> 3° Soit sur l'aptitude à l'emploi, les risques inhérents à l'utilisation du produit, les contrôles effectués, les modes d'emploi ou les précautions à prendre ».

Cet article vise un très grand nombre de cas de poursuites contre les personnes morales ou les individus qui mettent sur le marché des produits avec un étiquetage trompeur. Il faut alors pour constituer l'infraction, une tromperie et un élément moral. Selon l'alinéa 1° de l'article L 213-1, une tromperie sur les qualités de la denrée sera punie, tandis que selon l'alinéa 2°, c'est la tromperie sur les quantités livrées qui sera punie. L'alinéa 3° établit un

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[411] Voir Crim. 26 oct, 1999 :Bull. crim. n° 233.
[412] Art. L 121-6, alinéa 1 adopte les peines pour cette infraction pourvue par Art. L 213-1.
[413] Art. L 121-6, alinéa 2.
[374] de Brosses, *L'Etiquetage des denrées alimentaires, t. 1*, para. 112.

grand champ de contrôle pour les autres informations qui peuvent se trouver sur les étiquettes.

La plus simple articulation d'une infraction de l'article L 213-1 du *Code de consommation* est constituée par la non-conformité d'un produit à la réglementation qui en fixe la composition.[415] Les règlements d'origine communautaires ou français, examinés ci-dessus, servent comme base de contrôle pour les poursuites de délit de tromperie. La non conformité peut aussi venir du fait que l'étiquette même conforme aux règlements, ne soit pas conforme au contenu du produit.[416] Concernant les mentions obligatoires, il faut une étiquette qui soit conforme aux règlements et qui corresponde exactement au produit qu'elle décrit afin d'éviter une infraction au sens de l'article L 213-1.

Les mentions facultatives peuvent constituer des infractions visées par l'article L 213-1 du *Code comm.*. Si par exemple, on vend des poulets comme « fermiers » provenant d'un élevage industriel, on est coupable du délit de tromperie.[417] Dans le cas des étiquettes trompeuses, la plupart des infractions concernent un aspect du produit qui est aisément repérable comme trompeur à l'instar des produits ; par exemple le pâté « truffés » qui ne contient pas de truffes.[418] Autre exemple d'étiquette mensongère le cas de la vente de fromages AOC Chaource alors que le lait de fabrication ne provient pas de la zone AOC.[419] Quelquefois la tromperie peut s'entendre même sur les aspects du produit qui doivent être plus ou moins évidents aux yeux du consommateur, comme la vente de denrées alimentaires dont la date limite de vente est dépassé.[420]

Il faut, pour établir l'infraction, que la tromperie résulte d'une intention frauduleuse, rarement recherchée par le juge, au demeurant. Le simple fait qu'un prévenu responsable

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[415] Voir Crim. 30 mars 1994 : JCP éd E 1994. Panor. 865.
[416] Voir Crim. 9 mars 1999 : Bull. crim. n° 33.
[417] Voir Crim. 28 mai 1974 : Gaz. Pal. 1974. 2. 620.
[418] Voir Bordeaux, 13 févr. 1964 : JCP 1964. IV. 92.
[419] Voir Trib. gr. inst. Troyes, 9 mars 1999 : BID 1999, n° 10, p.53.
[420] Voir Crim. 8 mars 1983 : D. 1983. IR. 308.

n'ait pas effectué les vérifications qui lui incombaient est suffisant pour établir l'élément moral du délit de tromperie.[421]

Les sanctions pour délit de tromperie se trouvent à l'article L 213-1 du *Code comm.* : deux ans de prison et une amende de 37 500 euros. De plus, s'il existe des circonstances aggravantes (dangers pour la santé, emploi de moyens frauduleux, etc.) ces peines seront doublées.[422]

Le droit positif français crée et protège les signes de qualité. Il existe alors plusieurs sanctions pénales en cas d'infractions à ces dispositions. Parmi ces infractions on trouve : l'usurpation d'appellation d'origine et la contrefaçon de marque.

S'il s'agit d'une appellation d'origine contrôlée, les dispositions du *Code comm.* prévoient des sanctions pénales spécifiques en plus des délits de publicité mensongère ou de tromperie.[423] L'article L 115-16 crée un délit pour toute personne qui utiliserait des appellations d'origine inexactes.[424] Ces personnes seront punies de peines prévues à l'article L 213-1 (tromperie) du *Code comm.*. Articles L 115-3 et L 115-9 créent un délit pour toute personne qui utiliserait des mentions provoquant une confusion sur l'origine du produit.

En ce qui concerne l'utilisation des labels et des certificats de conformité, l'article L 115-24 du *Code comm.* punit toute personne qui utilise ou tente d'utiliser frauduleusement ces labels ou ces certificats par un renvoi aux peines prévues par l'article L 213-1 du *Code comm.*.

Quant au délit de contrefaçon d'une marque de commerce, il est inscrit au *Code de la propriété intellectuelle.*[425]

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[421] Voir Crim, 12 avr. 1976 : D. 1977. 239, note Fourgoux.
[422] Art. R 213-2.
[423] Voir Olszak, *Droit des appellations d'origine*) à la p. 174-175 pour un débat sur le recours au délit de tromperie dans le cas spécifique des AOC et d'autres signes de qualité.
[424] Art. L 115-26-3 prévoit les mêmes peines pour l'utilisation frauduleuses des signes AOP et IGP que pour l'utilisation frauduleuses des signes AOC.
[425] Cf. Art. L 716-1 et les articles suivants du *Code de la propriété intellectuelle.*

Plusieurs dispositions du *Code comm.* prévoient des contraventions qui peuvent relever de la méconnaissance des règles d'étiquetage. L'article R 112-6 interdit de détenir en vue de vente ou de vendre des denrées alimentaires dont l'étiquetage n'est pas conforme aux prescriptions du Code. Les articles L 214-2 et R 112-7, alinéa 1, prévoient également d'autres contraventions.[426]

Les mêmes faits peuvent entraîner une poursuite pour délit de publicité mensongère, pour délit de tromperie ou une contravention d'étiquetage. Cette dernière est cependant la plus facile à prouver car élément moral de l'infraction est présumé et ne sera pas à prouver. En effet, un seul élément suffit pour établir une contravention comme la méconnaissance des règles de l'étiquetage prévues dans les règlements communautaires ou les règlements français. Citons quelques exemples de contraventions : la vente de produits dont la DLC est dépassée[427], l'utilisation irrégulière d'une dénomination[428] ou le non-usage de la langue française dans l'étiquetage.[429]

Les peines pour les contraventions d'étiquetage correspondent à celles prévues par les contraventions de 3eme classe[430] qui s'élèvent au maximum à 5000 euros. Cependant, ces peines peuvent s'attacher à tous les produits mis en circulation, tandis que les délits de publicité mensongère ou de tromperies ne s'attachent qu'à l'ensemble d'une activité particulière.[431] Ceci veut dire qu'un marchand qui a mal étiqueté 100 articles, par exemple, peut faire face à 100 fois 5000 euros d'amende mais seulement à 37 500 euros pour le seul délit de tromperie. Ce résultat est un peu bizarre étant donné qu'il n'est pas nécessaire de rigoureusement établir l'élément moral pour les délits, tandis qu'elle est présumée pour les contraventions!

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[426] de Brosses, *L'Etiquetage des denrées alimentaires, t. 1,* para 107.
[427] Voir CA Paris, 13° Ch. 24 juin 1986, Juris-data n° 026030.
[428] Voir CA Versailles, 2 juin 1988, Juris-data n° 024431.
[429] Voir Crim. 26 avr. 2000, Juris-data n° 002155.
[430] Art. L 214-2 du *Code comm.*
[431] Art. 132-7 du *Code pénal.*

2. les sanctions civiles

La méconnaissance des règles de l'étiquetage peut donner lieu aussi à des sanctions civiles, car les éléments qui sont essentiels pour constituer une infraction pénale sont souvent les mêmes que ceux exigés pour constituer une faute civile. Alors les sanctions civiles se cumuleront aux sanctions pénales lorsque par exemple, le juge ordonne le versement de dommages intérêts pour la victime d'une étiquette mal faite lui ayant causé un dommage. Les sanctions civiles peuvent aussi relever d'une action de consommateur, d'un concurrent ou d'une association touchée par une faute civile venant d'une étiquette non conforme ne tombant pas sous le coup d'une action pénale.

Un défaut d'étiquetage peut être soulevé par un concurrent ou un syndicat professionnel lorsqu'il y a concurrence déloyale. Egalement, un concurrent ou un syndicat victime de concurrence déloyale peuvent obtenir des dommages intérêts, mais il faut qu'ils prouvent une atteinte à leur intérêt respectivement individuel ou collectif. Dans les deux cas, ils pourront obtenir du tribunal la cessation des actes déloyaux.

Il y a plusieurs hypothèses de concurrence déloyale[432], mais peu donnent lieu à des infractions relevant de l'étiquetage. Cependant, une entreprise peut dénigrer les produits de ses concurrents par son étiquetage. Les mentions de l'inefficacité du produit d'un concurrent ; les mentions de la supériorité de produit ; les mentions de la seule authenticité d'un produit sont des exemples typiques du dénigrement des produits d'un concurrent qui peut se faire par la voie des étiquettes.[433]

La méconnaissance de la réglementation sur l'étiquetage peut constituer de la concurrence déloyale car elle met en question les conditions d'égalité et de bon

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[432] de Brosses en cite cinq : le dénigrement de l'entreprise ou de ses produits, l'imitation, la désorganisation générale du marché, la désorganisation de l'entreprise concurrente et le parasitisme. de Brosses, *L'Etiquetage des denrées alimentaires, t. I,* para. 214.

[433] Le *Code comm.* interdit les comparaisons des produits par la voie des emballages (et par conséquences les étiquettes) dans Art. L 121-11 et donc une telle faute mènera à la fois à une infraction pénale et un acte de concurrence déloyale.

fonctionnement du marché entre les concurrents.[434] Quant aux produits qui bénéficient d'une appellation d'origine contrôlée, le *Code comm.* prévoit le recours à une action civile pour « toute personne qui prétend qu'une appellation d'origine est appliquée, à son préjudice direct ou indirect et contre son droit, à un produit naturel ou fabriqué, contrairement à l'origine de ce produit, aura une action en justice pour faire interdire l'usage de cette appellation. » [435] Les syndicats et associations légalement constitués disposent des mêmes prérogatives que les entreprises et les particuliers.

Les sanctions civiles pour concurrence déloyale peuvent être des dommages intérêts, une astreinte pour usage de mots, mentions, ou dénominations figurant sur un étiquetage, la publication du jugement de condamnation ou dans le cas d'une marque illicite, la nullité de la marque en question. L'interdiction de l'usage de la marque et de l'appellation d'origine, voire le retrait des produits mal étiquetés, sont aussi des sanctions possibles.

Dans le cas du consommateur individuel, la simple méconnaissance des règles d'étiquetage par un vendeur de denrée alimentaire constitue une faute civile délictuelle[436] ou contractuelle[437] si le défaut (l'étiquetage trompeur ou insuffisant) a causé un dommage au consommateur. Si le défaut de l'étiquetage mène à un déloyauté ou touche à la salubrité du produit, le consommateur peut avoir droit à des dommages intérêts ou voir le contrat de vente annulé et/ou au remboursement du prix du produit. Dans la plupart des cas ces problèmes sont réglés par le service consommateur de l'entreprise, notamment si la faute civile touche à la sécurité ou santé de ce consommateur. Ceci est bien plus efficace pour l'entreprise car « le vendeur doit garantir que la denrée livrée est conforme à chacune des mentions d'étiquetage, telles qu'elles sont définies par la réglementation et les usages. »[438]

Cependant les défauts d'étiquettes touchant à la déloyauté seront difficiles à mettre en valeur sur le plan juridique pour un consommateur individuel. Dans ces circonstances, il

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[434] de Brosses, *L'Etiquetage des denrées alimentaires, t. 1,* para. 223.
[435] Art. L 115-8 de *Code comm.*
[436] Cf. *Code civil* Art. 1382 (faute volontaire) et Art. 1383 (faute involontaire).
[437] Cf. *Code civil* Art. 1582 et suivants (règles générales de contrat) et *Code comm.* Art. L 111-1 (l'obligation de l'information du vendeur professionnel à l'égard du consommateur).
[438] de Brosses, *L'Etiquetage des denrées alimentaires, t. 1,* para. 188.

devra faire appel à une association de consommateurs. Ces associations, pourtant, n'ont pas le droit d'agir en justice en leur nom.[439] Les associations de consommateurs ont le droit d'agir pour défendre les intérêts directs ou indirects des consommateurs comme le stipulent les articles R 411-1 et suivants du *Code comm.*, selon une de trois voies. L'activité de l'association, au nom du ou des consommateurs, peut découler en parallèle d'une infraction pénale. « Chaque fois qu'une irrégularité d'étiquetage constitue une infraction pénale, une association agréée peut donc agir en justice...La seule condition est que l'infraction pénale ait causé un préjudice à l'intérêt collectif des consommateurs défendu par l'association. ».[440] L'association pourra alors agir dans l'intérêt d'un ou de plusieurs consommateurs ayant souffert ou ayant été victime d'un étiquetage défectueux. L'action de l'association peut aussi se cumuler à celle d'un particulier ou être initiée au nom de plusieurs consommateurs qui « ont subi des préjudices individuels qui ont été causés par le fait d'un même professionnel ».[441]

Dans le cas d'un consommateur victime d'une étiquette mal faite, il peut demander la nullité du contrat de vente ainsi que des dommages intérêts. Les sanctions civiles pourront aussi revêtir la forme de dommages intérêts, d'astreinte pour usage de mots, mentions, ou dénominations figurant sur l'étiquetage, et la publication du jugement de condamnation.

Dans le cas où l'intérêt collectif des consommateurs est lésé, les associations pourront demander la cessation de l'agissement illicite, alors que dans le cas où c'est l'intérêt individuel du consommateur qui est lésé, celles-ci pourront solliciter du juge aussi, des dommages intérêts.

3. les sanctions administratives

Parfois, les sanctions administratives s'avèrent plus lourdes de conséquence que les sanctions juridictionnelles.[442] Parmi les sanctions administratives possibles, deux

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[439] Il faut que l'association soit agréée et que figure de manière explicite dans sont statut la défense des intérêts des consommateurs.
[440] de Brosses, *L'Etiquetage des denrées alimentaires, t. 1,* para. 230.
[441] Art. R 422-1 du *Code comm.*
[442] Olszak, *Droit des appellations d'origine* à la p. 172.

s'appliquent aux produits qui utilisent sans justification des signes de qualité. « En cas de non-conformité, la sanction est évidemment l'interdiction d'utiliser l'AOP ou l'IGP convoitée, selon les dispositions qui figurent dans les différents décrets de reconnaissance. Cette sanction concerne les lots présentés, qui ne peuvent alors être commercialisés que sous la forme d'un produit ordinaire... »[443] Une seconde sanction administrative, qui est très grave sur le plan économique pour le producteur ou le fabricant d'un produit AOC, est la perte de cette appellation pour l'ensemble de sa production. Ceci peut arriver s'il est évident que la méthode ou le lieu de production ne correspondent pas au cahier des charges, qui expliquent les conditions demandées pour bénéficier de l'appellation d'origine.

C. les contrôles en pratique

D'après les entrevues avec la personnel de la DGCCRF, Service de la Répression des Fraudes,[444] il est bien évident que la DGCCRF prend un rôle très actif dans la vérification de l'étiquetage des denrées l'alimentaires et en cas de méconnaissance, de la poursuite des infractions relevées.[445]

D'abord, sur le plan de la formation, il y a une école nationale pour entraînement des inspecteurs de la DGCCRF. Pendant la période de cette formation qui dure un an, les futurs inspecteurs suivent des sessions qui examinent l'encadrement juridique des règles de l'étiquetage des denrées alimentaires. Un fois les études terminées, les inspecteurs se mettent au travail dans un des 96 départements administratifs de la France.

Prenons l'exemple des activités de la DGCCRF dans le département de l'Hérault. Ce département a une population d'a peu près un million de personne. Le bureau principal de la DGCCRF dans l'Hérault se situe à Montpellier, la ville principale du département. La

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[443] Olszak, *Droit des appellations d'origine* à la p. 172.
[444] Bernard Jouvenel, Inspecteur Principal, Direction Générale de la Concurrence, de la Consommation et de la Répression des Fraudes (entrevue à Montpellier le 3 février 2004).
[445] Voir aussi les rapports des activités de la DGCCRF tels que Direction Générale de la Concurrence, de la Consommation, et de la Repression des Fraudes (DGCCRF) "Activités 2003 : Agir dans l'interet des consommateurs" (Paris : DGCCRF, 2004) (online : DGCCRF : <http://www.finances.gouv.fr/DGCCRF/01_presentation/activites/2003/consommateurs.htm?>) ; et "Activités 2002 : au service des usagers" (Paris : DGCCRF, 2003) (online : DGCCRF : <http://www.finances.gouv.fr/DGCCRF/01_presentation/activites/2002/usagers.htm>).

DGCCRF surveille beaucoup d'activités économiques, y compris les activités liées à la consommation et à la répression des fraudes. C'est alors dans ce domaine que les activités du personnel de la DGCCRF rencontrent l'étiquetage des denrées alimentaires.

Pour le département, il y a huit personnes qui ont directement la responsabilité de la vérification des étiquettes et le contrôle des restaurants et des hôtels. Leur action se déroule sur deux plans : un contrôle régulier prédéterminé des conditionneurs et des vendeurs de denrées alimentaires qui s'opèrent dans le département; et les investigations des plaintes à propos des étiquettes soit non conformant aux règles, soit nuisibles au consommateur.

Dans l'année 2003, il y avait presque 4000 enquêtes sur les étiquettes non conformes avec plus de 1000 poursuites pour des contraventions ou des délits. Ce nombre d'enquêtes et de poursuites est plus ou moins constant dans les derniers cinq ans. Ces chiffres indiquent un niveau de contrôles très importantes en France, beaucoup plus élevé, certainement plus de 25 fois plus élevé que dans le Ghana ou le Canada.

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En ce qui a trait aux aspects culturels des aliments, la France est communément reconnue comme étant parmi les meilleurs pays au monde pour sa gastronomie, son amour de la nourriture ainsi que pour l'importance que joue la nourriture dans la vie « française ». Les aliments sont au cœur du psychisme collectif. On identifie les français à une culture qui attribue une grande importance aux aliments, de façon générale, et plus spécifiquement encore aux méthodes de préparation et de production de nourriture. Ainsi, la formation classique en matière de préparation de nourriture partout au monde tire souvent ses origines de la tradition française.[446] Les entreprises françaises de production alimentaire jouissent, depuis des siècles, d'une protection juridique spéciale pour leur production d'aliments de qualité en vertu du système des « appellations d'origine contrôlée ». De plus, ces entreprises

[446] Par exemple, un manuel standard utilisé dans la formation de chefs professionnels, W. Gisslen, *Professional Cooking*, 4 éd., (New York : John Wiley, 1999), est un ouvrage de collaboration entre un auteur américain et l'Institut Le Cordon Bleu de Paris, qui est renommé au plan international.

de production ainsi que les commerçants de produits alimentaires qui tentent de tromper le consommateur sont systématiquement poursuivis en justice.

Ce résumé de la réglementation nationale des étiquettes des denrées alimentaires en France montre que les aspects juridiques traitent deux grands sujets importants pour les objectifs différents : l'étiquetage obligatoire pour la protection du consommateur et pour la répression des fraudes; et l'étiquetage marquant la qualité pour la promotion commerciale des produits de qualité et pour la protection de la propriété industrielle. Ce sont les bijoux de la réglementation de l'étiquetage des denrées alimentaires en France.

Chapter 2 – Canada

This chapter explores the evolution of Canadian food labelling law from the colonial period when Canada was first under French and then English rule and during its first century as an independent state (Section 1). Canadian food labelling law, clearly influenced by early food labelling laws oriented towards food inspection and commercial fairness, has been significantly reoriented since the 1970s when legislators passed food labelling laws advancing consumer interests, initially by the way of mandatory labelling requirements and most recently, by new requirements for nutritional and health-related food labelling laws (Section 2).

Section 1 argues that early Canadian food labelling legislation developed from the pursuit of three separate objectives. In the period prior to 1867 when Canada was not yet an independent State, food labelling was primarily a commercial matter to identity food products (Paragraph 1). Producers marked their products to distinguish them from their competitors and government inspectors marked products to indicate that they met minimum quality standards. After Confederation, a new trend emerged in Canadian food labelling law. Commercial and consumer objectives were served by the passing of new laws that prohibited food adulteration (Paragraph 2). During this period, three separate streams of laws with food labelling provisions are apparent; an historic one to facilitate the commercial interests of food traders; a food safety one that finds expression in Canada's first *Food and Drugs Act*; and the beginning of a consumer information one which spawns legislation that requires mandatory food labelling for all prepackaged foods.

Section 2 explores the current matrix of food labelling laws in Canada. Almost the entirety of food labelling law falls within the competence of the Federal Parliament and as such several federal departments have been active in molding food labelling legislation. Most recently the task has been taken up by Health Canada and the Canadian Food Inspection Agency (CFIA). While commercial objectives are still pursued as part of food labelling law, consumer health and information objectives are finding expression in more

onerous requirements for food labelling (Paragraph 1). Administration and enforcement of Canada's food labelling laws, now largely centralized, does not yet demonstrate, however, a particularly aggressive approach to ensure compliance with Canada's food labelling requirements for the benefits of consumer and producer alike (Paragraph 2).

Section 1 – Historical Perspectives

Paragraph 1 – The beginnings of labelling in New France and Pre-Confederation Canada

A. the first food labels - adopting the approach of the motherland

The first recorded legislation requiring food labelling on Canadian soil was promulgated less than 100 years after the settlement of Quebec. In 1706, an Act (revised in 1715) of the Conseil Supérieur de Québec set out regulations governing the sale of bread in the region. Section 3 of the 1715 Act read as follows:

> III. Que conformément à l'article premier du règlement du premier février, mil sept cent six, et sous les peines y contenues, les dits boulangers seront tenus d'avoir toujours en vente dans leurs boutiques du pain de toutes qualités, bon et bien conditionné, et marqué de la marque particulière du boulanger qui l'aura fait.[447]

In la Nouvelle-France, bakers were required not only to produce all qualities of bread that were "good and well made" but also to "mark" it with that particular baker's mark. Thus began the labelling of food products in what would become Canada. This legislative requirement for the marking of bread bears a striking resemblance to the legislation introduced in Paris in 1635.[448] Following the legislative example of the motherland, "les habitants de la Nouvelle-France" could enjoy a certain protection from unscrupulous bakers who were selling inferior bread claiming it came from a reputable baker. Through the means

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[447] *Arrêté du Conseil Supérieur de Québec du 1715 relatif à la vente et le marquage du pain* dans *Arrêts et Règlements du Conseil Supérieur de Québec et Ordonnances et Jugements des Intendants Du Canada* (Quebec: La Presse à Vapeur de E.R. Fréchette, 1855) at 169.

[448] *Ordonnance n° 267 de Roi Louis XIII – Richelieu, Paris, 30 mars 1635, « Ordonnance du lieutenant civil sur la police générale de Paris de Charles VI - Règlement général de police pour la juridiction de prévôt des marchands et échevins de Paris »* dans I. Isambert et al., *Recueil Général des Anciennes Lois Françaises depuis l'an 420 jusqu'à la révolution de 1789* (Paris: Belin-Leprieur, 1829), t. 16, (1610-1643) 424.

of mandatory marking, consumers could have some assurance that the bread they were buying came from their favourite baker and merited any premium they might have to pay to acquire it.[449]

B. food labelling rules flow from commodity inspection laws

Prior to the Union of Lower and Upper Canada in 1841, both Lower Canada and Upper Canada had enacted statutes regulating the inspection of specific foodstuffs.[450] In 1841, these Acts were repealed when the government of the new Province of Canada enacted four new Acts governing the inspection of basic foodstuffs. Each Act—one for flour and meal,[451] one for beef and pork,[452] one for fish and fish oil,[453] and one for hops[454]—set out specific inspection, grading and marking requirements for its named commodity.[455] In addition, two of the Acts—that relating to flour and meal and another to beef and pork, imposed the requirement of mandatory labelling of shipping crates to indicate qualitative aspects of the produce. For example, s. 15 of the *Flour and Meal Act* (with corresponding

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[449] Similar legislation remained in force in the province of Quebec for almost three centuries. See (Québec) *Loi sur le commerce du pain*, L.R.Q., c. C-32, art. 8 et 9. Bakers were required to indicate the weight of their products, as well as their name and address on the labels or packaging for all products. The law was finally repealed in 1993.

[450] For Lower Canada, see for example the *Act to authorize the governor, lieutenant governor, or person administering the government, to appoint inspectors of flour, pot and pearl ashes, within the province [of Lower Canada]*, (43 George III) (1801), c.7 amended by 60 George III (1820), c.5. For Upper Canada, see the *Act for the Inspection of Beef and Pork [in Upper Canada]*, 1834 (3 Victoria) (1840), c. 25.

[451] Initially, the *Act for the Inspection of Flour and Meal*, 1841 (15 Victoria), c. 45 which was then replaced by the *Act for the Inspection of Flour, Indian Meal and Oatmeal*, 1856 (19-20 Victoria), c. 87, which was again amended by *Act for the Inspection of Flour and Meal*, 1859 (22 Victoria), c. 58. This latter Act can be found in *Consolidated Statutes of Canada and Upper Canada, Title 4 – Trade and Commerce* (Toronto: Stewart Derbishire and George Desbarats, Law Printer to Her Majesty the Queen, 1859).

[452] *Act for the Inspection of Beef and Pork*, 1859 (22 Victoria), c. 48 in *Consolidated Statutes of Canada and Upper Canada, Title 4 – Trade and Commerce* (Toronto: Stewart Derbishire and George Desbarats, Law Printer to Her Majesty the Queen, 1859).

[453] *Act for the Inspection of Fish and Oil*, 1859 (22 Victoria), c. 50 in *Consolidated Statutes of Canada and Upper Canada, Title 4 – Trade and Commerce* (Toronto: Stewart Derbishire and George Desbarats, Law Printer to Her Majesty the Queen, 1859).

[454] *Act for the Inspection of Hops*, 1859 (22 Victoria), c. 52 in *Consolidated Statutes of Canada and Upper Canada, Title 4 – Trade and Commerce* (Toronto: Stewart Derbishire and George Desbarats, Law Printer to Her Majesty the Queen, 1859).

[455] For example, s. 16 of the *Flour and Meal Act* stated that: "All the said brand marks shall be neat and legible, and each Inspector of Flour and Meal shall govern himself, as far as may be possible by one uniform standard and shall brand or mark, within a space not exceeding fourteen inches long by eight inches broad, on every barrel or half barrel of Flour and Meal inspected by him, all brands and nails required by this Act under a penalty of twenty dollars for each barrel or half barrel inspected and branded, or inspected and marked, otherwise than required by this Act."

sections in the *Beef and Pork Act*)[456] imposed additional grading requirements for flour found in poor condition:

> (2) On each and every barrel or half barrel of Flour or Meal, which may on inspection be found sour, without any other damage or unmerchantable quality he shall brand the word "Sour" in letters as large as those upon the rest of the brand or mark, in addition to the brand or mark designating quality.
>
> (3) In all cases where the Flour or Meal is found to be of unsound or unmerchantable quality from other causes, he shall brand the word "Rejected" at full length, and in plain legible characters, in addition to the brand or mark designating the quality.

These early acts had as their objective the inspection of foodstuffs to ensure that produce sent out into the market was of a minimum quality. Labelling was also a means to indicate to subsequent buyers that the produce had been inspected and met certain quality requirements. The "label" was any mark or stamp or legend which provided both a minimum requirement for entry into the market place and a guarantee of quality to domestic and international buyers.

As little was known at that time about food pathogens, chemical residues and food toxicity, the inspection and eventual labelling of food products under the early Acts was primarily for market fairness and export market quality assurance. While unsoundness as a quality characteristic made its way into the *Flour and Meal Act*, food safety as an independent objective of labelling had not yet made its way onto the scene. The labelling provisions of these early inspection Acts also produced an interesting procedural environment for their enforcement. While each of the Acts contained penalty provisions for non-compliance there is little evidence that quasi-criminal prosecutions were actually used with any frequency. Instead, the inspection process, initiated under these Acts, seems to have produced an environment of "prevention" rather than "prosecution", that is, if the products were not properly marked when inspected they could not be sold. Inspection would become the *de facto* enforcement tool of choice over prosecution which would be reserved for egregious cases of wrong-doing.

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[456] The similar provisions in the *Act for the Inspection of Beef and Pork,* 1859 (22 Victoria), c. 48 are found in s. 10(2) with respect to the word "soft", and in s. 10(3) with respect to the word "rejected".

Paragraph 2 – Food labelling in an independent Canada

A. food labelling rules arising from the prevention of food adulteration

After Canada became an independent state in 1867, the individual inspection Acts were consolidated into the 1874 *General Inspection Act.*[457] This Act made the inspection of an increasing number of food products mandatory and continued the aim of regulating the market to ensure the delivery of quality goods to domestic and international markets. These Acts were enacted either as general laws that applied to most traded commodities or as specific laws for the inspection and marking of selected commodities. This Act and the ones like it that would follow[458] were primarily designed to ensure Canadian produce was of high quality, both to protect international market access and to provide quality food to Canadians. Food labelling integrity was part of this quality assurance.

1. food safety, food purity and food labelling – the *Adulteration Acts*

Much of the concern for food quality and food safety issues during the 19th century came out of scandalous revelations of widespread food adulteration in England. Accum, a English chemist, documented shocking cases of food adulteration in his 1820 work called the *Treatise on Adulterations of Food, and Culinary Poisons.*[459] While his revelations were initially discredited by commercial interests, these egregious cases of food adulteration eventually provided the initiative for the establishment of an Analytical and Sanitary Commission in 1850. When the food adulteration allegations proved to be true, the English Parliament responded in 1860 with the first British *Food and Drugs Act.*[460] This Act was

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[457] S.C. 1874.

[458] The *Canned Goods Act*, R.S.C. 1906, c. 134 made mandatory the inspection of all food products destined for interprovincial or international markets. Later laws, first the *Meat and Canned Foods Act,* S.C. 1907 (6-7 Edward VII), c. 27 and then the *Fish Inspection Act*, S.C. 1914, c. 45., *Meat Inspection Act,* S.C. 1955, c.36, and the *Canada Agricultural Products Standards Act*, S.C. 1955, c. 27 continued this tradition.

[459] Reay Tannahill, *Food in History* (London: Review, 2002) at 294. For example Accum's book documented early food adulterations including "crusted old port" being new port with supertartrate of potash; pickles coloured with copper, sweets coloured with poisonous salts of copper and lead and the rich orange rind of Gloucester cheese coming from ordinary red lead.

[460] Tannahill, *Food in History* at 294. See also, L.I. Pugsley, "The Administration of Federal Statues on Food and Drugs in Canada" (1967) 23(3) Medical Services Journal Canada 387 at 390-91. The full name of the Act was *An Act for Preventing the Adulteration of Articles of Food and Drink.* Section 1 of the Act stated: "Every person who shall sell any article of food or drink with which to the knowledge of such person any ingredient or material injurious to the health of persons eating or drinking such articles has been mixed, and every person

considerably amended in 1872 and would be the impetus for a similar act in Canada that would reorient food legislation from inspection for commercial purposes to the prevention of food adulteration.[461]

As Canada rapidly expanded both in terms of political boundaries and economic activities, opportunities for fraudulent and dangerous food practices increased. The adulteration of hard liquor first caught the attention of elected officials in the Canadian government and catapulted the Canadian government into action. On January 1, 1875, when *The Inland Revenue Act, 1875*[462] came into force, the ambit of the new Act was much broader than just regulating the production and sale of alcohol. While the Act was largely silent on labelling issues *per se*, lurking beneath the surface of the Act's definition of "adulterated food or drink"[463] was the germ of the idea that came to the fore in later revisions of the Act in requiring labelling for the prevention of food adulteration and for the promotion of food safety. In 1878, an amendment was passed prohibiting the sale of articles of food and of drugs not of a proper nature, substance and quality, but with no specific reference to labelling.[464]

The focus of Canada's adulteration legislation took a decided turn away from alcohol in 1884 and towards the regulation of all food and drugs with the coming into force of the *Act to Amend and to consolidate as Amended the Several Acts Respecting the Adulteration of Foods and Drugs.*[465] The 1884 *Adulteration Act* was a significant advancement in food regulation in Canada and indeed the common law world as it defined adulteration of foods more precisely than its predecessor Act. Under a 1890 amendment, the ambit of the Act was enlarged so as to permit the drawing up and dissemination of official standards for food

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who shall sell as pure or unadulterated any food or drink which is adulterated or not pure, shall for every offence ... forfeit and pay a penalty."

[461] B.L. Smith, "Food Legislation", in *The Canadian Encyclopedia* (Edmonton: Hurtig, 1985) at 659.

[462] *Inland Revenue Act*, S.C. 1874-75 (37 Victoria), c. 8. The Act's long title is an *Act to Impose Licence Duties on Compounders of Spirits; to Amend the Act Respecting the Inland Revenue; and to Prevent the Adulteration of Food, Drink and Drugs.*

[463] "All articles of food or drink with which there has been mixed any deleterious ingredient, or any material or ingredient of less value than is understood or implied by the name under which the article is offered for sale."

[464] Pugsley, "The Administration of Federal Statues on Food" at 394-95.

[465] *Adulteration of Food and Drugs Act (Can)*, S.C. 1884 (47 Victoria), c. 34. The Act's short title was the *Adulteration Act.*

through Orders in Council, being acts of the executive branch of government. Although the bulk of the standards would not be prepared until 1910,[466] the 1890 amendments already tied the standards to the definition of adulteration. Any standardized food would be deemed to be adulterated "if its strength or purity falls below the standard, or its constituents are present in quantity not within the limits of variability fixed by the Governor in Council". These standards, which had the force of law, predated but had much in common with their French "cousins", the administrative standards promulgated under *la loi du 1er août 1905*. Both sets of standards played a pivotal role in defining when food fraud, food adulteration or food dishonesty had taken place. They each set an objective standard by which the physical characteristics of a food product could be compared to determine if the food "on the inside" was what it purported to be "on the outside."

From a labelling perspective, the new Act carried forward the 1875 definition of "adulterated" food to include a food that "is an imitation of, or sold under the name of another article". As well the Act permitted sellers to use labelling to avoid liability under the Act. If, for example, a food might otherwise be deemed to be adulterated under the Act because of the addition of an ingredient or because a food was mixed with other ingredients, liability could be avoided by labelling the food as "mixture, stating the components of such a mixture and the proportions of each of such components".

2. food labelling under Canada's first *Food and Drugs Act*

In 1920 a new Act, the *Food and Drugs Act*[467] was passed to replace the *Adulteration Act*.[468] It was this 1920 Act that first systematically tackled the challenges of

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[466] The first binding standard in the form of a regulation would appear in 1894 with myriad more to follow in the period 1910-1919. These standards in the form of regulations would be consolidated for the first time in 1920 with the passing of the Food and Drugs Act. Bruce H. Lauer, The *Rage for Cheapness: Food Adulteration in the United Canadas and in the Dominion 1850-1920* (Masters of Arts Thesis, Carleton University, 1993) [unpublished] at 207. Only after extensive consultation with industry and with standards in force in other jurisdictions did the first Orders in Council appear in 1910. At the same time standards were enacted for milk and milk products, meat and meat products, grain and grain products, maple products and alcoholic and nonalcoholic products. By 1913, there were official standards for vegetable oils, fruits and fruit products, honey, flavouring extracts, glucose products and vinegar products. Official limits for permitted levels of arsenic in foods were established as well. See also Pugsley, "The Administration of Federal Statues on Food" at 400.

[467] *Food and Drugs Act,* S.C. 1920, c. 27. *Food and Drugs Act*, R.S.C. 1927, c. 76; *Food and Drugs Act*, R.S.C. 1952, c. 123.; *Food and Drugs Act*, S.C. 1952-53, c.38, *Food and Drugs Act*, R.S.C. 1970, c. F-27, and *Food and Drugs Act*, R.S.C. 1985, c. F-27.

food labelling in Canada. Although the Act did not contain a definition of "label" (that definition would not appear until a 1952 amendment to the Act), ss. 5 and 6 specifically proscribed certain labelling activities. The Act adopted not only the adulteration definition of the prior *Adulteration Acts* but also the new concept of "misbranding" food. All but one of the parts of the statutory definition related to the labelling (or more correctly the mislabelling) of food. Food was "misbranded" if it was an imitation of another article of food or drug without being plainly and conspicuously labelled so as to indicate its true character;[469] if its label stated to be a product of a place or a country of which it was not truly a product;[470] if it was sold by a name which belongs to another article;[471] if it was coloured or coated or powdered to make it appear better or of greater value than it really was;[472] if the label on the package, bore any statement that is false or misleading[473] and several others.[474]

As well, s. 6 of the 1920 Act required that "Every article of food which is a compound, mixture, imitation or substitute shall be plainly and correctly labelled as such; and the words "pure" or "genuine" or words equivalent to these terms, shall not be used on the labels or in connection with such articles, and such articles shall have been so packed, marked or labelled as not to be likely to deceive any person with respect to their true nature.

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[468] The *Food and Drugs Act,* S.C. 1920 (10-11 George), c. 27. did not contain any provisions regarding fertilizers, as did the 1884 Act, as these were carved off into the new *Fertilizers Act* which fell under the administration of the Department of Agriculture. Pugsley, "The Administration of Federal Statues on Food" 404.

[469] *FDA*, Sec. 5(a).

[470] *FDA*, Sec. 5(b).

[471] *FDA*, Sec. 5(c).

[472] *FDA*, Sect. 5(d).This definition of "misbranding" was one that was brought over from the earlier *Adulteration Act* definition of adulteration.

[473] *FDA*, Sec. 5(h).

[474] *FDA,* Sec. 5(e) "if false or exaggerated claims are made for it upon the label or otherwise"; (f) "if in package form, sealed by the manufacturer or producer, and bearing his name and address, the contents of each package are not conspicuously and correctly stated within limits of variability to be fixed by regulations as in this Act provided, in terms of weight, measure or number, upon the outside of the package..."; (g) "if sold as a compound, mixture, imitation or substitute, it is not labelled in accordance with the provisions of this Act"; or (i) "if the package containing it, or the label on the package, bears the name of an individual or of a company, claimed to be the manufacturer or producer of the article, which individual or company is fictitious or non-existent".

Under s. 22, "every person who attaches to any article or package of food or drug or offered or exposed for sale any label or mark containing an untrue or misleading name, device or statement, or who neglects or refuses to label or mark any article or package of food or drugs in accordance with the Act" was guilty of an offence.

With its misbranding and penalty provisions, the 1920 *Food and Drug Act* appeared to have taken a more aggressive legislative stance on the prevention of consumer fraud and food adulteration. While it permitted compounds, mixtures and substitute products for the "real thing", the Act was influenced by the appearance of "pure food laws" emanating from the United States.[475] The so-called "pure food laws" were however as much motivated by some producers of "pure" goods who wished to maintain their markets in the face of an onslaught of cheaper mixed foods as about protecting consumers from food adulteration.[476] Moreover, the record of actual prosecutions under the Act (and successor Acts) is scant.[477] Thus even with its new penalty and enforcement provisions in the *Food and Drugs Act 1920*, government officials responsible for the Act appear to have clung to the belief arising out of 19th century Canadian law that prior food inspection, rather than prosecution of offenders offered Canadian consumers better protection from the mislabelling and adulteration of food.

B. the XXth century - development of a fuller but disjointed food labelling law regime

1. the *Food and Drug Act (FDA)* and the "food safety" family of legislation

The *FDA* was amended several times after 1920 with consolidations in 1927, 1952, 1970 and 1985. Three important legislative developments concerning labelling transpired as a result of these several consolidations. First, the *FD Regulations* were consolidated. In 1949, the Department of National Health and Welfare completed a project to revise and

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[475] Lauer, The *Rage for Cheapness* at 72.
[476] As was the case for example with butter versus margarine and maple syrup versus flavoured sugar substitutes and honey versus sugar honey, see Lauer, The *Rage for Cheapness* at 39.
[477] For an account of the current regulatory framework in Canada see Buckingham, Donald E., "Both Fish and Fowl: Food Labelling Law in Canada" (Paper, Ottawa, 2002) [unpublished] and Donald E. Buckingham, "The Legislative Environment Mandating Food Labelling in Canada." (Research Report for the Canadian Food Inspection Agency Ottawa, 2002) [unpublished].

organize the *FD Regulations* which were passed into law the same year and consisted of five parts.[478] This common organization and nomenclature facilitated regulator and industry communications and remains the basis for the regulations under the Act today.

Second, the 1952 Act finally provided a definition for "label". Having a legislative definition of " any legend, word, or mark attached to, included in, belonging to or accompanying any food, drug, cosmetic, device, or package", a definition which has not materially changed to the present, assisted industry players, regulators and enforcement officials in identifying exactly what would be considered a "label" and what would not.

Third, the 1934 and the 1952 Acts created new food labelling offence provisions which would, theoretically at least, clarify what were offending acts and when prosecutions could be expected. In 1934, a new provision was introduced which had the effect of prohibiting labels from making claims that a product was a treatment for any of several listed diseases. The 1952 Act abandoned the "misbranding" offence. Instead that Act reworked the s. 22 offence of mislabelling into a new offence[479] which made sellers liable for false, misleading or deceptive labelling. A new offence was created under Section 6 of the 1952 Act which required that all standardized foods be labelled to conform to that standard. In 1985, the offences provisions were again amended to respond to the Supreme Court of Canada decision in *Labatt Brewing Co. v. Canada*[480] which found that certain provision of the FDA were beyond the competence of the Federal Parliament. The Act was amended so that the interprovincial and international aspects of trade are highlighted in the wording of the offence for mislabelled standardized goods, a phraseology that favoured a finding that the Federal Parliament had legislative competence. For insurance, a new section 6.1 was also added whose authority was clearly based on the federal government's jurisdiction over health, safety and consumer protection.[481]

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[478] Namely, Part A General Administration, Part B Foods, Part C Drugs, Part D Vitamins, and Part E Cosmetics.
[479] Sec. 5. This section remains largely unchanged in the current *FDA*.
[480] [1980] 1. S.C.R. 914 (Supreme Court of Canada), examined *infra*.
[481] The section which still exists as part of the 1985 consolidation of the *FDA* reads: (1) The Governor in Counsel may, by regulation, identify a standard prescribed for a food, or any portion of the standard, as being necessary to prevent injury to the health of the consumer or purchaser of food; (2) Where the standard or any portion of a standard prescribed for a food is identified by the governor in Council pursuant to subsection (1),

2. marketing and food standards and the "food trade" family of legislation

Legislation that allows producers to protect quality and value has existed in Canada since before Confederation. Canada has permitted the registration and protection of trade marks since 1868.[482] Trademarks legislation over the years[483] has not only allowed for the registration and use of trade-marks but has also contained provisions to discourage the fraudulent use of registered marks. The current Act, for example, prohibits the use of any description that is false and likely to mislead the public as to the character, quality, quantity or composition, geographical origin, or mode of the manufacture or production of goods.[484]

Some producers did not need to rely on trademarks legislation to protect their products offered for sale in the Canadian market or overseas. The 1878 amendments to the *Inland Revenue Act of 1875* saw the first use of labelling provisions to mark specific products. Much earlier than in France, producers and marketers of oleo-margarine in Canada were specifically required to label their product as "oleo-margarine". Eight years later the "Oleomargarine Act" of 1886[485] would totally ban the production and sale of oleo-margarine. At least one author suggests that this legislation was a thinly disguised form of protectionism motivated by the Canadian dairy industry to prevent market share loss to a cheaper substitute which was enjoying new market demand.[486]

Another example of special requirements for the labelling of food products was a particular provision in the 1884 *Adulteration of Food Act* regarding skimmed milk. Section 16 (1) contained the following: "...skimmed milk may be sold as such if contained in cans bearing upon their exterior, within twelve inches of the tops of such vessel, the word

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no person shall label, package, sell or advertise any article in such a manner that it is likely to be mistaken for that food unless the article complies with the standard or portion of a standard so identified.

[482] *Trade Mark and Design Act*, S.C. 1868.

[483] *Trade Mark and Design Act*, S.C. 1868; *Trade-marks Act,* R.S.C. 1952, c.9.; *Trade-marks Act,* R.S.C. 1970; c. T-10.*Trade-marks Act,* R.S.C. 1985, c. T-13.

[484] *Trade-marks Act,* R.S.C. 1985, c. T-13, s. 7(d).

[485] *An Manufacture and Sale of Certain Substances for Butter Act* (the *"Oleomargarine Act"*), S.C. 1886 (49 Victoria), c. 42.

[486] Lauer, The *Rage for Cheapness* at 39.

"skimmed" in letters not less than two inches in length, and served in measures also similarly marked...".[487]

Other products, particularly sugar-based ones, also became targets of "legislative naming provisions". A similar prohibition against the manufacture of "sugar honey and other honey substitutes" was enacted through an 1896 amendment to the *Adulteration Act* and then relaxed in 1914 amendments which simply prohibited the use of the word "honey" for any products which were not pure honey or which resembled honey. It seemed open to manufacturers after 1914 to market "sugar honey" or other sweeteners as long as they were labelled to reflect their sweetener qualities and did not mention only the word "honey" on the label. "Honey" could only describe pure honey. Maple products were another example of early pure food law under the *Adulteration Act*. Amendments to the *Adulteration Act* in 1914 required that:

> The word "maple" shall not be used either alone or in combination with any other word or words on the label or other mark, illustration or device on the package [which was also for the first time defined] containing any article of food or on any article of food itself which is or which resembles maple sugar or maple syrup, and no package containing any article of food itself, which is not pure maple sugar or pure maple syrup, shall be labelled or marked in such a manner as is likely to make persons believe it is maple sugar or maple syrup which is not pure maple sugar or pure maple syrup, and any article of food labelled or marked in violation of this subsection shall be deemed to be adulterated within the meaning of this Act.

A 1915 amendment made it illegal to make or offer for sale any imitation of maple syrup or maple sugar or any product composed of partly maple syrup. Any maple syrup not meeting the standards in the regulations promulgated in 1911 and revised in 1914 was considered adulterated under the Act. These provisions, along with new ones would form the *Maple Products Act* which remained in force until 1983.[488] Its provisions found new life in the *Maple Products Regulations*[489] which under the current *Canada Agricultural Products Act*[490], continue the grading and standards provisions first set out in the 1914 amendments relating to maple products.

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[487] *Adulteration of Food and Drugs Act (Can),* S.C. 1884 (47 Victoria), c. 34.
[488] *Maple Products Industry Act*, R.S.C. 1970, c. M-2.
[489] *Maple Products Regulations*, C.R.C., c. 289.
[490] *Canada Agricultural Products Act*, R.S.C. 1985 (4th Supp.), c. 20.

With respect to meat products, Federal Parliament passed the *Meat and Canned Foods Act* in 1907[491] following the legislative path carved by the United States. In response to a meat processing scandal in the United States largely brought to light by Upton Sinclair's *The Jungle*,[492] a new inspection act applying to all canned products and uncanned meat products was adopted. Inspection, grading and labelling were features of the new legislative regime. While probably improving domestic production conditions and producing safer food for Canadian, the new law also reassured European consumers that Canadian products were of continuing high quality.[493]

Why were some products singled out for special legislative treatment and others not? Two explanations are possible. Some producer groups of certain products, such as milk, honey and maple syrup, may have been powerful enough to move legislators and bureaucrats to make regulations to prevent the sale of "impure" substances. The labelling requirements under the "pure food" Acts, which allegedly were about protecting consumers from "impure" or adulterated food products, also prevented market access to new synthetic compounds that were similar but not harmful to the consuming public.[494] Another explanation is that Canada's reputation in the international market of a seller of high quality goods was worthy of safeguarding. This explanation is perhaps more plausible, however, for food standards for primary commodities like grains and meat for which Canada had developed important international markets than for honey, maple syrup and milk.[495]

Whatever the motivation, this "family" of agri-food statutes[496] was overseen by the Department of Agriculture rather than the Department of Inland Revenue until 1997. In that

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[491] *Meat and Canned Foods Act,* S.C. 1907 (6-7 Edward VII), c. 27.
[492] Upton Sinclair, *The Jungle* (New York: Modern Library, 2002). The book was first published by 1906. It made for grisly reading in its chronicling of the abuses that occurred in the Chicago meat-packing industry.
[493] Lauer, The *Rage for Cheapness* at 63. Lauer is also unconvinced that there was a need for this legislation as the *Adulteration Act* could have provided inspection and quality assurances, et seq. 63- 70. He is convinced that the legislation was rather a power grab by the Department of Agriculture.
[494] Lauer, *The Rage for Cheapness* at 39.
[495] Lauer, *The Rage for Cheapness* at 37.
[496] The major streams that have flowed from it are a Meat and Canned Goods stream (the last *Meat and Canned Foods Act* was repealed in 1985), a Meat Inspection stream (genesis for the current *Meat Inspection Act*), a Fish Inspection stream (genesis for the current *Fish Inspection Act*) and a general food product stream

year, responsibilities were transferred to the newly created Canadian Food Inspection Agency (CFIA).

The intent of the legislation was to facilitate trade by exercising control at the production end of the food chain for all products destined for interprovincial and international markets. Inspection, the proper use of federal marks and grades and, in some cases, the pre-approval of labels leveled the playing field for traders in the domestic market and ensured a high quality product that would be accepted in international markets.

From a labelling perspective, the food trade family of legislation spawned a number of very detailed provisions for different products under different acts and regulations. Provisions contained in these acts and regulations required specific product composition (standards), which could then be described by regulated product names. These acts and regulations prescribed the use of grade names and legends and prohibited their unauthorized use. It was not until 1997 with the creation of the CFIA[497] that Canada centralized its regulation and inspection of all food products. Even with this centralized administration, there has never been a successful comprehensive consolidation of labelling regulations under the various acts and regulations that regulate food safety, food quality, food inspection and food labelling, although attempts at consolidation have been made.[498]

3. food labelling in the consumer age and the "consumer" family of legislation

The *Consumer Packaging and Labelling Act* represented a stark departure from prior approaches to food labelling in Canada. Enacted in 1970, it unabashedly was based on the consumer objectives of protecting health and providing more accessible and useful

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(including Acts like the *Canada Dairy Products Act* (repealed in 1980/81/82), the *Natural Products Marketing Act*, 1934 c.57, the *Fruit, Vegetables and Honey Act*, S.C. 1935, c. 62, the *Canada Agricultural Products Standards Act* (being the genesis of the current *Canada Agricultural Products Act* and its extensive sets of regulations).

[497] *Canadian Food Inspection Agency Act*, S.C. 1997, c. 6.

[498] On April 22, 1999 the Canada Food Safety and Inspection Act (Bill C-80) was introduced into Parliament to consolidate the majority of existing food safety and inspection legislation. Unfortunately, it died on the order paper when that session of Parliament was prorogued. Attempts by various government departments to resuscitate the Bill at a later date all failed. The proposed Act would have modernized and consolidated eight Acts and 46 different sets of regulations. See K, Stolarik, "Benefits of Bill C-80" (CFIA, Ottawa, 1999) (on file with author).

consumer information. The Act required mandatory labelling of most consumer goods, including prepackaged foods. Sections 4, 7 and 10 set out general rules for labelling with more detailed provisions in the *Regulations* promulgated under the *Act*. These sections require that all prepackaged foods sold in Canada display a label containing a declaration of net quantity of the product in the form and manner required by the *Act* or *Regulations* and that this information be located on the principal display panel of the label clearly and prominently, easily legible and in distinct contrast to any other information or representation.[499]

The Act also set out general provisions to prevent the sale of products that display a label containing any false or misleading representation that relates to or may reasonably be regarded as relating to that product. This provision continues today is in addition to a similar one found in the *Food and Drugs Act*. A "false or misleading representation" under the *CPLA* includes:

> (*a*) any representation in which expressions, words, figures, depictions or symbols are used, arranged or shown in a manner that may reasonably be regarded as qualifying the declared net quantity of a prepackaged product or as likely to deceive a consumer with respect to the net quantity of a prepackaged product;
> (*b*) any expression, word, figure, depiction or symbol that implies or may reasonably be regarded as implying that a prepackaged product contains any matter not contained in it or does not contain any matter in fact contained in it; and
> (*c*) any description or illustration of the type, quality, performance, function, origin or method of manufacture or production of a prepackaged product that may reasonably be regarded as likely to deceive a consumer with respect to the matter so described or illustrated.[500]

While the Act increased the mandatory content for consumer product labels, it also "muddied the waters" with respect to food labelling. Judging from the content of the Act, it can be argued that no significant legislative coordination effort was undertaken before the *CPLA* came into force. As a result, the provisions of the CPLA in some regards only seemed to duplicate or, even worse in some cases, to conflict with existing provisions for food labelling required under the food safety and food trade streams of regulation. Thus at the

[499] Section 4.
[500] Section 7.

dawning of the XXIst century, Canadian food labelling legislation was to be found in several Acts and Regulation, a situation that remains even into the present. Excessive complexity, opaqueness and difficulty of in applying the law of food labelling are the inevitable consequences of this historical development of Canadian food labelling law.

Section 2 – The Current Situation

To appreciate the legislative environment for food labelling in Canada, it is necessary to know not just the historical development of food labelling and its current state, but also some basic facts about food production, food markets and the basic literacy skills of Canadians who read food labels.

Canada is the second largest country in the world with a land mass of almost 10 million square kilometres.[501] Less than 5% of it however, is arable land. Still, the amount of arable land in Canada is almost 3 times that of France and more than 12 times that of Ghana. Canada is indeed blessed with the ability to produce an abundance of food despite its somewhat harsh climate.[502] Today, with a population of about 30 million people, Canada continues its traditions of excess food production capacity which fuels its agricultural exports.[503]

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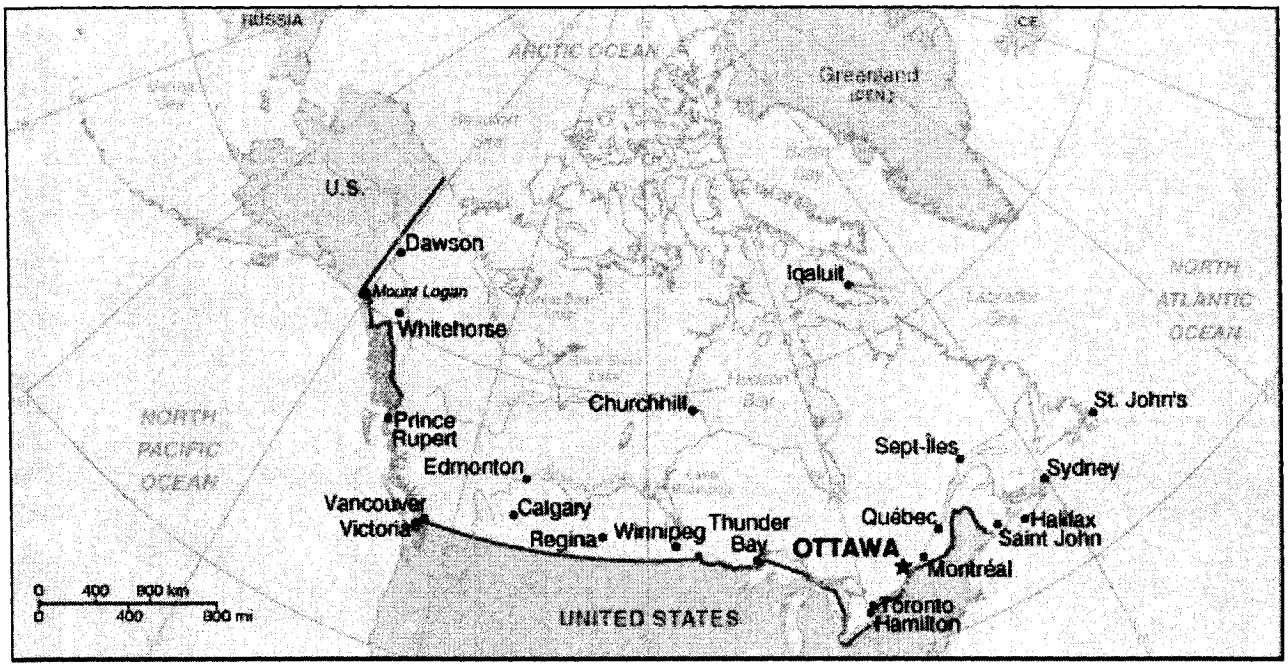
[501] The map below is courtesy of the United States Central Intelligence Agency, "The World Factbook", online : CIA <http://www.cia.gov/cia/publications/factbook/geos/ca.html>.

[502] Total agricultural production exceeds $28 billion, total processed food products and beverages production exceeds $51 billion and total retail food sales and food services sales exceeds $94 billion, Agriculture and Agri-Food Canada, Economic and Policy Analysis Directorate, "A Portrait of the Canadian Agri-Food System", (Ottawa: AAFC, 2000), Graph 1-1.

[503] In 1998, Canadian agriculture and agri-food exports exceeded $22 billion dollars and with imports around $16 billion dollars. All figures in this sub-section, unless otherwise noted, are in Canadian dollars for the year 1998 and are from Agriculture and Agri-Food Canada, Economic and Policy Analysis Directorate, "A Portrait of the Canadian Agri-Food System", (Ottawa: AAFC, 2000), Graph 1-1. Export and import figures for 2003 were $24 billion and $21 billion respectively. Agriculture and Agri-Food Canada, "Trade Summary Tables derived from Statistics Canada Merchandise Trade Database", Table 1 (online, AAFC, <http://www.agr.gc.ca/spb/rad-dra/publications/trdsmmtbl/trdsmmtbl_jan-jun04_e.pdf>).

Figure 4 - Map of Canada



Canadians spend about 13% of their total disposable income on food.[504] Food sales in Canada take two predominant forms—purchases of food products to be prepared at home and purchases of food for consumption outside the home in restaurants and other food service establishments. About 70% of Canadians' food budget is spent in stores and markets. This figure is down slightly from the 1982 figure of 75%.[505] When it comes to buying food for home use in Canada, more than 80% of every food dollar spent in stores was spent in a supermarket, about 10% purchased from specialty food stores, convenience stores and other types of stores, and the balance purchased from markets and other non-retail establishments.[506] All this to say that most of the food purchased for home preparation and use is prepackaged and labelled. While it is difficult to determine exactly how much food in Canada is actually labelled, it is reasonable to assert that least 80% of food purchased by

[504] At a household level, Canadian households spend about $124 week on food, a figure that has remained fairly constant over the past 5 years. Agriculture and Agri-Food Canada, Economic and Policy Analysis Directorate, "A Portrait of the Canadian Agri-Food System", (Ottawa: AAFC, 2000), Graph 1-1.
[505] Statistics Canada, "Food Consumption in Canada, Appendix B: Annual Food Expenditures per Person, by Province, Canada" in "Food Expenditure in Canada 2001". Catalogue no. 62-554-XIE at Table 1 at 9.
[506] Statistics Canada, "Food Consumption in Canada" at 10.

Canadian for home use will be prepackaged[507] and therefore require compliance with Canada's food labelling laws.

A first step to identifying whether Canada's labelling laws are effective is identifying whether people can read food labels. Literacy issues are not generally of concern for the majority of Canadians. Official literacy rates in Canada are estimated at 99% although this number is likely to be somewhat lower. The United Nations Human Development Report 2004 has reported that 16.6% of Canadians lack functional literacy skills.[508] This number is concentrated within certain communities, such as aboriginal peoples (First Nations, Inuit and Metis)[509] and immigrant populations.[510] Therefore, while not generally a concern, illiteracy must not be overlooked as an obstacle to food labelling in Canada.

Paragraph 1 - An overview of legislative content for food labelling in Canada

The major legislative pieces that make up Canadian food labelling law are set out in Table 7 below.

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[507] Author's calculation which adds the amounts spent on fresh fruits (7%) and fresh vegetables (8%) out of total food expenditures in stores. This number may be as high as 20%, given that other fresh fruits and vegetables are purchased in farmers' and other markets which are not included in these official statistics. Statistics Canada, "Food Consumption in Canada" at Table 1d at 18-23.

[508] United Nations Development Report, Human Development Report 2004: Cultural liberty in today's diverse world (New York: UNDP 2004), Statistical Tables.

[509] Movement for Canadian Literacy, "Literacy and Aboriginal Success" suggests that literacy rates for First Nations peoples in Canada is below 50%. (online, MCL <http:///www.literacy.ca/litand/13.htm.>). A similar figure of at or below 50% is cited in a speech by the Honourable Jane Stewart, Canadian Minister for Indian Affairs and Northern Development on the occasion of the unveiling of "Gathering Strength—Canada's Aboriginal Plan of Action (delivered 7 January 1988 in Ottawa) <http://sisis.nativeweb.org/clark/jan0798can.html>.

[510] Some estimates put Canada's immigrant population at around 5 million. Cohen, David, "Canada: The Place You Want to Be", Immigration Law Offices of Campbell and Cohen, Montreal; http:// canadavisa.com/documents/essays/place2be.htm (accessed 09 September 2004). However, for newly arrived immigrants, literacy in English or French may be a transitional rather than systemic obstacle. Interestingly however, one study shows that "there are higher proportions of immigrants to Canada at both the high and the low ends of the literacy scale compared to those who are native born". OECD and Statistics Canada , Literacy, Economy and Society: Results of the First International Adult Literacy Survey, Paris and Ottawa, 1995.

Table 7 - Overview of Canadian legislation affecting food labelling

Type of labelling legislation	federal legislation	provincial legislation
General labelling rules affecting all food products ("horizontal rules")	**Consumer Packaging and Labelling Act, (CPL Regulations)** **Food and Drugs Act (FD Regulations)** **Weights and Measures Act**	**None**
Labelling rules applying to production standards and naming of specified products or groups of products ("vertical rules")	**meat - Meat Inspection Act, (MI Regulations)** **fish - Fish Inspection Act, (FI Regulations)** **grains - Canada Grain Act, (CG Regulations)** **all other food products - Canada Agricultural Products Act (7 sets of Regulations for specific product groups)** **Food and Drugs Act, (FD Regulations)**	**meat - various provincial acts including** **(Manitoba) Meat Inspection Act** **(Ontario) Meat Inspection Act** **other products - [B.C.] Agri-food Choice and Quality Act** **[Ontario] Food Safety and Quality Act** **[Quebec] Loi sur les produits alimentaires**
Labelling rules arising from intellectual property and quality in food products	**Trade-marks Act;** **Canada Agricultural Products Act**[511] **Meat Inspection Act, R.S.C., 1985**[512]	**[Ontario] Vintners Quality Alliance Act** **[Ontario] Wine Content and Labelling Act** **[B.C] Wines of Marked Quality Regulation** **[B.C.] Organic Agricultural Products Certification Regulation**
Laws punishing food labelling non-compliance[513]	**all of the above statutes contain penalty provisions for non-compliance**	**all of the above statutes contain penalty provisions for non-compliance**

[511] The federal *Meat Inspection Act*, s.4 creates national trade marks for grade names for agricultural products and vests this intellectual property in the federal government of Canada.
[512] The *Canada Agricultural Products Act*, s.15 creates national trade marks for grade names for agricultural products and vests this intellectual property in the federal government of Canada.
[513] As seen above, it is important to bear in mind that several of other the other food statutes explored above, such as the *Meat Inspection Act* and the *Canada Agricultural Products Act* also contain provisions prohibiting false and misleading labelling. One could also include in this category the *Criminal Code*, R.S.C. 1985, c. C-46 which has provisions creating criminal liability for fraud, which could arise from widespread and willful deception arising from false labels on food products.

A. constitutional considerations

Canada is a federal state with a constitutional monarchy. The two most important written portions of the Canadian constitution are the *Constitution Act, 1867* and the *Constitution Act, 1982*. The former establishes "which organs can exercise legislative power (making new law), executive power (implementing law) and judicial power (adjudicating disputes), and the limitations on those powers."[514] However, as Canada is a federal state, the Constitution also allocates competencies over heads of powers, or subject matters, to either the federal Parliament or to Provincial Legislatures.

The executive branch is led by the head of state, Queen Elizabeth II represented in Canada by Governor-General Adrienne Clarkson and for the provinces by 10 Lieutenant-Governors. The head of government in Canada is the Prime Minister, currently Mr. Paul Martin. Each province has a head of provincial government called the Premier. At the federal level, the Prime Minister is assisted by his Cabinet of Ministers, each of whom is selected by the Prime Minister from among elected Parliamentarians from his own political party. The Ministers oversee several government departments. From a food labelling perspective, the relevant ministries are Health Canada, Agriculture and Agri-food Canada, Industry Canada and Justice Canada. Several boards and agencies are created under each ministry, with the most significant one with regards to food labelling, being the Canadian Food Inspection Agency. At the provincial level, the Premier creates a Cabinet of Ministers. There are provincial Ministries and boards and agencies which assist the executive branch in the carrying out of functions. Important provincial ministries which, at times, contribute to Canadian food labelling law are the Ministries of Agriculture and Food and Ministries of Health, but these provincial ministries carry different names depending on the province.

Federal laws are passed in the bicameral Parliament[515] which sits in Ottawa, the nation's capital city. Provincial laws are passed in unicameral Legislatures which sit in the provincial capitals of each of Canada's 10 provinces. Parliament and Legislatures operate

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[514] Hogg, P. W. *Constitutional Law of Canada* (looseleaf) (Toronto: Carswell, 1997) at 1.1.

[515] 308 members elected by direct, popular vote for terms of up to five years in the House of Commons and 105 members in the Senate appointed by the Governor-General on the advice of the Prime Minister and serve until reaching 75 years of age.

generally along the lines of British Parliamentary tradition with Bills proposed by government, read and debated in Parliament or the Provincial Legislature and then passed with a final reading and vote in both houses of Parliament for federal legislation or in the Provincial Legislature for provincial legislation. On the basis of powers delegated in the laws passed by Parliament and the provincial Legislatures, the executive branch, through its Ministries and agencies, is empowered to enact rules and regulations to execute the actions and objectives set out in the laws.

The judicial branch of government in Canada has both provincial and federal components which merge as all final appeals are decided by the Supreme Court of Canada, which sits in Ottawa. Unfortunately, there has been little judicial activity in the area of food labelling legislation and thus few pronouncements on its interpretation and enforcement by the Supreme Court.

Canadian law-making in the area of food labelling, or any other area for that matter, is complicated by the fact that Canada is a federal state. The *Constitution Act, 1867*[516] divides legislative competencies between the federal and provincial governments. A detailed discussion of the interpretation of these powers in relation to agriculture has been discussed elsewhere.[517] However, with respect to food labelling, constitutional issues have not been systematically explored in the legal literature.

Under the *Constitution Act, 1867*, all subject matters are allocated to either the federal or provincial level of government. In most cases, this grant of power over a subject matter will be exclusive to one of the level of governments. Section 91 of the *Constitution Act*, 1867 lists those subject matters over which the federal government has exclusive power while section 92 lists provincial powers. Sections 93-95 outline shared powers, one of which is over the subject matter of agriculture. Any incursion into an area of exclusive power by the other level of government can result in legislation, if challenged, being declared invalid by Canadian courts. However, in some limited circumstances, a matter for legislation will

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[516] 30 & 31 Vict., c. 3 (U.K.), reprinted in R.S.C. 1985, App. II, No. 5.
[517] Fuller, R. and D. Buckingham, *Agriculture Law in Canada* (Toronto: Butterworths 1999)

not clearly fall within a named head of power set out in sections 91-95. In these cases, courts are called upon to decide if the matter is one of exclusive provincial or federal power or if it is a matter of concurrent jurisdiction. Sometimes, courts will decide that where the subject matter of legislation comes primarily within the competence of one level of government, incidental effects on areas of jurisdiction of the other level of government may be permissible as long as the "pith and substance" of the legislation belongs to the level of government enacting the legislation.

Sections 91 and 92 make no specific or direct reference to agriculture, food or food labelling. Section 95 gives legislative competence to both levels of government to enact "Laws in relation to Agriculture". At the time of Confederation, the issue of legislative competence over agriculture was hotly debated by Canadian politicians.[518] However, the power over agriculture has never really been relied on as the constitutional basis for food law although it has been used to support other federal legislation regulating agricultural production issues.[519]

While there was considerable debate about the jurisdictional basis for the food adulteration law during the presentation of the first *Adulteration Act* in 1884, the debate did not centre upon nor even consider section 95. Instead during Parliamentary debates of the

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[518] Donald E. Buckingham, "Dead Stump or Living Tree: A Look at the S. 95 Agriculture Power under the Constitution Act, 1867" (Paper, Ottawa 2004) [unpublished].

[519] The use of the shared s.95 power over agriculture for food labelling has not been pursued by either level of government as the ambit of the head of power has been significantly curtailed since the 1925 Supreme Court of Canada decision in *King v. Eastern Terminal Elevator*. [1925] 3 D.L.R. 1 at 21 (S.C.C.). For a detailed discussion of this case, see Fuller and Buckingham, Agriculture Law in Canada, supra, pp142-44. In that case Mignault J. drew a line between measures which are for the "encouragement or support of agriculture" and those which are not, with only the former being supportable under s. 95. The case appears to still be good law in Canada. Section 95 has been recognized, however, as the head of jurisdiction to support federal legislation relating to the standardization of production inputs and the protection of animal husbandry practices but not production outputs once they leave the farm gate. At least two cases specifically deny the federal government's ability to regulate food products, including the labelling of them, beyond the farm gate under the authority of s. 95. In *Reference re Importation of Margarine*,[1949] S.C.R. 1, [1949] 1 D.L.R. 433; affd [1950] 4 D.L.R. 689, [1951] A.C. 179 (P.C.) the Supreme Court of Canada held that the regulation of margarine under the federal *Dairy Industry Act* was not a law in relation to agriculture under s. 95. In the *Dominion Stores* case, the majority held that the regulations made under the *Canada Agricultural Products Standards Act* pertaining to apple grade names were held not to be "in relation to agriculture". Estey J. wrote: "I say no more than to point out that these apples clearly form no part of the process of agriculture once they have entered the commercial marketing conduits and therefore I believe the fate of these proceedings in no way turns upon the availability of s. 95 of the *British North America Act*."

Bill, members questioned whether the legislation was grounded in the federal powers over criminal law or the trade and commerce power or in the provincial powers over property and civil rights and the administration of justice in the provinces.[520] In Parliament, Liberal David Mills said:

> This is regulation of a civil right; it is interfering with the rights of the Provinces, and the hon. gentlemen might just as well take charge of all these municipal and local affairs in every town and city of this Dominion, as undertake to deal with this particular question. It is not part of the criminal law...[521]

During the same debate, the then Prime Minister Macdonald disagreed:

> The Bill is not one for the protection of public health, but it is to prevent adulterated articles from being sent from one Province to another, or from Canada, as a whole, to a foreign country.... Chalk and water, for instance, have been very extensively used to adulterate milk, the mixture containing, perhaps, a very little sprinkling of milk. Such adulteration is considered to be an offence, not only against morals and society, but an offence of the character of a crime. It is not enough to limit proscription to adulterated articles that won't poison, that won't kill, but we must include articles unwholesome in themselves.[522]

This exchange between Mills and Macdonald captures the tension between the principal constitutional powers at play in Canada concerning the promulgation of legislation affecting food and food labelling. The position of the Prime Minister carried the day. Oddly enough however, Prime Minister Macdonald's argument is somewhat confusing in that one is not sure under which of the two separate grounds--trade and commerce and criminal law—his argument succeeds. With respect to the argument concerning the federal government having exclusive jurisdiction over trade and commerce, the Prime Minister was quite right. This constitutional grounding for food labelling legislation is still an important one particularly for food standards. However, it has its limits.[523] It cannot strictly speaking regulate transactions that occur wholly within one province as that regulatory power belongs to the provinces under section 92(13) "property and civil rights".

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[520] Lauer, *The Rage for Cheapness* at 42.
[521] House of Commons Debates, Vol. 16 (2nd Session, 5th Parliament, March 12-April 19, 1884), pp. 1246-1248 as found in Lauer, *The Rage for Cheapness* at 42-43.
[522] House of Commons Debates, Vol. 16 (2nd Session, 5th Parliament, March 12-April 19, 1884), pp. 1246-1248 as found in Lauer, *The Rage for Cheapness* at 42-43.
[523] See discussion, *infra*, with respect to the decisions of the Supreme Court of Canada in *R. v. Dominion Stores Limited* [1980] 1. S.C.R. 844 (S.C.C.) and *Labatt Brewing Co. v. Canada* [1980] 1. S.C.R. 914 (S.C.C.).

His second point, that the *Adulteration Act* was not about public health but rather about criminal law, probably still represents sound constitutional reasoning. Convincing arguments are still made to the effect that the division of powers between the federal and provincial governments considers the protection of public order and human health and safety a matter of federal jurisdiction under the section 91(27) "criminal law" power whereas matters of a general local nature occurring within a province such as health care are matters of provincial jurisdiction under section 92(13) "property and civil rights".

Given the development of Canadian constitutional law, it is safe to conclude that competence for enacting food labelling law is one that falls almost exclusively to the federal government, with only a few exceptions. The federal government's ability to regulate food labelling is grounded under several of the subject matters identified in section 91. The criminal law power (section 91(27)), the trade and commerce power (section 91(2)), the weights and measures power (section 91(17)), the trade marks powers (section 91(22)) and the residual "Peace, Order and Good Government" power may all provide justification for the various pieces of food labelling legislation currently in force in Canada.

Provinces have a far more limited range of constitutional powers under which they can enact food labelling laws, and those laws can only have effect for products produced or sold in that province which are not traded nationally or internationally. Provinces can, of course, exercise their legislative competence over matters affecting property and civil rights within the province. Thus some provinces have enacted legislation for the labelling of certain food items like wine[524] or for foods with certain production or quality characteristics.[525] Even this produce will be subject to federal food labelling legislation,

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[524] [British Columbia] *Wines of Marked Quality Regulation*, B.C. Reg. 79/2005 (effective August 1, 2005); [Ontario] *Wine Content and Labelling Act, 2000,* S.O. 2000, c. 26; [Ontario Wine Content and Labelling Act] *General Regulation*, O. Reg. 659/00; [Ontario] *Vintners Quality Alliance Act*, 1999, S.O. 1999, c. 3.

[525] For example, provinces regulate to varying degrees the labelling of organic produce, fruits and vegetables, meat and other food products produced within their provincial boundaries and not destined for international or interprovincial trade. See for example [British Columbia] *Agri-food Choice and Quality Act*, S.B.C. 2000, c. 20; [British Columbia] *Organic Agricultural Products Certification Regulation*, B.C. Reg. 200/93; [Ontario] *Food Safety and Quality Act, 2001,* S.O. 2001, c. 20; [Ontario] *Health Protection and Promotion Act*, R.S.O. 1990, c. H.7; [Ontario] *Meat Inspection Act (Ontario),* R.S.O. 1990, c. M.5; [Ontario Meat Inspection Act] *General Regulation*, O. Reg. 632/92; [Québec] *Loi sur les produits alimentaires*, L.R.Q, c. P-29; [Québec]

grounded in the criminal law or in the trade and commerce power should the produce move out of province. Thus provincial food labelling law plays a very limited role in labelling Canadian food products.

B. the matrix of food labelling law in Canada

The current legislative framework for food labelling is a product of its diffuse history and as such is relatively complex. Whether one examines the framework chronologically, by rule type or by jurisdiction there is no neat analytical framework. This section will introduce the general contents of the Canadian legislation using the same general framework as was used for France above: prohibited claims, required labelling and reserved claims.

1. prohibited claims

There are few absolute prohibitions on what may be written on labels under the six primary statutes[526] that regulate food labelling in Canada. The prohibitions can be grouped into three categories:

1° no elements can be included on a label that a food is a treatment, preventive or cure of diseases, disorders or abnormal physical states;
2° no elements may be included on a label that are (a) scandalous, obscene, immoral; (b) are associated with entities or organizations such as the Royal Family and for which no permission for their use has been obtained; or (c) refer to the Food and Drugs Act or its Regulation; and
3° no elements can appear on a label that would mislead, deceive or otherwise convey false information to the consumer.

1° no elements can be included on a label that a food is a treatment, preventive or cure of diseases, disorders or abnormal physical states

Section 3(2) of the *FDA* states that: "No person shall sell any food, drug, cosmetic or device (a) that is represented by a label, ...as a treatment, preventative or cure for any of the diseases, disorders or abnormal physical states referred to in Schedule A." This provision,

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Règlement sur les aliments, R. R. Q., 1981, c. P-29, r.1; [Québec] *Règlement sur les fruits et légumes frais*, R. R. Q., 1981, c. P-29, r. 3.

[526] *Food and Drugs Act (FDA) ; the Consumer Packaging and Labelling Act (CPLA) ; the Meat Inspection Act (MIA) ; the Fish Inspection Act (FIA) ; the Canadian Agricultural Products Act (CAPA) and the Trade-marks Act (TMA).*

which has been part of Canadian law since 1934, prevents food labels from containing claims that the food or its properties can treat, prevent or cure diseases. This has two immediate effects. First, the provision prohibits food labels from being a means to communicate any information about the food's impact on certain diseases. Second, without some other legislative provisions, it makes it difficult for food producers to label food products with information that their products might have certain health benefits. The first concern still remains a feature of Canadian food law, with claims about the listed diseases impossible to put on food labels. The second concern, however, has been addressed with new legislation that allows food processors and vendors the right to include certain specified health and nutrition claims.

2° no elements may be included on a label that are scandalous, obscene, immoral or are associated with entities or organizations such as the Royal Family and for which no permission for their use has been obtained

Section 9(1)(j) of the *TMA* prohibits the use of marks on labels that are scandalous, obscene or immoral words. The remainder of section 9 prohibits the use of words or images relating to the Royal Family, flags, national symbols, and other public authorities—for example, Olympic marks and university emblems,[527] unless used with permission.

Section B.01.013(1) of the *FDA Regulations* prohibits any reference, direct or indirect, to the *FDA* or to its *Regulations* on any label of a food. This prohibition has been established to avoid vendors from making claims about how their product has been approved by or complies with federal authorities and regulations when in fact all foods must be so approved. There is however, a very limited set of circumstances where this prohibition is

[527] David Vaver, *Intellectual Property Law: Copyright, Patents, Trademarks* (Concord (Ontario): Irwin Law, 1997) at 197. See also Roger T. Hughes et al., *Hughes on Trade Marks*, 2nd ed. (Toronto: Butterworths, looseleaf); Kelly Gill & Scott R. Jolliffe, *Fox on Canadian Law of Trade-marks and Unfair Competition*, 4th ed. (Toronto: Carswell, 2002); Gordon Henderson, *Trade-Marks Law in Canada* (Toronto: Carswell, 1993).

relaxed.[528] There is also a general prohibition against the use of the term "kosher" on a label unless the food meets the religious requirements of the kashruth applicable to it.[529]

3° no elements may be included that would mislead, deceive or otherwise convey false information to the consumer

There is a general prohibition against the use of false, misleading or deceptive labelling on food found in provisions in several statutes. All information which a seller is required, or chooses, to place on a food label must not be false, misleading or deceptive. Each of several pieces of legislation has provisions to protect against fraud in the marketplace.

Two statutes speak specifically to the false and misleading labelling of food. Pursuant to section 5(1) of the *FDA*: "No person shall *label, package*, treat, process, sell or advertise any food in a manner that is false, misleading or deceptive or is likely to create an erroneous impression regarding its character, value, quantity, composition, merit or safety" (emphasis added). Section 7 of the *CPLA* prohibits the sale or advertising of a product that has a label which contains any false or misleading representation relating to the product. "False or misleading representation" is defined in section 7(2) and includes: any representation likely to deceive a consumer with respect to the net quantity of a prepackaged product;[530] any expression that implies that a prepackaged product contains any matter not contained in it[531] or any description of the type, quality, performance, function, origin or

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[528] Subsection (2) permits manufacturers of the food for which a specific Standard has been developed and promulgated in the *Food and Drugs Regulations* to state on the food's label that it "complies with the standard for (naming the common name of the food in respect of which the claim is made) in the *Food and Drug Regulations*".

[529] *FDA Regulations,* Part B Foods - Division 1, s. B.01.049.

[530] *CPLA*, Sec.7(2)(a). The full definition reads "any representation in which expressions, words, figures, depictions or symbols are used, arranged or shown in a manner that may reasonably be regarded as qualifying the declared net quantity of a prepackaged product or as likely to deceive a consumer with respect to the net quantity of a prepackaged product.

[531] CPLA, Sec.7(2)(*b*). The full definition reads "any expression, word, figure, depiction or symbol that implies or may reasonably be regarded as implying that a prepackaged product contains any matter not contained in it or does not contain any matter in fact contained in it."

method of manufacture or production of a prepackaged product that may reasonably deceive a consumer.[532]

Two other statutes outline prohibitions on fraudulent labelling for all products in the market, including of course, food products.[533] Under section 7 of the *TMA*, "no person shall: ... (*d*) make use, in association with wares or services, of any description that is false in a material respect and likely to mislead the public as to (i) the character, quality, quantity or composition, (ii) the geographical origin, or (iii) the mode of the manufacture, production or performance of the wares or services." Section 52(1) of the *Competition Act* states that : "No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect." Section 52 (2) adds that a representation can be expressed on an article offered or displayed for sale or its wrapper or container, i.e. the product's label.

Finally, two statutes will deem non-compliance with labelling standards or mandatory elements on any label to be "false and misleading". Both the *FDA* and the *CPLA* contain provisions to the effect that if required information is not included on the label, then those labels will be deemed to be false and misleading. For example, Section 5(2) of the *FDA* states that: "An article of food that is not labelled or packaged as required by, or is labelled or packaged contrary to, the regulations shall be deemed to be labelled or packaged contrary to subsection (1)."

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[532] CPLA, Sec.7(2)(c). The full definition reads (*c*) any description or illustration of the type, quality, performance, function, origin or method of manufacture or production of a prepackaged product that may reasonably be regarded as likely to deceive a consumer with respect to the matter so described or illustrated.

[533] One might also include a third statute in this group. Under s. 9(1) of the *Weights and Measures Act*: No trader shall sell, offer for sale or have in his possession for sale any commodity the quantity of which has been determined on the basis of number or measure, unless the quantity of the commodity is stated accurately within prescribed limits of error and in the manner prescribed in terms of number or units of measurement of length, area, volume or capacity, or mass or weight (*a*) on the commodity, (*b*) on the package containing the commodity, or (*c*) on a shipping bill, bill of lading or other document accompanying the commodity, as may be prescribed; (2) Subsection (1) does not apply with respect to any commodity that has been packaged, on the basis of number or measure, or labelled, in terms of number or a unit of measurement, as required or authorized by or under any other Act of Parliament.

2. mandatory elements to be included on every food label

Mandatory labelling elements generally are required to pursue consumer objectives of protection of consumer health and provision of consumer information. Certain mandatory declarations are required on all food labels under the *FDA* and the *CPLA*. The Regulations under these Acts set out general requirements that apply to the labelling of all foods ("horizontal" requirements). The *FD Regulations* and the Regulations under the other pertinent Acts explored above also set out specific requirements that apply to certain categories of foods ("vertical" requirements).

a. horizontal requirements

Mandatory requirements for the labelling of all foods in Canada relate to both form and content of the label. To meet the mandatory requirements, a food label must:

- be clear and its information readily discernible to the purchaser;[534]
- be easily legible;[535]
- be in a specific font size;[536]
- be in both official languages;[537]
- have specified elements on a principal display panel (PDP);[538]
- have no required elements on the bottom of the food product.[539]

[534] *FD Regulations*,, s. A.01.016.
[535] *CPLA*, s. 4(2) and the *CPL Regulations*, s. 15.
[536] *CPL Regulations*, s. 14.
[537] *FD Regulations*, s. B.01.012(2); and the *CPL Regulations*, s.6(2).
[538] Under *FD Regulations*, s. B.01.001 "principal display panel" means, despite the meaning assigned to that term in section A.01.010, (a) in the case of a label applied to a prepackaged product that is subject to the *Consumer Packaging and Labelling Act* the principal display panel as defined in the *Consumer Packaging and Labelling Regulations*, (b) in the case of a label applied to a prepackaged product that is not subject to the *Consumer Packaging and Labelling Act*, that part of the label applied to all or part of the side or surface of the container that is displayed or visible under normal or customary conditions of sale or use, and where the container does not have such a side or surface, that part of the label applied to any part of the container, except the bottom, if any, and (c) in the case of a label applied to a food that is not a prepackaged product, that part of the label applied to all or part of the side or surface of the food that is displayed or visible under normal or customary conditions of sale or use; (*espace principal*).
[539] *FD Regulations*, s. B.01.005.

With respect to the mandatory elements to be listed on a label, the following must be included on every label of prepackaged food in Canada:

1° the common name of the product (to be displayed on the PDP);[540]

2° net quantity in metric units of measurement (on PDP);[541]

3° declaration of products that have certain compositional characteristics[542]

4° the identity and principal place of business of the person by or for whom the food was manufactured or produced;[543]

5° durable life date ("best before") or packaging date ("packaged on") for products with less than 91 days expected shelf life;[544]

6° a list of ingredients, shown in descending order of their proportion of the prepackaged product;[545]

7° nutritional fact table (mandatory as of December 12, 2005).[546]

1° the common name of the product

Under the *FD Regulations*, the common name of a food product means "(a) the name of the food printed in boldface type in the *FD Regulations*,[547] (b) the name prescribed by any other regulation, or (c) if the name of the food is not so printed or prescribed, the name by

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[540] *FD Regulations*, s. B.01.006(1) and B.01.010; the *CPLA*, s. 10(b)(ii) which requires "the identity of the prepackaged product in terms of its common or generic name or in terms of its function"; and *the CPL Regulations*, s. 12(b) and s. 30.

[541] *CPLA*, section 4 requires that all prepackaged products be labelled with the net quantity of the product either by count or by a unit of measurement set out in the *Weights and Measures Act*. The *Weights and Measures Act* and *Regulations* require a declaration of net quantity for foods that have not been prepackaged for retail sale; and CPL Regulations s. 12(a).

[542] Such as having previously been "frozen" (*FD Regulations,* s. B.01.080(2)); containing "simulated" rather than real ingredients (*FD Regulations*, s. B.01.100) with other simulated and artificial flavourings must be declared pursuant to s. 34(1) of the *CPL Regulations*; having been "irradiated" (*FD Regulations*, s. B.01.035); or containing additives (*FD Regulations*, s. B.16.001).

[543] *FD Regulations*, s. B.01.007(1.1)(a); and also *CPLA*, s. 10(b)(i); and *CPL Regulations*, s. 13.

[544] *FD Regulations*, s. B.01.007(1.1(b) to 8).

[545] *FD Regulations*, s. B.01.008(1)(b) to 10).

[546] *FD Regulations*, s. B.01.401(1) "Except as otherwise provided in this section and sections B.01.402 to B.01.406 and B.01.467, the label of a prepackaged product shall carry a nutrition facts table that contains only the information set out in column 1 of the table to this section expressed using a description set out in column 2, in the unit set out in column 3 and in the manner set out in column 4 (author's emphasis).

[547] All foods printed in bold face print are foods for which a product standard is set under the *FD Regulations*. See infra, *FD Regulation* B.14.015A for "Medium Ground Beef". These foods are referred to as "standardized" food products.

which the food is generally known."[548] This basic provision is a window onto the regulated landscape of Canadian food law. Under Canadian law, food vendors do not have complete liberty to call their products whatever they would like but must in certain circumstances use "legislated names." For example beef that is ground up and sold cannot be labelled as "minced beef" or "hamburger meat", or "sausage meat" as it might be known in other countries but instead must be called "ground beef". Moreover, it cannot simply be sold as "ground beef" but must instead carry the qualifier of "lean", "medium" or "regular". Thus the *Food and Drug Regulation* B.14.015A states as follows:

> [S]. **Medium Ground Beef** shall be beef meat processed by grinding and shall contain not more than 23 per cent beef fat, as determined by official method FO-33, Determination of Fat in Meat and Simulated Meat Products, October 15, 1981.

Not to use this name would constitute false and misleading labelling under both the *FDA* and the *CPLA*.[549]

2° the net quantity in metric units of measurement (on PDP)

This requirement is relatively straight forward. In some limited circumstances, the quantity can be given in number of pieces of the food item. Secondly, non-metric measures may also be included on the label as long as the two measures are in close proximity to each other on the label.

3° declaration of products that have certain compositional characteristics such as having previously been "frozen" (on PDP), containing "simulated" rather than real ingredients (on PDP) or having been "irradiated" or containing additives

Legal provisions scattered throughout the *FD Regulations* require that certain compositional characteristics be declared on the label of food products. Examples include processing characteristics like "frozen" [550] and "irradiated" [551]. Other characteristics that

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[548] *FD Regulations*, s. B.01.001 "common name".
[549] Of course, not only the correct name must be used for a standardized product, that is those marked the symbol [S] and with a name in bold print, but the product itself must meet the standard specifications which in the case of medium ground beef means that the meat must be entirely beef having no more than 23% beef fat.
[550] *FD Regulations*, s. B.01.080(2).
[551] *FD Regulations*, s. B.01.035.

must also be declared include words like "simulated"[552] for products that could potentially be deceptive substitutes for traditional names and preparations of foods. As well, there are requirements in *FDA Regulations* that specify which additives may be used in food products and that all additives must be declared in the list of ingredients. [553]

4° the identity and principal place of business of the person by or for whom the food was manufactured or produced

Section B.01.007 of the *Food and Drugs Regulations* requires the identity and principal place of business of the person by or for whom the food was manufactured or produced.[554] While the Acts and Regulations are not specific, it would seem that to meet these requirements, the manufacturer or producer would have to include a contact address and/or telephone number.

5° the durable life date ("best before") or packaging date ("packaged on") for products with less than 91 days expected shelf life

The general rule under Canadian law is that product dating is permitted but not required unless the food product has a shelf life of less than 91 days. Then product dating is required and must be set out according to *FD Regulations*.[555] If the prepackaged product has a durable life of 90 days or less and is packaged at a place other than the retail premises from which it is to be sold, then the durable life date ("best before"), and instructions for the proper storage, if any are necessary because of health risks. When a prepackaged product has a durable life of 90 days or less and is packaged on the retail premises from which it is to be sold, then the label requires a packaging date "packaged on", rather than "best before" date. The durable life of the food must also be marked on the label.[556]

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[552] *FD Regulations*, s. B.01.100. See also simulated and artificial flavourings that must be declared, s. 34(1) of the *CPL Regulations*.
[553] *FD Regulations*, s. B.16.001.
[554] This is one of the few elements on a Canadian food label that is permitted by Regulation to appear in only one and not necessarily in both of Canada's two official languages. *CPL Regulations*, s. 6.
[555] *FD Regulations*, s. B.01.007.
[556] *FD Regulations*, s. B.01.007(1.1).

6° a list of ingredients, shown in descending order of their proportion of the prepackaged product

Canadian law regarding the listing of ingredients is quite permissive, at least compared with that of France. In Canada, all that is required is a simple listing of the ingredients in descending order. Two major problems are evident. First, there are a number of compound ingredients for which the constituent ingredients need not be listed. Examples of permitted compound ingredients on labels are "starches", "vinegar", "flour", "relish or cheese"[557], "vegetable oil" and "spice mixtures". Such compound ingredients can pose a threat to persons suffering from severe allergenic reactions to even minute traces of proteins of specific products.[558]

Second, percentages of ingredients are not required to be listed even where an ingredient is highlighted on the label or where there might be a huge difference in product characteristics depending on how much of each ingredient is in the product. Take for example, a product labelled as "olive and canola oil". There is no requirement that the label name put the higher content oil first, only that the higher content oil appears first in the list of ingredients. Even then the consumer has no way of knowing whether there is 95% canola and 5% olive oil or 55% canola and 45% olive oil. The most a consumer can know is that there is more canola oil than olive oil in the product.

7° the nutritional fact table (currently voluntary and mandatory as of December 12, 2005)

On January 1, 2003, amendments were enacted that usher in a new dimension in food labelling law in Canada—the mandatory inclusion of a nutritional fact table for all[559] prepackaged foods. The nutritional fact table requirement is being phased-in over 4 years. It has been required since 2003 for all food products where a nutritional claim has been made on the label or in advertising about the product. It will become mandatory on December 12,

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[557] When less than 10% of the total product.
[558] All peanut products must be declared, even if they are part of a compound product. *FD Regulations*, s. B.02.009(4).
[559] Some exceptions were set out in the Regulations such as for one bite confections, milk and cream in refillable glass bottles, single portion packs meant to be served with meals, fresh fruit and vegetables and raw, single ingredient meat, poultry and fish, except for ground meat and ground poultry.

2005 for all products sold by persons with food sales of more than $1,000,000 annually in Canada and by December 12, 2007 for all other persons.[560]

The nutrient fact table is very precisely set out in the *FD Regulations* and deviations from it are not possible unless spelled out in these Regulations. 13 elements must be set out in the nutrient fact table: (1) serving size; (2) calories; (3) fat; (4) saturated fat, (5) trans fat, (6) the sum of saturated and trans fat, (7) cholesterol, (8) sodium, (9) carbohydrate, (10) fibre, (11) sugars, (12) protein, (13) vitamins and minerals, more precisely: (a) vitamin A, (b) vitamin C, (c) calcium, and (d) iron.[561] Some authors consider the core list as including 13 nutrients plus calories.[562]

Food vendors may include an additional 30 nutrients[563] on product labels but only these 30 may be represented and they must be represented according to the strict requirements of the Regulations. As well, the format for the nutrition fact table is very strictly regulated, complete with font size, ink colours and permitted shapes and orientation of the table itself.[564]

Given the technical complexity of the regulations and the need for strict compliance with them, the creation of nutrition fact tables will be a complex and costly process. Professional guidance both from private firms specializing in food labelling and from government sources[565], will be necessary both for domestic producers and vendors as well as

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[560] Some additional exemptions exist for roadside sales, farmers' markets, craft shows, flea markets, fairs and sugar bushes if the seller is the person who prepared the food product.
[561] *FD Regulations*, s. B.01.401 "Table Core Information".
[562] Yin Lee, "Nutrition Labelling – Compliance and Enforcement". A paper presented to the National Forum on Food Safety and Security: Ensuring Product Integrity in the Marketplace, Toronto, February 23-24, 2004. See also Alice Tseng, "Complying with the New Food Labelling Regulations". A paper presented to the National Forum on Food Safety and Security: Ensuring Product Integrity in the Marketplace, Toronto, February 23-24, 2004.; and Brenda Watson "Nutrition Labelling: Opportunities and Challenges". A paper presented to the National Forum on Food Safety and Security: Ensuring Product Integrity in the Marketplace, Toronto, February 23-24, 2004. See also See specifically, CFIA, "2003 Guide to Food Labelling and Advertising" (Ottawa: CFIA, 2003 (looseleaf service)) online: <http://www.inspection.gc.ca/english/fssa/labeti/guide/toce.shtml> at para 2.9.
[563] Examples include the amount of omega-6 polyunsatrated fatty acids, omega-3 polyunsaturated fatty acids and monounsaturated fatty acids.
[564] *FD Regulations*, s. B.01.450 *et seq.*
[565] See specifically, CFIA, "2003 Guide to Food Labelling and Advertising" (Ottawa: CFIA, 2003 (looseleaf service)) online: <http://www.inspection.gc.ca/english/fssa/labeti/guide/toce.shtml>.

producers from abroad and their importers in Canada. At least some of these associated costs will have to be picked up by the consumer. However, the information provided by nutrition fact tables is for the benefit of the consumer. Whether the consumer will be able to adequately make use of the information offered is a question yet to be answered. These new legal requirements for mandatory nutrition fact tables underscore the current Canadian approach for more food labelling pursuing consumer-oriented objectives.

b. vertical requirements

Besides the mandatory elements that must appear on all prepackaged food labels, a staggering number of additional labelling provisions exist in several statutes for specific food products. They are too numerous to explore in any detail here but it is important to note that they are mandatory for the specific food products covered.

Many of these "vertical requirements" are contained within and along side the "horizontal requirements" in the *FD Regulations*. Take the example cited above for ground beef. Another example would be *FD Regulation*, Division 8 - Dairy Products - B.08.008 which requires that "No person shall sell sterilized milk unless the label carries the statement 'This milk is not a concentrated product, but has only the food value of normal milk'". Still food standards and labelling requirements in the *FD Regulations* have developed historically to safeguard consumer expectations and to level the playing field amongst producers.

As well, many of the agriculture marketing statutes under the food trade family of statutes contain commodity-specific labelling requirements. Sections 46 and 89-123 of the *Meat Inspection Regulations* set out specific rules for labelling meats. Sections 25-33 of the *Fish Inspection Regulations* set out specific rules for labelling fish and fish containers. Under the *CAPA*, egg labelling regulations are contained in sections 14-22.1 of the *Egg Regulations*; dairy product labelling under sections 17-23 of the *Dairy Products Regulations*; fresh fruit and vegetable labelling under sections 4-26 of the *Fresh Fruit and Vegetable Regulations*; honey labelling under sections 35-37 of the *Honey Regulations*; livestock and poultry grading rules and corresponding marks under sections 5-12 of the

Livestock and Poultry Grading Regulations; maple products labelling under sections 11-12 of the *Maple Products Regulations*; processed egg labelling under sections 12-14 of the *Processed Egg Regulations*; and processed products labelling under sections 31-44 of the *Processed Products Regulations*. These requirements are often in addition to those specifically applicable to the same products outlined in the *FD Regulations*.

3. reserved claims

Reserved claims are those elements on food labels that are neither prohibited claims that cannot appear on labels nor mandatory claims that must appear on labels. Reserved claims include all label elements that may be used subject to the user meeting certain conditions. There are three types of reserved claims in Canadian food labelling law. There are health-related food claims, the use of which is circumscribed by the *FD Regulations*. There are grading names that are reserved under different pieces of marketing legislation. Finally, there are those claims that are reserved as a result of the Canadian trade mark law system.

-health-related food claims

Along with the reform package that brought mandatory nutrition fact table labelling to Canada in 2003 came two other significant changes that would "positively list" all permitted uses of nutrient content claims and diet-related health claims.

Nutrient content claims, unlike the nutrition fact table, are individual claims about a food's nutrient profile. Examples include "fat free", "100% fat free", "source of omega-3 polyunsaturates" "low sodium", "high fibre", "light".[566] They require a bench mark for their significance. The amendments to the *FD Regulations* provide a list of nutrient claims and their benchmarks. Products which meet the benchmarks can use the specified claim, i.e."low fat" products must have a fat content below the maximum allowable content for that product. Products which do not meet the benchmark cannot bear the nutrient claim.

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[566] These examples are courtesy Alice Tseng, "Complying with the New Food Labelling Regulations". A paper presented to the National Forum on Food Safety and Security: Ensuring Product Integrity in the Marketplace, Toronto, February 23-24, 2004.

Moreover, only the 47 permitted nutrient claims can be used on food labels. If the nutrient claim that a company wishes to use is not on the "positive list" and it goes ahead and uses it, then it will be engaging in false and misleading labelling practices.

Diet-related health claims can be used only if certain compositional conditions apply. The *FD Regulations* permit only five such claims and the wording of the claim on the label must be identical to that in the *FD Regulations*.[567] An example of one such permitted claim comes from *FD Regulation* B.01.603 "Table" and reads as follows:

> (1) "A healthy diet containing foods high in potassium and low in sodium may reduce the risk of high blood pressure, a risk factor for stroke and heart disease. (Naming the food) is sodium-free."

For each of the five permitted health claims[568] scientific studies have concluded that there is a causal relationship between the food nutrient consumed and a specific positive or negative health outcome. No other claims for such positive or negative health outcomes as a result of ingesting food are permitted. Furthermore, even these diet-related health claims may not claim the product treats or prevents diseases, which is a generally prohibited claim as seen above. The claims simply state the scientific correlation between the food nutrient and the health condition and then state that the present food is a good source of (encouraging a positive health outcome) or free of (preventing a negative health outcome) the particular nutrient.

-grading names

A series of food production, inspection, grading, processing and marketing statutes—the *CAPA*, the *Meat Inspection Act (MIA)*, and the *Fish Inspection Act (FIA)*— set out another dimension of the food labelling law. These statutes are among the oldest in Canada establishing food labelling rules. All of the *Acts* and their *Regulations* establish grade names for Canadian products that are traded interprovincially or internationally. These grade names

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[567] Alice Tseng, "Complying with the New Food Labelling Regulations" (Paper presented to the National Forum on Food Safety and Security: Ensuring Product Integrity in the Marketplace in Toronto, February 23-24, 2004). [unpublished] at 4.

[568] The five claims are the health relationships between : (1) sodium, potassium – high blood pressure, stroke, heart disease; (2) calcium, vitamin D – osteoporosis; (3) saturated and trans fat – heart disease; (4) vegetables and fruit – some types of cancer; and (5) fermentable carbohydrate – tooth decay. See Tseng, "Complying with the New Food Labelling Regulations" at 5.

are both a minimum standard to enter the market and influence market values for products. The grade names are, therefore, strictly controlled under the legislation with respect to who can use them and on which product labels. The grade names represent a mark of government approval for any consumer and a base level of safety for the consumer. Besides grade names, these commodity statutes also provide for product standards and punish the misuse of grade names, the disregard of product standards and the misnaming of food products. Examples include "Grade A beef", "No. 1 Medium Maple Syrup". Only those products meeting the standards set out in the pertinent Regulations may use these elements as part of the food label.

Provincial legislation may also set standards, grades and names for various foods produced and marketed within the province. Wines, organic produce, fresh fruits and vegetables, meats and other foods may in certain circumstances be required to meet provincial labelling requirements.[569] Various provincial *Meat Inspection Acts,* for example, set out product standards for meat and meat products (e.g. "mechanically deboned chicken"), have naming requirements for meat and meat products (e.g "lean ground beef"), and provide enforcement provisions for mislabelling and fraud. However, once a product is destined for interprovincial or international trade, it becomes next to impossible for any provincial legislation to dictate labelling requirements. Provincial statutes concerning the labelling of provincially produced and provincially traded food products are therefore quite limited.

-trade marks and other marks protected under Canadian intellectual property law

While quality indicators of a geographic origin have not matured into free-standing provisions in the same manner as they have in France, Canadian legislation nevertheless

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[569] See for example [British Columbia] *Wines of Marked Quality Regulation*, B.C. Reg. 79/2005 (effective August 1, 2005) [Ontario] *Wine Content and Labelling Act, 2000,* S.O. 2000, c. 26; [Ontario Wine Content and Labelling Act] *General Regulation*, O. Reg. 659/00; [Ontario] *Vintners Quality Alliance Act*, 1999, S.O. 1999, c. 3; [British Columbia] *Agri-food Choice and Quality Act*, S.B.C. 2000, c. 20; [British Columbia] *Organic Agricultural Products Certification Regulation*, B.C. Reg. 200/93; [Ontario] *Food Safety and Quality Act, 2001,* S.O. 2001, c. 20; [Ontario] *Health Protection and Promotion Act*, R.S.O. 1990, c. H.7; [Ontario] *Meat Inspection Act (Ontario),* R.S.O. 1990, c. M.5; [Ontario Meat Inspection Act] *General Regulation*, O. Reg. 632/92; [Québec] *Loi sur les produits alimentaires*, L.R.Q, c. P-29; [Québec] *Règlement sur les aliments*, R. R. Q., 1981, c. P-29, r.1; [Québec] *Règlement sur les fruits et légumes frais*, R. R. Q., 1981, c. P-29, r. 3.

imposes strictures on the use of some names and claims as protected under several statutes that protect different kinds of intellectual property.[570]

It has been mentioned above that grading names and legends are part of a system of reserved claims ensuring consumer protection and government oversight of minimum quality for its food system, but such names are also a form of intellectual property owned by the government of Canada. Section 5 of the *MIA* prohibits the use of a meat inspection legend unless it has been authorized by the regulations. Section 6 prohibits the use of any legend, mark, symbol or design that resembles a meat inspection legend and is likely to be mistaken for a meat inspection legend. Section 16 of the *CAPA* prohibits the use of a legend, word, symbol or design that resembles an agricultural product legend or grade name. Under both Acts, the grades and legends are deemed to be national marks vested in the Queen.[571] Section 4 of the *MIA*, for example, states that: "The meat inspection legend shall be a national trade-mark, and the exclusive property in and, subject to this Act, the right to the use of that trade-mark is hereby declared to be vested in Her Majesty in right of Canada."

Under the *Trade-marks Act*, unauthorized use of trade-marks, certification marks, and geographical indications are prohibited. Trade-marks includes both (a) a mark that is used by a person for the purpose of distinguishing or so as to distinguish wares or services manufactured, sold, leased, hired or performed by him from those manufactured, sold, leased, hired or performed by others, and (b) a certification mark.

Trade marks,[572] of course, are private property rights which "exist to identify the trade source of products and services."[573] Food products will often have trade-marks as part

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[570] Among the most important intellectual property to be protected via food labelling relates are trade marks, which under Canadian law also include certification marks. For a general review of Canadian law on these subjects, see Roger T. Hughes et al., *Hughes on Trade Marks*, 2nd ed. (Toronto: Butterworths, looseleaf); Kelly Gill & Scott R. Jolliffe, *Fox on Canadian Law of Trade-marks and Unfair Competition*, 4th ed. (Toronto: Carswell, 2002); Gordon Henderson, *Trade-Marks Law in Canada* (Toronto: Carswell, 1993); and David Vaver, *Intellectual Property Law: Copyright, Patents, Trademarks* (Concord, Ont.: Irwin Law, 1997).
[571] *Canadian Agricultural Products Act*, s.15.
[572] *Trade-marks Act*, s.12.
[573] Vaver, *Intellectual Property Law* at 176.

of their label and it is up to the holder of the trade-mark how and when that trade mark will be use. Certification marks[574], on the other hand,

> do not distinguish one producer from another. Indeed, a producer of goods such as those covered by the registration cannot directly own a certification mark. Instead, the mark distinguishes products or services of a defined standard from others. The standard setter owns the mark and licenses those meeting the standard to use it.[575]

Certification marks also play some limited role in labelling in Canada with some food producer and livestock associations securing certification marks for use by their members. As well, groups that promote certain environmental and social objectives and wish to demonstrate this via a food label use certification marks.[576]

Finally, the *Trade-marks Act* sets out provisions for the establishment of property rights in geographical indications.[577] These provisions however currently only apply to wines and spirits and have no application to food labelling other than for alcoholic beverages.

Paragraph 2 - Administration and enforcement of food labelling laws

How does one ensure that food sellers, manufacturers and producers actually comply with food labelling law? As with all Canadian laws, those responsible for complying with the legislation have the primary responsibility for its implementation. Food producers, manufacturers and sellers have a responsibility to produce and use accurate and truthful labels on their products. Monitoring, verifying and enforcing compliance is however, the responsibility of the Government of Canada. Food labelling rules are developed in

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[574] *Trade-marks Act*, s.23-25.
[575] Vaver, *Intellectual Property Law* at 187.
[576] "Fairtrade" coffee use certification marks. See Carolyn Magwood, "Cup of Conscience: Labelling Fair Trade Coffee – Problems and Possibilities" (Student LL.B. Research Paper for course CML 4112C The Regulation of Sustainable Agriculture, Ottawa, April 2004) [unpublished].
[577] *Trade-marks Act*, s.11.11 - 11.19.

consultation with industry and consumer groups and several government departments are responsible for its final formulation and implementation.[578]

Health Canada and the CFIA are the federal government departments with the primary responsibility for establishing and implementing food labelling law in Canada.[579] Other government departments including Agriculture and Agri-Food Canada, Fisheries and Oceans Canada, Industry Canada, the Department of Justice Canada, and International Trade Canada have subsidiary roles.

Pursuant to the *FDA*, Health Canada is responsible for the establishment of policies and standards relating to health, safety and nutritional quality of food sold in Canada. However, the CFIA is responsible for the administration of food labelling policies relating to misrepresentation and fraud in respect of food labelling, packaging and advertising and the general agri-food and fish labelling provisions respecting grade, quality and composition under the *CAPA,* the *MIA* and the *FIA*.[580] It also carries out inspections of food producers and processors and ultimately, bears the brunt of the enforcement of food labelling law in Canada.[581]

A. the role of the CFIA in food label verification

The CFIA ensures labelling compliance through three major approaches: a) "label registration" which is specialized and limited to meat products and certain processed products; b) on-site monitoring of registered establishments; and c) a general approach for

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[578] There appears to be a significant degree of consultation between industry and the CFIA both in terms of general policy concerns and compliance problems based on comments from key bureaucrats in the Canadian government. (Mark McCombs, General Counsel, Head Legal Services, Canadian Food Inspection Agency (interviewed in Ottawa 7 March 2002) and Ronald Doering, (then) President, Canadian Food Inspection Agency (interviewed in Ottawa 4 April 2002).

[579] Debra Bryanton, Director, Foods of Plant Origin, Programs Branch, Canadian Food Inspection Agency (interviewed in Ottawa 7 March 2002).

[580] CFIA, "2003 Guide to Food Labelling and Advertising" (Ottawa: CFIA, 2003 (looseleaf service)) online: <http://www.inspection.gc.ca/english/fssa/labeti/guide/toce.shtml> at para. 1.4.1.

[581] The CFIA inherited its mandate from several former and existing departments including the Ministries of Agriculture, Health, Industry Canada, Consumer and Corporate Affairs, and Fisheries and Oceans. The CFIA also inherited and has substantially updated the Canadian food labelling bible "2003 Guide to Food Labelling and Advertising" a policy book now over 300 pages in length first produced in 1961 and regularly up-dated that attempts to provide a detailed recipe book on permissible label claims.

all food products which is prioritized and delivered on a risk assessment basis and in response to consumer/competitor complaints and outbreaks of illness.[582]

All of the Acts regulating food labelling contain compliance and enforcement provisions. Some, such as the *MIA* and the *CAPA*, require pre-approval of labels for some food products and as such, exercise an "upstream" control on labelling integrity.[583] All labels for prepackaged meats and processed meat products must be pre-approved by the CFIA in a process called label registration.[584] This process for meats and processed products is comprehensive, proactive and requires a permanent staff of label reviewers. Only fully compliant labels are approved.[585] Therefore, all labels originating from federally registered Canadian meat, poultry and processed fruit and vegetable establishments as well as from foreign meat, poultry and processed fruit and vegetable establishments must have labels for their product pre-approved by CFIA staff.[586] Food products from these establishments represent at best only 50% of the food found on supermarket shelves.[587]

A second form of control of labelling compliance is the monitoring of federally registered establishments. Under the *MIA*, the *FIA* and the *CAPA*, establishments wishing to engage in the preparation of foods for interprovincial or international trade must be registered. As registered establishments, they are entitled to use federal grading standards and marks, and are subject to federal inspection which will include labelling verification. While not specifically prescribed, inspectors will make routine inquiries about label compliance and can assist plant managers should labelling questions arise. When inspectors

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[582] Greg Orriss, Canadian Codex Contact and Director, Bureau of Food Safety and Consumer Protection, Programs Branch, Canadian Food Inspection Agency (interviewed in Ottawa 5 March 2002 and 2 May 2005).
[583] Richard Robinson, Chief, Livestock Identification and Legislation, Food of Animal Origin, Programs Branch, Canadian Food Inspection Agency (interviewed in Ottawa 5 March 2002).
[584] *MIA Regulation* s. 110 requires the label to be registered with CFIA's Director for registration for meat products while the *CAPA*'s *Processed Products Regulation* s. 44 requires the label to be registered in the Register of Labels.
[585] However, novel claims on labels such as "free-range" or "natural" or several others that industry proposes may present label reviewers with a challenge as such labelling terminology is not clearly dealt with under existing legislation, guidelines or practice.
[586] CFIA, "2003 Guide to Food Labelling and Advertising" at 1.4.3. There was significant disagreement among personnel interviewed at the CFIA as to the cost/benefit of the pre-approval system for food label compliance. Some thought the program that has been in place since the 1960s was very beneficial. Others thought that it required too many resources given that it only covered at best 50% of food products.
[587] Greg Orriss, Canadian Codex Contact and Director, Bureau of Food Safety and Consumer Protection, Programs Branch, CFIA.

observe non-compliance, they seek to help offenders undertake steps to bring themselves into compliance. These steps may include education and instruction, warning letters, and re-inspection. In cases of continued non-compliance, prosecution under the *FDA*, CPLA or the food trade Acts will be commenced.

A third method of label monitoring arises under the provisions of the *FDA* and the *CPLA* where non-conforming labels are identified as a result of a consumer or competitor complaint, or the discovery of a problem by a government inspector. When voluntary compliance cannot be secured, non-conforming food dealers are prosecuted.

For all foods sold in Canada, including those regulated under label registration and those produced by registered establishments under the food trade Acts, label compliance is monitored on a risk assessment basis and by responses to consumer or competitor complaints.

As a preventative measure, some companies consult with CFIA personnel for opinions on the acceptability of prospective labels. CFIA staff may base decisions on the CFIA's "2003 Guide to Food Labelling and Advertising".[588] This Guide provides detailed guidelines for CFIA field staff to determine potential compliance and non-compliance of food labels. The Guide moves from a consideration of the basic labelling requirements contained in the *FDA* and the *CPLA* for which fairly detailed legislative authority is referenced to more and more detailed labelling requirements for particular foods. As the interpretive provisions on labelling become more detailed, the Guide offers less in the way of reference to legislative authority for its guidance. The Guide provides a road map as to when something might be considered misleading under section 5 of the *FDA* or section 7 of the CPLA. Other Guides and CFIA decision databases are also available for use by CFIA staff and the public.[589]

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[588] CFIA, "2003 Guide to Food Labelling and Advertising" (Ottawa: CFIA, 2003 (looseleaf service)) online: <http://www.inspection.gc.ca/english/fssa/labeti/guide/toce.shtml>.

[589] CFIA, "Meat Hygiene Manual of Procedure", http://www.inspection.gc.ca/english/anima/meavia/mmopmmhv/mane.shtml; CFIA, "(Labelling) Decisions", http://www.inspection.gc.ca/english/bureau/labeti/decisions/decisionse.shtml; CFIA Bureau of Food Safety and Consumer Protection, "Retail Food Decisions",

Thus while there are no provisions for the mandatory pre-approval of labels under the *FDA* and the *CPLA*, alleged offences under these Acts are brought to light by the CFIA's general and specific monitoring projects or by consumer or competitor complaints. In the former case, compliance is targeted to specific sectors or commodities, such as olive oil, while in the latter case, compliance is based on a reactive approach as signalled by specific complaints about, or illness due to, a food product.

B. legal avenues for enforcement of food labelling law in Canada

Canadian courts have acknowledged the government's role in enforcing food labelling law. Some litigants have requested that courts require government departments to better enforce Canadian labelling laws. Courts have generally refrained from dictating to government departments how their enforcement powers must be exercised as long as they "have demonstrated that they have in place an enforcement program that constitutes a reasonable response to its legislative duties given considerations of resource limitations, risk assessment and scope determinations."[590]

Actual enforcement through prosecutions for labelling offences is quite rare in Canada and as such there is a very sparse body of case law interpreting Canada's food labelling law.[591] This is somewhat surprising considering the large number of statutes and regulations that govern labelling and the long history of several of these legislative

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http://www.inspection.gc.ca/english/bureau/retdet/decisionse.shtml; CFIA, "Label Inspection Guide for Fish and Fish Products", http://www.inspection.gc.ca/english/anima/fispoi/product/labeque.shtml; and CFIA, Fish, Seafood and Production Division, "Questions and Answers - Labeling", http://www.inspection.gc.ca/english/anima/fispoi/product/questions/indexlabetie.shtml.

[590] *Northern Lights Fitness Products Inc. v. Canada (Minister of National Health and Welfare)*, [1994] F.C.J. No. 319 (Q.L.) at para. 20. The trial judge added the following at para. 16:

> The Respondents [the Government of Canada and its relevant departments] agree that they are under a duty to enforce the relevant legislation, but argue that the decision as to how and when this will occur is purely a matter of policy. I agree with their position. The nature of the duty owed is to enforce the law, and only complete inaction in this respect may give rise to a judicial remedy. An important distinction must be drawn between requiring a government body to take some enforcement action, which the Court can do, and determining the manner of enforcement, which the court cannot do.

[591] Mark McCombs, General Counsel, Head Legal Services, Canadian Food Inspection Agency (interviewed in Ottawa 7 March 2002).

measures.[592] Below is a brief review of the major cases in Canadian courts that have interpreted provisions in the six Acts which lie at the heart of the current regulatory framework for food labelling in Canada.

The majority of labelling prosecution cases arise in the context of false or misleading labels. Under the *FDA*, labelling prosecutions have focused on the substantive interpretations of *FDA* provisions in section 5 (labelling which is false, misleading or deceptive) and in section 6 (non-conforming labelling on a standardized food product). Violations of the labelling provisions, whether under section 5 or 6 of the *FDA*, are generally treated as offences of strict liability in answer to which the defendant may raise a defence of due diligence.[593] The prosecution must prove the case against the defendant using the criminal law standard of proof of "beyond a reasonable doubt" instead of lower the civil burden of proof of "on the balance of probabilities".

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[592] There is however a collection of cases that have resulted from prosecutions for food labelling offences. The CFIA, and the agencies enforcing food labelling law prior to the CFIA, actively prosecute a number of food labelling offenders. Many of these cases result in guilty pleas from offenders and thus do not yield legal interpretations of the food labelling provisions which are the subject of this report. Synopses of recent CFIA prosecutions, including those relating to labelling offences, are listed at their webiste under the heading "The CFIA Newsroom - Prosecution Bulletins" online, CFIA <http://www.inspection.gc.ca/english/corpaffr/projud/projude.shtml>.

[593] *R. v. Rube (1991)*, 63 C.C.C. (3d) 47 (British Columbia Court of Appeal) concerned an accused who had allegedly mislabelled cuts of beef prior to sale. The evidence was clear that the offered beef was not what the label purported it to be. Rube was convicted. The issue on appeal concerned the application of the Charter to the public welfare offence outlined in s. 5 of the FDA. Was the offence one of absolute or of strict liability to which the accused could argue the defence of due diligence? The Court held that s. 5 is a strict liability offence to which the defence of due diligence is available. Unfortunately for the accused, there was insufficient evidence to support his claim that he was duly diligent. The Court of Appeal decision was affirmed by the Supreme Court of Canada (75 C.C.C. (3d) 575); *R. v. Rube (1992)*, 75 C.C.C. (3d) 575; [1993] 1 W.W.R. 385 (S.C.C.). See also the older case of *R. v. Standard Meat Ltd. (1993)* 13 C.C.C. 92d) 194 (S.C.A.) wherein the court held that the s. 5 of the FDA is a strict liability offence not requiring *mens rea* and which converts a civil personal duty to a public one so as to protect the public. See also *R. v. Eastern Fish Markets Ltd.* [1990] N. J. No. 155 (Nfld. S.C. - Trial Division), in which the accused was charged with violations of sections 26(1)(a) and (b) and 31 of Fish Inspection Regulations promulgated under the *FIA* for shipping salmon that was improperly labelled. The accused was charged when his salmon which was destined to be shipped by air for export was found packaged in boxes marked with code dates, but with no indication of origin, ownership or processor. Like the *Rube* case, this case is authority for the proposition that labelling offences under the food trade acts are strict liability offences. Barry J. articulated the principle this way:
...it is not necessary that the Crown prove that the accused intended to commit an offence in acting as it did. It is only required to show that the salmon were delivered to the freight shed for shipment in a condition contrary to the Regulations. In other words, to establish the guilt of the accused for commission of this type of offence it is not necessary to establish that there was *mens rea* on the part of the transgressor as in most criminal offences. In this instance the mere commission of the forbidden act and the identification of the offender is sufficient to constitute an offence.

Prosecutions under section 5 of the *FDA* for false, misleading or deceptive labelling are more common than section 6 prosecutions. As the terms in section 5 are not defined, the CFIA and those charged with section 5 offences must rely on the courts for guidance as to what will be considered as "false, misleading or deceptive." The guidance provided by the courts has been somewhat limited, however, as several of the cases[594] have involved quite egregious cases of false labelling in which one would have expected a relatively easy conviction, even when applying the criminal law standard of proof.

Prosecutions under section 6 of the *FDA* involve products for which the Act sets out specific production standards and thus labelling requirements that meet these production standards. The pivotal case under section 6 is *Labatt Brewing Co. v. Canada.*[595] In that case *Labatt* began marketing a new brand of beer which it labelled "Labatt's Special Lite." The new beer contained 4% alcohol. A standard existed under the *FDA* regulations that "light beer" must contain no more than 2.5% alcohol. The court was asked to decide whether the standard for "light beer" applied to a product labelled "Labatt's Special Lite." Labatt argued that the difference in spelling and the absence of the word "beer" alongside the word "lite" was sufficient for the label not to be misleading or deceptive. The Court found that "Special Lite" must be read in conjunction with the product to which the label was attached, namely beer. The court concluded that the label was indeed misleading as the consumer would think it was a light beer, and this beer did not conform to that standard.

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[594] In *R. v. Ray Williams (2000)* (Docket No. 97809) (unreported decision of the Supreme Court of British Columbia), the accused was charged with 13 counts under s. 5(1) of the FDA, four of which related to labelling violations. The accused operated a meat shop and during its operation labelled foreign lamb as "Saltspring Island lamb", beef liver as "calf liver" and as "baby beef liver", and sold previously frozen turkeys as free range turkeys with no indication that they had ever been frozen. The prosecution was initiated when former employees of the company alerted government field staff that the accused was engaging in practices that were "ripping-off the consumer." Much of the evidence to substantiate the charges was supplied by the former employees. Likewise in *R. v. A. & A. Food Ltd. [1997]* B.C.J. No. 2720 (British Columbia Supreme Court), the company and its director were convicted on two counts of violating s.5(1) of the FDA by being in possession of unlabelled Monterey cheese packed in bulk. The director was found guilty because he failed to set up a system and to take precautions to prevent the occurrence of a foreseeable offence relating to the non-labelling of the product. The case supports the proposition that a s.5(1) violation can include non-labelling as the basis for "creating an erroneous impression" of the character of the product. It would appear, however, that s. 5(2) could also be used to support a conviction on similar facts.

[595] [1980] 1. S.C.R. 914 (Supreme Court of Canada).

Some labelling prosecutions have however turned on new product characteristics, particularly with respect to production or processing claims made on the label. With respect to the interpretation of a label such as "free range" the judge held that it was possible to attach a commonly understood meaning, even if no official definition existed.[596]

False and misleading information on labels can also give rise to prosecutions under section 4[597] of the CPLA and under the food trade family of statutes and their regulations.

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[596] In *R. v. Ray Williams* at para. 16, Wilson J states:
Turkeys may be called "free-range" or "free-run" because they are not confined to cages with the food brought to them, but rather are entitled to range at large about a barn or a yard and get their own food. I am satisfied however, that although there may be no prescribed definition of "free-range", there is an understanding by people who work in the industry, such as Ms. Grue, of a quality distinction between free-range and Canada Grade A. And I find that Mr. Williams, as well, knew that there was such a distinction. And as I say, s. 5 of the *Food and Drugs Act* imposes the risk on the retailer to get it right. It was misleading and deceptive for the company to have notified members of the consuming public that it was selling "free-range" turkeys when the company knew, as did Mr. Williams, that what the public was really buying was a Canada Grade A turkey.

Another interesting case is *Burns Foods Ltd. v. Canada* [1982] F.C.J. No. 1026 (Federal Court - Trial Division). In it Mahoney J. explored the interplay between label pre-approval under the MIA and prosecution under s. 5 of the FDA. The case was not a s. 5 prosecution but an application by Burns Foods for damages against the government of Canada after the former had been directed by the federal Department of Agriculture to change its labels for a meat product called "Bacon Grill." The label had been initially approved under the meat label pre-approval process. However, when a competitor complained to the Department of Consumer and Corporate Affairs (CCA) which was then responsible for enforcement of the FDA labelling provisions, the CCA threatened to prosecute Burns under s. 5(1) if it did not remove the label. Burns complied but suffered losses in so doing. In refusing to find liability on the part of the government of Canada, Mahoney J. found that the product labelled "Bacon Grill" contained no bacon and could likely have been impugned under s. 5 of the FDA. Mahoney J. stated that it "is perhaps unnecessary to say it but there was, of course, no suggestion that the granting of approvals were, per se, binding predeterminations that the display of the commercial product and the containers would not contravene the law [prescribed by the FDA]."

[597] Mandatory labelling requirements concerning the declaration of net quantities as set out under s. 4 of the CPLA have been considered in two Manitoba cases: *R. v. Econo-Mart Ltd.* [1995] M.J. No.396 (Manitoba Provincial Court - Criminal Division) and *R. v. Westfair Foods Ltd.* [1996] M.J. No. 290 (Manitoba Court of Queen's Bench). In both cases, the vendors labelled processed meat products with the phrase "minimum net weight" but did not provide an exact weight on the product. In some instances, up to 100% additional weight of product was included. Charges were laid under both s. 4(1) of the *CPLA* and s. 9(1) of the *WMA*, although these latter charges were stayed after a conviction was entered on the *CPLA* charges. Swail J. in *Econo-Mart Ltd.*, found that "providing a minimum net weight and the total price was not equivalent to providing a 'declaration of net quantity' of the product in the form and manner required by the Act, even if more than the minimum was provided to the consumer." Steel J. in *Westfair Foods Ltd.* in paragraph 14 sets out the objectives of the *CPLA*:

> The *Consumer Packaging and Labelling Act* has two primary purposes. The first purpose is to ensure that any information provided to a consumer on prepackaged product is not false or misleading in any way. However, there is a second purpose and that is to provide information to consumers so they could make informed choices. That is the mischief which s. 4 is intended to prevent.

He concludes in paragraphs 18 and 19 that the crux of the case was that:

Several reported cases have proceeded under section 72 of the *Dairy Products Regulations*.[598]

In *R. v. A. & A. International Industries Inc*[599], the accused was found guilty of 3 offences of labelling grated cheese products as Parmesan cheese when that claim was indeed false, misleading and deceptive. Daniel J. chastised the seller and set out the rationale for his sanction against this unscrupulous merchant:

> Companies in the food and dairy industry must accept that the greatest possible care must be taken to ensure products are accurately labelled. Consumers rely on labels to disclose honestly and accurately, the product's contents, especially those with allergies and those concerned about their intake of certain ingredients. The public wants to know and has the right to know, whether the product they purchase is 100% pure, or whether other ingredients, preservatives, colour, additives, adulterants, fillers or contaminants are present. This material disclosure is essential to a product's value, quality, composition, identity and nature. Less than a full material disclosure is misleading, deceptive and likely to create an erroneous impression. It may result in irreparable harm to an unwitting consumer with serious allergies to non-disclosed ingredients. Without all the information, the consumer cannot make a fully informed purchase.
>
> . . .
>
> The risk is that the honest producer might be tempted to follow the dishonest producer's lead, simply to compete and survive in a difficult market. The economic advantage of mislabelling must be curtailed. A clarion message to the industry must be sent: the courts take these sorts of offences very seriously and penalties for mislabelling will be such as to minimize or obliterate the otherwise expected profits. Any other result and companies will simply accept prosecution and fines as a cost of doing business.[600]

> the consumer did not receive [...] accurate, complete and meaningful information. I adopt the finding of the learned trial judge when he found that the intent of the requirement for a declaration of net quantity is to provide consumers with as much information as possible and that a simple declaration of "minimum net quantity" does not fulfill that intention.

Both the *Westfair* and the *Econo-Mart* cases were prosecuted under s. 4 of the *CPLA* and as such the courts held that the accused could not rely on a s.7(3) defence of "otherwise not less than the declared net quantity of the pre-packaged product." Steel J. in *Westfair* held that the accused was convicted of not providing mandatory information, not of providing false or misleading information.

[598] This section states: A dairy product for which standards are prescribed pursuant to this Part shall not be described or presented on any label in a manner that is false, misleading or deceptive or is likely to create an erroneous impression regarding the product's value, quantity, composition, quality, identity or nature.

[599] [1998] A.J. No. 748 (Alberta Provincial Court- Criminal Division).

[600] At para. 4 – 6.

One of the few cases to grapple with the meaning of the general phrase "false, misleading, or deceptive or likely to create an erroneous impression" and whether a product's label fits within that meaning is *R. v. Salerno Dairy Products Ltd.*[601] The case is authority for the proposition that when a standard for a product does not list all possible ingredients, a label may be misleading if it does not identify an ingredient which the consumer might not expect to be in the food. The accused was charged under section 72 of the *Dairy Products Regulations* for selling "grated parmesan cheese" which contained 9.4% lactose. This information was not declared on the label. Evidence showed that true Parmesan cheese costs about $25/kg while the lactose in skim milk powder cost $3.70/kg. The case turned on whether the accused was required by the regulations to make a "grated Parmesan cheese" with a certain maximum level of lactose. Delong J. found that while the Regulations for Parmesan cheese set out standards for the amount of milk fat and moisture, they were silent with respect to lactose. Expert evidence was admitted that showed that industry guidelines for parmesan cheese permitted less than 1% lactose. On that basis, the judge found the label to be in violation of section 72.

In *Baxter Foods Ltd. v. Canada (Minister of Agriculture)*[602], Baxter Foods sought an injunction to stop the Department of Agriculture from detaining Baxter "Nice'n Light" light ice cream because of non-compliance under section 72 of the *Dairy Products Regulations*. The trial judge found that the wording "light ice cream" on the Baxter Foods product had been tacitly approved by the Department of Consumer and Corporate Affairs. When the company tried to ship the product out of the province of production, the Department of Agriculture intervened, claiming that the new product was in violation of labelling provisions for a standardized product. Baxter succeeded in obtaining an injunction against the federal Department of Agriculture on the basis that the new ice cream product was not covered by any standard. The new product contained less than 7% butterfat. There was a standard for ice milk (under 5% butterfat) and for ice cream (over 8% butterfat), but no standard for anything in between. Baxter had chosen to label the product "light ice cream", a product for which there was no standard. Section 72 of the regulations did not apply. Section

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[601] [1995] A.J. No. 790 (Alberta Provincial Court - Criminal Division).
[602] [1988] F.C.J. No. 410 (Federal Court - Trial Division).

3(2) of the *Canada Agricultural Products Standards Act* (then the Regulations' enabling statute) also did not apply. That section provided that no one may label a dairy product in such a manner as to mislead the public into thinking it is a standardized product. Rouleau J. held that:

> The Baxter product is clearly labelled: "light ice cream, contains 30% less fat than our regular ice cream." In this diet conscious era, this labelling carries a very clear and obvious message to the consumer. Since this product is not labelled in a manner so closely resembling "ice cream" as to mislead the consuming public, as provided for in Subsection 3(2) of the Act, the product is not one over which the defendant's servants have any authority.

While this case does not interpret the phrase "false, misleading or deceptive" it does suggest that a new food item will be scrutinized to determine if it fits within an existing standard. If the manufacturer/producer can successfully argue that it does not and there is obvious consumer demand for the product as in the *Baxter Foods* case, section 72 will not be applicable. Nor would it appear that any of the *FDA* or *CAPA* provisions against "false and deceptive" labelling would apply to a new product which is labelled clearly to differentiate it from an existing standardized product.

C. actual enforcement practice in Canada

Until very recently, enforcement of food labelling law was not a centralized function. Before 1997, food labelling regulations were under the purview of at least four separate departments—Health, Agriculture, Industry Canada (formerly Consumer & Corporate Affairs) and Fisheries & Oceans. Each department had its own history and procedure for ensuring compliance with food labelling violations which culminated, if needed, in prosecutions. In 1997 when the CFIA was created, it inherited this decentralized mechanism for monitoring and enforcement.[603]

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[603] Moyra Nicholson, Senior Counsel, Legal Services, Canadian Food Inspection Agency (interviewed in Ottawa 4 April 2002).

The CFIA now has an Operations Branch which monitors registered establishments[604] on a regional basis. Ongoing monitoring, instruction and compliance activities (including detentions and seizures) for foods from non-registered establishments and for all foods under the *FDA* and *CPLA* are coordinated through the Bureau of Food Safety and Consumer Protection of the CFIA Programs Branch in Ottawa. Persistent or flagrant violations identified by the Bureau or by Operations Branch regional inspectors are then forwarded to the Enforcement and Investigations Services of the CFIA located in Ottawa.[605]

The Enforcement and Investigations Service has become the centralized office responsible for the formal documentation and coordination of all enforcement proceedings under food labelling statutes. Where prosecution is considered, the Director of the Enforcement and Investigations Service will enlist the assistance of appropriate CFIA personnel to collect case documentation and evidence and to identify witnesses.[606] If compliance with the specific statute cannot be effected with the company or individual, or where a very serious violation has been detected, a recommendation for prosecution will be prepared based on the evidence gathered. The file will then be transferred to the Federal Prosecution Service of the Department of Justice to decide whether to proceed with a prosecution in the appropriate Canadian court. In recent years only about 10 cases per year are prosecuted for food labelling related offences.[607]

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As a colony first of France and then of England, Canada's first food labelling laws originated from the legislation of the "homeland". Early food labelling laws focused on protecting commercial vendors from unfair competition at the hands of unscrupulous competitors whose inferior products could harm honest sellers and consumers alike. Since

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[604] All meat, fish and processed food products that are traded interprovincially must come from establishments registered under one of the *MIA*, *FIA* or the *CAPA*.
[605] Suzanne Frost, Director, Enforcement and Investigation Services, Operations Branch, Canadian Food Inspection Agency (interviewed in Ottawa 28 March 2002).
[606] Suzanne Frost, Director, Enforcement and Investigation Services.
[607] Suzanne Frost, Director, Enforcement and Investigation Services.

early Canada also was heavily dependant on international markets, poor quality food products or adulterated ones could harm international sales. Canada's food labelling history begins with a pursuit of commercial objectives prohibiting marketplace fraud and setting market standards. Gradually, however, food safety and other consumer concerns become primary objectives with the imposition of mandatory labelling of all prepackaged foods in the 1970s. The current situation, with Canada's new legislative requirements for nutrition and health claims, demonstrates that Canada has intensified its pursuit of consumer-oriented health and safety objectives through food labelling.

Chapter 3 – Ghana

This chapter explores the historical backdrop of food labelling legislation in Ghana (Section 1) and provides a current overview of food labelling law in Ghana (Section 2).

Section 1 below traces the historic development of Ghana (formerly known as the "Gold Coast"[608]) and its effects on the passage of food labelling legislation. Ghanaian history, for present purposes can be divided into three distinct parts—colonial times 1850-1956; early independence and political upheaval 1957-1991; and the current period of democratic government and political stability 1992- present. Each part of the country's history yields a unique contribution to Ghanaian food labelling law. The beginnings of food labelling law in Ghana can be traced to the efforts of colonizers to protect British interests in both the Ghanaian and international markets. These developments relate to statutory protection for British intellectual property in Ghana and for Ghanaian export products like cocoa in international trade (Paragraph 1). With the coming of independence in 1957, food labelling took on a domestic orientation and the first "homegrown" Ghanaian laws on food labelling appeared in 1967 (Paragraph 2). After significant political upheaval, 1992 ushered in not only democratic government but also the *Food and Drugs Law, 1992* and a new attitude to food law, including labelling (Paragraph 3).

Section 2 below examines the salient features of the current Ghanaian food labelling law and practice. It begins with a brief examination of the food market in Ghana and explores the current regulatory structure for food labelling (Paragraph 1). This section concludes with an appraisal of the administrative and enforcement of food labelling law in Ghana (Paragraph 2).

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[608] From approximately the year 1000 through to the 1500s, vast amounts of gold were exported from this region. The trade in gold eventually gave way to a trade in slaves. Despite this insidious change in commodity, trade in Ghana was a major component of its economy and formed a foundation for the receipt of European manufactured products well into the twentieth century and remains vital to its economic well-being today.

Section 1 – Historical Perspectives

Paragraph 1 - Threads of labelling law from colonial times

Ghanaian history has been one of successive waves of empires, domination of less powerful peoples, collapse of empires and the re-emergence of various cultural and political elites. Ghana's break from its colonial masters dates from only 1957 when it became the first sub-Saharan African country to achieve independence. However, the history of the people and of the region of what is present day Ghana has been documented to prehistoric times.[609]

Starting in the XVth century, European explorers and trading companies came to explore and exploit the riches of West Africa. From Ghana (then the Gold Coast), vast quantities of gold were the first articles of trade, only to be replaced by humans captured and sold as slaves through the XVIth to XVIIIth centuries. By the XVIIIth century indigenous elites were replaced by colonial rulers primarily at the hands of the British, French and Portuguese. British control of present-day Ghana was made official, at least in the minds of the Western European politicians, with the passage of the *Foreign Jurisdiction Act* in 1843 by the British Parliament. This Act gave the British Government control over the Gold Coast and several other regions of Africa. During subsequent years, British military and administrative institutions established control over the entirety of present-day Ghana.[610]

Colonial rule, among other things, brought the need to organize the Ghanaian economy so as to permit British interests to exploit the available natural and human resources available in the colony. One commercial opportunity explored by the British was the development of new products from the Gold Coast for export trade. Of great significance

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[609] Patrick Puy-Denis, *Le Ghana*, (Paris: Editions Karthala, 1994) at 16-23.

[610] For example, the Ashanti regions of central Ghana did not finally come under British rule until 1901 after the Ashanti Wars (1807-1874). See Puy-Denis, Le Ghana at 217 *et seq.* By 1850, the first legislative and executive council was established for the administration of the colony of the Gold Coast with the first African member (Mr. George Blankson from Anomabu in western Ghana) of the legislative council named in 1861. Ultimate control of the colony remained however with the British Governor-General based in Sierra Leone. The Governor-General was also the Official Representative of the British Head of State for Sierra Leone, the Gambia and Lagos, see Puy-Denis, *Le Ghana* at 217 *et seq.* See also Eboe Hutchful, *Ghana's Adjustment Experience: The Paradox of Reform* (Geneva: United Nations Research Institute for Social Development, 2002), also "Chapter 1 - The Making of the Crisis: From Nhrumah to Limann".

was the development of the cocoa industry. Cocoa, indigenous to South America was first commercially grown by a Ghanaian, Tetteh Quashie, in 1879. Cocoa production took root, however, in 1886 when the British Governor of the Gold Coast, Sir William Brandford, gave his official support to the growing of cocoa in the Gold Coast. Its success in Ghana is evidenced by the fact that Ghana was the world's leading producer from 1910 to 1976 dropping to the third largest producer in recent years.[611] A second commercial opportunity was to use the colony as a new market for British-made goods. Both opportunities required new infrastructure and a legislative framework to secure adequate production of acceptable quality (in terms of producing cocoa for export), creation of conditions that would facilitate the operation of commercial markets and to prevent the unauthorized production and use of British technology and intellectual property by citizens of the Gold Coast.

Paragraph 2 - Independence and legislative action amidst upheaval

As the British began to shape the commerce of the Gold Coast under its colonial rule, they also took steps to shape its political contours giving the nationals of the Gold Coast little say in their political destiny. While the British were able to maintain their political stronghold for the first half of the 20th century, Gold Coast citizens began to protest their limited involvement after World War II. In the 1940s and early 1950s, indigenous politicians appeared who enjoyed the broad support of the general population. These politicians eloquently articulated the demands of the Ghanaian people for self-rule and pressured colonial authorities to grant increasing political freedoms to their people. Along with new political concessions to nationals, the British Colonial government also commenced a series of legislative changes to meet new demands for economic and market reform. Finally, after increasing pressure, Ghana took its independence from the United Kingdom officially on March 6, 1957.[612] In so doing, Ghana become the first of several sub-

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[611] J. E. K. Amoah, *Development of Consumption, Commercial Production and Marketing - Cocoa Outline Series* (Accra: Jemre Enterprises Limited, 1995) at 45.

[612] For the purposes of this study it is important to note that all legislation prior to independence consists of legislation and subsidiary legislation of the colonial government. All legislation during the colonial period was recorded in the year that it was passed, for example Ordinance No. 9 of 1896 - Weights and Measures and was then occasionally consolidated. A final consolidation of pre-independence legislation occurred in 1954 for all legislation enacted on or before the 31st day of December 1951. This consolidation was in five volumes containing 224 chapters. The notation for a chapter in the consolidated Laws of the Gold Coast 1951 is, for example as follows: Weights and Measures Ordinance (Cap. 188). Any legislation promulgated after 31

Saharan colonies to achieve independence and enter a new period of national independence and full participation on the world scene.

Independence was not, however, without its trials, trials which continue into the present.[613] The country's independence has been marked by constant regime change oscillating from a civilian democratic government to a civilian one-party state to several military governments and back to civilian democratic government. From independence in 1957 to 1966, the government of Ghana was presided over by Dr. Kwame N'Krumah.[614] This government had the heavy task of bringing the country from colonial rule into a fully independent state. Much needed to be done and legislatively speaking, constitutional instruments were of prime importance. By 1966, there was significant disagreement with the direction in which Dr. N'Krumah was taking the country and the seeds for revolution were sown.

A military government called the National Liberation Council (NLC), led by Lieutenant-General J.A. Ankrah, overthrew Dr. N'Krumah's government and reigned from 1966 to 1969. Ankrah's government passed a number of legislative acts very quickly upon coming to power including the first general labelling law.[615] The military government of the NLC was replaced by a civilian one lead by Prof. Busia in 1969 which ushered in the Second Republic and laws called the Constitution Acts of the Second Republic.

December 1951 and before 6 March 1957 is only available as an ordinance of the year in which it was passed and thus bears a number from that year as its citation. Equally, pre-independence subsidiary legislation is recorded in the year of its introduction but it was consolidated one final time in 1956 for all subsidiary legislation passed on or before 31 December 1954. This consolidation is collected confusingly in a four volume set consisting of Volumes I to XI and chapters 151-272. Instruments in the consolidation are referred to by volume and page of the Subsidiary Legislation in Laws of the Gold Coast (1954). Some of this subsidiary legislation is still in force as in the case of *The Merchandise Marks (Prohibited Goods) Regulations, 1963 (VOL. X, p. 425)* All subsequent subsidiary legislation is collected in three series: from 1955-1959 under the abbreviation L.N. meaning "Legislative Notice; Statutory Instrument in Annual Volumes of Subsidiary Legislation (1955-1959)"; from 1960 - present under the abbreviation L.I. meaning Legislative Instrument (1960-); or from 1960 - present under the abbreviation E. I. meaning Executive Instrument.

[613] See generally Hutchful, *Ghana's Adjustment Experience* "Chapter 1 - The Making of the Crisis"

[614] During the time of Dr. N'Krumah's leadership, the country's government was transformed from constitutional monarchy to republic to one-party state. All laws under the three periods however are recorded under the same numbering system of an Act number and the year that it was passed.

[615] These laws bear the nomenclature of National Liberation Council Decrees plus a sequential number such as the *Standards Decree, 1967* (N.L.C.D. 199).

However, the Busia government was short-lived and by 1972, a second military coup brought General Ignatius Kutu Acheampong to power under the banner of the National Redemption Council (NRC).[616] The 10 year period following 1972 was a very turbulent one in Ghana. It was also a busy legislative period, at least as far as food labelling legislation was concerned. During this period, new food labelling rules were introduced and many Ghana food standards were promulgated. In 1975, the Executive Council of the NRC was abolished and replaced by the Supreme Military Council with laws passed during that period called Supreme Military Council Decrees. In 1977, a new ruling coalition of military and civilian individuals was formed but it was short-lived with a third military coup sweeping Lieutenant-General Frederich W.K. Akuffo to power in 1978. In 1979, reestablishment of a new civil multi-party democratic government failed when a fourth and fifth coup brought Flight Lieutenant J. Rawlings to power to direct the formation of the new civil government.[617] Flight Lieutenant J. Rawlings remained in control of Ghana's military.

On 18 June 1979, Dr. Limann was elected as the leader of the People's National Party (PNP) with the Constitution for the Third Republic written by the Armed Forces Revolutionary Council. Under the watchful eye of the military, power was returned to civilians under the leadership of Dr. Limann on 1 October 1980. On 30 December 1981, however, a sixth coup lead again by Flight Lieutenant J. Rawlings deposed the civilian government and ended the Third Republic.

Paragraph 3 - Political stability and the beginning of a second generation of food labelling legislation

Flight Lieutenant J. Rawlings went on to rule the country for two decades, first as a military dictator and then as a democratically elected leader.[618] After over a decade, Rawlings stepped down as military leader and Head of State and in 1992 stood for the

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[616] Laws passed during this period were called National Redemption Council Decrees followed by a sequential number and included for example, the *Standards Decree, 1973* (N.R.C.D. 173).

[617] This transitional time saw several pieces of new legislation introduced as Armed Forces Revolutionary Council Decrees (A.F.R.C.D.) including for example the *Standards (Amendment) Decree, 1979* (A.F.R.C.D. 44)).

[618] From 1981-1992, Rawlings was leader of the Provisional National Defence Council (P.N.D.C.) and thus laws promulgated under this regime were Provisional National Defence Council Laws (P.N.D.C.L.), such as the *Food and Drugs Law, 1992* (P.N.D.C.L. 305B).

presidential elections when the military handed power over to civilians under the Constitution of the Fourth Republic.[619] He was successful in two elections but was barred by the Constitution from standing for a third term. During this period, a new era began for food law in Ghana with the coming into force of the *Food and Drugs Law, 1992* and the formation of the Food and Drugs Board in 1997. The modernization and expansion of food law has continued under the leadership of the new Ghanaian president Dr. John Kufuor, from then opposition New Patriotic Party, elected in 2000 and re-elected in December 2004.

During the turbulent 40 year period of Ghana's modern history, the fact that significant food and food labelling legislation was passed underlines the health and safety and commercial importance of food and all its related legal aspects[620] which can never be overlooked by civilian and military authorities alike.

Section 2 – The Current Situation

Ghana is a mid-size country of some 238,000 km^2 located in West Africa.[621] It has a population of 20.1 million with the majority of people living along the almost 600 km of Atlantic coastline in the south of the country. Its neighbours are Togo to the East, Cote D'Ivoire to the west and Burkina Faso to the north.

Climatically speaking the country is extremely diverse with tropical rainforest in the southwest corner and semi-arid landscape in the northern half. The centre of the country, influenced in part by the huge expanse of water in the man-made Lake Volta is a temperate zone. The southeast corner is savannah plain. Thus from an agricultural perspective, the country is very diverse with a number of crops grown for domestic and international consumption. Among the most important crops are cocoa, cassava, plantain, yam, copra

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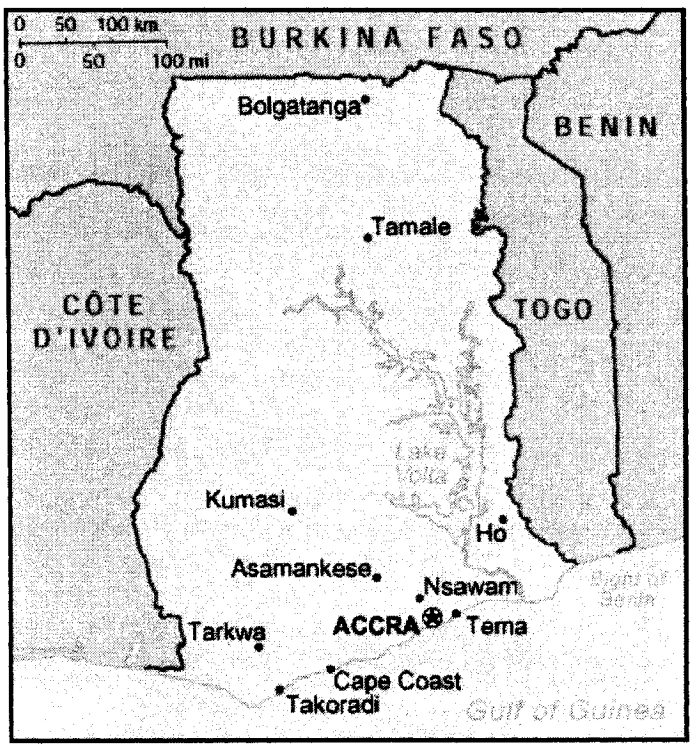
[619] All laws under the Fourth Republic are numbered by title, Year and a sequentially numbered act, such as the *Food and Drugs (Amendment) Act, 1996* (Act 523)).

[620] Despite the turbulence of the 1966-1992 period, subsidiary legislation nomenclature did not change. Thus since 1959, all subsidiary legislation is referred to either as a Legislative Instrument (L.I. + number) or an Executive Instrument (E.I. + number). For the purposes of this study on Ghanaian food labelling law, all subsidiary legislation has been carried out by Legislative Instrument rather than by Executive Instrument.

[621] This map below is courtesy of the United States Central Intelligence Agency, "The World Factbook", online : CIA <http://www.cia.gov/cia/publications/factbook/geos/gh.html>.

(also known as kernel oil or coconut oil), rice, bananas and pineapple. Cattle production is also important. On a smaller scale, individuals produce vegetables and some fruit for personal and commercial sale.

Figure 5- Map of Ghana



With respect to food exports, Ghana exported $310 million USD in agricultural products in 2001.[622] The most significant exported food commodity is cocoa, which has its own marketing board. But coffee and bananas are also produced. Ghana also has a significant export market in edible oils, particularly coconut meal (copra) oil and palm kernel oil. There are special regimes for the regulation of each of these products. The regimes are markedly similar. This interest on the part of the Ghanaian government is to be expected given the importance in ensuring that export products are of a high quality and are appropriately labelled so as to be attractive in international markets.

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[622] FAOSTAT and World Bank World Development Indicators, "Food and Agriculture Indicators; Country: Ghana", online: FAO <http://www.fao.org/es/ess/compendium_2003/pdf/ESS_GHA.pdf>.

Despite these efforts Ghana is a food importing nation spending about $370 million annually on imports of agri-food goods.[623] Prior to 2000, Ghana's agriculture trade balance had been positive, meaning that it was exporting more agricultural products than it was importing. This has changed however in the past few years as cocoa prices have softened and demands for more cereals and imported food products has risen.[624] Most of its external trade is conducted with Europe and the United States, although South Africa has made significant trade inroads with Ghana. Ghana is a member of both multilateral[625] and plurilateral[626] trade agreements which facilitate its international trade relationships. Ghana is also a member of the Economic Community of West African States (ECOWAS) which seeks to harmonize standards such that eventually it will result in a full monetary and customs union. For the moment, prospects for deeper integration of West African states appear, however, to be stagnating.[627]

The food market in Ghana has several levels with consumers of different financial means in each. At a most basic level, a large portion of the population is involved in small-scale agriculture or are lower-income urban consumers. This large group either produces its own staples or buys mostly unlabelled food directly from producers, from street vendors, or from small entrepreneurs. While some purchased foods may include pre-packaged and labelled products, most will not, being instead bulk and fresh products which are neither labelled nor packaged. Ghana produces much of its own food supply, including fish, starches (such as cassava, yams, plantain, maize and rice), fresh vegetables (such as carrots,

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[623] Total imports for all goods and services in 2002 were $4,100 million thus making agri-food imports just less than 10% of total imports. Agri-food imports were in the following amounts: Beverages $10.7 m; Red meats and poultry $23.9 m; Fish and seafood $75.1 m; Fruits, vegetables, nuts and spices $19.7 m; Prepared food and confectionary $65.4 m; Dairy products $20.4 m; Other agri-food (including base cereals) $154.8m. All figures are in U.S. dollars unless otherwise noted. Canadian High Commission in Accra and the Canadian Trade Commissioner Service, The Agri-Food Market in Ghana, May 2004, at iii and 4.

[624] Corn, rice, wheat flour and sugar imports have increased dramatically since 1998. See FAOSTAT and World Bank World Development Indicators, "Food and Agriculture Indicators; Country: Ghana".

[625] Ghana is a member of the World Trade Organization, the World Intellectual Property Organization and the Codex Alimentarius.

[626] Due to its former status as a British colony, Ghana is a signatory to the ACP-EU Partnership Agreement. It is also a preferred state under the U.S. African Growth and Opportunity Act. Both the Agreement and the Act, provide Ghanaian products with preferential access to the European Union and the United States markets, respectively.

[627] Canadian High Commission in Accra and the Canadian Trade Commissioner Service, The Agri-Food Market in Ghana, May 2004, at 8.

zucchini, tomatoes and onion), fruit (including bananas, mangoes, pineapples) and edible oils, particularly from palm-kernels or coconut (copra).

A second level of the food market consists of middle income urban consumers.[628] These consumers are more price-sensitive than high-income consumers and purchase their food at local traditional markets and small convenience stores, rather than at supermarkets. Fewer imported products are available in these venues but many products are usually packaged and labelled. This includes hundreds or thousands of everyday food products such as basic starches, edible oils, spreads like peanut butter, drink products and chocolate.

A third level of the food market consists of high-income Ghanaians and expatriates. They purchase much of their food from supermarkets, most of which are small and few in number by comparison to those found in European or North American countries, but which like the latter have a large variety of domestically-produced and imported foodstuffs almost all of which are packaged and labelled. While the majority of Ghanaians enjoy only a modest income by Western standards,[629] Ghana has a rapidly growing segment of high-income consumers, who have helped boost demand for high-value imported agri-food products.[630]

While the Ghanaian food market can be divided into the above three classes of consumers, it is important to note that all three groups have access to, and frequent in differing degrees, the traditional open-air food markets of Ghana whether located in large cites like Accra, up-country towns like Techiman in the central region of Ghana, or in small villages located throughout Ghana. These traditional open-air markets account for

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[628] This group is defined as including those persons being part of a household which earns less than $12,000 per year. Canadian High Commission in Accra and the Canadian Trade Commissioner Service, The Agri-Food Market in Ghana, May 2004, at 11.

[629] The World Bank estimates the per capita Gross National Income (GNI) in 2002 at $270 while the United Nations Development Program offers a figure of $1964 per person in 2000 based on purchasing power parity (PPP) measure. Canadian High Commission in Accra and the Canadian Trade Commissioner Service, "The Agri-Food Market in Ghana", May 2004, at 1.

[630] Estimates put the size of this sector of the Ghanaian population at around 5%. They consume, however, the majority of imported foods. Canadian High Commission, "The Agri-Food Market in Ghana" at iii and 11.

approximately 65% of the total food retail market.[631] While the bulk of items sold in these markets is unlabelled, many dry and canned goods are labelled.

An important consideration with respect to food labelling issues in Ghana is literacy. While the rate of literacy in Western European countries and in Canada is at or near 100%, in Ghana literacy is about 80% of men aged 15 years and over and about 63% of women aged 15 years and over.[632] However, this number hides actual rates of literacy among different groups and in different regions in Ghana. Moving from south to north in Ghana, the general literacy rate drops to below 50%. As well as between men and women, men in Ghana have an average literary rate of 70-80%; for women it is 50-60%. Considering women buy much of the food for their families, a challenge for the Ghanaian government in the area of food labelling which is different from that for French and Canadian societies, is improving literacy or devising other means to enable consumers to profit from the information required to be displayed on pre-packaged products.

Paragraph 1 - Overview of current legislative framework for food labelling

Ghana's interest in labelling issues extends far beyond its interest in securing and maintaining international markets for its primary agricultural exports. The food labelling regime also serves to pursue several other important objectives, as it does in the other two study countries, such as protecting intellectual property of trademark holders, regulating fairness and establishing standards in the marketplace for the benefit of both vendors and consumers, and preventing fraud and deception in the marketplace.

Several pieces of legislation are currently in force which set out the content of food labelling law in Ghana. They are set out in Table 8 below.

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[631] Canadian High Commission "The Agri-Food Market" at 15.
[632] World Bank, "Ghana Summary Gender Profile", online: World Bank, <http://www.worldbank.org/afr/gender/ghana.pdf>. Data is for the year 1999.

Table 8 - Overview of Ghanaian legislation affecting food labelling

Type of labelling regulation	legislation	subordinate legislation
General labelling rules affecting all food products ("horizontal rules")	**Standards Decree 1973**	(Ghana Standards Board (Food, Drugs and Other Goods) General Labelling Rules, 1992); (Ghana Standards) GS 46: 1992 Packaged Food Labelling Requirements
	Weights and Measures Decree, 1975	
Labelling rules applying to production standards and naming of specified products or groups of products ("vertical rules")	**Standards Decree, 1973**	(various Ghana Standards) (GS starting in 1973); (for example GS 50: 1973 Specifications for Canned Tomatoes)
	Food and Drugs Law, 1992	(Breastfeeding Promotion Regulations, 2000)
	Cocoa Industry (Regulation) (Consolidation) Decree, 1968	(Cocoa Industry Regulations)
	Fruit Industry Decree, 1969	(Fruit Industry (Banana) Regulations, 1970); (Fruit Industry (Coffee) Regulations, 1970); (Fruit Industry (Copra) Regulations, 1970); (Fruit Industry (Palm Kernels) Regulations, 1970)
Labelling rules arising from intellectual property in food products	**Merchandise Marks Act, 1964; Trade Marks Act, 1965; Geographical Indicators Act, 2003**	
Laws punishing food labelling law non-compliance	**Criminal Code, 1960; Merchandise Mark Act, 1964; Standards Decree, 1973; Food and Drugs Law, 1992**	

A. constitutional considerations

The current constitution was approved on April 28, 1992. It establishes a unitary state with executive, legislative and judicial branches of government. The executive branch is led by the President, presently Mr. John Kufour,[633] who is assisted by his Council of Ministers, all of whom are presidential nominees approved by Parliament. The Ministers oversee several government departments. From a food labelling perspective, the relevant ministries are Food and Agriculture, Trade and Commerce, and Justice. Several boards and agencies are created under each ministry, the two principal ones, in regards to food labelling, being the Ghana Standards Board and the Food and Drugs Board.

Laws are passed in the unicameral Parliament[634] which sits in Accra, the nation's capital city. The Parliament operates generally along the lines of British Parliamentary tradition with Bills proposed by government, read and debated in Parliament and then passed with a final reading and vote in Parliament. On the basis of powers delegated in the laws passed by Parliament, the executive branch, through its Ministries and agencies, is empowered to enact rules and regulations.

The judicial branch of government in Ghana has local courts that sit in a number of centres with final appeals from the local courts to the Supreme Court of Ghana, which sits in Accra. There has been very little judicial activity in the area of food labelling legislation and its interpretation and enforcement.

From a constitutional perspective, there are few impediments to the development and implementation of food labelling law. However, as is examined below, limited resources and organizational obstacles have prevented the cohesive development of food labelling law in Ghana.

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[633] The President is both the chief of state and the head of government.
[634] 200 seats with members being elected by direct, popular vote to serve four-year terms.

B. the matrix of food labelling law in Ghana

In colonial times and during the first decade of independence, the development of food labelling law was not a field of intensive regulatory activity. However, during this period, some legislation was passed to protect private intellectual property, to prvent product mislabelling and fraud in the national marketplace, and to maintain basic production standards or quality standards for products destined for international markets. The first legislative act that specifically focused on food labelling did not appear until 1967. The advent of mandatory minimum labelling requirements began in that year with the *Standards Decree* (revised in 1973) and these requirements were made more stringent with the promulgation of the *Food and Drugs Law, 1992*. As in the other two country case studies, the initial examination of the current state of Ghanaian food labelling legislation will be presented according to three categories: prohibited claims, mandatory food labelling and reserved claims that can be used on food labels.

1. prohibited claims

Two types of prohibited claims exist under food labelling law in Ghana:

1° the unauthorized use of "any badge, seal, device, emblem or flag" reserved by law for the official use of the state and its official bodies; and
2° food labelling that is false, misleading or deceptive.

1° the unauthorized use of "any badge, seal, device, emblem or flag" reserved by law for the official use of the state and its official bodies

General requirements set out in the *Trade Marks Act* preclude the use of certain words or marks[635] on all products including the unauthorized use of "any badge, seal, device, emblem or flag" reserved by law for the official use of the state and its official bodies.[636]

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[635] The Act defines "mark" as including "a device, brand, heading, label, ticket, name, signature, word, letter, numeral, or any combination thereof (s. 66(1)) and "use of a mark shall be construed as references to the use of a printed or other visual representation of the mark, and references to the use of a mark in relation to goods shall be construed as references to the sue thereof upon, or in physical or other relation to, goods." (s.66(2)).
[636] Labels using such elements would expose the producer to a fine of 20 pounds or to up to 3 months imprisonment. The legislation has never been amended to convert these amounts into cedis but presumably if a

2° food labelling that is false, misleading or deceptive

Four separate statutes[637] prohibit food labelling that is false, misleading or deceptive. The clearest legal provisions prohibiting food product mislabelling are found in the *Food and Drugs Law, 1992*. This Act requires that label claims on food not be false or misleading, particularly where they related to foods for which official standards exist. Section 3 requires labelling not to be false, misleading or deceptive as regards its character, nature, value, additives, substance, quality, composition, merit or safety. Section 4 creates an offence for the mislabelling of foods that are prescribed in a standard but which do not meet that standard. Section 5 makes it an offence for any person to sell "to the prejudice of a purchaser any food which is not of the nature, substance or quality of the article demanded by the purchaser."[638]

While the *Standards Decree 1973* contains no provision creating a general offence for false, misleading or deceptive labelling,[639] it does prohibit the mislabelling of a product through the inappropriate or unauthorized use of marks which suggest that a product conforms to a standard specification when it does not[640] or through the use of a standard mark[641] when the producer or seller is not licensed to use that mark.[642]

The *Merchandise Marks Act 1964* contains important provisions relating to the obligation for truthful label descriptions of all products for sale in Ghana. The Act makes it

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Ghanaian court were to convert this amount using current exchange rates for British pounds this would result in a maximum fine of approximately 270,000 cedis.

[637] *The Criminal Code*, the *Food and Drugs Law, 1992*, the *Standards Decree 1973* and the *Merchandise Marks Act, 1964*. One might also include the *Weights and Measures Decree, 1975* which includes a provision, present in every Weights and Measures statute since 1892, that obliges all marketplace sellers to weigh or measure a product offered for sale to a prospective buyer when so requested. No to do so is an offence under the Act.

[638] An additional provision of a similar nature is contained in sec. 6A(4) which reads that "No person shall label, package, sell or advertise salt in a manner that is likely to be mistaken for salt of the prescribed standard." This section was added to the *FDL, 1992* in 1996 as part of the general amendment requiring the iodization of all salt sold for human consumption in Ghana.

[639] This was also true of the *Standards Decree, 1967*.

[640] Sec. 21.

[641] One presumes that this refers to the Ghana Standards Certification Mark.

[642] Penalties for these offences are limited to 500 cedis or imprisonment of up to two years. S. 21(2).

an offence to misdescribe or mislabel products for sale, so as to label or sell a product which "applies a false trade description to goods"[643] Applying a false trade description to goods includes the application of such a description to the product itself or to "any covering, label, reel, or other thing in or with which the goods are sold or exposed."[644] Furthermore the Act contains definitions of "false trade description"[645] and "trade description"[646] which are broad enough to create a general obligation for truthful labelling for all products sold in Ghana, including food products.

Finally, for serious cases of food mislabelling and fraud, particularly where human health is endangered, *The Criminal Code, 1960* could be used to protect consumers from false or misleading labelling of food products. Section 286 of Chapter 8 – Public Nuisances, prohibits the sale of food or drink that is "in such a condition, from putrefaction, adulteration, or other cause, as to be likely to be noxious to health". This section could be used to prosecute a merchant who labelled his wares being fit for human consumption when they were not. This offence, however, is concerned more with food safety threats than with false or misleading labelling. Given the other statutes which permit prosecutions for food mislabelling, a criminal action under section 286 would likely prove difficult in securing a conviction for a food labelling offence. On the other hand, the general fraud provisions of the Code (sections 16, 131, 132, and 133) are available to be used if there are serious, widespread and egregious cases of deceptive sales of foods, involving fraudulent and misleading labelling on a grand scale.[647] It should be noted that recourse to the Criminal

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[643] Sec. 2 of the Act sets out a number of defences to such charges including lack of intent to defraud, reasonable care exercised to not misdescribe goods and cooperation with the prosecution to provide information as to the persons on whose behalf the description was applied.

[644] Sec. 3(1).

[645] Sec. 17 states that "false trade description" means "a trade description which is false or misleading in a material respect as regards the goods to which it is applied, and includes every alteration of a trade description whether by way of addition, effacement or otherwise, where that alteration makes the description false or misleading in a material respect, and the fact that a trade description is a trade mark, or part of a trade mark shall not prevent the trade description from being a false trade description within the meaning of the Act."

[646] Sec. 17 states that "trade description" means "any description, statement, or other indication, direct or indirect – (a) as to the number, quantity, measure, gauge, or weight or any goods; or (b)as to the standard of quality of any goods, according to a classification commonly used or recognized in the trade; or (c) as to the fitness for purpose, strength, performance or behaviour of any goods, or (d) as to the place or country in which any goods were made or produced, or (e) as to the mode of manufacturing or producing any goods; or (f) as to the materials of which any goods are composed; or (g) as to any goods being the subject of an existing patent, privilege, or copyright."

[647] The author is not aware, however, of any cases in Ghana prosecuted under this provision.

Code is limited, given the provisions contained in other specific legislation like the *Food and Drugs Law, 1992.*

2. mandatory elements to be included on every food label

Certain mandatory elements are required on labels of food products sold in Ghana. These mandatory elements are found in legislation outlining general requirements for all food products ("horizontal requirements") and in legislation outlining mandatory labelling requirements for specific food products ("vertical requirements").

a. horizontal requirements

Mandatory elements that must appear on all prepackaged food labels are set out in two pieces of delegated legislation under the *Standards Decree, 1973*, the *Ghana Standards Board (Food, Drugs and Other Goods) General Labelling Rules, 1992 (1992 General Rules*) and the *Ghana Standard GS 46: 1992 Packaged Food - Labelling Requirements (1992 Ghana Standard).*[648] With respect to the form of a food label, it must:

- be clear;[649]
- be prominent, with the name of the food in the most prominent lettering of the label;[650]
- be readily legible;[651]
- have lettering in contrasting colour to the label background;[652]
- name and provide the net contents of the food on the normal presentation side of the packaged product;[653] **and**
- be in English unless the product is destined for export.[654]

[648] The *Standards Decree, 1973* revokes the *Standards Decree, 1967* and contains powers to promulgate regulatory instruments to permit bye-laws, rules, standard specifications, and licences. Under the Decree, the Ghana Standards Board is empowered to promulgate "standard specifications ... prescribing standards of composition, purity, or other properties of goods" and to make rules "governing ... the packaging, labelling, advertising and selling of goods." It is under these powers that the Ghana Standards Board has enacted the *Ghana Standards Board (Food, Drug and Other Goods) General Labelling Rules, 1992* and the *Ghana Standard GS 46: 1992 Packaged Food - Labelling Requirements* which sets out the mandatory elements of food labels in Ghanaian law.

[649] *1992 Ghana Standard*, s. 4.1.

[650] *1992 Ghana Standard*, s. 4.1.

[651] *1992 Ghana Standard*, s. 4.1; *1992 General Rules*, s. 4(2).

[652] *1992 Ghana Standard*, s. 4.1.

[653] *1992 Ghana Standard*, s. 4.1.

[654] *1992 Ghana Standard*,, s. 4.2; *1992 General Rules*,, s. 4(3).

With respect to the mandatory elements to be listed on a food label, the following is the list prescribed by Ghanaian law:

1° the name of the food;[655]

2° the list of ingredients;[656]

3° the net content of product by weight or volume;[657]

4° the name and address of the producer, manufacturer, packer, distributor, importer, exporter or vendor of the food;[658]

5° the country of origin;[659]

6° a code to identify the production lot of the product;[660]

7° a date marking;[661]

8° storage conditions and handling precautions that may be necessary;[662]

9° instructions for use, if it would be difficult to make appropriate use of the food in the absence of such instructions;[663] **and**

10° if treated with ionizing radiation, an indication thereof.[664]

1° the name of the food

There are several rules to determine the legal name of a food. The name used should be specific enough to reflect the true nature of the food, but also be consistent with the common or usual name of the product.[665] Where a name has been established by a specific Ghana Standard, that name must be used but not necessarily to the exclusion of other names for the product.[666] Where no common name or Standard name exists, an appropriate

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[655] *1992 Ghana Standard*, s. 3.2.1, *1992 General Rules*, s. 1(1)(a).
[656] *1992 Ghana Standard*, s. 3.2.2, and *1992 General Rules*, s. 1(1)(b).
[657] *1992 Ghana Standard*, s. 3.2.3, and *1992 General Rules*, s. 1(1)(g). The *Weights and Measures Decree, 1975* also contains the mandatory labelling requirement that all packaged goods show both gross and net weights and measures on the package or container. (s. 19).
[658] *1992 Ghana Standard*, s. 3.2.4, and *1992 General Rules*, s. 1(1)(j).
[659] *1992 Ghana Standard*, s. 3.2.5, and *1992 General Rules*,, s. 1(1)(i).
[660] *1992 Ghana Standard*, s. 3.2.6, and *1992 General Rules*, s. 1(1)(h).
[661] *1992 Ghana Standard*, s. 3.2.7, and *1992 General Rules*, s. 1(1)(c).
[662] *1992 Ghana Standard*, Annex 1, s.A-3, *1992 General Rules*, s. 1(1)(d).
[663] *1992 General Rules*,, s. 1(1)(e).
[664] *1992 Ghana Standard*, s. 5.2.
[665] *1992 Ghana Standard*, s. 3.2.1.1 and s. 3.2.1.3; *1992 General Rules*, s. 2.
[666] *1992 Ghana Standard*, s. 3.2.1.2; *1992 General Rules*, s. 2.

descriptive name must be used although a coined or fanciful name may be used as long as it is not misleading. [667]

2° the list of ingredients

A complete list of ingredients must be declared on the label in descending order of proportion.[668] All ingredients, even of composite ingredients, must be listed, although there is a list of composite ingredients which are exempted by itemized declarations and which can be declared in their composite form. The latter include "animal fat", "animal oil", "vegetable oils", "herbs", "starches" and a number of substances in the general classes of production aids like anti-caking agents, emulsifiers, etc.[669]

3° the net content of product by weight or volume

The net contents must be declared in metric units unless for export, by volume for liquid foods and by mass for solid foods.[670]

4° the name and address of the producer, manufacturer, packer, distributor, importer, exporter or vendor of the food

An address must be listed of the name and address of a person who is associated with the production or sale of the food. However, neither the *1992 Ghana Standard*, nor the *1992 General Rules* appear to require that the name and address listed be for a person located in Ghana, which is problematic for disgruntled or injured Ghanaian consumers wishing to seek redress for their concerns.[671]

5° the country of origin

All pre-packaged foods must indicate the country of origin of the food product on their labels. No particular guide is given as to how to determine country of origin for products that are made from several ingredients from several countries.[672]

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[667] *1992 Ghana Standard*, s. 3.2.1.4 and s. 3.2.1.5. *1992 General Rules*,, however, in s. 2(5) denies the use of a "fancy name" for the use of a "common name".
[668] *1992 Ghana Standard*, s. 3.2.2.1.
[669] For a complete list, see *1992 Ghana Standard*, s. 3.2.2.3.
[670] *1992 Ghana Standard*, s. 3.2.3.
[671] *1992 Ghana Standard*, s. 3.2.4.
[672] *1992 Ghana Standard*, s. 3.2.5.

6° a code to identify the production lot of the product

All products must have a lot number or production code so that they can be identified in case a food safety or other consumer concern arises with respect to the food product.[673]

7° a date marking

All food products must be marked with one of: date of manufacture; date of packaging; sell-by date; date of minimum durability ("best before" date); or use-by date ("expiration date").[674] The *1992 Ghana Standard* does not itself specify when one or the other of the date markings be used. However, the *1992 General Rules* require one of date of manufacture and expiry date; best before date; and use by date. The *1992 Ghana Standard* refers to the power of the Ghana Standard Board to make specific rules as to which marking must be used for a specific food product. If in doubt, one could argue that the appropriate date marking to be used would be the one that meets the objective of providing "the consumer with information about the period within which the expected quality of the product can be guaranteed provided that it has been properly stored".[675]

8° storage conditions and handling precautions that may be necessary

The *1992 General Rules* make this requirement mandatory whereas the *1992 Ghana Standard* states that if any special storage conditions are required for the durability date given to be valid, then such conditions should be indicated in close proximity to the date marking.

9° instructions for use, if it would be difficult to make appropriate use of the food in the absence of such instructions

This provision is vague and unique to the *1992 General Rules* as it does not appear in the *1992 Ghana Standard.*

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[673] *1992 Ghana Standard*, s. 3.2.6.
[674] Whatever mode of date marking selected, day/month/year must appear for products with a shelf life of less than three months and month/year for products with a shelf life of more than three months. *1992 Ghana Standard*, s. 3.2.7, Annex A, s. A.5.
[675] *1992 Ghana Standard*, s. 3.2.7, Annex A, s. A.1.

10° if treated with ionizing radiation, an indication thereof

Section 5.2 of the *1992 Ghana Standard* states that "foods which have been treated with ionizing radiation shall be so designated". It does not set out how that must be done but either words or symbols would meet this requirement. There is however a specific *Ghana Standard on Irradiated Food* which addresses the specifics of labelling such foods.[676]

Neither the *FDL, 1992* nor the *Regulations* promulgated under it, contains any horizontally applicable mandatory labelling requirements.[677] However, the Food and Drugs Board does have the power under the Act to require such labelling. Section 28 sets out one of the functions of the Food and Drugs Board, "in co-operation with the Ghana Standards Board, [to] ensure adequate and effective standards for food and drugs," which feeds directly into mandatory labelling requirements by operation of the standards created under the *Standards Decree, 1973.* The *FDL, 1992* in s. 47 also empowers the Minister of Health, after consultation with the Food and Drugs Board, to enact regulations governing the packaging, labelling, advertising and selling of food; the size, dimensions, fill and specifications of packages of food; the use of any substances as an ingredient in any food; and the protection of the consumer or purchaser of food from being deceived or misled as to its quality, character, composition, merit or safety or to prevent injury to the health of consumer or purchaser; for the regulation of importation of food, drugs, cosmetics, devices or chemical substances and the prescription of methods of manufacture, processing, sale, storage and transportation of food, drugs, cosmetics, devices or chemical substances. These powers have been exercised only once (see below for vertical labelling requirements on infant breastfeeding substitute products).

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[676] *GS 210:1998 Food technology – Specification for irradiated food,* s. 8.6 which sets out that the food label must contain a declaration "treated with ionizing radiation" and carry the internationally accepted logo for irradiated foods.

[677] One exception to this is the 1996 amendment for the iodization of salt. S. 6A of the Act now contains a provision which requires the mandatory packaging and labelling of all consumer salt sold in Ghana so as to conform to the standard for the fortification of salt as set out by the Ghana Standards Board. As well, though not a mandatory labelling requirement, the *FDL, 1992* does set out a general "truthfulness in labelling" obligation.

b. vertical requirements

Mandatory labelling requirements are also set out in other pieces of delegated legislation under Ghanaian law. Under the *Standards Decree, 1973*, the Ghana Standards Board has been empowered to create specific Ghana Standards for several food products. As well under the *FDL, 1992*, the Food and Drugs Board has promulgated one piece of delegated legislation to establish labelling and sale standards for human milk substitutes.

The Ghana Standards Board has adopted many Ghana Standards for production and presentation for specific products. An early example of one such standard was the *GS 50: 1973 Specifications for Canned Tomatoes.*[678] Taking that Standard as an example, *GS 50: 1973* contains certain specific labelling requirements for canned tomatoes. Section 7 of *GS 50: 1973* is entitled "Labelling" and sets out mandatory and permissible product names (such as when the term "tomato" can be used) and qualifying adjectives (such as "unpeeled", "whole", "regular", "flavoured", etc.) that may be used on the labels of canned tomato products. These qualifying adjectives or adjectival phrases relate to styles, types, and packing media.

Under the *FDL, 1992*, the Minister of Health, after consultation with the Food and Drugs Board has enacted regulations governing the packaging, labelling, advertising and selling of infant breastfeeding substitute products. The *Breastfeeding Promotion Regulations, 2000*[679] set out a comprehensive scheme for the regulation of breastfeeding substitute products. These rules grew out of the response of international organizations[680] to the worldwide outcry against multinational corporations' trade practices in the marketing and distribution of infant formula. The Ghanaian regulations limit the sale, advertising and promotion of breastfeeding substitute product (BSP). As well, these *Regulations* contain

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[678] Later examples, of which there are now over one hundred, include ones for specific products like *GS 91: 1990 Meat and Meat Products - Specification for Dressed, Chilled and Frozen Poultry* or of a specific processes like *GS 151: 1992 Specification for weighing instruments to be used for trade purposes*, or *GS 210: 1998 Food technology - Specification for irradiated food.*

[679] L.I. 1667.

[680] This outcry resulted in the development of an "International Code of Marketing of Breast-milk Substitutes by the World Health Organization" (Geneva: WHO, 1981) and a Codex Alimentarius standard, "Codex Standard for Infant Formula - Codex Stan 72-1981" (Rome: Codex, 1981)

very specific provisions regarding prohibited[681] and mandatory labelling requirements of BSPs. With respect to form and presentation, the label of a BSP must be written in English.[682] Other labelling provisions in the *Breastfeeding Promotion Regulations* require special mandatory labelling requirements for feeding bottles and teats,[683] for BSPs that do not satisfy all the nutritional requirements of an infant but which can be modified to do so,[684] and for condensed milk products.[685]

Finally, specific labelling requirements arise for the major export commodities of Ghana-- cocoa, bananas, coffee, copra (coconut meal) and palm-kernels. The *Cocoa Industry (Regulation) (Consolidation) Decree, 1968*[686] governs the grading, marking and export of cocoa while the *Fruit Industry Decree, 1969*[687] governs the other four export commodities.

Under both of these *Decrees,* the five named export commodities must be inspected, bagged (or wrapped in the case of bananas), the bags stamped or stenciled with officially assigned grade and product name, and then sealed with a government seal. The regulations for each commodity set out the mandatory labelling requirements to appear on each bag (or case) of the product. Usually this will consist of the name of the product and its grade and/or grade-mark. Each set of *Regulations* (cocoa,[688] coffee,[689] copra,[690] and palm-kernels[691] but not for bananas) specifically sets out what information must be marked on the bag.

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[681] No BSP label may contain the word "materalized" or similar expression. (s. 10(2)). Furthermore, no photo, drawing or other graphic representation, other than for illustrating the method of preparation of the BSP is permitted on a BSP label (s. 10(3)(a)).
[682] *Breastfeeding Promotion Regulations, 2000, s.* 10(3)(b).
[683] *Breastfeeding Promotion Regulations, 2000, s.* 11.
[684] *Breastfeeding Promotion Regulations, 2000, s.* 10(4).
[685] *Breastfeeding Promotion Regulations, 2000, s.* 12 states that "A label on a container of condensed milk shall have a clear and conspicuous warning that it shall not be used for infant feeding."
[686] N.L.C.D. 278 and the Regulation promulgated under it, namely the *Cocoa Industry Regulations, 1968* (L.I. 598).
[687] N.L.C.D. 356 and the Regulations promulgated under it, namely *the Fruit Industry (Bananas) Regulations, 1970* (L.I. 643); the *Fruit Industry (Coffee) Regulations, 1970* (L.I. 644); the *Fruit Industry (Copra) Regulations,* 1970 (L.I. 645); and the *Fruit Industry (Palm-Kernels) Regulations, 1970* (L.I. 646).
[688] The *Cocoa Regulations* specify, for example, the exact form and size of the grade-marks to be affixed to the bags of cocoa once the cocoa has been graded. In the case of cocoa, the markings must exactly match those set out in the Second Schedule of the Regulation, being one, two or three stools each stool being 4.4 by 3 inches in size or if the cocoa is sub-standard quality, the words "Sub-standard" in letters no less than two inches high. Oddly though there is no official requirement that each bag be marked with the word "cocoa". For the other

The two *Decrees* set out offences for the unauthorized or fraudulent use of grade marks and seals and the unauthorized removal or alteration of such marks and seals.[692] The specific commodity regulations[693] contain additional prohibitions, but only the *Cocoa Regulations* also contains additional penalty provisions.[694] However, the *Fruit Decree* penalty provisions explicitly indicate that they apply to regulations as well as to the Decree itself. Penalties for offences under the Decrees and their Regulations include fines and/or imprisonment[695] and forfeiture of produce associated with the perpetrator's proscribed activities.

3. reserved claims

Intellectual property statutes in Ghana also provide for reserved claims on the labelling of food products. One could also consider the grading names explored in the paragraph above as reserved claims for produce deserving of the specific grade names under Ghana law. Certain aspects of Ghana's intellectual property law regime which affect food labelling are explored below.

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export commodities this requirement is clearly spelled out in the Regulation. For example, bags of palm-kernels must be marked "Palm-Kernels" in letters no less than two and one-half inches high.

[689] S. 2(2) "Each such bag shall show the type of coffee, that is to say Liberica, Robusta or Arabica which it contains by being marked thus: ROBUSTA COFFEE, the letters to be at least 2 ½ inches high." The Regulations require this marking in addition to the grade-mark assigned by the inspector which must be in the form set out in the Regulation and which must be at least three inches high (s.9).

[690] S. 13 states that the grade-marking of quality must be in "letters to be at least 3 inches high."

[691] S. 2(1) states that "All palm-kernels intended for export shall be packed in clean dry bags of strong and unimpaired texture and each such bag shall be clearly marked "Palm-Kernels" in letters at least 2 ½ inches high." The Regulations require this marking in addition to the grade-mark assigned by the inspector which must be in the form set out in the Regulation and which must be at least three inches high (s.10).

[692] S. 6 and 7 of the *Cocoa Industry (Regulation) (Consolidation) Decree, 1968* and s. 6 of the *Fruit Industry Decree, 1969.*

[693] See s. 8 of the banana regulation, s. 14 of the coffee regulation, s. 15 of the copra regulation, s. 12 of the palm-kernel regulation regarding the prohibition against interference with seal, marks or contents of inspected bags.

[694] Depending on the provision breached, the Cocoa regulations provides fines that range from 200 to 4000 cedis and/or six months to 10 years imprisonment, with marking offences subject to the intermediate range of punishment (500 cedis and/or one year of imprisonment), thus making this latter penalty the same as under the *Cocoa Decree* for the same offence.

[695] Up to 500 cedis and/or imprisonment of up to one year under the Cocoa Decree (s. 13) and up to 200 cedis or in default of payment, imprisonment of up to six months under the Fruit Decree (s. 6).

Some of Ghana's oldest legislation impacting the labelling of food is found in its intellectual property law dating back to colonial times. Colonial statutes were rolled into two new statutes after independence in the form of the *Merchandise Marks Act, 1964*[696] and the *Trade Marks Act, 1965*.[697]

The *Merchandise Marks Act* makes it an offence to mark or describe products, including food products, for sale in Ghana with a trade mark that is falsified, forged or used without permission.[698] Even the making or possession of an instrument to make such marks is an offence under the Act. Thus all labels containing illegitimate trade marks are prohibited.

The *Trade Marks Act, 1965*[699] provides for the registration of trade marks and certification trade marks.[700] Use of markings identical to or resembling trade marks or certification trade marks constitutes an infringement of the rights granted to the trade mark proprietor and can lead to an action for damages. As well the Act also sets out specific penalty provision for persons representing on a label that the marks they are using are registered trademarks when they are not.[701] As a practical matter then, persons who are not the proprietors of particular trade marks or certification trade marks are precluded from using any registered mark or any mark that closely resembles that mark on their product labels.

In 2003 and 2004 Ghana revised almost its entire intellectual property regime, a project which included the promulgation of a *Geographical Indicators Act*. The only piece of legislation which has not yet become law is the new *Trade Mark Act* which is currently

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[696] Act 253.
[697] Act 270.
[698] S. 1(1)(b), (c),(d), and (e).
[699] An revamped *Trade Marks Act* is currently before Parliament.
[700] S. 36(3). The condition to be met for the registration of a certification trade mark are further elaborated in the First Schedule of the Act and generally require that the applicant is competent to certify the goods in respect of which the mark is to be registered, whether the draft rules are satisfactory, and whether in all the circumstances the registration applied for would be to the public advantage (s.1(5) of the First Schedule).
[701] If convicted under this provision, offenders are liable to a fine up to 20 Ghanaian pounds. (s. 55). However, with the change of the Ghanaian currency to cedis and its frequent devaluation, the provision for fines is now virtually meaningless.

before Parliament. This full-scale renovation of the intellectual property regime is Ghana's response to new obligations undertaken under the *Agreement on Trade-Related Aspects of Intellectual Property (TRIPS Agreement)* of the WTO.[702] The *Geographical Indicators Act* most clearly reflects this trend as the Act reflects the requirements for the protection of geographical indicator names, particularly as found on product labels, as set out in Articles 22-24 of the *TRIPS Agreement.*

Paragraph 2 - Administration and enforcement of food labelling laws

A. confusion arising from delegated legislation

It is very odd that the promulgation of the *1992 Ghana Standard*, explored above, occurred at almost the exact same moment that the Ghana Standards Board promulgated the *Ghana Standards Board (Food, Drugs and Other Goods) General Labelling Rules, 1991*[703] which were almost immediately replaced by the *1992 General Rules*[704] which remain in force today. All of these instruments set out specific rules for labelling food, drugs and other goods and new penalty provisions for some aspects of non-compliance. The *1992 General Rules* differ in only two important aspects from those of 1991. The *1992 General Rules* permit the Ghana Standards Board to appoint Inspectors to implement and enforce the labelling rules and the *1992 General Rules* define "food"[705] and "label."[706]

As discussed, Part I of the *1992 General Rules* outlines the mandatory labelling requirements that apply to prepackaged food, which differ slightly from the requirements under the *1992 Ghana Standard.* Part III of the *1992 General Rules*[707] outlines the rules

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[702] Fori Boateng, Legal Officer, Ghana Ministry of the Attorney General, Legal Drafting Department (interviewed in Accra 5 March 2003 and 21 April 2004).
[703] L.I. 1512.
[704] L.I. 1541.
[705] "food" means any article manufactured, sold or presented for use as food or drink for human consumption, chewing gum and water.
[706] "label" includes "any tag, brand, mark, pictorial or other descriptive matter, written, printed, embossed or impressed on or attached to the item or inserted in its container."
[707] Part II deals with requirements for drugs and will not be examined in this study.

concerning how the label must be displayed. Again, these rules differ slightly from the *1992 Ghana Standard.*[708]

The *1992 General Rules* contain no general penalty provisions.[709] They contain only a specific provision for the offence of obstructing an Inspector in the performance of his functions or the offence of an Inspector assisting a person to contravene the Rules. Either action constitutes an offence and subjects the accused to a fine of 200,000 cedis or twelve months in prison. Unfortunately, the requirement that foods be properly labelled carries no sanction under the Rules except that such products are subject to seizure and forfeiture. It is unclear why the *1992 General Rules* have abandoned the general liability for persons who contravene the act but who do not obstruct an inspector.

The above analysis reveals that the mandatory labelling standards under the *1992 General Rules* and the *1992 Ghana Standard* differ in material respects. Which takes precedence? The *1992 General Rules* require label elements such as an indication of the minimum durability in the form of a date of manufacture and one of the expiry date, the best before date, or the use-by-date; any special storage conditions and handling precautions that may be necessary; and instructions for use in respect of the food, if it would be difficult to make appropriate use of the food without such instructions. The *1992 Ghana Standard* does not.

The *1992 Ghana Standard*, on the other hand, requires that the form of the label contain lettering in contrasting colour to the label background; that the name of the food is in the most prominent lettering on the label; and that the name and net contents of the food be on the normal presentation side of the packaged product while the *1992 General Rules* do not.

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[708] For example, the 1992 rules as to label form are limited to the following: (i) the label must be printed, impressed, embossed or stamped legibly in indelible ink; and (ii) the label must be in English.The 1992 Rules removes the prohibition contained in the 1991 Rules which prohibits stamped or handwritten marks and labels (s. 4). The 1992 Rules also provide a saving provision for small packages such that if they cannot be conveniently marked or labelled, the outer package enclosing the small packages need meet the requirements of the Rules.

[709] This is in contrast to the 1991 Rules which declared that any person who contravenes any provision of the Rules commits an offence and is liable to a fine not exceeding 500,000 cedis or 12 months in prison.

The *1992 General Rules* define "food" as any article manufactured, sold or presented for use as food or drink for human consumption, chewing gum and water while the *1992 Ghana Standard* leaves this key term undefined. The definitions of "label" in the two documents are not even the same![710] Furthermore, neither of the definitions of "label" in the two pieces of legislation mirrors the wording of the definition of the same word under the *FDL, 1992*. Finally, the *1992 Ghana Standard* offers a definition for "labelling" when no other piece of Ghanaian legislation defines the term.

From a practical perspective these incongruities present not only serious challenges to the food processor/seller and the food label inspector assessing label compliance, but also to the consumer who does not enjoy a standard content and form of food labelling.

The *FDL, 1992* only adds to the confusion. Unfortunately, while the Act provides several key definitions including "food"[711] and "label,"[712] it does not define "standards." Section 4 of the *FDL, 1992* is instructive on this point but is problematic in that it considers that "standards" will flow from any enactment concerning food.[713] This seems overly broad as it could thus include Ghana Standards and Foreign Standards adopted by the Ghana Standard Board but also any other foreign national or international food standard whether they have been officially adopted in Ghana or not.

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[710] Contrast the *1992 Ghana Standard* definition of means "any tag, mark, pictorial or other descriptive matter written, printed, stenciled, marked, embossed or impressed on, or attached to a container of foods" with the *1992 General Rules* definition of "any tag, brand, mark, pictorial or other descriptive matter, written, printed, embossed or impressed on or attached to the item or inserted in its container."

[711] Defined in s. 51 as including "salt and any article manufactured, sold or represented for use as food or drink for human or animal consumption, chewing gum, water and any ingredient of the food, drink, chewing gum or water."

[712] Defined in s. 51 as including "any legend, work or mark attached to, included in, belonging to or accompanying any food, drug, cosmetic, device or chemical substance."

[713] Where a standard has been prescribed under <u>any enactment</u> for any food, any person who labels, packages, sells or advertises any food in such a manner that is likely to be mistaken for food of the prescribed standard commits an offence(emphasis added).

B. legal avenues for enforcement of food labelling law in Ghana

Each of the *FDL, 1992*, the *Standards Decree, 1973*, the *Merchandise Mark Act, 1964* and the *Criminal Code, 1960* contain provisions which could be used for enforcement actions against persons selling food products with non-conforming labels in Ghana.

Implementation, monitoring and enforcement of labelling obligations falls primarily to the officers of the Ghana Standards Board under the *Standards Decree, 1973* and its subsidiary legislation, to officers of the Food and Drugs Board under the *FDL, 1992* and to the police and customs officers in the case of criminal prosecutions for fraud and for trade mark infringement cases.

Under the *Standards Decree 1973* food labelling inspectors are appointed pursuant to the *1992 General Rules*.[714] The *1992 General Rules* was the first piece of Ghanaian legislation to specifically outline powers to be accorded to food labelling inspectors. Inspectors may enter any premise where food is being distributed or offered for sale, examine the food for compliance to the labelling rules and seize all food products which contravene any of the provisions of the rules or "which have been labelled in such a way as to be deceptive, misleading or false."[715] The inspectors' powers also extend to examining imports in which case if any food is imported into Ghana which is not labelled according to the Rules it is detained for a period of 28 days to be relabelled. If after this period the food has not been relabelled, it can be seized. [716] Under the *Standards Decree, 1973* the next step after inspection is a request for compliance, failing which a prosecution under the Decree and its subsidiary legislation is contemplated. The offences and the penalties attached to them have been reviewed above.

Under the *FDL, 1992* regulatory officers perform a similar function to the inspectors under the *Standards Decree, 1973* but judging from interviews with Food and Drug Board staff, only a modest amount of the officers' time and efforts are devoted to labelling issues

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[714] L.I. 1541.
[715] S. 8(c).
[716] S. 11 makes all goods seized under these Rules liable to forfeiture.

as the mandate of food safety requires considerable staff time and resources.[717] Staff stressed that the Food and Drug Board does not generally "enforce" *FDL, 1992* provisions, particularly labelling irregularities, through the formal mechanisms mentioned in the Act. Rather, the Food and Drug Board aims to educate food producers, importers and sellers as to what the labelling rules mean for their products, whether domestic or imported, and help private industry to develop labels that comply with provisions of the *FDL, 1992*.[718] However, in cases where non-compliance is found and where an offender does not attempt to comply after several requests from FDA officers, formal prosecution remains a possibility. Offences relating to food labelling can be prosecuted under the general penalty provisions of Part I of the *FDL, 1992*. Thus the *FDL, 1992* provides for quasi-criminal sanctions of fines and/or imprisonment, forfeiture of offending food articles and/or the suspension or cancellation of any licence issued to the person under the *FDL, 1992*.

C. actual enforcement practice in Ghana

Prosecutions for non-compliance for food labelling offences may not be effective in Ghana for several reasons. The lack of jurisprudence[719] as well as comments from GSB and FDB staff suggest that the formal remedies have rarely been used against suspected or actual violators of Ghana's food labelling laws. Several reasons may account for non-enforcement through the courts. These reasons included: lack of adequate resources to pursue violators; the slowness, costliness and uncertainty of legal proceedings that are necessary to lead to a conviction; very low financial penalties for offences; the possible chilling effect that such prosecutions might have on the general activities promoting food production and marketing

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[717] Mr. Ben Botwe, Deputy Chief Executive, Ghana Food and Drugs Board (interview conducted 27 February 2003).

[718] Mrs. Yvonne Nkrumah, Legal Officer, Ghana Food and Drugs Board (interview conducted 14 March 2003). This function has however led to an interesting court action. In "*The Republic vrs. The Chief Executive, Food and Drugs Board, Ex Parte Body Sense Foods* - Suit No.MISC1268/2001" a food producer requested the court to review a decision of the FDB with respect to the former's application to the Board for permission to produce and test-market "slim chocolate" and "power chocolate". The case appears to have been settled before any court decision was forthcoming as no report case has been found. For commentary on the case, see Dr. Samuel K. Asibuo and Mr. Kingsley K.K. Ampofo, "Final Report- Review Study of Health Sector Regulation in Ghana, A Technical Assistance Report to Danish International Development Agency (DANIDA) Health Sector Support Office, Ghana and to the Ministry of Health and Regulatory Institutions in Ghana's Health Sector" (Accra, Ghana: November 2001) (on file with author) at p. 81.

[719] The author could find no reported cases relating to convictions for food labelling offences nor could the Food and Drugs Board nor the Ghana Standards Board provide cases that they had carried to prosecutions. Nor was the author able to find or was referred to cases that were settled prior to s. 9 prosecution proceedings.

in Ghana; and the use of other less formal mechanisms to ensure compliance with labelling provisions.

It appears, therefore, that unless labelling problems threaten health and safety in Ghana, little systematic action is taken by either GSB or FDB officers to review products as a group or particular players in the market for labelling conformity.[720] If a monitoring activity is undertaken it is usually on an *ad hoc* basis in response to a competitor or (less often) a consumer complaint of false, misleading or deceptive labelling.[721]

Prosecutions under the remaining legislation (the *Merchandise Marks Act*, the *Trade Marks Act*, the *Weights and Measures Act*, the *Cocoa Industry (Regulation) Consolidation Decree,* the *Fruit Industry Decree* and the *Criminal Code*) also appear rare and fall to police, customs officers and the public prosecutor's office. No cases were found, however, resulting from prosecutions for labelling offences under any of these statutes.

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The food labelling regime in Ghana has weathered turbulent times. From its colonial past, Ghana inherited laws for the basic protection of intellectual property and for the inspection and marking of basic food products destined for export markets. After gaining independence in 1957, Ghana began its own journey in crafting a set of laws that would prevent marketplace fraud and protect food safety. In its second decade after independence, Ghana passed its first mandatory food labelling law, *Standards Decree, 1973* which empowered Ghanaian authorities to recognize and implement several international food standards many of which had labelling provisions. These Ghana Standards served the dual purpose of preventing unfair competition and providing consumer information in relation to specific food products.

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[720] Yvonne Nkrumah, Legal Officer, Ghana Food and Drugs Board (interviewed in Accra 14 March 2003 and 21 April 2004) and Daniel Nyampong, Head, Legal Office, Ghana Standards Board (interviewed in Accra 10 March 2003 and 20 April 2004).

[721] Joseph Y.B. Bennie, Head and Senior Regulatory Officer, Ghana Food and Drugs Board (interviewed in Kumasi 19 April 2004).

Through the difficult economic and political times of the 1970s and 1980s, Ghana food labelling law was limited to existing intellectual property statutes and then new *Standards Decree, 1973*. The 1990s, however, ushered in political stability and a renaissance of food labelling regulation. The *FDL, 1992*, the *1992 General Rules* and the *1992 Ghana Standard* all point to a new direction for food labelling, one that is more focused on protecting consumer health as well as providing marketplace fairness. The *1992 Ghana Standard*, as will be examined in the Part I conclusions which follow this chapter, very closely mirror the content of the Codex Alimentarius General Standard for the Labelling of Prepackaged Foods.[722] Today, Ghana enjoys a food labelling legislative regime based on international standards. Its mandatory labelling requirements are similar to the other two study countries and its regulation of prohibited and reserved claims for food labels is comparable as well.

Ghana does however face challenges. Three are unique to its food labelling legal regime. First, there is a serious overlap in administrative responsibility for food labelling. The Ghana Standards Board and the Food and Drugs Board both regulate some aspects of food labelling without sufficient coordination. At times the two departments even appear to be in competition with each other. Second, when food labelling law was revised in 1992 several conflicting provisions between new and prior Acts and Regulations were not rationalized. This situation makes the interpretation and application of Ghanaian food law unnecessarily complex today. Third, Ghanaian authorities seem reluctant to prosecute violators of labelling law choosing instead to work with wrongdoers through conciliation and education. This approach has little deterrence and may have negative long term consequences if labelling violations threaten consumer health and safety.

Other challenges are systemic ones that face many developing countries. The food labelling authorities in Ghana lack sufficient human and capital resources to effectively implement food labelling laws throughout the country. Outside of the capital, only a few

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[722] Codex Alimentarius Commission, Joint FAO/WHO Food Standards Programme, "Codex General Standard for the Labelling of Prepackaged Foods Codex Stan 1-1985 (Rev. 1 -1991)" *Codex Alimentarius, Vol. 1A: General Requirements*, 2nd ed. (Rome: FAO and WHO, 2000) 25-35, online CAC <http://www.codexalimentarius.net/web/standard_list.jsp>.

civil servants exist to monitor food labelling. Scarce public resources are allocated for other pressing social and economic needs. Finally, low literacy rates, particularly among women, limit the effectiveness of food labelling laws. Funds destined for basic education and literacy are necessary to create an environment where food labelling requirements can function to promote consumer health and provide consumer information.

PART I CONCLUSIONS / LES CONCLUSIONS DE LA PARTIE I

Each of France, Canada and Ghana has developed a unique food labelling regime based on a special blend of historical, social, political and legal factors. At least four conclusions can be drawn from Part I's detailed review of the evolution and current content of food labelling law in each of the study countries. First, there is a discernable context or orientation in each country for the development of food labelling legislation which favours the pursuit of certain labelling objectives over others. Accordingly, a second conclusion is that the actual contents of national food labelling regimes differ in many significant respects. Third, national food labelling regimes do, however, share some common legislative elements. Fourth and finally, the study of the Ghanaian context and its food labelling law demonstrates that there are certain basic considerations that affect the evolution of food labelling regimes in developing countries that are not at play in developed countries.

1. Each State's Orientation to Food Labelling Laws Arises From Its Unique Historical Context

1.1 France – food quality and enforcement

"La grande cuisine", "la bonne bouffe", "manger, c'est vivre", whatever the expression, there is plenty of evidence that food is very importance in French culture. Not only is obtaining and eating good food personally satisfying but it is socially desirable and expected. As well, those who produce, prepare and serve food are held in high regard, as long as they are honest. Producers and consumers in France, historically speaking, have for some time now considered food as more than just another commercial commodity.

A second feature of French history and culture is also germane to a discussion of the general context for food labelling in France. Except for one brief period immediately after the French Revolution, the State has always been very interventionist in the regulation of food. From the XIVth century onwards, the State has seen fit to enact laws to protect both

producer and consumer interests in food, laws which often have directly regulated the labelling of foods. Early French legislation put an emphasis on the protection of markets for certain high value food products (wines and cheeses) by prohibiting the sale of cheaper inferior goods sold as high value foods. Such legislation clearly had a producer benefit but as well provided guarantees to the consumer, where the latter wished to obtain the authentic higher value product.

However, such legislation was not initially of general application to all food products. This changed with the passing of the laws of 1851 and 1905 which specifically targeted the repression of fraud in the sale of food products. These were laws that clearly demonstrated that food was special and that it required its own laws to protect both consumer health and quality concerns and producer commercial and property (value) objectives. Other laws, which dictated production methods and marking requirements for a broader range of high value products, continued to advance producer interests. Cultural attitudes to food and the food labelling regime that recognizes "quality and high value foods" have contributed to France's food labelling system to recognize and protect food "quality" and "value" in a way that the other two study countries do not. Food quality labelling rules protect the use of elements on labels that both producers and consumers demand. While "quality" surely includes "safe food" and "healthy food", in French legislation it also extends to other aspects of as well—taste, satisfaction, and service. French food labelling laws, thus, have a general orientation to protect human health, promote fair competition among producers, and provide producers and consumers information about food quality.

Moreover, French authorities take a very active role in enforcement. When it comes to food labelling laws, they are systematically enforced through a specific cadre of civil servants. Armed with an abundance of civil and criminal penalties, civil servants and aggrieved individuals can bring a food labelling wrongdoer to justice in a way that is not possible in either of the other two study countries. As well, among the three countries, the annual number of prosecutions for food labelling offences is highest in France. Whether a

food marketer improperly uses a "signe de qualité", provides a misleading label or neglects to include a necessary mandatory element on the label, prosecution is a constant threat.

1.2 Canada – market standardization and food safety

Canada, by comparison to France, is a newly settled country with the bulk of its population arriving from abroad in the XXth century. Canada's history is not one of development of indigenous agriculture and food consumption patterns, but rather is one primarily of export-oriented bulk commodity production. Agriculture as practiced by First Nations communities was replaced in the XVIIth – XIXth centuries by small pockets of domestic agriculture in Eastern Canada. Then in the XXth century, intensive agricultural production in Eastern Canada and the opening up of the West for extensive agriculture made Canada into an internationally recognized exporter of food staples. Most of Canada's food trade surplus is due to continuing high level of primary commodities like wheat, oilseeds and meat. On the other hand, Canada still depends on a large amount of imported food, particularly fruits and vegetables, to meet its seasonal food needs.

All of the above factors have produced a Canadian agri-food system and regulatory regime quite different from the one found in France. Food does not generally enjoy the same status in Canadian culture as it does in France. The demand for food quality markers has not been one that Canadian consumers have general sought, nor one for which the State has provided. With respect to propriety concerns, foodstuffs are under no greater scrutiny or enjoy no enhanced protection than any other commercially-traded products. The *Trade-marks Act* is available to food and non-food products alike with no separate "signe de qualité" legal regime.[723]

Early Canadian food labelling legislation did, however, institute food labelling for commodities to ensure compliance with basic standards. These standards served two

[723] It is interesting to note, however, that prior to the English conquest of Quebec while it was still under French rule, the first food labelling law (*Arrêté du Conseil Supérieur de Québec du 1715 relatif à la vente et le marquage du pain*) to be promulgated on Canadian soil did concern the issue of food quality and rudimentary "signes de qualité".

objectives—a producer-oriented objective of indicating that the commodity was sound for the market and could be traded internationally, and a consumer-oriented objective that the commodity was "wholesome" or "safe". Later standards legislation mandating the specific way that certain foods should be made, and prohibiting the making and sale of certain food products also served producer and consumer objectives. Producers were protected from new, cheaper food products eroding the markets of traditional foodstuffs (i.e butter, milk, honey, maple syrup). Consumers were protected in that the "pure food" laws would guarantee that consumers could buy a product that they knew was made to specific standards and trusted to be safe. Sometimes these standards had to be listed on food labels, but most of the time they did not. It was sufficient that Canadians were assured that their food met minimum safety standards.

While the number of food standards proliferated, primarily under the *FDA*, little in the way of new consumer-oriented protection was added until the 1970s, with the coming into force of the *CPLA*. Again, like the *Trade-marks Act*, the *CPLA* was not specific to food but applied to all consumer products, although a specific part of the Act set out mandatory labelling elements for food products. With this new statute, Canada's food labelling regime began to place more emphasis on consumer-oriented objectives of providing basic product information to consumers. In 2003, Canadian food labelling law took another bold step in the provision of consumer health information with the introduction of mandatory nutrition labelling. This new required information puts Canada at the forefront of the provision of health information, information not required in either of the other two study countries. Canada remains, however, an interesting paradox. Of the three study countries it is the country with the shortest list of mandatory labelling elements, but the one which requires the most detailed scientific nutritional information. It remains to be seen if Canada has now committed itself to satisfying consumer health concerns over other competing labelling objectives.

If one looks to enforcement of food labelling law, the Canadian system is largely complaint-driven. While some pre-inspection of food labels is mandated by statute, most labels will only be reviewed by State officials when they are notified of instances of non-

compliance by competitors or by disgruntled consumers. Canadian law provides many statutory provisions to prosecute persons committing labelling offences but all are quasi-criminal prosecutions requiring the criminal law burden of proof of all elements of the offence being proved "beyond a reasonable doubt". Canada's small cadre of civil servant enforcement personnel, its very limited range of prosecution options and its less aggressive approach to prosecution of labelling offences together account for very low rates of labelling non-compliance cases proceeding to trial.

1.3 Ghana – from imperial interests to adoption of Codex standards

Ghana's history and food culture differ dramatically from that of Canada or of France. The issues of recognizing food quality so essential to French culture, or of the provision of nutritional information for Canadian consumers do not mirror Ghanaian concerns for food labelling. Ghana's history from its colonial past to recent struggles with military and democratic governments, have made for turbulent times for developing and implementing food labelling laws.

Early food labelling laws were designed to protect British commercial interests with both the mandatory marking of commodity exports and prohibitions against the misuse of merchantable marks serving this purpose. However after independence in 1957, the Ghanaian state was faced with the gargantuan task of nation-building with food labelling legislation left relatively low on the ledger of priorities. Initial food labelling rules were quite basic but soon were drafted to incorporate directly or with slight changes, international horizontal and vertical food labelling standards from the Codex Alimentarius Commission in Rome. In this way, Ghana was able to modernize its food labelling regime at a relative low cost.

Economic stability has not been a hallmark of Ghanaian development since 1957. With various civilian, military and democratic governments in power, the Ghanaian economy has not flourished until quite recently. Currently, therefore there is a discernable trend for the State to pursue objectives that will generate economic growth in the country.

New statutes in the area of intellectual property have been enacted to encourage private economic development. Over-regulation is seen as a concern. Thus, when it comes to food labelling, producer-oriented concerns are accented, whether they protect indigenous producers or investors wanting to engage in economic activities in Ghana. Furthermore, the consumer movement is very weak in Ghana. As a consequence, legislation affecting food and food labelling frequently has producer-oriented objectives in mind.

Enforcement continues to be a challenge in Ghana. Ghanaian government priorities of encouraging economic development coupled with limited resources for enforcement activities for food labelling violations make Ghanaian agencies quite reluctant to prosecute food labelling offences. Certainly where food labelling non-compliance is dangerous to human health, Ghanaian regulators intervene. Often, however even in such cases, a negotiated solution for future compliance is preferred to actual prosecution. Furthermore, with capital and human resources in short supply within food labelling agencies, enforcement for non-human health concerns is almost non-existent.

2. There Are Significant Differences in the Food Labelling Laws of France, Canada and Ghana

From a practical perspective, the heart of any national food labelling scheme is its list of mandatory elements. Comparing the list of mandatory elements provides an initial perspective on the convergence and divergence of food labelling law in the three countries. However food labelling law is far more complex than just the mandatory elements involved in labelling food. National food labelling regimes' full ambit cannot be understood without an appreciation of their treatment of reserved claims and prohibited claims as well as the country's record of enforcement.

2.1 Mandatory elements and the advancement of consumer-oriented objectives

- the core horizontal requirements

Mandatory elements in food labelling are about informing consumers. These elements provide information to protect human health and to inform consumer choice as well as to allow for comparisons between products. A comparison of mandatory elements as set out in national legislation shows that France requires 11 such elements; Canada, 7 elements and Ghana, 10 elements.

Table 9 – Comparing mandatory elements for food labelling in the three study countries

Element	France[724]	Canada[725]	Ghana[726]
1. name, common name of food	✔	✔	✔
2. net quantity or content	✔	✔	✔
3. (a) list of ingredients	✔	✔	✔
(b) quantity of certain ingredients	✔	x	x
4. (a) name and address of food maker or seller	✔	✔	✔
(b) name and address inside country or region	✔	x	x
5. (a) a date marking (for <91 day shelf life foods)	✔	✔	✔
(b) a date marking (for >90 day shelf life foods)	✔	x	✔
6. production lot number or code	✔	x	✔
7. price	✔	x	x
8. place or country of origin	✔[727]	x	✔
9. instructions and precautions for use	✔	x	✔
10. storage conditions	✔	x	✔
11. declaration of special characteristics of food	✔	✔	✔
(a) additives	✔	✔	✔
(b) processing (frozen, simulated, irradiated)	✔	✔	✔
(c) presence of genetically eng. matter	✔	x	x
12. nutrient fact table	x	✔	x
Total (of 12 major elements)	**11**	**7**	**10**
Common mandatory elements	**6**	**6**	**6**

[724] See page 103 *et seq.* for expanded explanations of each element.
[725] See page 162 *et seq.* for expanded explanations of each element.
[726] See page 201 *et seq.* for expanded explanations of each element.
[727] Required only where omitting from label the place or country of origin would create confusion in the mind of the purchaser as to the real origin of the product.

Requirements in Ghana and France most closely resemble one another with those of Canada being fewer in number and less comprehensive in nature.

Analyzed from another perspective, only six mandatory elements are common to the legislative requirements in all three countries. Using the "inside-out" taxonomy of elements found on food labels set out in Figure 1 in Title 1[728], it is apparent that that there is only a very basic consensus on required information in each category among the three countries. In the essential nature category "product name," "net contents", and "list of ingredients" are required in all three countries. In the product claims category only "durability dating" is a common element. For PPM claims, each country requires "producer/vendor identification", and some form of "identifications of special characteristics about the food that occurred during production and processing". Beyond these six elements, no further consensus exists among the three countries.

Horizontal food labelling law requirements in France and Ghana are more complete and provide more information in each of the four categories than does Canadian law. On the other hand, Canadian law requires the most scientifically explicit (and arguably the most costly to provide) information for compliance with its requirement for mandatory nutrition fact tables.

In both France and Ghana, the consumer benefits from mandatory requirements for "instructions and precautions for use", "storage conditions", "production lot number" and "place of origin" information on all food labels. These elements about the product and its production assist both in safeguarding human health and in further informing consumer choice.

French food labels must further provide the price of the food item as well as a number of enhancements for other basic mandatory labelling elements such as: (1) quantities of certain ingredients in the ingredients list; (2) name and address of a food handler within

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[728] Figure 1, Part I, Title 1, Chapter 1, *infra*, p. 32.

the EU; and (3) date marking for all food products.[729] Each of these elements is of great value to the consumer to knowing both the essential nature of the food and more information about product itself (product claims) to better inform consumer choice.

With respect to basic product information that must be supplied by producers to meet mandatory labelling requirements, Canadian consumers are less informed than either their French or Ghanaian counterparts.

- enhanced health information

The introduction of mandatory nutrition fact table labelling in Canada and requirements for the "positive listing" of both nutrient content claims[730] and diet related claims[731] makes more complex health information a new requirement on food labels. The effect of this information on consumers is, of course, not yet known. Given the limited number of other mandatory label elements required by food labelling legislation, it is curious that Canada has foregone legislation forcing vendors to inform consumers of basic information and requires instead that they provide detailed nutritional information to the consumer. The Canadian consumer now will know how many calories and how much vitamin C is in a food, without knowing what proportion of ingredients are in a food, nor information about the durability date if the product has a shelf life of more than 90 days.

What explanation can be offered for this development? Canada's decision to provide mandatory nutrition fact table labelling may point to a new emphasis in food labelling that favours the protection (and the promotion) of human health over other labelling objectives. What is lacking in Canada's approach to this new sort of health information is an assurance that Canadians can interpret this information, that it is useful to them, and that they will use it to make healthier food choices in absence of requirements to force vendors to provide other useful, more readily consumer-friendly information.

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[729] Ghana legislation requires this element as well.
[730] limited to 47 possible claims.
[731] limited to 5 possible claims.

- the value of complex vertical requirements

A review of the mandatory horizontal labelling requirements tells only part of the story with respect to the overall impact of food labelling law in a country. The other dimension of food labelling law is the "morass of vertical requirements." This term is used because these mandatory requirements are buried in the hundreds, even thousands of provisions contained in delegated legislation in each of the three countries. They are largely inaccessible to the uninitiated and require a certain expertise to find, decipher and then coordinate with horizontal labelling requirements.

Among the three study countries, Canada probably has the most impenetrable legislative system of vertical labelling requirements. This is due to the following factors: (1) vertical and horizontal requirements are often "mixed and stirred" into different parts of one long and complex piece of delegated legislation (i.e. the *FDA Regulations*); (2) vertical requirements for the same product may be set out in more than one piece of delegated legislation (i.e. for meat products one must consult both the *FDA Regulations* and the *MIA Regulations*); (3) vertical requirements may apply in some cases to only a specific portion of a food's distribution (i.e. *MIA Regulations* only apply to meat that is traded interprovincially); and (4) vertical requirements may be part of federal and provincial law, (i.e. meat labelling for meat traded interprovincially is regulated by the federal *MIA Regulations* while meat labelling for meat traded intraprovincially is regulated under a provincial *MIA Regulation*). While departments within the federal government as well as the federal government and its provincial counterparts have tried more than once to rationalize vertical labelling standards, all attempts to date have failed to become law.

Vertical food labelling requirements are slightly easier to understand and apply IN France as many EU regulations now set out EU-wide vertical food labelling rules for specified products. Clarity from EU regulations is not the only advantage that French vendors enjoy when determining which vertical requirements exist for which products. Another advantage is that interface between horizontal requirements (as set out in the *EU Directive 50/2000* and in the *Code comm.* provide a clear point of point of departure in order

to determine how the horizontal and vertical requirements mesh together. Finally, the amount of legal literature in Europe available to interpret the vertical and horizontal requirements for food labelling far exceeds the sole government publication that exists on such matters in Canadian law.[732]

The Ghanaian treatment of vertical requirements is perhaps the best of the three countries studied. Ghana has developed a very orderly system of promulgating vertical standards in the form of Ghana Standards for specific products. As these standards follow the international Codex standard for the same product, all vertical requirements are located always and only in a section entitled "labelling" in each Ghana Standard. To meet legislative requirements, Ghanaian producers and vendors need only consult the legislation setting out the horizontal standards for all prepackaged foods and then the labelling section of the Ghana Standard for their product. No other vertical labelling requirements will be relevant.

In conclusion, the vertical standards in all the countries increase the complexity of food labelling law and make compliance more difficult and more costly. The system of vertical requirements is most opaque in Canada and is in serious need of rationalization and simplification. Canada has yet to abandon its now antiquated system of "standardization" that was established over 100 years ago. In Canada, the six Acts and the dozen or so sets of Regulations promulgated under them have become unduly complicated and discriminatory as between product groups as some products' labels are subjected to far more legislative requirements than others. Do such complex and labyrinthine vertical requirements advance either consumer or producer objectives? Consumers cannot be assured of consistently presented information from product to product. Producers are faced with specific requirements that are difficult to ascertain and, as such, compliance likely increases their costs which they will then pass along to consumers.

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[732] CFIA, "2003 Guide to Food Labelling and Advertising" (Ottawa: CFIA, 2003 (looseleaf service)) online: <http://www.inspection.gc.ca/english/fssa/labeti/guide/toce.shtml>.

2.2 Reserved claims and the advancement of producer-oriented objectives

All three study countries have provisions in their national laws which restrict the use of certain claims on food labels in order to assist producers in promoting the sale of their products. At one end of the spectrum are restricted claims that relate to terms or claims reserved under trademark law. At the other end of the spectrum are reserved claims that the State's official will attach to certain producers to show that they conform to certain State-approved grades or minimum standards. In between are those terms that the State has permitted to be registered and used by producers to show that their products conform to certain characteristics.

- a small common core in private trademark law

All three countries have trade mark law systems which permit food producers to register a mark that will, if they meet all the requirements for registration of a valid trade-mark, become their own private property. Owners of a trade-mark have the right to exclude all others from the use of their recognized intellectual property marks. The registration and use of privately held trademarks is roughly similar. Intellectual property rights protected in the three study countries are not however limited to private trademarks.

- government-applied public inspection and grading marks

In both Canada and Ghana, the State is active in actually marking food products with marks signifying a passing inspection mark, a quality grade or a minimum standard for trade. Since the XIXth century government inspection marks have been essential for several Canadian products to be able to enter national and even international trade. Still today, under Canada's *MIA* and *CAPA*, State-appointed inspectors stamp food products with grading legends and marks called national trade marks that permit that product to enter into Canadian or international trading.

Ghana also uses "minimum quality" marks for certain commodities, like cocoa and fruit, destined for the international market. The inspection and grading marks represent a government-assigned quality assurance and commercial benchmark for the goods in question.

- laws regulating quasi-public marks (" signes de qualité" and "certification marks")

All three countries have laws that permit the registration of marks that can be used to identify food products of value that conform to certain standards. Under the Canadian *Trade-Marks Act*, "certification marks" may be adopted and registered by a person (usually an association of producers) and then licensed to others to use in association with food products that meet the defined standard registered under the Act. A similar provision for the registration and use of "certification trade marks" exists under the provisions of the Ghanaian *Trade Marks Act, 1965.*

The French (and the European Union's) system of recognition of "signes de qualité" recognizes several different marks of quality that are reserved for producers whose products meet specific standards. Provisions for the recognition of "certificate de conformité", "label rouge", "AOC", "biologique", et "montagne" are contained in French legislation which requires registering associations to complete detailed descriptions of production processes before registration in order for a specific product to benefit from the reserved quality designation.

The level of government involvement in the recognition of the quality marks varies. In Canada and Ghana, quality marks are largely thought of in terms of trademarks and the recognition that the producer, not the production process or origin of the product, is the source of quality. Under this system, the State's involvement does not really extend beyond recognizing the registration of the quality mark. It is rarely involved with enforcement as trade mark infringements are a matter to be dealt with by private parties in a civil action for trade mark infringement. In France, on the other hand, quasi-public marks of quality require more government involvement both for registration and enforcement. In fact, the full enforcement apparatus of the State, as well as private enforcement, can be brought to bear against illegitimate users of quality marks in France.

While it is apparent that a minimal degree of consensus on the recognition and use of quality marks exists, recognition and use of quasi-public marks differs significantly among the study countries with the French system of "signes de qualité" the most elaborate.

2.3 Prohibited claims - a common core to prevent fraud

All three study countries have enacted legislation to prohibit certain types of claims to be made on food labels. By far the most common and the most sweeping is the general prohibition on claims that are false, misleading and deceptive. In France, the prohibition is contained in the *Code comm.* and has been litigated with such frequency that its meaning has been clarified and is clearly ascertainable by producers, vendors and prosecutors alike.

The same clarity does not exist in the other two country studies. In Canada, there is not one, but several, statutory provisions prohibiting false and misleading labelling found in different pieces of legislation. With respect to prohibition on false and misleading claims, there are provisions in the *FDA*, the *MIA*, the *CPLA*, the *FIA*, the *Trade-marks Act* and even the *Competition Act*. Sometimes there are even additional prohibitions found in the some of the Regulations promulgated under these Acts. With respect to labelling integrity, is it really necessary or helpful to have enforcement provisions for "false and misleading" labels under several Acts? In addition, in Canada there has been very little case law developed as to the meaning of what constitutes "false and misleading" labelling.

In Ghana, there is a similar multiplicity of definitions in several pieces of legislation. The complexity of determining what exactly is prohibited is exacerbated by the paucity of jurisprudence on the judicial meaning of "false and misleading labelling". Research in recorded Ghanaian cases failed to turn up even one case report of a prosecution for "false or misleading labelling" under Ghana's legislative provisions.

2.4 Approaches to enforcement

In addition to substantive differences in the food labelling law of three study countries, there is a huge difference in approaches to verification and enforcement of food labelling law.

- France

Comparing results from interviews with enforcement officials from the three study countries confirms that the French system de "contrôle des etiquettes" results in the most food labelling prosecutions in any given year. Based on interviews with DGCCRF personnel, France takes a firm, aggressive approach in pursuing merchants that mislead or mislabel foods. Furthermore, France has a special training school for its "repression of frauds" civil servants and produces a greater number of food label inspectors per capita than Canada or Ghana. French food inspectors review food labels for conformity both through extensive on-site visits for "upstream compliance" and through "downstream compliance" in response to consumer and competitor complaints. By tradition, since its inception in 1907, the DGCCRF's role is actively to seek out fraudulent actors in retail sales of food and to prosecute them. With several avenues—contraventions or more serious criminal charges—available to them, prosecutors register many convictions and generate an abundance of jurisprudence. As well private actions for injury due to mislabelling can be joined to public actions thereby saving the private party significant legal expenses to pursue a private claim. In both Canada and Ghana, the approach to enforcement is very different.

- Canada

When speaking with Canadian civil servants about enforcement, mention was often made that many food labels are subject to pre-approval by State inspectors. This is certainly true for processed fruit and vegetable products and for interprovincially traded meats. This type of "upstream" control should mean that fewer non-conforming labels make it onto the Canadian market. However, for the rest of Canadian food products, there is only a small allocation of resources with the Canadian Food Inspection Agency for labelling verification and compliance. Furthermore, given the lack of jurisprudence on food labelling prosecutions

and the high level of convictions in that jurisprudence, it appears that the CFIA and Justice Canada most often only pursue the most egregious cases of food labelling non-compliance. Finally, when it comes to enforcing Canada's mandatory label requirements, the legislation has become so detailed and so convoluted that only food labelling consultants, food marketing experts, and seasoned bureaucrats can penetrate the labyrinth of the *FD Regulations*, commodity Act Regulations and the *CPLA Regulations*. This complexity might also be a factor in preventing discernment of clear violations and make enforcement and convictions more difficult for State regulators.

One final question to ponder regarding enforcement in Canada is whether Canada's new consumer health labelling provisions will propel State regulators to a new level of review of potential violators. It is, of course, too early to tell if the new rules regarding health claims, nutritional claims and mandatory nutrient fact tables, will give rise to a more aggressive approach to enforcement in Canada.

- Ghana

During interviews with State regulators, it became apparent that enforcement is not really the proper word for the way in which non-compliance is dealt with in Ghana. No reported cases of prosecutions were found and regulators explained this finding by suggesting that the Ghanaian approach was more conciliatory and remedial, than prosecutorial. For imports, goods with non-complying labels could simply be detained at port and released when properly labelled or refused entry into the country. Nationally-produced goods found to have non-conforming labels would generally lead to the manufacturer or vendor meeting with State regulators to work out a plan of compliance. Only in the cases of mislabelling that had led to or was likely to lead to threats to human health would the resources of the State be used for prosecution of offenders. Furthermore, as criminal offences are the only option for the prosecution of labelling offences under Ghanaian law, securing a conviction requires a costly full-blown criminal trial. Options for administrative proceedings for less serious offences, such as are available under French law, do not exist under Ghanaian (or Canadian) law.

3. A Small Core of Common Food Labelling Obligations Exists Among the Three Nations

While fundamental differences do exist amongst the three countries, they also share some similar basic elements in their food labelling law. With respect to producer concerns, all three national food labelling regimes contain provisions designed to prohibit false and misleading labelling. All three offer some form of protection for quality marks as seen above. With respect to consumer concerns, mandatory labelling in each jurisdiction outlines six major elements that are required on all prepackaged foods. As Table 7 indicates, each country requires the following elements to be displayed on all prepackaged food labels: name, net quantity, list of ingredients, name and address of food maker or seller, date marking, and some form of declaration of special characteristics of the food (ex. presence of additives). Most of these food product labelling elements are required to fulfill consumer-oriented objectives. However there are common aspects of the three national food labelling regimes that focus on producer-oriented objectives as well.

3.1 Producer concerns

- commerce and leveling the playing field

All three countries have important labelling requirements related to commercial objectives to ensure fair trading. The food labelling legislation in all three countries contains one or several prohibitions on "misleading and false" labelling, an objective seeking to advance commercial objective of leveling the playing field among food sellers as well as offering protection to consumers against unscrupulous vendors. Of course, how this common requirement is implemented, makes a great difference in the effectiveness of the obligation. Several mandatory labelling claims[733] which relate jointly to commercial objectives and to consumer objectives are common to all three regimes.

[733] Such as "durability dating" "producer/vendor identification", and some form of "identifications of special characteristics about the food that occurred during production and processing".

- property and recognizing high value products

In all three countries, an intellectual property regime of general application exists. It is used extensively by food producers and marketers to have quality attributes recognized in the market. State protection of these property rights is also a feature of regime. In all three countries, the trade mark is recognized as an intellectual property mark that identifies the food product with a certain producer. That relationship is protected in law and is supported by private law.

3.2 Consumer concerns

- food safety and human health

With respect to food's essential qualities, all countries require that a food label reveal the food's nature[734] or core content. This most basic level of labelling information has two aspects: basic product identification and basic ingredient and nutrient profiling. Declarations about the product that fall into this category are validated by recourse to linguistic conventions (what is this product to be called?) and to scientific analysis (proportion of ingredients in the product, and the overall weight of the product). In many respects, the core elements seem to present little basis for controversy. Across the three study countries three common elements of the food's essential nature must be declared on all food labels: (1)"product name," (2)"list of ingredients" and (3)"net contents". Beyond these, however, there is no consensus.

4. Ghana, as a Developing Country, Faces Unique Challenges and Opportunities

The challenges of crafting and implementing food labelling law in developed and developing countries are not uniform. Comparing only the legislation establishing food

[734] This would correspond to the author's first of four categories of elements found on food labels (essential nature declarations), see Part I, Table 2, page 32.

labelling obligations in the three countries, one might be tempted to conclude that France, Canada and Ghana have simply chosen different sets of rules to regulate food labelling. Such a conclusion would, however, overlook several unique challenges that Ghana, as a developing country faces when carrying out any legislative or policy reform.

4.1 Basic literacy not a given

Basic to transmitting information via food labelling is the ability to read. While literary is almost 100% in Canada and France, in Ghana only about 2/3 of the population can read and write. This presents an obvious problem for a text-based system of food labelling obligations.

What has Ghana chosen to do in these circumstances? Two options are being pursued. One is increase literacy rates, a priority to which the Ghanaian government has shown serious commitment. Universal childhood education, adult literacy campaigns and expenditure on educational infrastructure are vital to improving the effectiveness of any food labelling law in Ghana and in any countries with lower literacy rates.

The other option is to legislate for some food labelling information to be presented in the form of pictures. This option has been pursued in only the very limited circumstances of labelling obligations relating to breast milk substitutes. Should more pictorial information be required? How would pictures and images be regulated? These are not questions that Ghanaian regulators have yet addressed.

Because pictorial food labelling information will increase costs and pose obstacles to free trade, producers and manufacturer are likely to oppose its mandatory use. As well if literacy-enhancement programs work, pictorial information will not be necessary. One might also question the spending of resources to improve the comprehensibility of food labels through the use of pictures when expenditure on education might be more appropriate than on such food labelling laws. Requiring pictorial information on food products would require developing a whole new set of rules for the kinds of images that will be acceptable and what

information they must transmit. Such rules would have to be developed from "square-one" as no existing Codex Standards sets out such rules. Finally, requiring pictorial labelling would put Ghana out of step with other States, making imports of food products more difficult as all such imports would have to be relabelled with the required pictorial images.

4.2 Competition for scarce human and capital resources

The above discussion on literacy referred to the competition for scare human and capital resources for public policy development in Ghana. Food labelling must, like other projects, compete for very scarce resources. While strong arguments can be made that food labelling regulations are necessary to meet basic human health objectives and therefore should be at the "front of the line" for resources, other public policy objectives are also at the "front of the line". Public health, education, and economic development initiatives all require significant public expenditure. Food labelling is only one legislative mechanism for improving human health. For this reason, the resource allocation both for developing food labelling law and for its enforcement is meager in absolute terms compared to a developed country budget.

Ghana has been able to leverage resources to enhance its capacity in developing a fully mature legislative framework for food labelling by adopting Codex Standards. These standards allow Ghana, with minimal expense, to adopt internationally accepted standards. Such standards, setting out both vertical and horizontal standards, follow a format that is easily understood by producers and manufacturers and allow for food labelling practices that will meet minimum international trade requirements. Thus, adopting Codex Standards may not only be economical for Ghanaian firms, it may ultimately assist them to develop international markets for their products.

4.3 Redevelopment of administrative and legal infrastructure

Despite having a fully mature legislative framework for food labelling, Ghana faces certain limitations for the implementation and enforcement of that framework. Beyond

competition with other government departments for more resources, the Ghanaian system has internal constraints as well. There is currently a duplication of administrative apparatus for developing and overseeing the implementation of food labelling law. The "turf war" between the Ghana Standards Board and the Food and Drugs Board is an unnecessary double expenditure. This is particularly true given the shortage of resources already allocated to either for the work of implementing food labelling regulation. As well, most of the resources for implementation and enforcement appear to be concentrated in the capital, Accra, when non-compliance is not limited to that region.

Finally, the legal infrastructure for ensuring compliance with food labelling law in Ghana may require re-orientation. The criminal provisions for non-compliance are rarely applied and case law interpreting such provisions is difficult, if not impossible, to obtain. Food labelling policy-makers and regulators should consider new, non-criminal offences for labelling non-compliance which could be pursued more expeditiously, which would be educational rather than penal in nature, and which would raise revenues for State regulators to finance further activities in the area of food labelling.

PART II : ASSESSING THE INFLUENCE OF INTERNATIONAL LEGAL REGULATION ON THE EVOLUTION OF FOOD LABELLING LAW IN FRANCE, CANADA AND GHANA

... depending on its content, scope and nature, including its mandatory or voluntary character, labelling may have a significant impact on trade.

-European Communities, *Submission to the TBT Committees and the Committee on Trade and the Environment of the WTO*, 2002[735]

L'aliment sert à se nourrir mais l'homme ne mange pas pour se nourrir : il répond à un désir (la faim) et (dans nos pays au moins), il assouvit ce désir par le plaisir de manger. Se nourrir est la conséquence, non la cause. Cette valeur hédonique tient une place importante dans le processus de commercialisation des matières premières comme des produits transformés, et le législateur doit aussi intégrer ces éléments dans l'esprit et la lettre de ses textes.

- Pierre-Marie Vincent, *Le droit de l'alimentation*, 1996[736]

PARTIE II : L'ANALYSE DES INFLUENCES DES INSTITUTIONS INTERNATIONALES SUR L'EVOLUTION DU DROIT DE L'ETIQUETAGE DES DENREES ALIMENTAIRES DANS LA FRANCE, LE CANADA ET LE GHANA

[735] G/TBT/W/175; WT/CTE/W/212, 12 June 2002, para. 3.
[736] Vincent, Pierre-Marie. *Le droit de l'alimentation, Que sais-je?* vol. 3103 (Paris: Presses Universitaires de France, 1996) à la p. 10.

Part I of this study examined the national regimes for food labelling in three study countries. Each has developed it own unique regulatory system with points of intersection and divergence which correspond to food cultures, legal systems and historical developments. However, the full picture for food labelling law in any State is not complete without consideration of international obligations undertaken by States that may limit the development of national law. Part II examines the development and content of international legal obligations assumed by States and concludes that these obligations now have an increasingly important impact on the development of national food law, particularly since the establishment of the World Trade Organization (WTO) in 1995.

No international agreement or organization has food labelling as its central concern. However, it would be incorrect to assume that international organizations and the international obligations that issue from agreements and instruments do not affect the labelling of food. There are three distinct streams of international regulation that impact upon national food labelling law—international intellectual property treaties, international trade treaties, and international instruments setting out food standards. Each of these streams is today administered by an international body, the World Intellectual Property Organization (WIPO), the WTO and the Codex Alimentarius Commission (CAC), respectively.

At this preliminary point in the discussion, it should be noted that some legal experts disagree with the claim that international legal obligations are "squeezing" the development of national labelling law. De Brosses, for example, states that international law has very few direct effects on national food labelling law:

> Il existe rarement des accords internationaux en matière d'étiquetage, à l'exception de certains accords bilatéraux ou multilatéraux de reconnaissance de signes de qualité, interdisant l'utilisation d'un signe dans chaque pays signature par l'entreprise qui ne remplit pas les conditions pour cela.... Mais pour la quasi-totalité des denrées alimentaires, il n'existe pas d'autres conventions internationales que les Accords de l'OMC, qui n'ont pas d'effet direct et ne peuvent donc pas être invoques directement par un particulier. ... Quant aux normes de Codex Alimentarius, elles n'ont aucun caractère

> obligatoire et ne constituent pas de textes d'harmonisation contraignants pour les États.[737]

As a matter of private law, and from individual merchants' perspectives concerning compliance with national laws concerning the design and content of product labels, de Brosses' view may be accurate. However in a broader sense, Part II argues that the effects of international law on national food labelling law have not only become significant, but are now exerting an increasingly profound effect on national food labelling law.

Part II begins by tracing the historical development and then presents the current "état des lieux", or inventory, of international regulation affecting food labelling. Title 1 examines the development of each of the three streams of international activities that affect food labelling—international industrial property treaties (Chapter 1), international trade treaties (Chapter 2), and international food standards (Chapter 3).

Title 2 examines the new and extended reach of international regulatory instruments into national food labelling regimes resulting from legal obligations assumed by Member States of the WTO. Particularly influential are the WTO general obligations on Member States to refrain from enacting national measures that are discriminatory or unnecessarily restrict trade (Chapter 1). WTO obligations concerning intellectual property rules and reference to international food standards which now form part of WTO obligations also have an important impact on national food labelling laws (Chapter 2).

The dissertation concludes with a section entitled "Final Conclusions and the Future of Food Labelling Regulation". This section presents two overarching conclusions about the interaction of national and international food labelling regimes. Firstly, international legal obligations now undeniably represent a direct pressure or constraint on the development of certain aspects of national food labelling law. However, a second conclusion is that international legal obligations have not penetrated every aspect of national food labelling law. Some aspects are still untouched as international legal obligations are still insufficiently

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[737] Antoine de Brosses, *L'Etiquetage des denrées alimentaires, t. 1 : Mentions obligatoires, Mentions interdites* (Paris: RIA, 2002) at 370.

developed to act as a legitimate constraint on the pursuit of food labelling objectives deemed necessary by a particular State for its citizens.

Title 1: International Law's Influence on the Labelling of Food Prior to the Establishment of the World Trade Organization - Three Families

-Pour dépasser cette égalité et tendre vers l'uniformité de la protection internationale, la condition des personnes a dû être complétée par l'adoption des règles matérielles destinées à harmoniser les législations nationales.

-Denis Rochard, *La protection internationale des indications géographiques*, 2002.[738]

Titre 1 : L'influence du droit international sur l'étiquetage des denrées alimentaires avant l'établissement de l'Organisation Mondiale de Commerce - Trois Familles

[738] Denis Rochard, *La protection internationale des indications géographiques* (Thèse de docteur en droit, Université de Poitiers, 1999) (Paris : Presses Universitaires de France, 2002) at 245.

International obligations affecting food labelling first arose when States agreed to international initiatives to advance the protection of intellectual property rights, to develop rules to limit discriminatory trading practices by states, and to develop internationally-standardized food trading practices.

States have concluded intellectual property treaties to deal with two important aspects essential to the labelling of food products—the protection of public and private marks of quality (trademarks and geographical indications primarily) and prevention of fraudulent practices in the selling of food products (Chapter 1).[739] States view international rules as necessary to extract equivalent protection from trading partners so that products in international trade will enjoy the same protections as they do in home markets. Of course difficulties have arisen when States cannot agree on what level and type of protection marks of quality deserve and which fraudulent practices need to be curtailed.

Trade rules have developed generally to reduce national barriers to trade. Unlike the intellectual property treaties which try to establish harmonized intellectual property protection, international trade treaties seek to limit national measures which will restrict trade across national borders. Trade rules under the GATT, 1947 had a fairly minimal effect on national labelling (Chapter 2).

The development of international food standards has not been completed through the conclusion of international treaties. Instead, states have agreed to develop international voluntary standards, through the Codex Alimentarius Commission (CAC) to advance three objectives—promoting consumers' health, ensuring fair trade practices and facilitating international trade.[740] Several of these standards, though voluntary, have been adopted by States as part of their basic food labelling laws (Chapter 3).

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[739] Fraudulent practices vary along a spectrum from the selling of unsafe food to selling food, the label of which is false, misleading or deceptive. These latter practices may or may not also include a violation of intellectual property laws through unauthorized or deceptive use of a restricted or registered property mark.
[740] Codex Alimentarius Commission, Joint FAO/WHO Food Standards Programme. "General Principles of the Codex Alimentarius" *Codex Alimentarius, Vol. 1A: General Requirements*, 2nd ed. (Rome: FAO and WHO, 2000) 3, para. 1.

For most of the XIXth and XXth centuries, each of these three streams of international regulation had a very limited impact on national food labelling law. As well, each stream has interacted very little with the other two. The historical development of international legal obligations prior to 1995 demonstrates that States agreed to few international obligations that would constraint their ability to develop a national food labelling regime. With each stream of international regulation distinct, States were also free to pick and choose to be bound by the international obligations which best suited their regulatory national objectives.

Chapter 1 – The Impact of Industrial and Intellectual Property Treaties on Food Labelling

Beginning in the XIXth century, international regulation of issues that affected food labelling arose primarily for two reasons: to protect industrial property of exports destined for international markets (section 1), and to prevent the sale of sub-standard and fraudulent foodstuffs (section 2).

Section 1 – Property issues: using treaty law to protect producer premiums through labelling

The advent of world fairs in the XIXth century displaying new industrial technology and the proliferation of such technology around the world galvanized a number of states into action to protect new inventions and other forms of intellectual property.[741] While much of the focus was on securing international protection for patents, the opportunity to develop provisions for the international protection for other forms of intellectual property was not missed.

With respect to product labelling, producers generally have two intellectual property concerns when selling their products in home or international markets. The first is that where their product enjoys a mark or sign that consumers associate with superior quality, they want to be able to have exclusive (or near exclusive use) of the mark. Second, producers want to be able to stop others, both in national and foreign markets from selling marketing products that bear their quality sign or mark, or one that sufficiently resembles that mark.

As can be observed from the case studies in Part I, different countries champion different signs of quality for food products. However, all three of the study countries recognize intellectual property claims in terms of trademarks that can and do appear as part

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[741] Norbert Olszak, *Droit des appellations d'origine et indications de provenance* (Paris: Tec & Doc, 2001) at 107.

of food labelling. Although there are differences in the national systems designed to protect intellectual property in trademarks, all three provide for the protection of intellectual property in trademarks and have done so for a considerable period of time.

On the other hand, no such consensus exists for the protection of government-endorsed quality claims relating to provenance and production methods for food products. In France, there is a long tradition of recognition of public signs of quality through the system of "appellations d'origine" and related signs. This recognition is not shared by all trading nations of the world. In fact, differences in sensibilities to the issue exist even within the European Union,[742] and even more between Europe and the rest of the world. Olszak notes that the source of such differences may be attributable to geography, culture, religion and other factors.

> Même si ces divergences peuvent se retrouver à l'intérieur d'un même corps social, les auteurs s'accordent à reconnaître qu'il existe un clivage majeur entre l'Europe du Nord et celle du Sud, entre les pays anglo-saxons et latins, voire entre protestants et catholiques (footnotes omitted).[743]

States have for more than a century looked to the conclusion of treaties to meet a perceived need for international rules for the protection of producer premiums captured through national intellectual property legislation. The challenges have been two-fold: to develop an international consensus on which signs or marks are deserving of protection; and, the legal mechanism to actually protect those signs from unauthorized use and from marks that resemble protected marks and signs when they enter international commerce.

Although negotiations to develop rules for the protection of trademarks and other marks of quality have proceeded at the same time and often in the same fora, a greater consensus has evolved for trademark rules than for other quality marks. International efforts to conclude international treaties to protect both private marks like trademarks, and public ones like indications of provenance and production methods commenced at roughly the same time. However, treaties for the protection of trademarks explored in Paragraph 1

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[742] Denis Rochard, *La protection internationale des indications géographiques* (Thèse de docteur en droit, Université de Poitiers, 1999) (Paris : Presses Universitaires de France, 2002) at 14-15.
[743] Olszak, *Droit des appellations d'origine* at 104-105.

below, enjoyed a broader international consensus and acceptance than those relating to the protection of public marks for the protection of provenance (Paragraph 2). Later, the *World Intellectual Property Organization Convention*[744] provided an umbrella framework for these existing intellectual property treaties and the objectives for its work.[745]

Paragraph 1 – The international protection of private marks – trademarks

A. the 1883 Paris Convention for the Protection of Industrial Property

The *Paris Convention for the Protection of Industrial Property of 1883*[746] was the first multilateral treaty to regulate legal aspects relating to trademarks, patents, designs, indications of source and appellations of origin. The *Convention* expressly acknowledged in Article 1(2) that its scope extends to the protection of, *inter alia*, trademarks, indications of source or appellations of origin, and the repression of unfair competition. All of these have a direct impact on national labelling laws. For over 100 years the *Paris Convention*, as amended, has set out obligations that all States Members must observe for the protection of trademarks of non-nationals. It is still in force today.

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[744] The Convention is also known as the *Stockholm Convention* as it was signed in Stockholm on 14 July 1967 and came into force in 1970 being WIPO into existence. WIPO was created in 1970 becoming a specialized agency of the United Nations in 1974. As of 2005, WIPO had 182 Member States. Its predecessor organization, however, dates back to the creation of a secretariat for the *Paris Convention for the Protection of Industrial Property of 1883*. This secretariat was merged with the one created under the *Berne Convention for the Protection of Literary and Artistic Works of 1886* to create in 1893 the Bureaux Internationaux réunis pour la protection de la propriété intellectuelle (BIRPI). See, Sisule F. Musungu & Graham Dutfield, "Multilateral agreements and a TRIPS-plus world: The World Intellectual Property Organization (WIPO)" *TRIPS Issues Papers 3* (Geneva: Quaker United Nations Office, Geneva and Quaker International Affairs Programme, Ottawa, 2003) at 4. By the time the BIRPI was replaced by WIPO in 1970, it also managed five other special agreements under the Paris Convention, including three that have some impact on intellectual property and labelling, namely the *1891 Madrid Agreement for the Repression of False and Deceptive Indications of Source on Goods*, the *1891 Madrid Agreement Concerning the International Registration of Marks*, and the *1958 Lisbon Agreement for the Protection of Appellations of Origin and their International Registration.*

[745] The Convention states WIPO's objectives in Article 3 as the promotion of the protection of intellectual property throughout the world through cooperation among States, and, where appropriate, in collaboration with any other international organization; and of administrative cooperation among the Unions.

[746] *Paris Convention for the Protection of Industrial Property*, March 20, 1883, as revised at Brussels on December 14, 1900, at Washington on June 2, 1911, at The Hague on November 6, 1925, at London on June 2, 1934, at Lisbon on October 31, 1958, and at Stockholm on July 14, 1967, and as amended on September 28, 1979, WIPO online: <http://www.wipo.int/treaties/en/ip/paris/trtdocs_wo020.html>.

Article 2 of the Treaty guarantees national treatment for nationals of Member States in all respects for the protection of industrial property in the territory of other Member States.

Article 6 speaks to the kind of marks that enjoy protection under the Treaty. The conditions for the filing and registration of trademarks shall be determined by each country according to its own legislation (Art. 6(1)). Art. 6bis requires Member States to refuse or cancel the registration of a trademark that constitutes a reproduction or imitation of trademark that is "well known". Art. 6quinquies requires Member States to protect marks registered in one Member State in another Member State, subject to certain limitations.

B. enforcement of trademarks rights under the *Paris Convention*

Article 9 and 10ter provide for enforcement through an undertaking by Member States to put in place laws for the seizure of goods unlawfully bearing a trademark and the right to sue in national courts for additional remedies and relief. While these substantive provisions appear to provide adequate intellectual property protection for trademarks, the effectiveness of the enforcement of these private rights and dispute resolution at a state-to-state level are a major impediment to the Convention's effectiveness.

> The two fundamental perceived flaws of the Paris and Berne Conventions were: (a) the absence of detailed rules on the enforcement of rights before national judicial authorities; and (b) the absence of a binding and effective dispute settlement mechanism (for disputes between states).[747]

Paragraph 2 – The international protection of public marks – collective marks

A. the *1883 Paris Convention for the Protection of Industrial Property*

The *Paris Convention of 1883* provided more than just the protection of private trademarks in its Member States. The Treaty also set out provisions for the protection of collective marks and for rights of enforcement by the collective owner of the mark or by

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[747] Daniel Gervais, *The TRIPS Agreement: Drafting History and Analysis*, 2nd ed. (London: Sweet & Maxwell, 2003) at 10.

individual members entitled to use the collective mark. Art. 7bis, for example, requires Member States to accept for filing and to protect collective marks "belonging to associations the existence of which is not contrary to the law of the country of origin".

B. later treaties protecting collective marks

1. the *1891 Madrid Agreement* and the *1958 Lisbon Agreement*

The *1891 Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods* and the *1958 Lisbon Agreement for the Protection of Appellations of Origin and their International Registration* tackled the issue of protecting collective marks relating to geographical origins.[748]

These treaties created more detailed obligations for the recognition and protection of collective marks than those contained in the *1883 Paris Convention.*[749] While the *1891 Madrid treaty* set out rules forbidding the use of deceptive indications of source, it was not until the *1958 Lisbon treaty* that States agreed to certain definitions that would assist in the recognition of certain marks, specifically "appellations of origin" that would be protected. The *Lisbon treaty* defines "appellation of origin" as "the geographical name of a country, region, or locality, which serves to designate a product originating therein, the quality and characteristics of which are due exclusively or essentially to the geographical environment, including natural and human factors."[750]

The *Lisbon treaty* sets out the kind of protection that appellations of origin will receive amongst Member States. Art. 3 of the treaty states that: "La protection sera assurée contre toute usurpation ou imitation, même si l'origine véritable du produit est indiquée ou si

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[748] Olszak, *Droit des appellations d'origine* at 110.
[749] Musungu & Dutfield, "Multilateral agreements" at 28.
[750] Article 2; en français : « la dénomination géographique d'un pays, d'une région ou d'une localité servant à designer un produit qui en est originaire et dont la qualité ou les caractères sont dus exclusivement ou essentiellement au milieu géographique, comprenant les facteurs naturels et les facteurs humains ». This definition would serve as a base for later definitions of "designation of origin" and "geographical indication" in the EU (CE, *Règlement n° 2081/92 du Conseil, du 14 juillet 1992, relatif à la protection des indications géographiques et des appellations d'origine des produits agricoles et des denrées alimentaires,* [1992] J.O. L. 208/1) and eventually for the definition of "geographical indication" in Art. 22 of the World Trade Organization's *TRIPS Agreement*. See Gervais. *The TRIPS Agreement* at 188-189.

l'appellation est employée en traduction ou accompagnée d'expressions telles que « genre », « type », « façon », « imitation » ou similaires." As well Art. 8 sets out the rigorous enforcement measures that can be taken against infringers: public and private rights of action by any interested party against the infringer.

2. commodity-specific treaties protecting appellations of origin – cheese and olives

The *1951 Stresa Convention on the protection of certain cheeses of appellation d'origine* was concluded between Austria (who withdrew in 1996), Denmark, France, Italy, Norway, the Netherlands and Switzerland. The Member States agree under the convention to prohibit the production of cheeses and to prosecute those making or marketing products which purport to be in native or foreign languages the cheeses that are protected under the convention. There are two categories of protected cheeses, the first list being those enjoying an "appellation controllée" in their home country and the second list being those with protected designations. It is important to note however, that the treaty or the principle it enshrines are not applicable amongst member states of the European Union as was evident after the "Edam" case[751] and has of late fallen into disuse even amongst Member States.[752]

The *International Agreement on Olive Oil and Table Olives, 1986*[753] also contains exacting provisions on the naming of olive oil and the protection of indications of source and appellations of origins. Article 28(2) for example states that : "Appellations of origin, when given, may only be applied to extra virgin olive oil produced and originating exclusively in the country, region or locality mentioned." Extra virgin olive oil is a defined term under the treaty meaning oil obtained "from the fruit of olive trees solely by mechanical or other physical means...that do not lead to the deterioration of the oil, and which have not undergone any treatment other than washing, decantation, centrifugation and

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[751] *Ministère public c. Gérard Deserbais*, C-286/86, [1988] E.C.R. I-04907, [22 septembre 1988]. (Edam cheese case).
[752] Olszak, *Droit des appellations d'origine* at 128.
[753] *International Agreement on Olive Oil and Table Olives,* 1986, as amended and extended, 1993, and last prolonged, 2003, online: IOOC <http://www.internationaloliveoil.org/historicback.asp#catre>.

filtration [and] ... which has free acidity, expressed as oleic acid, of not more than 0.8 grams per 100 grams."[754]

C. enforcement under intellectual property treaties for collective marks

All of the treaties protecting intellectual property in indications of source and appellations of origin suffer major limitations. The *Paris Convention* provides only a limited and vague protection of collective marks and limited avenues for enforcement. Although enforcement provisions for collective marks and private trademarks are similar, repression of violations of collective marks has not been as effective at a practical level than enforcement of violations of private trademark rights.

Later conventions, like those addressing the general intellectual property protection offered for collective marks (eg. *Lisbon of 1958*) or the commodity specific treaties (olive oil and cheese), suffer from a different defect. While the substantive protection offered by each set out more detailed rules and perhaps stronger dispute resolution mechanisms than the *Paris Convention*, each of these later treaties has a very limited membership. The *Madrid Convention* has only 34 States Parties with the *Lisbon Convention* only 23. With respect to the two commodity agreements, the *International Olive Oil Agreement* has only 38 States Parties and the *Stresa cheese Agreement* only 6. In contrast, the *Paris Convention* has near universal participation of 169 States Parties.[755]

The limited membership makes protection of collective marks for food products difficult in international trade. It is also symptomatic of a deeper divide between States that recognize and pursue the protection of collective marks and those that do not.[756] France is at the forefront of recognizing and protecting appellations of origin registering almost two thirds of all the appellations under *Lisbon Convention* (64% up to 1999)[757] with the Czech and Slovak Republics, Bulgaria, Hungary and Italy having the next largest share, together

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[754] Article 26.
[755] Most recent figures for country memberships for intellectual property agreements are for 2005. Source: WIPO online <http//:wipo.org>.
[756] Rochard, *La protection internationale des indications géographiques* at 14-15.
[757] Olszak, *Droit des appellations d'origine* at 112.

accounting for another 15% of the registrations. At least two thirds of the products covered relate to the protection of wines, spirits and cheeses. With the exception of the United Kingdom (whose membership in the European Union requires membership in the *Lisbon Convention*), no countries with common law legal systems are members of the *Lisbon Convention.*

The creation of the WIPO and its responsibility for oversight of the intellectual property agreements did not vastly improve the intellectual property protection for collective marks. An important step in the protection of collective marks came with the establishment of the WTO and the adoption of its Member States of the *Trade-Related Aspects of Intellectual Property (TRIPS) Agreement.* [758] While Member States may seek to enforce intellectual property rights under both the WIPO and the WTO systems, the former has not been made redundant: As one author puts it:

> While the WTO trade rounds framework and the concept of single undertaking proved important in pushing TRIPS through, WIPO remains the main international institution that is involved in the continuous development of intellectual property standards and rules.[759]

The same authors also note however the importance that the WTO has now taken on with the *TRIPS Agreement* an integral part of the WTO.

> Ultimately, the circumstances leading to the adoption of the TRIPS Agreement in the WTO demonstrate that for WIPO to remain the main forum on intellectual property matters, it must show to the USA and its industry that it can deliver new standards faster and more efficiently.[760]

With its focus on the promotion of the protection of intellectual property, WIPO now must walk a delicate path, given its involvement with the WTO with its focus on trade liberalization. However some advocates think that the solution is not in molding the WIPO operations to dovetail with those of the WTO, but rather to broaden them to fit with the objectives of the other United Nations Agencies. These advocates believe the ultimate purposes which should be served by WIPO's activities should include broad development objectives and measures to ensure that developing countries benefit from modern scientific

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[758] See *infra*, Part II, Title 2, Chapter 2, Section 1.
[759] Musungu & Dutfield, "Multilateral agreements"at 10.
[760] Musungu & Dutfield, "Multilateral agreements" at 11.

and technological advances in health, environment, communication, information technology and food and nutrition among others.[761]

Section 2 – Commercial issues: international treaty efforts to prevent food fraud

National legislation for regulating commercial practices in the food trade, that started making its appearance in the second half of the XIXth century, tried to address as best it could how the elimination of nefarious food trade practices occurring at home. To stem the flow of such practices to and from adjoining states required international action.

> De plus, la fraude est encore stimulée par d'autres circonstances : une pratique qualifiée de fraude et prohibée dans un pays peut trouver un refuge et s'exercer librement dans un autre pays à la faveur d'une législation ou d'une surveillance insuffisantes ; des fraudes restent impunies parce qu'elles ont été pratiquées dans un pays voisin. ... La nécessité de mesures internationales s'impose.[762]

Therefore, in addition to international treaties dealing with intellectual property, the international community came together to address other legal issues that would have a direct impact on food labelling. Protection against unfair commercial practices other than violation of trademarks was not adequately covered by intellectual property agreements. Curtailing these practices was important from a commercial perspective to protect profits and maintain customer goodwill. It would also prevent consumer confusion, unfair business practices, and practices that were potentially dangerous to human health.

At first the international community's initial efforts to combat food fraud did not separate health and commercial considerations to any great degree. States simply realized that something had to be done to improve international cooperation to enhance food safety and fraud prevention in the fabrication and marketing of food stuffs. The issue was addressed both by general treaties affecting trade in all goods and by specific treaties that addressed the food trade directly.

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[761] Musungu & Dutfield, "Multilateral agreements" at 18.
[762] René Vincent, *De la répression des fraudes et falsification de denrées alimentaires* (Thèse du doctorat, Université de Caen, Faculté de Droit, 1909) (Caen: Imprimerie Charles Valin, 1909) at 259.

Paragraph 1 – The 1883 Paris Convention and the prevention of fraudulent trading practices

As explored above, the first major treaty to address fraudulent trading practices was the *1883 Paris Convention.* Article 10 required States Parties to ensure that goods that were sold into a Member State did not contain a false indication of the source of the goods or the identity of the producer, manufacturer, or merchant. Later revisions to the *Convention* in 1900, 1911 and 1925 added obligations in Article 10bis that required States Parties to provide effective protection for nationals of all States Parties against unfair competition.[763]

Under Art. 10bis (2) "unfair competition" is given a general definition as "any act of competition contrary to honest practices in industrial or commercial matters". Thus states are given latitude in defining exactly what kinds of acts will be included in "unfair competition given their national circumstances. As one commentator puts it: "Several acts are considered to be acts of unfair competition in one or more countries, but not—or only in special circumstances—in other countries."[764] Art. 10bis (3) provides specific examples of unfair competition. Pertinent parts of the Article read as follow:

> (3) The following in particular shall be prohibited:
> 1. all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities of a competitor;
> ...
> 3. indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods."[765]

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[763] G.H.C. Bodenhausen, *Guide to the Application of the Paris Convention for the Protection of Industrial Property* (Geneva: WIPO/United International Bureaux for the Protection of Intellectual Property, 1969) at 142.

[764] Bodenhausen,*Guide to the Application of the Paris Convention* at 144.

[765] Article 10bis(3)iii. As well Article 6ter introduces further labelling prohibitions in that the Article prohibits the use of state emblems, official hallmarks, and the emblems of international organizations. These provisions, of course, prevent a commercial producer from obtaining a sales advantage by supposedly offering a product endorsed by one of these organizations. Such illegal practices also defraud consumers by convincing them the product has the endorsement of the organization when in fact it has not.

These provisions in the Agreement outline common legislation for all Member States and must either be accepted as part of their domestic legislation or be directly applied by their judicial or administrative authorities.[766]

The *1883 Paris Convention*, although not specific to the food trade, contains important provisions which Member States can use to control fraudulent food labelling practices particularly with respect to fraudulent mislabelling as to product origins and product characteristics.

Paragraph 2 – The 1891 Madrid Agreement and the problem of deceptive indications of source

The *1891 Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods* further addressed the problem of the prevention of commercial fraud in international trade. This agreement[767] created a system for the seizure, on importation, of all goods bearing a false or deceptive indication of origin for places or regions within the Contracting Parties.[768] The treaty was not limited to food products but covered all goods traded between member states.

The *1891 Madrid Agreement* and the *1883 Paris Convention* represent the international legal minimum standard for commercial practices in international trade and can have a direct bearing on national legislation affecting food labelling practices.

Section 3 – Food safety issues: efforts to prevent food adulteration and their effects on food labelling

As food science and chemistry advances were made in the XIXth century, food adulteration became a hot topic. New scandals and health scares surfaced as scientists became able to better detect food adulteration. To deal with the scandals and scares, national

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[766] Bodenhausen, *Guide to the Application of the Paris Convention* at 145.
[767] The Agreement is still in force today with 34 Contracting Parties.
[768] Musungu & Dutfield, "Multilateral agreements" at. 27.

national governments passed legislation[769] to deal with food sellers who committed fraudulent acts against competitors and consumers and who sold products that were dangerous to human health. By the 1870s nations were ready to bring the issue to the international level.

Paragraph 1 - The Medical Sciences Conferences[770] 1879-1887

The 1879 - 1887 international Medical Sciences Conferences catalogued food adulterations scandals, suggested methods for cooperation for the prevention of fraudulent activities relating to food, and created laboratories at international borders to inspect transborder trade in food and drinks. These efforts were then communicated to all members of the Medical Conference[771] but no international treaty was ever concluded that outlined State obligations in the international trade of food relating to the protection of human health.[772] While there is no indication that food labelling issues were specifically discussed at these conferences, later discussions arising from these conferences did examine food fraud issues that directly impacted upon food labelling.[773]

As food production and processing advances rapidly unfolded in the XXth century, the need for international regulation of the food trade became more apparent. The science of chemical and biological analysis kept pace with advances in food processing technology and allowed for testing of new products for their effects on human health. As well, advances in detection methods allowed government regulators to uncover new fraudulent activities in the marketing and sale of food products thereby enhancing human health protection and exposing fraudulent activities.

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[769] France introduced such legislation in 1857 and Canada in 1874.
[770] These international meetings were actually called "Conventions" but so as not to confuse them with the use of the "conventions" meaning "treaties" under international law, the meetings are referred to as "conferences".
[771] René Vincent, *De la répression des fraudes et falsification de denrées alimentaires* (Thèse de doctorat, Université de Caen, Faculté de Droit, 1909) (Caen: Imprimerie Charles Valin, 1909) at 261-2.
[772] Vincent, *De la répression des fraudes et falsification* at 261-2.
[773] Vincent, *De la répression des fraudes et falsification* at 261-2.

Paragraph 2 – "Pure food" standards at the international level

Agreeing on international food standards, food names and food processing techniques facilitates international trade in food products and was seen as one of the ways to prevent food fraud and protect human health. Several countries saw food codes or "pure food" laws as steps in this direction. Towards the end of XIXth century, the Austro-Hungarian Empire promulgated a non-binding collection of standards and product descriptions for a wide variety of foods called the Codex Alimentarius Austriacus. Between 1897 and 1911, these standards were used as a reference, most by Austrian courts, to determine standards of identity for specific foods. However, the idea for a set of food standards for international trade was soon taken up by other organizations.[774] By the early 1900s food trade associations surveyed the possibility of harmonizing food standards to facilitate world trade with the International Dairy Federation (IDF) leading the charge. The IDF developed international standards for trade in milk and milk products.[775]

A. the *White Cross Convention of 1908*

The *White Cross Convention of 1908*, signed in Geneva by over 30 states, included binding international obligations for food standardization. The Convention contained definitions of commercially "pure" foodstuffs and encouraged states to adopt harmonized national legislation recognizing the treaty's purity laws so as to lead to more effective fraud and falsifications of foodstuff enforcement.[776] With the adoption of "pure" food binding standards, product names and production norms would be fixed for certain foodstuffs. Any products that were not made according to these norms could not be called by that product name. When such non-conforming products did make use of a standardized product name, such a use would be considered fraudulent by the signatories to the treaty. Defining the "pure" foods was no easy task, with the French according to one author taking "une part

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[774] The modern Codex Alimentarius draws its name from the Austrian code. Codex Alimentarius Commission, Joint FAO/WHO Food Standards Programme. "Origins of the Codex Alimentarius", *Understanding the Codex Alimentarius* (Rome: FAO and WHO, 1999), online: FAO Information Division <http://www.fao.org/docrep/W9114E/W9114E00.htm> at 2.

[775] Codex "Origins of the Codex Alimentarius" at 3.

[776] Vincent, *De la répression des fraudes et falsification* at 263.

prépondérante" in leading the charge on which products would be so defined as this task had to some degree already been drafted into legislation in France.[777]

B. other treaties creating compositional and labelling standards for food products

Commodity-specific treaties as such above like the *Stresa Convention of 1951* on cheeses and the *International Olive Oil Agreement*, although primarily protecting commercial interests also provided international guidance for the standardization and production of safe foodstuffs. The standards created by these agreements prohibited, or made actionable by competitors or State authorities, the marketing of non-conforming cheese and olive oil products.

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As national governments began to regulate food marketing practices at home, both for commercial and health reasons, they quickly became aware that national laws alone would not be sufficient, either to protect intellectual property rights in quality food products, or to ensure fair competitive practices and the sale of safe food in the international market place. Thus, the oldest international legal instruments affecting food labelling issue from industrial and intellectual property treaties, such as the *Paris Convention of 1883* and the *Madrid Agreement of 1891*, which were concluded to bind States to minimum standard for the protection of marks and names of products as well as to prohibit unfair trade practices.

Obligations relating to mandatory food labelling that would serve consumer interests for health and other information, however, were practically non-existent at the international level during this period. Some consumer-oriented benefits did result from the intellectual property and commercial treaties. The intellectual property treaties contained provisions obliging Member States to institute laws and enforcement mechanisms to prevent practices, including deceptive labelling practices that would mislead or deceive the consumer. As well, the Medical Conferences of the late XIXth century, while not producing international

[777] Vincent, *De la répression des fraudes et falsification* at 262.

obligations for "pure foods" at least sounded the alarm bells that some sort of international regulation was necessary to protect the integrity of food supplies.

World wars and nationalistic cultural attitudes to food and commerce, particularly in the area of intellectual property rights for collective marks, prevented the further development of international commitments until after the Second Great War. By then, international attention was focused on a new topic—tariff reduction and trade facilitation. States seeking to advance these new objectives looked to the conclusion of trade treaties, which would incidentally provide a new source for international obligations affecting food labelling.

Chapter 2 – The Effects of the GATT 1947 and Obligations to Facilitate Trade on Food Labelling

The efforts of international cooperation which were so apparent in many areas of international discourse at the end of the XIXth century and into the early XXth century were frustrated by the outbreak of the two great wars. In fact the interwar period was marked by world-wide financial instability, natural disasters in agricultural production and rising protectionism, all of which restricted international trade. World leaders, aware of this undesirable situation, saw the end of World War II as an opportunity to rediscover international cooperation in order to redevelop war-torn countries and to restore financial and trade opportunities. [778] While the United Nations and its member organizations worked to establish political and economic frameworks for general international relations, three specific institutions—the International Monetary Fund, the Bank for International Reconstruction and Development (World Bank) and the International Trade Organization—held out hope for the specific reconstruction of international financial and trade matters.[779]

In 1946 in an attempt to achieve international consensus on what was to be done with respect to improving international trade, the newly created Economic and Social Council of the United Nations, upon a motion from the United States, adopted a resolution calling for the convening of a "United Nations Conference on Trade and Employment". This Conference, later to become known as the Havana Conference, was to consider the

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[778] For excellent historic accounts of the conditions that led to the conclusion of the GATT and general economic conditions during the mid-XXth century, see J. Jackson, *World Trade and the Law of GATT* (Indianapolis: Bobbs-Merrill 1969) at 35-57; R. Hudec, *The GATT Legal System and World Trade Diplomacy*, 2d. ed. (Salem, N.H.: Butterworths, 1990) at Part I; K.Kock, *International Trade Policy and the GATT 1947-67* (Stockholm: Almqvist & Wiksell 1969) at 1-94; W.A. Brown, Jr., *The United States and the Restoration of World Trade* (Washington: Brookings Institution, George Banta 1950) at 29 et seq.; G. Curzon, *Multilateral Commercial Diplomacy: The General Agreement on Tariffs and Trade and Its Impact on National Commercial Policies and Techniques* (London: Michael Joseph 1965) at 15-33; D. Jouanneau, *Le GATT, Que sais-je?* (Paris: Presses Universitaires de France 1987) at 5-37; and WTO, *GATT, Analytical Index: Guide to GATT Law and Practice*, 6th ed. (Geneva:, WTO, 1995) at 3-6.

[779] Hudec, *The GATT Legal System*, Chapter 2; Jagdish Bhagwati, *The World Trading System at Risk* (Princeton, N.J.: Princeton University Press, 1991) at 3; Donald E. Buckingham, *Our Daily Bread: An Evaluation of International Regulation Affecting the World Wheat Trade* (Thesis for the Diploma in International Law, Cambridge University, 1990) [unpublished] at 48.

establishment of an International Trade Organization (ITO) and the implementation of an international agreement to bring structure and discipline to international trading practices.[780]

Despite proud and ambitious beginnings, the International Trade Organization never saw the light of day.[781] Though the drafting of the entire international agreement—the Havana Charter—that would have brought the agreement into force was completed, the final death knell to the Agreement came in 1950 when the United States Department of State issued a statement indicating that the Havana Charter would not be submitted again to the United States Congress for ratification.[782]

Prior to the completion of the negotiations for the Havana Charter, States Parties agreed at a Preparatory Conference in 1947, to bring into force provisionally an interim agreement—the *General Agreement on Tariffs and Trade (GATT 1947)*—to deal immediately with certain trade issues of importance. [783] On January 1, 1948, the *GATT 1947* came into force, a treaty that would fundamentally change the international landscape for the rules governing international trade. From a fledgling institution, it would grow into one whose effects would be felt by legislators the world over. As well, it would lay the groundwork for the phoenix that would rise from the ITO's ashes some 50 years later in the form of the World Trade Organization.

The ambitious objective of the *GATT 1947* was "the harmonious development of trade relations conducive to the growth of international trade to the benefit of all member countries, irrespective of their levels of development or economic system."[784] More specifically the *GATT 1947* had two major goals: (1) the gradual and continuing reduction of import tariffs on specific trade items through on-going negotiations; and (2) the imposition

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[780] Jackson, *World Trade* at 41; WTO, *GATT, Analytical Index* at 3.
[781] John Jackson, *Restructuring the GATT System* (London: Royal Institute of International Affairs & Pinter, 1990) at 12; Hudec, *The GATT Legal System* at 49. Daniel Gervais, *The TRIPS Agreement: Drafting History and Analysis*, 2nd ed. (London: Sweet & Maxwell, 2003) at 4; WTO, *GATT, Analytical Index* at 6.
[782] WTO, *GATT, Analytical Index* at 6; Buckingham, *Our Daily Bread* at 51. See also Jackson, *Restructuring the GATT* at 12.
[783] Jackson, *World Trade* at 44-45; WTO, *GATT, Analytical Index* at 4-5.
[784] O. Long, *Law and its Limitations in the GATT Multilateral Trade System* (Martinus Nijhoff: Dordrecht 1988) at 109.

of legal controls with respect to the implementation of non-tariff barriers affecting both national production and international trade in goods.[785] The *GATT 1947* was divided into four parts. Parts I (Articles I and II) contained the "most-favoured nation (MFN) treatment" and tariff concession obligations. Part II (Articles III to XXIII) contained most of the major substantive obligations including those relating to customs procedures, quotas, subsidies, ant-dumping duties, national treatment and other obligations limiting the use of national non-tariff measures.[786] Part III (Articles XXIV to XXXV) contained administrative provisions for the operation of the *GATT 1947* and Part IV (Articles XXVI to XXXVIII), added in 1964, addressed certain problems in "trade and development".[787]

Parts I and III became immediately binding on contracting parties as of January 1, 1948, but Part II required contracting parties' compliance only "to the fullest extent not inconsistent with existing legislation".[788] This "grandfathering" of pre-existing rights permitted many States to sign the Protocol by executive authority rather than having to go to the legislature for approval.[789] But it also meant that in the absence of Part II being fully binding on Member States, GATT rules on non-tariff rules evolved more slowly. Over the life of the *GATT 1947*, States negotiated additional tariff reductions and further clarified obligations for disciplining non-tariff barriers during eight rounds of multilateral trade negotiations.

Despite *GATT 1947*'s constitutional and substantive anomalies,[790] several obligations flowed from the treaty which potentially could affect national food labelling measures. Among these were obligations undertaken by States to accord MFN status and national treatment to all contracting parties to the *GATT 1947* (Section 1). These obligations were

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[785] Buckingham, *Our Daily Bread* at 50.
[786] Jackson, *Restructuring the GATT* at 13-14.
[787] Pursuant to this Part IV, developed nations agreed to assist developing nations in international trade matters by not requiring from developing countries reciprocity for tariff and non-tariff commitments made by developed countries during multilateral trade negotiation (MTN) rounds and by reducing and eliminating trade barriers which impact upon products produced by developing countries.
[788] *Protocol of Provisional Application of the GATT Protocol of Provisional Application of the General Agreement on Tariffs and Trade*, 30 October 1947, 55 U.N.T.S. 308; WTO, GATT, Analytical Index: Guide to GATT Law and Practice, 6th ed. (Geneva:, WTO, 1995) at 6.
[789] Jackson, *Restructuring the GATT* at 13-14.
[790] Jackson, *Restructuring the GATT,* Part I "The Defective Constitution of GATT".

diluted, however, by *GATT 1947* rules which permitted contracting parties to shield certain national legislative measures, including labelling measures, when they pursued legitimate objectives as set out in *GATT 1947*, Article XX (Section 2).

Section 1 – General obligations to liberalize trade

The *GATT 1947* contained many obligations for contracting parties that would assist in facilitation of international trade. Arguably the most important of these was the lowering of tariffs, which through progressive reductions in the eight rounds of multilateral trade negotiations succeeded in significantly lowering tariffs on most products. No less significant, but somewhat more difficult to quantify, was the gradual agreement on disciplines that would limit the actions national governments could take that had a trade-restrictive effect. The most basic of these obligations was the obligation not to discriminate as between similar or "like" goods (paragraph 1), but other obligations that would have an impact on food labelling included obligations with respect to marks of origin (paragraph 2).

Paragraph 1 – Commercial issues: non-discrimination rules for trade liberalization

The *GATT 1947* imposed the obligation of non-discrimination in the trade of goods on contracting parties in two ways. Art. I, the cornerstone of *GATT 1947*, obliged contracting parties to conduct their commercial activities with one another on the basis of equal treatment without discrimination. Thus any tariff or other concession granted one contracting party by another had to be extended to all contracting parties. This first branch of the obligation of non-discrimination has become known as MFN treatment. The MFN obligation thus would prohibit national legislation which set different labelling standards for imports from one country compared to imports from another country. The second branch articulated in Art. III—the obligation for national treatment of goods from contracting parties—precluded, for example, national legislation which would set labelling requirement for imported goods that was not required for domestic goods.

A. MFN, food labelling and "dolphin safe" tuna

A mechanism for the settlement of disputes evolved under the *GATT 1947* out of its Articles XXII and XXIII even though neither article explicitly mentions the words "dispute settlement".[791] A Panel on Complaints was created in 1952[792] which dealt with the first GATT Article XXIII proceeding.[793] From that moment, GATT dispute resolution continued to evolve into an increasingly formal Panel procedure with States following a quasi-judicial format of written and oral presentations to the Panel of three to five independent experts of GATT.[794] Panels then issued reports which outlined findings on the GATT-compatibility of national measures and recommendations for rectifying non-compliance. Then the Contracting Parties acting together would adopt the dispute settlement Panel report as a "ruling", that is, an "authoritative determination of the existing GATT rights and obligations of the disputants in the case under dispute."[795] If the Contracting Parties failed to agree to adopt the report, it was left in limbo with requests for adoption of the Report to resurface on a recurring basis. In 1993/94. for example, there were 12 outstanding requests for adoption of Panel Reports.[796] Over the 50 year history of the GATT, Art. XXIII permitted a contracting party to the GATT to ask for the establishment of a GATT panel to examine a complaint where that State believed that a benefit accruing to it under the GATT was being nullified or impaired, or if the attainment of any objective of the GATT was being impeded as a result of the failure of another contracting party to carry out its obligations under the *GATT 1947*.[797]

No GATT Panel was ever asked to directly address the WTO-compatibility of a mandatory national food labelling measure. However, as part of a large and complex case

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[791] Ernst-Ulrich Petersmann, "International Trade Law and the GATT/WTO Dispute Settlement System 1948-1996: An Introduction", Chapter 1 in Ernst-Ulrich Petersmann, ed., *International and European Trade and Environmental Law after the Uruguay Round* (The Hague: Kluwer, 1995) at 33.
[792] Robert Hudec, *Essays on the Nature of International Trade Law* (London, Cameron May, 1999) at 41.
[793] *GATT Panel of Complaints Report to the Contracting Parties regarding Belgian Family Allowances*, 7 November 1952, G/32, B.I.S.D., 1st Supp. 59.
[794] Petersmann, "International Trade Law" at 35.
[795] Petersmann, "International Trade Law" at 39.
[796] Petersmann, "International Trade Law" at 53.
[797] See Jackson, *World Trade* at 161 et seq. and J.-G. Castel, "The Uruguay Round and the Improvements to the GATT Dispute Settlement Rules and Procedure" (1989), 38 I.C.L.Q. 834 at 835.

the1991 Panel Report on *United States – Restrictions on Imports of Tuna*[798] examined the labelling provisions of the US *Dolphin Protection Consumer Information Act (DPCIA).* The case before the GATT Panel was principally concerned with whether this national measure was a justifiable unilateral import restriction on Mexican tuna, which the Panel found it was not.[799]

As a secondary issue, the Panel was asked to rule on the GATT-compatibility of the legislation's labelling provisions permitting tuna products meeting certain conditions to be labelled "Dolphin Safe". The American legislation provided that when a tuna product exported from or offered for sale in the United States bears the label "Dolphin Safe" or a similar label indicating it was fished in a manner not harmful to dolphins, the product was not permitted to contain tuna harvested on the high seas by a vessel engaged in driftnet fishing, or harvested in the Eastern Tropical Pacific Ocean (ETP) by a vessel using a purse-seine net.[800] Mexico complained that the labelling requirements arising from the application of the *DPCIA* violated Art. I obligations by discriminating against Mexican products and not those of several other countries that were contracting parties to the *GATT 1947.* A GATT Panel did not find a violation on this point holding as follows:

> By imposing the requirement to provide evidence that this fishing technique had not been used in respect of tuna caught in the ETP the United States therefore did not discriminate against countries fishing in this area. The Panel noted that, under United States customs laws, the country of origin of fish was determined by the country of registry of the vessel that had caught the fish: the geographical area where the fish was caught was irrelevant for the determination of origin. The labelling regulations governing tuna caught in the ETP thus applied to all countries whose vessels fished in this geographical area and thus did not distinguish between products originating in other countries.
>
> ... The Panel found for these reasons that the tuna products labelling provisions of the DPCIA relating to tuna caught in the ETP were not inconsistent with the obligations of the United States under Article I:1 of the General Agreement.[801]

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[798] *United States – Restrictions on Imports of Tuna* (unadopted Panel Report), 30 I.L.M. 1594 (1991).
[799] Ernst-Ulrich Petersmann, *The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement* (The Hague: Kluwer, 1997) at 125.
[800] WTO, *GATT, Analytical* at 33.
[801] *United States – Restrictions on Imports of Tuna* (unadopted Panel Report), 30 I.L.M. 1594 (1991) at paras. 5.43-5.44.

The Panel Report was never adopted by the Contracting Parties. The portion of the Panel Report that addresses the GATT-compatibly of voluntary labelling measures confirms, however, that national food labelling measures can have discriminatory effects and are therefore subject to the disciplines outlined under international trade obligations.

B. national treatment, food labelling and foreign eggs

Australia complained in 1955 when a Hawaiian regulation required firms to inform consumers that they were selling "foreign eggs", alleging that such a measure was a violation of Art. III(4) of the *GATT 1947*. The complaint was withdrawn when a U.S. domestic court decision declared the law unconstitutional and contrary to paragraph 4 of Art. III(4).[802]

C. national treatment, food labelling and name of producer, etc. on labels

A third decision by a *GATT 1947* body involving labelling and Art. III national treatment obligations arose in the 1956 Working Party Report in *Certificates of Origin, Marks of Origin, Consular Formalities.* In that report it was noted "that the question of additional marking requirements, such as an obligation to add the name of the producer or the place of origin or the formula of the product, should not be brought within the scope of any recommendation dealing with the problem of marks of origin. The point was stressed that requirements going beyond the obligation to indicate origin would not be consistent with the provisions of Article III, if the same requirements did not apply to domestic producers of like products."[803]

Each of these cases demonstrates that the commercial objective of trade facilitation was a cornerstone of the *GATT 1947* and that the objective would be upheld as against non-conforming national labelling measures.

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[802] L/411 (1955) SR.10/13; as referenced in WTO, *GATT, Analytical Index* at 162.
[803] L/595, adopted on 17 November 1956, 5S/102, 105-106, para. 13; WTO, *GATT, Analytical Index* at 181.

Paragraph 2 – GATT 1947's Article IX (marks of origin)

Art. I and III obligations appear relatively unabashedly commercial in their orientation and application. Art. IX, another *GATT 1947* provision with potential effects on national food labelling measures, on the other hand is a mish-mash of commercial, consumer and property objectives. Art. XI sets out rules concerning the legitimate use of national measures for marking requirements. After restating the MFN obligation with respect to marking requirements in Art. IX(1), Art. IX(2) sets out the basic obligation for contracting parties with respect to marking (labelling) requirements:

> The contracting parties recognize that, in adopting and enforcing laws and regulations relating to marks of origin, the difficulties and inconveniences which such measures may cause to the commerce and industry of exporting countries should be reduced to a minimum, due regard being had to the necessity of protecting consumers against fraudulent or misleading indications.

These commercial and consumer-oriented objectives can be contrasted with the property objectives found in Article IX: 6 which requires that:

> The contracting parties shall co-operate with each other with a view to preventing the use of trade names in a manner as to misrepresent the true origin of a product, to the detriment of such distinctive regional or geographical names of products of the territory of a contracting party as are protected by its legislation. Each contracting party shall accord full and sympathetic consideration to such requests or representations as may be made by any other contracting party regarding the application of the undertaking set forth in the preceding sentence to names of products which have been communicated to it by the other contracting party.

This Article has been interpreted by a variety of GATT bodies.

A. MFN, national treatment and the "dolphin-safe" tuna label

The 1991 Panel Report on *United States – Restrictions on Imports of Tuna* had to consider the claim by Mexico that the labelling provisions of the American DPCIA restricted the use on tuna products of the label "Dolphin Safe" and were therefore inconsistent with Art. IX(1). The Panel held that Article IX refers to "Marks of Origin" and its text refers to marking of origin of imported products. It does not contain a national

treatment requirement but only a MFN one. Thus, the Panel indicated that Art. IX was intended to regulate marking of origin of imported products only and not marking of products generally. The Panel found then that the labelling provisions of the *DPCIA* did not fall under Art. IX(1).[804]

B. Working Parties of 1956 and 1958 limit scope of Art. IX to "marks of origin"

Two GATT Working Parties, one in 1956 and one in 1958, concluded that the ambit of Art. IX was quite narrow. The Report of the 1956 Working Party on *Certificates of Origin, Marks of Origin and Consular Formalities* held that "requirements going beyond the obligation to indicate origin would not be consistent with requirements of Article III, if the same requirements did not apply to domestic producers of like products."[805]

The 1958 Report of the Working Party on *Marks of Origin* further refined the ambit of Art. IX, by suggesting that the proper interpretation of Art. IX was as it applied to "marks of origin" and that such requirements should be kept "separate from requirements introduced for other purposes, e.g. to protect the health of the population, etc. In this connection, attention was drawn to Article III of the *General Agreement* which requires contracting parties to give to imported and domestic products the same treatment..."[806]

C. Art. IX - protection of distinctive names and imported alcohol into Japan

In 1987 a GATT Panel was asked to consider the obligation imposed by Art. IX(6) on contracting parties.[807] In this case the European Communities alleged that Japan had failed to provide adequate protection as regards marking the origin on its alcohol products and that Japan had failed to "cooperate ... with a view to preventing the use of trade names in such a manner as to misrepresent the true origin of a product, to the detriment of such

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[804] *United States – Restrictions on Imports of Tuna* (unadopted Panel Report), 30 I.L.M. 1594 (1991) at para. 5.41; WTO, *GATT, Analytical Index: Guide to GATT Law and Practice*, 6th ed. (Geneva:, WTO, 1995) at 288.
[805] L/595, adopted on 17 November 1956, 5S/102, 105-106, para. 13; WTO, *GATT, Analytical Index* at 181 and 289.
[806] L/912/rev.1, adopted on 21 November 1958, 7S/117, para. 2; WTO, *GATT, Analytical Index* at 289.
[807] Art. IX(6) states that "contracting parties shall cooperate with each other with a view to preventing the use of trade names in such a manner as to misrepresent the true origin of a product, to the detriment of such distinctive regional or geographical names of products of the territory of a contracting party as are protected by its legislation."

distinctive regional or geographical names of products of the territory of a contracting party as are protected by its legislation".[808]

After a review of the evidence presented by the EC and by Japan including the Japanese law in question,[809] the Panel concluded that the evidence was sufficient to support the Japanese position that the labels on liquor bottles manufactured in Japan indicated their Japanese origin. Despite the fact that many of these same bottles also bore French and European names, French-style label elements, and grape variety names, the Panel was not convinced that their use "had actually been to the detriment of 'distinctive regional or geographical names of products' produced and legally protected in the EEC." Furthermore, the Panel found that Japan had not, "given, for example, its participation in the *Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods* and its internal laws and regulations on labelling, failed to meet its obligations to cooperate pursuant to GATT Article IX:6."[810]

This case is instructive for three reasons. First, the GATT Panel was prepared to examine the conduct of a contracting party in other international institutional settings to decide upon its interpretation of the ambit of Article IX(6). Second, the Panel in the *Japanese Labelling* case assigned a very limited obligation on contracting parties under Art. IX(6) to protect the intellectual property associated with geographical indications and indications of source. Third, arguably the upshot of the Japanese Imported Wine Panel Report was that the focus of the *GATT 1947* was on facilitating trade and eliminating unnecessary national measures that restricted trade. The labelling practices of the Japanese liquor industry to adopt French words and symbols for alcohols made in Japan did not prevent French and European wine and alcohols from entering Japan. *GATT 1947* was a trade agreement. It left the consideration and enforcement of intellectual property issues to other international organizations.

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[808] *Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, L/6216 adopted on 10 November 1987, BISD 34S/83 *(Japan Labelling)*.
[809] Japanese Law and Cabinet Order concerning Liquor Business Association and Measures for Securing Revenue of Liquor Tax.
[810] *Japan - Customs Duties* at paras. 5.14-5.15.

Section 2 – Protecting national interests: GATT's Art. XX

The *GATT 1947* obligations undertaken by contracting parties were designed to limit national measures which would unnecessarily restrict international trade. However, many if not all, contracting parties had certain pieces of national legislation that would come into conflict with the broad objectives and obligations set out in the general rules if the *GATT 1947.* Article XX of the GATT therefore contained provisions which permitted contracting parties to shield certain national legislative measures, including labelling measures, from the full impact of *GATT 1947* obligations if certain conditions were met. In particular, three of the exceptions outlined in *GATT 1947* could potentially be used by contracting parties to justify national legislation affecting food labelling measures. The pertinent parts of Art. XX read as follows:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
> ...
> (b) *necessary to protect human*, animal or plant *life or health*;
> ...
> (d) *necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to* customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, *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; (emphasis added)

Each of the above subheadings of Art. XX could be employed by contracting parties to support national laws pursuing various food labelling objectives. Article XX(b) could be relied upon to support national labelling legislation for the protection of consumer health such as requirements for the listing of ingredients or for nutritional labelling. Article XX(d) could be used to support both the recognition of food labelling names reserved for private or collective use under intellectual property statutes as well as for laws that pursued objectives

of market fairness and fraud prevention. Finally, Article XX(g) could be used to support labelling legislation that had as its objective providing consumers with information about a product's production method as it might relate to the conservation of natural resources and eco-labelling.

While it was possible for States to resort to these exceptions to justify national food labelling measures that might otherwise offend GATT provisions, no State was ever required to do so. No GATT panel was ever required to rule on the application of Art. XX exceptions to a national measure relating to food labelling.[811] On the other hand, Art. XX exceptions and the jurisprudence created by GATT Panels with respect to Art. XX cases, were the basis from which Contracting Parties started WTO negotiations for an *Agreement on Technical Barriers to Trade,*[812] an *Agreement on the Application of Sanitary and Phytosanitary Measures* and certain aspects of the *Agreement on Trade-Related Aspects of Intellectual Property Rights.*

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[811] WTO, *GATT, Analytical Index* at 563-596. However there are two recorded instances where the "prevention of deceptive practices" was advanced as the basis for justifying national legislation. The first was in 1946 during discussions at the London sessions of the Preparatory Meetings for the Havana Charter, when Art. XX(d) was argued to be broad enough to justify national measures which proscribed false marking of geographical origin (EPCT/C.II/50, p. 5, 9; EPCT/C.II/54/Rev.1, p. 37). A second time that the argument was advanced was in 1987, when it was put forward by the EEC to the GATT Working Party on the Accession of Portugal and Spain in response to a question regarding an EEC regulation on the use of the term "sherry". The EEC stated that the regulation was a measure designed to prevent deceptive practices and was therefore justified under Art. XX(d) of the General Agreement. No one appears to have challenged this position. See WTO, *GATT, Analytical Index* at 583.

[812] As the *GATT 1947* evolved, contracting parties became aware of the impact of non-tariff barriers and a Working Party established to study the issue concluded that the largest category of non-tariff measures were technical regulations. By the end of the Tokyo Round of Multilateral Trade Negotiations in 1979, 32 GATT Contracting Parties signed the plurilateral *Agreement on Technical Barriers to Trade.* Commonly known as the "Standards Code", the Agreement laid down the rules for the preparation, adoption and application of technical regulations, standards and conformity assessment procedures. The Standards Code did not develop to deal with sanitary and phytosanitary measures specifically but it did cover the technical requirements resulting from food safety and animal health measures. Already the 1979 *Standards Code* used internationally developed standards such as those developed by Codex and encouraged governments to use the international standards unless they did not adequately protect health. WTO, "Understanding the WTO Agreement on Sanitary and Phytosanitary Measures", on line: WTO <http://www.wto.org/English/tratop_e /sps_e/spsund_e.htm>. The Code also established a reporting system for regulations that were not based on international standards and created a stand-alone dispute resolution mechanism which was used only sparingly by the contracting parties. Although the Code applied to regulations such as those relating to food labelling, the international agreement or of its dispute settlement body exerted little legal pressure on national legislative initiatives. See World Trade Organization, "The World Trade Organization: A Training Package", WTO, Geneva, 1998, Module 3 Goods: rules on NTMs at E3-1.

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It is difficult to conclude that *GATT 1947* had a direct and tangible impact upon national food labelling measures. Some examples of labelling measures being successfully challenged (ex. US (Hawaii) – Selling of Foreign Eggs) can be found, but most of the other measures survived GATT scrutiny with relative ease or simply were never put to the test.

The *GATT 1947* was a trade agreement with commercial objectives of tariff reduction and non-tariff elimination as its central concerns. Arguably, where food labelling measures would have provided examples of egregious violations of *GATT 1947*'s fundamental tenet of non-discrimination (Art. I (MFN) or Art. III (national treatment)), the *GATT 1947* dispute settlement mechanism could have been successfully employed by disgruntled trading partners to attack the discriminatory labelling measure. But where food labelling measures did not manifest such effects, GATT Panels did not find violations. When States tried to attack national food labelling laws because they did not provide adequate intellectual property protection (Japan Imported Wine case) or because they reserved a label claim "Dolphin-safe" that could be used if certain conditions were met (Tune Dolphin Case), GATT Panels did not find violations.

If there were few direct effects of the *GATT 1947* on national food labelling, perhaps there was one subtle one. The *GATT 1947* consisted of a system of trade rules that could be implemented, if necessary, through a developing system of dispute settlement. This combination of international trade facilitation rules and dispute settlement meant that national measures were no longer immune from international scrutiny. While few national measures were ever attacked, the establishment and development of the *GATT 1947* indicated the beginning of a new balance between total State sovereignty over food labelling matters and international scrutiny of those matters.

Chapter 3 – International Food Labelling Standards from the Codex Alimentarius

A review of intellectual property treaties and trade agreements in force prior to the establishment of the WTO indicates that few treaty obligations existed that had direct effects on national food labelling measures. Beyond treaty obligations, however, there was sustained international activity in the creation of food standards, including standards for food labelling. From its creation in 1962, the Codex Alimentarius Commission (CAC) has been the most active international forum for the development of food labelling norms (Section 1). The Standards, Guidelines, Recommended Practices and other norms[813] that the CAC created, and continues to create, form the Codex Alimentarius (the Codex) which has a significant impact on food labelling standards world-wide (Section 2).

Section 1 – The origins of the CAC and its process for the elaboration of Codex norms

The CAC is responsible for making proposals to the FAO and the WHO on all matters pertaining to the implementation of the Joint FAO/WHO Food Standards Programme.[814] The primary tool for making such recommendations is the development of the Codex which is defined by the CAC as:

> ... a collection of internationally adopted food standards presented in a uniform manner. These food standards aim at protecting consumers' health and ensuring fair practices in the food trade. The Codex Alimentarius also includes provisions of an advisory nature in the form of codes of practice, guidelines and other recommended measures intended to assist in achieving the purposes of the Codex Alimentarius. The publication of the Codex Alimentarius is intended to guide and promote the elaboration and establishment of definitions and requirements for food

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[813] When the terms "Standards", "Guidelines", and "Recommended Practice" are capitalized, they signifies the name of a specific international instrument that the CAC has developed. The general term "norm" or "standard" without capitalization is used as a general reference to Codex instruments.

[814] Art. 1, "Statutes of the Codex Alimentarius Commission" adopted by the FAO Conference and the World Health Assembly in 1961/62 in Codex Alimentarius Commission, Joint FAO/WHO Food Standards Programme, *Procedural Manual of the Codex Alimentarius Commission* (Rome: FAO and WHO, 2003), online: FAO Information Division <ftp://ftp.fao.org/codex/PM/Manual13e.pdf> at 2.

> to assist in their harmonization and in doing so to facilitate international trade.[815]

From its inception, the CAC has sought to promote three objectives representing a balanced combination of producer-oriented and consumer-oriented concerns: (a) the protection of consumers' health; (b) the promotion of fair practices in the food trade; and (c) the harmonization of food standards to facilitate international trade.

Paragraph 1 – The development and operation of the CAC

A. origins of the CAC

In 1945, the Food and Agriculture Organization of the United Nations (FAO) was created with responsibilities to enhance world agricultural production and food distribution.[816] Created three years later, the World Health Organization (WHO) was charged with a mandate for the promotion of human health and the establishment of food standards.[817] By 1950, the two organizations were conducting joint meetings on nutrition, food additives and related areas. In the first of these meeting, the two organizations agreed that food regulations among States were often conflicting and contradictory. "Legislation governing preservation, nomenclature and acceptable food standards often varies widely from country to country. New legislation not based on scientific knowledge is often introduced, and little account may be taken of nutritional principles in formulating regulations."[818] State regulators, food traders and consumers looked increasingly to the FAO and the WHO to provide leadership in "unraveling the skein of food regulations that were impeding trade and providing mostly inadequate protection for consumers."[819]

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[815] Codex Alimentarius Commission, Joint FAO/WHO Food Standards Programme, "General Principles of the Codex Alimentarius" *Codex Alimentarius, Vol. 1A: General Requirements*, 2nd ed. (Rome: FAO and WHO, 2000) 3, para. 1.

[816] Donald E. Buckingham, *Our Daily Bread: An Evaluation of International Regulation Affecting the World Wheat Trade* (Thesis for the Diploma in International Law, Cambridge University, 1990) [unpublished] at 81. For a general history of the FAO, see R. Phillips, *FAO: Its Origins, Formation and Evolution 1945-81* (Rome: FAO, 1981).

[817] Codex Alimentarius Commission, Joint FAO/WHO Food Standards Programme. *Understanding the Codex Alimentarius* (Rome: FAO and WHO, 1999), "Origins of the Codex Alimentarius" at 3, online: FAO Information Division <http://www.fao.org/docrep/W9114E/W9114E00.htm>.

[818] Report of the First Meeting of the Joint FAO/WHO Expert Committee on Nutrition, 1950 as cited in Codex, *Understanding the Codex*, "Origins of the Codex" at 2.

[819] Codex, *Understanding the Codex* "Origins of the Codex" at 6.

At almost the same time, various regional organizations and individual States were working towards the development of harmonized food standards. In 1949, Argentina proposed a Latin American food code, the Código Latino-Americano de Alimentos.[820] From 1954 to 1958, Austria championed the creation of a Codex Alimentarius Europaeus.[821] International and regional initiatives came together with the formation of a FAO Regional Conference for Europe in 1960. During this meeting States recognized:

> The desirability of international agreement on minimum food standards and related questions (including labelling requirements, methods of analysis, etc.) ... as an important means of protecting the consumer's health, of ensuring quality and of reducing trade barriers, particularly in the rapidly integrating market of Europe.[822]

This meeting resulted in the creation of a regional body, the FAO Regional Conference for Europe, empowered to develop food standards for the European trading region.[823] Only a year later in 1961 however, this body adopted a resolution proposing that its regional work on food standards be taken over fully by the FAO and the WHO so as to permit the development of world-wide standards.[824] Later that same year, at the Eleventh Session of the Conference of FAO, Member States established the CAC with a mandate to create an international food standards programme. The programme became a joint collaboration between the FAO and the WHO when the latter endorsed it in 1963.[825] Immediately the CAC began its work of developing international standards to protect consumer health, to ensure fair food practices and to facilitate international trade.

B. operation of the CAC

The CAC is not an organization whose existence is due to an international treaty. Instead, it is the creation of two international organizations, the FAO and the WHO, with membership open to Members States of the two organizations. From a constitutive

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[820] Codex, *Understanding the Codex* "Origins of the Codex" at 3.
[821] Codex, *Understanding the Codex* "Origins of the Codex" at 3.
[754] Codex, *Understanding the Codex* "Origins of the Codex" at 7.
[823] The Council of the Codex Alimentarius Europeaeus.
[824] Codex, *Understanding the Codex* "Origins of the Codex" at 3-4.
[825] Codex, *Understanding the Codex* "Origins of the Codex" at 8. The Sixteenth World Health Assembly in 1963 passed its resolution to establish and endorse the CAC.

perspective, the legal basis for the existence of the CAC is in Statutes[826] and Rules of Procedure of the CAC[827] passed by the FAO and the WHO. Once Member States of either the FAO or the WHO have declared themselves members of the CAC, they are permitted to participate in all activities of the CAC. The Statutes of the CAC also provided the legal basis for the Commission's work and set out the purposes, terms of reference, and objectives of the CAC. Participation in the CAC was strong and continues to be so.[828] The CAC quickly formulated Rules of Procedure to give shape to its working procedures, as well as establishing an executive committee, subsidiary bodies and procedures for the elaboration of standards.[829]

The CAC then set to work developing international food standards. In completing this task it was aided by various subsidiary bodies that it created. Two kinds of subsidiary bodies were created: "Coordinating Committees" which represented the various regions of the world[830] and thus were entrusted with the development and implementation of regional food standards; and "Codex Committees" which were assembled with a particular subject expertise and charged with the negotiation of draft food standards for submission to the CAC.

These latter "Codex Committees" became the most active bodies under the CAC and further subdivided into nine "horizontal" or general subject standards-setting committees[831], and 16 "vertical" or specific commodity committees, The "horizontal" general subject

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[826] Codex Alimentarius Commission, Joint FAO/WHO Food Standards Programme, "Statutes of the Codex Alimentarius Commission, Art. 2, in Codex, *Procedural Manual* at 3.
[827] Codex Alimentarius Commission, Joint FAO/WHO Food Standards Programme, "Rules of Procedure of the Codex Alimentarius Commission, Art. 2, in Codex, *Procedural Manual* at 6.
[828] Currently there are 170 States that are Members of the CAC accounting for over 97% of the world's population. Codex, *Understanding the Codex,* "The Codex system: FAO, WHO and the Codex Alimentarius Commission" at 1.
[829] Codex Alimentarius Commission, Joint FAO/WHO Food Standards Programme, "Rules of Procedure of the Codex Alimentarius Commission" and "Procedures for the Elaboration of Codex Standards and Related Texts" in Codex, *Procedural Manual* at 6, 19.
[830] There are 5 such Committees, one for each major region of the world: Africa; Asia; Europe; Latin America and the Caribbean; and North America and the Southwest Pacific.
[831] Committee on General Principles; Committee on Food Labelling; Committee on Methods of Analysis and Sampling; Committee on Food Hygiene; Committee on Pesticide Residues; Committee on Food Additives and Contaminants; Committee on Import/Export Inspection and Certification Systems; Committee on Nutrition and Foods for Special Dietary Uses; and the Committee on Residues of Veterinary Drugs in Foods. The Committee on General Principles is chaired by France while the Committee on Food Labelling is chaired by Canada.

Codex Committees developed "all-embracing concepts and principles applying to all foods in general"[832] while the "vertical commodity committees[833] developed standards for specific foods or classes of foods.

C. the role of the Codex Committee on Food Labelling (CCFL)

One of the nine horizontal Codex Committees, the Codex Committee on Food Labelling (CCFL), is specifically charged with responsibility for the development of Codex Standards relating to food labelling. The terms of reference of the CCFL[834] are:

> (1) to draft provisions on labelling applicable to all foods;
> (2) to consider, amend if necessary, and endorse draft specific provisions on labelling prepared by the Codex Committees drafting standards, codes of practice and guidelines;
> (3) to study specific labelling problems assigned to it by the Commission; and
> (4) to study problems associated with the advertisement of food with particular reference to claims and misleading descriptions.[835]

The CCFL has been instrumental in develoing a general international standard for food labelling.[836] However, its role is not limited to the development of only horizontal standards for food labelling. Under the CAC's "Format for Codex Commodity Standards", all vertical standards must follow a pre-determined format, one element of which is "labelling". Thus, before any vertical product standards developed by any of the 16 commodity committees can be presented to the CAC for adoption, the CCFL must review and approve the labelling provisions set out in the standard. The CCFL thus plays a key role in the development, preparation and, eventually, the adoption of food labelling standards

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[832] Codex, *Understanding the Codex,* "The Codex system: FAO, WHO and the Codex Alimentarius Commission" at 7.
[833] Committee on Fats and Oils; Committee on Fish and Fishery Products; Committee on Milk and Milk Products; Committee on Fresh Fruits and Vegetables; Committee on Cocoa Products and Chocolates; Committee on Sugars; Committee on Processed Fruits and Vegetables; Committee on Vegetable Protein; Committee on Cereals, Pulses and Legumes; Committee on Processed Meat and Poultry Products; Committee on Soups and Broths; Committee on Meat Hygiene; and Committee on Natural Mineral Waters. The Committee on Vegetable Proteins is chaired by Canada.
[834] The Codex Committee on Food Labelling met for its first Session in 1965 and has since met another 31 times with its most recent Session 32 held in Montreal in May of 2004. Canada chairs this Committee.
[835] Codex, *Procedural Manual* at 110-111.
[836] Codex Alimentarius Commission, Joint FAO/WHO Food Standards Programme. "Codex General Standard for the Labelling of Prepackaged Foods Codex Stan 1-1985 (Rev. 1 -1991)" *Codex Alimentarius, Vol. 1A: General Requirements*, 2nd ed. (Rome: FAO and WHO, 2000) 25-35, online <http://www.codexalimentarius.net/web/standard_list.jsp>.

with the CAC. As with all the committees of the CAC, membership in the CCFL is open to all members of the CAC.

Paragraph 2 – Implementation of Codex instruments

Before considering the actual substantive content of the international standards for food labelling developed by the CCPL and adopted by the CAC, two preliminary questions must be addressed. Considering the potential impact of international standards for food labelling, what is their status under international law? Does the CAC envisage a process for Codex standards to be incorporated directly into national law?

A. the status of Codex instruments under international law

The CAC has produced over 300 instruments relating to food.[837] These instruments include standards (of which there are three types--one for specific cheese types, one for specific dairy products, and one for all other food standards),[838] recommended practices,[839] maximum residue limits in foods,[840] general guidelines for certain foods,[841] and other miscellaneous instruments.[842]

What is the legal status of these instruments? Clearly, they are not binding obligations flowing from treaties.[843] All of the Codex instruments are developed through a

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[837] For a full listing of these standards, consult <http://www.codexalimentarius.net/standard_list.asp>.
[838] These instruments bear the designation CODEX STAN C- followed by a numeric identifier, CODEX STAN A- followed by a numeric identifier, and CODEX STAN followed by a numeric identifier respectively. As of 1 July 2004, Codex has adopted 16 CODEX STAN C- instruments, 14 CODEX STAN C- instruments, and 188 CODEX STAN instruments.
[839] These instruments bear the designation CAC/RCP followed by a numeric identifier. As of 1 July 2004, Codex has adopted 47 of these instruments.
[840] These instruments bear the designation CAC/MRL followed by a numeric identifier. As of 1 July 2004, Codex has adopted 3 of these instruments.
[841] These instruments bear the designation CAC/GL followed by a numeric identifier. As of 1 July 2004, Codex has adopted 39 of these instruments.
[842] These instruments bear the designation CAC/MISC followed by a numeric identifier. As of 1 July 2004, Codex has adopted 7 of these instruments.
[843] Professor Shaw states that "...the essence of an international treaty ... sets down a series of propositions which are then regarded as binding upon the parties", Malcolm N. Shaw, 3rd ed. *International Law* (Cambridge: Grotius, 1991) at 81.

process of consensus[844] by member States to the CAC. The CAC then encourages each member State to accept the Codex standards "in accordance with its established legal and administrative procedures in respect of the distribution of products to which the standard applies".[845] When this occurs, the standard then will have a determinate status under national law. Whether a Codex instrument has legal status under international law remains a more difficult question.

Arguably Codex instruments may be viewed as international soft law[846] obligations. As one author explains:

> Soft law instruments range from treaties, but which include only soft obligations ("legal soft law") to non-binding or voluntary resolutions and codes of conduct formulated and accepted by international or regional organizations ("non-legal soft law") to statements prepared by individuals in a non-governmental capacity, but which purport to lay down international principles (footnotes omitted).[847]

Codex instruments, as "voluntary resolutions" or "codes of conduct" formulated and accepted by an international organization, fit within the type of instrument that might take on the character of international soft law. The nature of a soft law obligation under international law is that while the instruments that contain the obligations are non-binding and require no State ratification, they still are able to exercise some moral suasion in exacting State compliance.[848] Soft law serves as a compromise for States, a stage of international discourse between maintaining State sovereignty over an issue and formally surrendering it to international regulation by treaty law.[849] While soft law "obligations" may lead to future

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[844] Codex, "Procedures for the Elaboration of Codex Standards and Related Texts" in *Procedural Manual* at 19.
[845] Codex, "General Principles of the Codex Alimentarius" at para. 4.
[846] The nature of international "soft law" has been examined in a number of academic articles including M. Bothe, "Legal and Non-Legal Norms – A Meaningful Distinction in International Relations?" (1980) 11 Neth. Y.B.I.L. 65; C.M. Chinkin, "The Challenge of Soft Law: Development and Change in International Law", (1989) 38 I.C.L.Q. 850; T. Gruchalla-Wesierski, "A Framework for Understanding 'Soft'", (1984) 30 McGill L.J. 37; N. Horn, "Normative Problems of a New International Economic Order" (1982) 16 J.W.T.L. 338; F. Roessler, "Law, De Facto Agreements and Declarations of Principle in International Economic Relations" (1987) 21 Ger. Y.B.I.L 27; I. Siedl-Hohenveldern, "International Economic Soft Law", (1980) 163 Rec. des Cours 164.
[847] Chinkin, "The Challenge of Soft Law" at 851.
[848] J.-Maurice Arbour, *Droit International Public*, 3e ed. (Cowansville, Québec.: Yvon Blais, 1997) at 40.
[849] Buckingham, *Our Daily Bread* at 80.

treaty law, they need not.[850] Instead, their status under international law as soft law is that they are able to shape international consensus towards the adoption of behaviour by States that States feel an obligation to adopt, or at least not expressly contradict. As Prof. Arbour points out, "La realité apparaît toutefois plus complexe car entre le droit et le non-droit, il semble bien qu'il se trouve une zone grise dans lequelle se meut une sort de quasi-droit".[851] Given their development as instruments of consensus among States to protect consumer health, maintain fair practices and facilitate international trade, Codex instruments likely have some considerable force as international soft law. Support for this conclusion can be found in the developing practice of WTO recognition of Codex standards as recognized international norms under the *Agreements* it oversees.[852]

B. implementation of Codex Standards into national law

Whether or not one considers Codex norms as international soft law obligations requiring State compliance, the CAC directly encourages Member States or Associate Members of FAO and WHO to accept the Codex instruments into national law. The CAC makes a distinction however between Codex Standards (both general and commodity ones)[853] and all other Codex instruments. The general (horizontal) and commodity (vertical) Codex Standards are adopted by consensus by the CAC and then are presented to Member States for adoption into national law. When they are not adopted, member States must give reasons for non-adoption and a timeframe for when they will reconsider adoption of the Standard. Other instruments such as recommended codes of practices, guidelines and codes of ethics do not require such formal measures and it is up to each individual state to use the CAC instruments as they see fit.

With respect to Codex Standards, formal acceptance by Member States may be signalled in one of two ways. Countries can either accept the standard fully, thereby agreeing to ensure that products to which the Standard applies will be allowed to circulate

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[850] J.-Maurice Arbour, *Droit International Public* at 39.
[851] J.-Maurice Arbour, *Droit International Public* at 39.
[852] This issue is discussed in detail, *infra*, Part II, Title 2, Chapter 2 "Bringing New Elements Within the WTO Framework".
[853] Codex maximum limits for residues of pesticides and veterinary drugs in foods also fall into this category.

freely in that country, or countries can accept the Standard with specified deviations. If they accept the Standard with deviations, they must, however, allow all products that meet the Standard as amended by the deviation, to circulate freely. Furthermore, a State which signals its acceptance with specified deviations must inform the CAC whether it expects to be able to give full acceptance to the Standard and if so, when. Adoption of a Codex Standard implies that the State will incorporate the contents of the Standard into any relevant domestic rules and legislation.

Rejection by a member country of a Codex standard also requires action on the part of the rejecting State. A country which considers that it cannot accept a Standard, either fully or with deviations, should indicate whether products conforming to the Standard will be allowed to circulate freely within its territorial jurisdiction. Furthermore, the country should also indicate to the CAC how any present national requirements differ from the Standard and "if possible, the reasons for these differences".[854]

As a means of fostering compliance, transparency and accountability, States that are members of the CAC must also facilitate continuous contact with other member countries through the establishment of country Codex Contact Points and National Codex Committees which coordinate activities nationally.[855]

C. implementation of Codex Standards in the national law of France, Canada and Ghana

National implementation of Codex Standards depends upon the attitude and mechanics of government in each Member State. In the three countries studied in this work, national implementation of Codex Standards varies.

In France, the situation is complex. As food standards are now generally set by the institutions of the European Union, there is little room left for French law makers to set food standards, particularly those that filter down from international organizations like the CAC.

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[854] Codex, "General Principles of the Codex Alimentarius" at para. 4.B.(ii).
[855] Codex, "The Codex system: FAO, WHO and the Codex Alimentarius Commission" at 1.

Instead Codex Standards are integrated into European food law either by reference to the Standard or by incorporation into an existing or new law. Codex Standards adopted by the European Union become incorporated into EU Regulations or EU Directives. Regulations have direct effect in EU Member States, while EU Directives require implementation by national law as seen in Part I, Title 2, Chapter 1 above. Monitoring and enforcement of the standards in EU Regulation and of national law is the responsibility of the individual EU Member State.

However, even where a Codex Standard has not been adopted or not adequately adopted in a Member State of the EU, the norms of Codex can be used by the European Court of Justice to determine if a national measure is a barrier to trade. As notes de Brosses:

> En l'absence de texte communautaire harmonisé, la Cour de Justice se réfère fréquemment aux normes du Codex Alimentarius pour savoir si une réglementation nationale est justifiée ou constitue au contraire une entrave déguisée. Si la réglementation du pays importateur est conforme à la norme Codex, elle est présumée justifiée et réciproquement.[856]

Furthermore Codex Standards have been used by private litigants within the EU to defeat national legislation which is more restrictive than Codex standards. In both the *Emmental san croûte* case[857] and the *Edam* case[858], Codex standards which set out the parameters of what products could be named by which names were adopted by the European Court over national definitions that were narrower. As de Brosses concludes: "Ces normes [de Codex] ont donc un réel effet à l'intérieur de la Communauté européenne, même si elles ne sont théoriquement que facultatives."[859]

Consideration of Codex norms within the EU thus represents more than just a useful judicial tool of interpretation for the Court. Where EU instruments are absent, the Codex

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[856] Antoine de Brosses, *L'Etiquetage des denrées alimentaires, t. 1 : Mentions obligatoires, Mentions interdites ; t. 2 : Valoriser le produit, Pratique de l'étiquetage* (Paris: RIA, 2002) at 350.
[857] *Jean-Pierre Guimont*, C-448/98 [2000], E.C.R. I-10663, [5 décembre 2000].
[858] *Ministère public c. Gérard Deserbais*, C-286/86, [1988] E.C.R. I-04907, [22 septembre 1988].
[859] de Brosses, *L'Etiquetage* at 351. Furthermore with the coming to force of the WTO in 1995, Codex standards are also being used by the WTO Dispute Settlement Panels to determine of national legislation is compatible with international trade obligations. See infra, Title 2, Chapter 2 and the analysis of the WTO case of *European Communities – Trade Description of Sardines* (WT/DS231/AB/R), Report of the Appellate Body, 26 September 2002.

norms will be the standard against which national requirements are measured to determine whether they are unnecessary barriers to the free movement of goods. This particular legal use of the Codex norms further substantiates the argument that Codex norms constitute international soft law obligations that have legal effect on State practice.

In Canada, Codex standards are implemented through national law, primarily under the *Food and Drugs Act* [860] and the *Consumer Packaging and Labelling Act.*[861] The *Food and Drugs Act Regulations,*[862] set out product standards which incorporate the Codex standards as and when Canada adopts them.[863]

In Ghana, Codex standards are by and large adopted by the Ghana Standards Board as Ghana Standards. As seen in Part I, Title 2, Chapter 3, Ghana Standards do not, however, have the force of law *per se*. On the other hand, Codex Standards that have become adopted as Ghana Standards are often made mandatory for food producers and processors through the Ghanaian practice of requiring these parties to obtain certification. Unless Ghanaian producers and processors agree to make their product conform to certain vertical and horizontal standards (most of which conform to Codex Standards), their application for certification under by the Ghana Standards Board will be denied.[864]

Section 2 – Food labelling instruments of the Codex

Several Codex Standards set out food labelling requirements (Paragraph 1). All vertical standards contain requirements for the labelling of the product to which the food standard applies (A). As well, in 1981, the CAC approved and distributed for Member State adoption the Codex General Standard for the Labelling of Prepackaged Foods (B).

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[860] R.S.C. 1985, c. F-27.
[861] R.S.C. 1985, c. C-38.
[862] *Food and Drug Regulations*, C.R.C., c. 870.
[863] Dr. Anne MacKenzie, Chair, Committee on Codex Committee on Food Labelling; Senior Officer, Canadian Food Inspection Agency (interview conducted 17 January 2005).
[864] Mr. Daniel Nyampong, Head, Legal Office, Ghana Standards Board (interview conducted 10 March 2003).

Other instruments also set out specific food labelling requirements (Paragraph 2). The Codex Code of Ethics for International Trade in Foods (A) and the WHO International Code of Marketing of Breast-milk Substitutes (B) are two such examples.

Paragraph 1 – Codex Standards

A. vertical standards on labelling

Vertical standards for specific products are developed by one of the 16 Codex Commodity Committees according to the CAC's standardized format for "Commodity Standards."[865] All vertical standards should contain 10 elements[866], several of which potentially impact the labelling of the food product in question. Every Codex vertical product Standard sets out two elements pertaining to labelling—the name of the product and the specific labelling provisions for that product.

Take for example, the first Codex commodity standard which was the Codex International Individual Standard for Cheddar (Codex Stan C-1-1966). Section 1 contains the name or designation of the product "cheddar" while section 7 "Marking and Labelling" states that "only cheese conforming with this standard may be designated as "Cheddar". The Standard adds that "cheddar" shall be labelled in conformity with the appropriate sections of Article 4 of the FAO/WHO Standard A.6, "General Standard for Cheese"." This latter Standard defines what can be called "cheese" in its section 2 and labelling requirements for all "cheeses" in section 7. All such products must be labelled as "cheese" unless a designation of an individual cheese variety reserved by a Codex standard or by national legislation exists so that the use of the word "cheese" is unnecessary. They must also carry information in addition to that contained in the general Codex Standard 1 for food labelling. These additional requirements include a declaration of milk fat content for firm, hard and extra hard cheeses, and the date of manufacture for all cheeses.

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[865] Codex, "Format for Codex Commodity Standards" at 89-92.

[866] The 10 elements are (1) name of standard; (2) scope of application; (3) description of product; (4) essential composition and quality factors of product which identify the product from close substitutes; (5) food additives permitted; (6) possible contaminants; (7) hygiene requirements; (8) applicable weights and measures; (9) labelling requirements; and (10) a complete description of the scientific procedures and methods used to sample and analyze the product.

Codex's vertical Standard for "cheddar" therefore provides labelling requirements for two distinct purposes. First, it separates those products that can be labelled "Cheddar" from those which may not bear such name or label. Second, for those cheeses that do meet the requirements to be labelled "cheddar", the vertical Standard sets out, or by reference to other Codex Standards incorporates, additional elements—milk fat content, date of manufacture—that the product's label shall bear.

B. horizontal standards on labelling – Codex Standard 1

There is only one general Codex Standard on food labelling that has been adopted by the CAC. Codex Standard 1 "General Standard for the Labelling of Prepackaged Foods"[867] was adopted in 1985 and has been revised twice, once in 1991 and again in 2001.[868] It is a comprehensive instrument which covers all aspects of labelling for prepackaged foods.

Codex Standard 1 provides the skeleton of what an internationally-approved food labelling regime looks like. It contains definitions defining "food",[869] "label"[870] and "labelling".[871] Section 1 of the Standard limits its scope to pre-packaged foods.[872]

Section 3 contains two general prohibitions regarding labelling. Labelling must not be false, misleading or deceptive or likely to create an erroneous impression regarding its character in any respect. Labelling of one food product must not use words, pictorial or other

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[867] Codex, "Codex General Standard for the Labelling of Prepackaged Foods Codex Stan 1-1985 (Rev. 1 - 1991)" in *Codex Alimentarius, Vol. 1A: General Requirements*, 2nd ed. (Rome: FAO and WHO, 2000) 25-35.
[868] The revision in 2001 added one new section, paragraph 4.2.2 which permitted certain class names to be used on labels instead of the specific name for all ingredients used (example "sugar" for all types of sucrose).
[869] Section 2, "food" means any substance, whether processed, semi-processed or raw, which is intended for human consumption, and includes drinks, chewing gum and any substance which has been used in the manufacture, preparation or treatment of food but does not include cosmetics or tobacco or substances used only as drugs.
[870] Section 2, "label" means any tag, brand, mark, pictorial or other descriptive matter, written, printed, stenciled, marked, embossed or impressed upon, or attached to, a container of food.
[871] Section 2, "labelling" includes any written, printed or graphic matter that is present on the label, accompanies the food, or is displayed near the food, including that for the purpose of promoting its sale or disposal.
[872] Section 1 lists the scope of the standard as applying "to all prepackaged foods to be offered as such to the consumer or for catering purposes and to certain aspects relating to the presentation thereof."

devices which refer to or are suggestive of any other product with which such food might be confused or in such a manner as to lead the purchaser to suppose that the food is connected with such other product.

Sections 4 and 5 set out 10 mandatory labelling requirements for all prepackaged foods.[873] Many of these requirements are mirrored in national legislation as already examined in Part I, *supra*.

Table 10 – Comparing mandatory elements for food labelling in the three study countries and Codex

Element	France	Canada	Ghana	Codex
1. name, common name of food	✔	✔	✔	✔
2. net quantity or content	✔	✔	✔	✔
3. (a) list of ingredients	✔	✔	✔	✔
(b) quantity of certain ingredients	✔	x	x	✔
(c) listing of ingredients causing allergies	x	x	x	✔
4. (a) name and address of food maker or seller	✔	✔	✔	✔
(b) name and address inside country or region	✔	x	x	x
5. (a) a date marking (for <91 day shelf life foods)	✔	✔	✔	✔
(b) a date marking (for >90 day shelf life foods)	✔	x	✔	✔
6. production lot number or code	✔	x	✔	✔
7. price	✔	x	x	x
8. place or country of origin	✔[874]	x	✔	✔[875]
9. instructions and precautions for use	✔	x	✔	✔
10. storage conditions	✔	x	✔	✔

[873] Section 4 requirements include (1) name of the food; (2) list of ingredients; (3) net contents and drained weight; (4) name and address of at least one of the manufacturer, packer, distributor, importer, exporter or vendor; (5) country of origin where its omission would mislead or deceive the consumer; (6) lot identification; (7) date marking and any special conditions for the storage of the food if the validity of the date depends on such conditions; and (8) instructions for use if necessary to ensure correct utilization of the food. Additional requirements set out in Section 5 include (1) when the labelling of a food places special emphasis on the presence of one or more valuable or characterizing ingredients, or on the low content of one or more ingredients, then the percentage of the ingredient must be declared on the label; and (2) where a food has been treated with ionizing radiation, such information must be marked on the label. Section 6 provides that small units of food where the largest surface area is les than 10 cm^2 need not meet mandatory labelling requirements.

[874] Required only where omitting from label the place or country of origin would create confusion in the mind of the purchaser as to the real origin of the product.

[875] Required only where omitting from label the place or country of origin would create confusion in the mind of the purchaser as to the real origin of the product.

11. declaration of special characteristics of food	✔	✔	✔	✔
(a) additives	✔	✔	✔	✔
(b) processing (frozen, simulated, irradiated)	✔	✔	✔	✔
(c) presence of genetically eng. matter	✔	x	x	x
12. nutrient fact table	x	✔	x	x
Total (of 12 major elements)	**11**	**7**	**10**	**10**
Common mandatory elements	**6**	**6**	**6**	**6**

Table 10 above graphically illustrates that France and Ghana requirements very closely resemble the mandatory elements set out under Codex Standard 1. Only just over half of Canada's requirements mirror of the Codex Standard.

The final sections of the Standard provide the two additional principles that are to be a part of a food labelling regime. Section 7 permits all other labelling information as long as it is not in conflict with the mandatory requirements. Section 8 requires the presentation of the labelling information not to be separated from the product, for the statements to be clear and legible with the name and contents of the food in a prominent position in the same field of view and in a language that is acceptable to consumers.

Paragraph 2 - Other Codex instruments on labelling

Besides Codex Standards, the CAC has adopted several other Codex instruments which affect food labelling. One set of such instruments, generally adopted in the form of Guidelines, targets a specific type of food process or claim and establishes rules for how the food process should be carried out so that specific claims may be used (for example "Codex General Guidelines on Claims"[876], "Codex Guidelines on Nutritional Labelling"[877], "Guidelines for Use of Nutrition Claims"[878], "General Guidelines for Use of the Term

[876] Codex, "Codex General Guidelines on Claims CAC/GL 1-1979 (Rev. 1-1991)" in *Codex Alimentarius, Vol. 1A: General Requirements*, 2nd ed. (Rome: FAO and WHO, 2000) 39-40. The Guidelines on Claims include an exhaustive list of prohibited claims, potentially misleading claims and conditional claims for food labels.

[877] Codex, "Codex Guidelines on Nutritional Labelling CAC/GL 2-1985 (Rev. 1-1993)" in *Codex Alimentarius, Vol. 1A: General Requirements*, 2nd ed. (Rome: FAO and WHO, 2000) 43-48.

[878] Codex, "Guidelines for Use of Nutrition Claims CAC/GL 23-1997" in *Codex Alimentarius, Vol. 1A: General Requirements*, 2nd ed. (Rome: FAO and WHO, 2000) 51-54. The Guidelines on Nutrition Labelling

'Halal'"[879], and "Guidelines for the Production, Processing, Labelling and Marketing of Organically Produced Foods"[880]). Each of these sets of guidelines includes detailed labelling recommendations.

Two other instruments promulgated in the form of Codes are also worthy of note as they too outline how food should be labelled.

A. the Code of Ethics for International Trade in Foods

The Code of Ethics for International Trade in Foods[881] sets out principles for how food is to be marketed internationally. Labelling practices figure prominently in the text. A principal objective of the Code is to stop exporting countries and exporters from dumping poor-quality or unsafe food on to international markets.[882] Therefore, with respect to labelling the document states that "no food should be in international trade which ... is labelled, or presented in a manner that is false, misleading or deceptive" and that "all food should be accompanied by accurate and adequate descriptive information particularly: (a) in the case of prepackaged food, labelling should be in accordance with provisions and standards elaborated by the Codex Alimentarius Commission..."[883]

The Codex Code of Ethics for International Trade in Foods and the various Guidelines mentioned above, do not constitute Codex "Standards" but rather are "other instruments" adopted by the CAC. As such, each one was "sent to all Member Nations and

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and the Guidelines for Use of Nutrition Claims also contain detailed provisions regarding the information that should appear on nutrition labelling, how it should be presented and the exact kinds of nutrition claims (for example, nutrient content claims "a fat free food", comparative claims "calorie-reduced food", or a nutrient function claim "fibre reduces the risk of colon cancer" that can be asserted via food labelling.

[879] Codex, "General Guidelines for Use of the Term 'Halal' CAC/GL 24-1997" in *Codex Alimentarius, Vol. 1A: General Requirements*, 2nd ed. (Rome: FAO and WHO, 2000) 57-59.

[880] Codex, "Guidelines for the Production, Processing, Labelling and Marketing of Organically Produced Foods CAC/GL 32-1999" in *Codex Alimentarius, Vol. 1A: General Requirements*, 2nd ed. (Rome: FAO and WHO, 2000) 63-95. This document sets out an elaboration system as to what products will qualify as organic ones and only those can be labelled as such. Section 3 sets out the language for permissible language and claims to be made for the packaging and sale of organic foods.

[881] Codex, "Code of Ethics for International Trade in Food, CAC/RCP 20-1979 (Rev. 1 -1985)" in *Codex Alimentarius, Vol. 1A: General Requirements*, 2nd ed. (Rome: FAO and WHO, 2000) 17-22.

[882] Codex, "Code of Ethics for International Trade in Food", Art. 1.

[883] Codex, "Code of Ethics for International Trade in Food", Art 4 and 5.

Associate Members of FAO and WHO as an advisory text, and it is for individual governments to decide what use they wish to make of ... [them]".[884]

B. the WHO's International Code of Marketing of Breast-milk Substitutes

Another international document which sets out very specific labelling requirements for one internationally traded foodstuff is the WHO's International Code of Marketing of Breast-milk Substitutes.[885] This Code was developed to combat worldwide abuse in the marketing of such products to the detriment of breast-feeding by new mothers. The Code articulates strict parameters as to how such products are to be introduced, advertised and marketed around the world.

Article 9 sets out labelling requirements for breast-milk substitutes. The Code requires that labels "provide the necessary information about the appropriate use of the product, and so as not to discourage breast-feeding" (Art. 9.1). More specifically, the labels should also state the ingredients used, the composition/analysis of the product, the storage conditions, the batch number and the date before which the product is to be consumed. The label should also contain a section entitled "Important Notice" which states the superiority of breast-feeding. The Code prohibits pictures or images that idealize the use of infant formula. These labelling requirements are clearly more onerous than those set out in the Codex Standard for Infant Formula.[886] The Codex Standard states that any indication that the infant formula is intended to supplement breast-feeding rather than replace it, is an optional rather than a mandatory label requirement.

The contents of the Code have been taken up in varying degrees in the legislation of our three study countries. In Ghana, as noted in Part I, Title 2, Chapter 3, national legislation

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[884] As set out in footnote 1 to each of the Guidelines. See Codex, "Guidelines for the Production, Processing, Labelling and Marketing of Organically Produced Foods CAC/GL 32-1999".
[885] World Health Organization, International Code of Marketing of Breast-milk Substitutes (Geneva: WHO, 1981.
[886] Codex, "Codex Standard for Infant Formula Codex Stan 72-1981". (Rome: FAO/WHO, 1997), online: Codex Current Official Standards < http://www.codexalimentarius.net/web/standard_list.jsp>.

concerning the labelling of infant formula has generally followed the Code principles. As well, further binding requirements have been added into Ghanaian law concerning breast-milk substitutes with the coming into force of the only set of regulations promulgated under the *Food and Drugs Law, 1992*.[887]

In Canada, mandatory labelling provisions for human milk substitute do not exactly track those set out in the Code. While the elements of mandatory labelling of "human milk substitutes" are set out in the *Food and Drugs Regulations*[888], labels need not contain the "Important Notice" of the Code and pictures and images of infants are permitted on the labels. On the other hand, elaborate nutritional information is required including: a statement of the content of protein, fat, available carbohydrate, ash and fibre, the energy value of the product, the quantity of vitamins and minerals present, the quantity of choline, directions for preparation and use of the product and the expiration date of the product.[889]

No specific regulation concerning the labelling of infant formula exists under French law and is therefore subject only to the regular labelling requirements for all food products. There is, however, a general prohibition against the free distribution of samples of infant formula and all other promotional materials for such products[890] with a narrow exception for philanthropic purpose. When this exception is relied upon, such products must carry the following warning on their label "(Ce produit) doit être utilisé selon les indications fournies par l'organisme habilité donateur. – Revente ou redistribution gratuite interdite."[891]

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Through the work of the CAC starting in 1962, States have been very actively creating international food standards in the pursuit of consumer health objectives and

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[887] *Food and Drugs Law, 1992* (P.N.D.C.L. 305B), *Breastfeeding Promotion Regulations, 2000* (L.I.1667).
[888] Sec. B.25.057-B.25.061.
[889] Sec. B.27.057.
[890] Art. L. 121-52 *Code comm.*
[891] *Décret no. 98-688 du 30 juillet 1998 pris en application de l'article L. 121-53 du code de la consommation relatif à la distribution gratuite des préparations pour nourrissons, à la documentation et au matériel de présentation les concernant*, J.O.182, 08/08/1998, 12154.

commercial objectives like trade facilitation and the promotion of fair trading practices. Codex Standard 1 "General Standard for the Labelling of Prepackaged Foods" provides a standardized framework for food labelling regulations. Furthermore, hundreds of vertical food standards, each containing naming and labelling requirements, complement the general labelling framework outlined in Codex Standard 1.

From a producer-oriented international trade perspective, the establishment of the CAC, an international body to create standards for food products entering international trade, was a welcome one. The CAC developed specific commodity committees to create standards that would facilitate trade through the harmonization of trade names, descriptions and verification procedures so as to eliminate various names and standards that were unnecessary barriers to trade.

From a consumer perspective, the Codex has offered Standards that States could adopt that would promote fair trade practices and consumer health. Every Codex Commodity Standard standardized the common name for the product covered so that consumers could readily identify and choose food that they wished to purchase as well as food that they thought might best promote and protect their health. The Codex General Standard for the Labelling of Prepackaged Food requires food labelling that also could contribute to the protection of human health by way of general ingredient listing and the specific listing of certain substances that cause severe adverse reactions to certain food proteins (allergies) for certain persons.

As the work of the CAC has processed, it has begun adopting more sophisticated instruments, often in the form of Codex Guidelines which address the more difficult dimensions of food labelling like the use of general claims on food labels and nutritional labelling.

Yet a key question remains after reviewing the entire body of work of the CAC, particularly for the period under review of 1962-1995. What is the legal value or the legal status of the Codex instruments if they are not adopted by Member States? Codex

instruments may be viewed by States as taking on the nature of international soft law obligations and, as such, can influence State behaviour both directly or indirectly. The Codex Standards and other instruments have become direct influences because States often adopt them by incorporating their provisions into national food labelling law. The clearest case of this of the three study countries is the food labelling regime of Ghana. It is also important to note that the Codex instruments also can have an indirect effect. They provide an internationally-developed benchmark for the kinds of labelling measures that would be appropriate for the protection and promotion of both commercial/trade purposes and consumer/health purposes.

With the establishment of the WTO in 1995, there is considerably less doubt now of the status of Codex instruments as soft law under international law. Their use as internationally agreed benchmarks in determining the compatibility of national measures with WTO treaty obligations has led to a significant "hardening" of all Codex instruments, not just Codex Standards. While the exact nature of legal obligation attached to Codex instruments may have been in doubt prior to 1995, States now ignore the legal impact of Codex instruments at their peril.

Title 2 : The WTO and Food Labelling - Bringing Three Families under One Roof

...there is strong evidence that certain labelling measures have not been without consequences to the international flow of goods.

Canada, *Communication to the Committee on Technical Barriers to Trade*, 2002[892]

Titre 2 : L'OMC et l'étiquetage des denrées alimentaires - trois familles, un foyer

[892] G/TBT/W/174/Rev.1, para. 2.

On January 1, 1995, the World Trade Organization (WTO) was created by the coming into force of the *Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement).*[893] The WTO is to "provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the Annexes to the *Agreement.*"[894] The agreements that the WTO oversees expand and refine trade facilitation obligations for goods[895], introduce new disciplines relating to trade in services,[896] trade-related aspects of intellectual property rights[897] as well as establish new rules for dispute resolution[898] and national trade policy review.[899]

This Title 2 examines how the establishment of the WTO has brought all three of the "families" of international regulation affecting food labeling examined in Part II, Title 1 under the WTO "roof". The legal disciplines relating to the trade in goods are set out principally in the *General Agreement on Tariffs and Trade 1994 (GATT 1994),* the *Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)* and the *Agreement on Technical Barriers to Trade (TBT Agreement)* and must be seen to have an important impact upon national food labelling law (Chapter 1). However, new WTO obligations arising from the incorporation of rules regarding intellectual property protection drawn from existing treaties and from the recognition of international standards issuing from Codex Alimentarius also significantly affect national food labelling measures.(Chapter 2).

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[893] *Marrakesh Agreement Establishing the World Trade Organization* (WTO Agreement), 15 April 1994, in *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts* (Geneva: GATT Secretariat/World Trade Organization), online: WTO <http://www.wto.org/english/docs_e/legal_e/03-fa_e.htm>. As of 2005, the WTO has 148 members including France, Canada and Ghana.
[894] *WTO Agreement,* Art. II(1).
[895] *WTO Agreement,* Annex 1A: Multilateral Agreements on Trade in Goods including the GATT 1994 and 12 other Agreements including the Agreement on Technical Barriers to Trade and the Agreement on the Application of Sanitary and Phytosanitary Measures.
[896] *WTO Agreement,* Annex 1B: General Agreement on Trade in Services.
[897] *WTO Agreement,* Annex 1C: Agreement on Trade-Related Aspects of Intellectual Property Rights.
[898] *WTO Agreement,* Annex 2: Understanding on Rules and Procedures Governing the Settlement of Disputes.
[899] *WTO Agreement,* Annex 3: Trade Policy Review Mechanism.

Chapter 1 – Expanding Trade Facilitation Rules and Their Effects on Food Labelling

The establishment of the WTO brought into force a complex web of agreements that touch upon every aspect of international trade. Petersmann calls the *WTO Agreement* "a highly complex, multi-layered legal system ... incorporating 29 *Agreements* and Understandings".[900] The objective of this multi-layered legal system is, according to Petersmann, to limit "discretionary trade policy powers of governments through world-wide long-term rules of a higher legal rank."[901]

The effects of such a complex system on specific types of national measures such as food labelling laws require a careful examination of which of the agreements might apply to such measures (Section 1). Two agreements under the oversight of the WTO contain obligations specifically applicable to national food labelling regulations. Where a food labelling measure is directly pursuing an objective concerning human health and food safety, then that measure must conform to the *SPS Agreement* (Section 2). Where a national food labelling measures is pursuing a combination of other objectives, then the measure must conform to the obligations set out in the *TBT Agreement* (Section 3). National food labelling measures, like any national measure which has an impact on trade, must also conform to the general obligations for trade in goods set out in the *GATT 1994*. National food labelling measures that permit or require that foods be labelled to indicate aspects of that product's lifecycle or production methods may run afoul of the general prohibition on measures that discriminate between "like" products (Section 4).

Section 1 – Unpacking the WTO Agreement: disciplines affecting food labelling

Pursuant to Article II of the *WTO Agreement* all 29 "agreements and associated legal instruments included in Annex 1, 2, and 3 (hereinafter referred to as "Multilateral Trade

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[900] Ernst-Ulrich Petersmann, *The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement* (The Hague: Kluwer, 1997) at 47-48.
[901] Petersmann, *The GATT/WTO Dispute Settlement System* at 47.

Agreements") are integral parts of this Agreement, binding on all Members."[902] The "single undertaking approach" is an improvement over the *GATT 1947* because it prevents the "free-rider" problem of States "picking-and-choosing" between various agreements created over the years that supplemented the obligations set out in the *GATT 1947*.

> "Free-riding", which was widespread under the "GATT à la carte" system because non-signatories of the Tokyo-Round Agreements benefited from them due to GATT's most-favoured nation obligation and due to the frequent practical need to apply import regulations uniformly, has thus been significantly reduced by the single undertaking approach and membership requirements of WTO law.[903]

As a result of the single undertaking approach, all Member States are bound by all 29 agreements. Three of these agreements—the *GATT 1994,* the *SPS Agreement* and the *TBT Agreement*—are of particular relevance for food labelling.

Paragraph 1 - Overview of agreements containing obligations affecting food labelling

The *GATT 1994* sets out basic international disciplines for trade in goods. The core of the *GATT 1994*, like the *GATT 1947* that it incorporates, is contained in its general rules prohibiting discrimination in trade. It has two branches—one found in Article I of the *GATT 1994* which requires most-favoured nation treatment for all like products; and that found in Article III of the *GATT 1994* which requires national treatment for all like products. Several other provisions outline additional specific prohibitions, such as that found in Article XI which generally prohibits the use of any quantitative measures which restrict trade. Article XX provides exceptions whereby measures that otherwise offend *GATT 1994* rules can be saved if the measures meet certain requirements.

The *SPS Agreement* resulted from fears from Member States during the Uruguay Round of negotiations that the WTO's gradual removal of tariff-based measures would result in countries being tempted to protect national products from international competition

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[902] *WTO Agreement*, Art. II(2).
[903] Petersmann, *The GATT/WTO Dispute Settlement System* at 50.

through the use of non-tariff barriers such as technical and safety standards.[904] The *SPS Agreement* was designed to build a science-based structure as a "gate-keeper" as to what would be a legitimate health and safety measure under the WTO. The disciplines outlined in the *SPS Agreement*, have to a large degree, harmonized the standards for national states to follow in the formulation and justification of their SPS measures.[905]

The *TBT Agreement* grants Member States a high degree of flexibility in the preparation, adoption and application of national technical regulations, but there are limits.[906] Technical regulations which do not pursue a legitimate objective[907] or create unnecessary obstacles to trade are prohibited by the *TBT Agreement*.[908] With technical barriers, a science-based approach is difficult to apply. As well, because cultural, social, and commercial objectives vary among Member States, the variety of technical measures that affect international trade is vast.

Paragraph 2 - Hierarchy of agreements affecting food labelling under the WTO

The single undertaking approach adopted under the *WTO Agreement* produces its own challenges, one of which is establishing the legal hierarchy among the various agreements to avoid conflict of laws within the *WTO Agreement* as a whole. Even among the three agreements that affect food labelling measures conflicts are possible. The various

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[904] Joe McMahon, "SPS Agreement, Food Safety and Food Quality" *Conference on Legal Issues in Agricultural Trade – II* (Brussels: Academy of European Law, 22 October 2003) at 2.
[905] Woolcock, Steve. "Has the WTO gone too far?" (Paper prepared for the International Trade Policy Unit, London School of Economics, London, undated), online: LSE <http://www.lse.ac.uk/collections/InternationalTradePolicyUnit/pdf/hasTheWTOgoneTooFar.pdf> at 9.
[906] McMahon, "SPS Agreement" at 16.
[907] These objectives are listed in two places in the TBT Agreement. In the Preamble four objectives for acceptable measures are mentioned and include those necessary: (1) to ensure the quality of a country's exports; (2) to protect human, animal, and plant life or health; (3) to protect the environment; (4) to prevent deceptive practices. In Article 2.2 as it applies to "technical regulations", four objectives are mentioned but not the same four as in the Preamble. Only three of the four are the same with "to ensure the quality of a country's exports" replaced by "national security requirements". It is likely, however, that this list of legitimate objectives is not a closed one, as countries now regularly provide notifications of TBT measures with legitimate objectives other than those specifically mentioned. Such objectives include trade facilitation, harmonization, consumer information and labelling, and adoption of new domestic law. See WTO, Committee on Technical Barriers to Trade, *Ninth Annual Review of the Implementation and Operation of the TBT Agreement*, Note by Secretariat, G/TBT/14, 5 March 2004 at para. 12.
[908] *TBT Agreement*, Article 2.2.

agreements of the WTO are drafted, however, to avoid such conflicts creating a hierarchy among the agreements. This is of relevance to determine which of the three agreements that affect food labelling will take priority over the others in cases of conflict.

Annex 1A of the *WTO Agreement* in its "General Interpretative Note to Annex 1A" states as follows:

> In the event of a conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A to the Agreement Establishing the World Trade Organization (referred to in the agreements in Annex 1A as the "WTO Agreement"), the provision of the other agreement shall prevail to the extent of the conflict.

Thus as between the *GATT 1994* and either of the *TBT Agreement* or the *SPS Agreement*, both of which are "other agreements" in Annex 1A to the *WTO Agreement*, provisions of either the *TBT Agreement* or the *SPS Agreement* prevail over the provisions of the *GATT 1994.*

What about conflicts between the provisions of the *TBT Agreement* and the *SPS Agreement*? The two agreements have been drafted, in theory at least, to explicitly avoid a conflict by identifying "water-tight" compartments for each agreement. Article 1.5 of the *TBT Agreement* states that:

> The provisions of this Agreement do not apply to sanitary and phytosanitary measures as defined in Annex A of the Agreement on the Application of Sanitary and Phytosanitary Measures.

The WTO Appellate Body was presented with arguments concerning the interpretation of this provision the *European Communities – Measures Concerning Meat and Meat Products* (Beef Hormones)[909] case, when the complainants United States and Canada claimed that measures taken by the European Communities were inconsistent with both the *SPS Agreement* and the *TBT Agreement.* The Appellate Body held that Article 1.5 of the *TBT*

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[909] *European Communities – Measures Concerning Meat and Meat Products* (WT/DS26/AB/R), Report of the Appellate Body, 16 January 1998 *(EC-Beef Hormones).*

Agreement was unequivocal and since the measures at issue were sanitary measures, the *TBT Agreement* was not applicable to this dispute.[910]

Thus, if a measure is included in Annex A of the *SPS Agreement*, then it will be governed by that Agreement and will not be subject to the obligations set out in the *TBT Agreement*. While this division of measures into "water-tight" compartments between the two Agreements may have been easily resolved in the *EC-Beef Hormones* case, it is far from clear that such a division between measures falling under one agreement or the other will always be easy. Such a division may prove to be particularly difficult for food labelling measures. Two problems are foreseeable. The *SPS Agreement* in its Annex A contains a specific reference to only certain food labelling measures, that is, to those "packaging and labelling requirements directly related to food safety."[911] All other packaging and labelling requirements fit within the definition of a "technical regulation" or "standard" under the *TBT Agreement*.[912] Thus an initial difficulty for Member States is determining whether a food labelling measure relates "directly to food safety". A second difficulty relates to the fact that national food labelling measures, as seen in the country studies of Part I, are often included in complex pieces of legislation which contain provisions that pursue a vary of objectives; food safety, consumer choice, commercial objectives, etc. Furthermore, it is unlikely that a piece of national food labelling legislation will explicitly state the objectives for its provisions. Even if the objectives of the legislation are discernable, they are not likely ones that would be covered solely by the obligations set in either the *SPS Agreement* or the *TBT Agreement*. Some measures would relate to food safety and some would relate to other labelling objectives. Therefore, for the purposes of WTO-compatibility, a single food labelling statute would require skillful surgery to separate those food labelling measures that would fall under scrutiny of the *SPS Agreement* from those that would fall under the obligations of the *TBT Agreement*.

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[910] *EC-Beef Hormones*; See also WTO, WTO Analytical Index: Technical Barriers to Trade; online: WTO, <http://www.wto.org/english/res_e/booksp_e/analytic_index_e/tbt_01_e.htm#article1B3a> , para. 3.
[911] *SPS Agreement*, Art. 1.
[912] *TBT Agreement*, Annex 1, Art. 1.2.

At any rate in terms of WTO compliance, States will be required to prove that their national food labelling measure is:

> (1) an SPS measure and meets the requirements for permissible SPS measures under the *SPS Agreement*;
>
> (2) a TBT measure and meets the requirements for permissible TBT measures under the *TBT Agreement*; or
>
> (3) whether a SPS measure or a TBT measure, a measure that otherwise meets the general requirements of non-discrimination under the *GATT 1994*.[913]

Below is an examination of the application of WTO disciplines to national labelling measures as SPS measures (Section 2), as TBT measures (Section 3) and as measures that must conform to the *GATT 1994*'s obligations of non-discrimination, a particularly thorny issue when it comes to national measures that require labelling for production and processing methods (Section 4).

Section 2 - Food labelling for food safety: a sanitary or phytosanitary (SPS) measure

The Preamble of the *SPS Agreement* acknowledges the tension between the sovereign right of States to enact measures to protect health and the need that such measures not become disguised restrictions on trade.[914] SPS rules are therefore designed to provide clear distinctions between legitimate national measures for health and safety reasons, even where they might distort trade, from those which are not. Two questions must be addressed to understand the application of SPS rules in making this distinction. The first is to

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[913] A fourth possibility exists. The measure might fall completely outside the scope of the all WTO Agreement provisions. This would be the case, for example, of a labelling measure undertaken by a private group in Canada that was totally voluntary and had no sanction from any government of Canada. It is unlikely, however, that such a measure would form part of the national regulatory scheme for labelling but instead would be a separate unregulated system of product identification. The bar code on food labels is an example of a purely private mark that is regulated by commercial parties for their own convenience.

[914] "Reaffirming that no Member should be prevented from adopting or enforcing measures necessary to protect human, animal or plant life or health, subject to the requirement that these measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between Members where the same conditions prevail or a disguised restriction on international trade", *SPS Agreement*, Preamble, para. 1.

determine which measures will be considered SPS measures under the agreement (Paragraph 1). The second is what tests will be applied to determine if a food labelling SPS measure is WTO-compatible (Paragraph 2).

Paragraph 1 – What is an SPS measure?

When will a food labelling measure be considered an SPS measure and be subject to the disciplines of the *SPS Agreement*? Annex A of the *SPS Agreement* defines sanitary or phytosanitary measure in two paragraphs. In the first paragraph of the Annex, four specific kinds of measures are identified as being SPS measures. Only the second of these will apply to food labelling legislation.[915] It states a national measure will be considered an SPS measure if it is applied:

> (b) to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs;

In its second paragraph, Annex A further elucidates the kinds of measures, including specific reference to labelling measures, that will be considered SPS measures.

> Sanitary or phytosanitary measures include all relevant laws, decrees, regulations, requirements and procedures including, *inter alia*, end product criteria; processes and production methods; testing, inspection, certification and approval procedures; quarantine treatments including relevant requirements associated with the transport of animals or plants, or with the materials necessary for their survival during transport; provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and packaging and *labelling requirements directly related to food safety* (emphasis added).

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[915] The other three types of measures included in Annex A are measures applied: (a) to protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms; (c) to protect human life or health within the territory of the Member from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; or (d) to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests. Definition (a) only applies to measures relating animal or plant life and health, not human health. Presumably, food labels are for humans and thus any action under this measure would not apply to food labels. The same can be said for definition (d) which speaks to measures to prevent the establishment of pests. This definition would be difficult to apply to any food labelling legislation. Definition (c) is equally inapplicable for food labelling legislation as though it speaks to measures relating to human health, the risk must arise from diseases carried by animals or plants. It would be very unlikely that food labelling provisions could issue from this source.

Clearly then, Member States contemplated food labelling measures as potential SPS measures. What is unclear, however, is whether the second paragraph examples are simply illustrative of the four kinds of measures found in the first paragraph, or the second paragraph enumerates further measures, particularly with respect to food labelling, that will be considered SPS measures. This incertitude is not merely academic. The definition in the second paragraph can be construed as significantly broader than that offered in the first paragraph, as is explained below.

Definition 1(b) of Annex A requires the measure (food labelling legislation) "to protect human ... life or health ... from risks arising from additives, contaminants, toxins or disease-causing organisms in foods or beverages...". Given this definition, of all food labelling measures that have been examined in Part I, very few would actually be caught under the rubric of an SPS measure. National legislative measures do not use food labelling provisions to address the risks of toxins or contaminants in foods. These are dealt with in other legislative ways. Consumers are not given the choice to buy or refrain from buying toxic or contaminated food. Thus, under definition 1(b) only those food labelling provisions directly related to measures protecting human health from risks arising from additives or disease-causing organisms in foods will be considered SPS measures. It is possible, however, to envisage a number of national measures that would meet this definition. These measures could be called "Group 1", or strongly arguable SPS measures, and "Group 2", or arguable SPS measures. Group 1 measures would include the following:

Group 1- Mandatory labelling legislation requiring

> (1) notice of potential pathogenic risks in food which can develop over time; example: Canadian, Ghanaian, and French legislation which requires the setting out of "use by dates" or "best before dates", particularly on highly perishable foods
>
> (2) notice of handling and cooking instruction as they relate to maintaining food safety
> example: French and Ghanaian legislation which requires notices of food dangers that arise from improper handling or cooking and instructions on how to handle and prepare the food;

(3) notice of the name of a food or the ingredients of a food so that acute food risks for specific categories of consumer can be identified:
example: French, Canadian and Ghanaian legislation which requires the setting out of the name of the product; French, Ghanaian and Canadian legislation requiring the listing of all food additives on labels; Canadian legislation for the mandatory labelling of all products containing peanuts.

All of these measures relate to labelling requirements of acute food risks that would result from the presence of "additives" or "disease-causing organisms."

However, there might be another group of national labelling measures that would be caught by the broader (paragraph 2) definition of SPS measures as those "labelling requirements directly related to food safety". This second group of mandatory labelling elements deals with less acute food risks. Instead, it foresees labelling that might address issues relating to possible pathogenic food risks and both positive and negative human health outcomes from food intake in the medium to longer term. Arguably each of the Group 2 measures still clearly relate to "labelling requirements directly related to food safety." Such measures might include:

Group 2 – Mandatory labelling legislation requiring

(4) notice of lot numbers and supply chain participants to identify and recall production batches that pose food safety or health risks to consumers;
example: French legislation which requires the setting out of lot numbers; Canadian, French and Ghanaian supply chain contact names and numbers

(5) notice of food ingredients which may be helpful for some consumers to avoid certain foods to reduce health risks;
example: French, Canadian and Ghanaian legislation requiring the list of ingredients

(6) notice of specific nutritional claims and the listing of specific nutritional attributes of a food so that consumers can make food choices to enhance health;
example: Canadian legislation which requires nutritional labelling and which regulates the use of nutritional claims.

Whether this second group of labelling requirements actually falls within the SPS categories depends on how one interprets the SPS measures definition found in Annex A. While it is difficult to argue that nutrition labelling or the regulation of nutritional claims, or

even the mandatory listing of ingredients other than known allergens is required "to protect human life from risks arising from additives, contaminants, toxins or disease-causing organisms", it is easier to argue that they are "labelling requirements directly related to food safety" as the notion of food safety is more elastic than the notion of risks arising from "additives or disease causing organisms". Nutritional labelling helps consumers make sound nutritional choices to avoid health conditions which might lead to premature death or disability but does it notify consumers of disease causing organisms? Likely the answer is in the negative.

Furthermore, other arguments can be raised that the Group 2 measures listed above are not included within the purview of the *SPS Agreement*. First, Annex A also includes in Article 3, a list of international standards, guidelines and recommendations to against which national standards will be measured. For those relating to food safety, it refers to only the "standards, guidelines and recommendations established by the Codex Alimentarius Commission relating to additives, veterinary drug and pesticide residues, contaminants, methods of analysis and sampling, and codes and guidelines of hygienic practice". It does not mention Codex standards relating to health or nutrition, or even to the general food standards promulgated by Codex.

Second, as argued below, these measures seem to be contemplated by the *TBT Agreement* under its category of measures with objectives which include "the protection of human health or safety".[916] As the WTO-compatibility test for an SPS measure is more stringent than that for a TBT measure, few states would want to have measures that could be classified as a TBT measure, fall under the rubric of an SPS measure. Of course, the breadth of the SPS category may well depend on whether one is seeking to attack the measure or defend a particular labelling measure. In the future, WTO Panels will likely need to provide further guidance on this matter.

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[916] Article 2.2. See also WTO, WTO Analytical Index: Technical Barriers to Trade <http://www.wto.org/english/res_e/booksp_e/analytic_index_e/tbt_01_e.htm#article1B3a> para. 7 setting out when notification to the WTO of national food labelling measures are necessary.

Paragraph 2 - The test for a WTO-compatible SPS food labelling measure

Once a national measure is found to be an SPS measure under Annex A, the rules of the *SPS Agreement* will determine if the measure is WTO-compatible. The standard to be met for WTO-consistent SPS measures under the Agreement is high. One author has even referred to the standard as "strict" and "harsh".[917] Legitimate SPS measures will either be those that are identical or similar to international standards, which for labelling matters will be those adopted by the CAC in the Codex or national standards in excess of international standards that meet the rules set out in the SPS Agreement.

The *SPS Agreement* recognizes international standards as the baseline for assessing the compatibility of national measures with *SPS Agreement* obligations.[918] Article 3.2 of the *SPS Agreement* states that SPS measures "which conform to international standards, guidelines or recommendations shall be deemed to be necessary to protect human, animal or plant life or health, and presumed to be consistent with the relevant provisions of this Agreement and of GATT 1994." This provision is an important one when the compatibility of a State measure is challenged for "if a member adopts measures that are identical or similar to the standards promulgated by the Codex, IPPC, or OIE, the member's measures will presumably be found consistent with its obligations under the SPS Agreement."[919]

States, however, are permitted to implement standards which are higher than international standards but such standards must meet six requirements to be considered legitimate. Legitimate SPS measures must: (1) be necessary for the protection of human, animal or plant life or health[920]; (2) be based on an assessment of the risks to human, animal,

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[917] Sara Dillon, *International Trade and Economic Law and the European Union* (Oxford: Hart Publishing 2002) at 55, 121.

[918] *SPS Agreement,* Preamble, Art. 3, 5, Annex A. For a discussion of the role of international standards in the interpretation of SPS Agreement obligations see Terence Stewart & David S. Johanson, "The SPS Agreement of the World Trade Organization and International Organizations: The Roles of the Codex Alimentarius Commission, the International Plant Protection Convention, and the International Office of Epizootics" (1998) 26 Syracuse. J.Int'l.L.& Com. 27.

[919] Stewart & Johanson, "The SPS Agreement" at 30.

[920] *SPS Agreement,* Art. 2(1). The measure may only be applied "to the extent necessary to protect human, animal or plant life or health", Art. 2(2).

or plant life or health[921]; (3) be maintained on sufficient scientific evidence;[922] (4) not arbitrarily or unjustifiably discriminate between foreign states where identical or similar conditions prevail (most-favoured nation status);[923] (5) not discriminate between nationally produced goods and goods from foreign states where identical or similar conditions prevail (national treatment);[924] (6) not be applied in a manner which would constitute a disguised restriction on trade;[925] and (7) be no more trade-restrictive than required to achieve the appropriate level of sanitary and phytosanitary protection ("least trade-restrictive" measures).[926]

WTO Panels have had considerable experience applying these tests and have focused much attention on the State defending its SPS measure to prove that the measure is based on scientific principles, supported by scientific evidence and in response to a scientific assessment of risk.[927]

Section 3 - Food labelling as a technical regulation: a technical barrier to trade (TBT) measure

The Preamble to the TBT Agreement states that:

> ... no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions

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[921] *SPS Agreement,* Art. 5(1).
[922] *SPS Agreement,* Art. 2(2).
[923] *SPS Agreement,* Art. 2(3).
[924] *SPS Agreement,* Art. 2(3).
[925] *SPS Agreement,* Art. 2(3).
[926] *SPS Agreement,* Art. 5(6).
[927] *EC-Beef Hormones; Australia – Measures Affecting Importation of Salmon* (WT/DS18/AB/R), Report of the Appellate Body, 20 October 1998.Australia- Salmon; *Japan – Measures Affecting Agricultural Products* (WT/DS76/AB/R), Report of the Appellate Body, 22 February 1999; and *Japan – Measures Affecting the Importation of Apples* (WT/DS245/AB/R), Report of the Appellate Body, 26 November 2003. As well, when countries choose to establish standards that are higher than international standards, they must, on the request of a Member State, provide an explanation of the objective and rationale of the SPS measure, which is to be accompanied by a copy of the risk assessment on which the measure is based. See Annex B of the SPS Agreement and McMahon,"SPS Agreement" at 5.

> prevail or a disguised restriction on international trade, and are otherwise in accordance with the provisions of this Agreement.[928]

The collection of measures that fall within the purview of *TBT Agreement* is indeed very large. Other than those measures caught by the *SPS Agreement*, practically all other national measures which can have an impact on trade must meet the requirements of the TBT or risk being found to be WTO-incompatible. The *TBT Agreement* is more flexible in its application than is the *SPS Agreement* both in theory and in practice.[929] While granting States flexibility in developing national technical regulations and standards,[930] it requires that such regulations and standards pursue one of several legitimate objectives.

Legitimate objectives are listed in two places in the *TBT Agreement*. In the Preamble four objectives for acceptable measures are mentioned and include those necessary: (1) to ensure the quality of a country's exports; (2) to protect human, animal, and plant life or health; (3) to protect the environment; (4) to prevent deceptive practices. In Article 2.2, as it applies to "technical regulations", four objectives are mentioned but only three of the four named in the Preamble. Article 2.2 omits specific mention of measures "to ensure the quality of a country's exports" and adds measures to give effect to "national security requirements". The list of legitimate objectives is not a closed one, however. Article 2.2 includes the Latin tag "*inter alia*" suggesting other objectives could be included in the list. This argument is supported by State practice as countries now regularly provide notifications of TBT measures with legitimate objectives other than those specifically mentioned. Such objectives include trade facilitation, harmonization, consumer information and labelling, and adoption of new domestic law.[931]

National food labelling legislation could fall under several of the legitimate objectives. Furthermore, there is plenty of evidence that Member States consider that their

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[928] TBT Agreement, Preamble, para. 6 in GATT. *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts* (Geneva: GATT Secretariat, 1994) at 138.
[929] Interviews with Greg Orriss, Canadian Codex Contact and Director, Bureau of Food Safety and Consumer Protection, Programs Branch, Canadian Food Inspection Agency (interviewed in Ottawa 5 March 2002 and 2 May 2005).
[930] McMahon, "SPS Agreement"at 16.
[931] See WTO, Committee on Technical Barriers to Trade, *Ninth Annual Review of the Implementation and Operation of the TBT Agreement*, Note by Secretariat, G/TBT/14, 5 March 2004 at para. 12.

national food labelling laws will fall under the scrutiny of the *TBT Agreement* and as a result provide notification of such measures to the TBT Committee of the WTO as required by Article 2.9 of the *TBT Agreement*.[932]

Paragraph 1 – What is a TBT measure?

Measures covered by the *TBT Agreement* will be either technical regulations or standards. A technical regulation is defined as 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 [emphasis added].[933]

On the other hand, a standard is a:

> Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which *compliance is not mandatory*. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method [emphasis added].[934]

Measures that will be considered TBT measures may therefore be mandatory (technical regulations) or voluntary (standards). Generally speaking "technical regulations and standards set out specific characteristics of a product--such as its size, shape, design, functions and performance, or the way it is labelled or packaged before it is put on sale."[935] Food labelling measures are clearly contemplated as measures that will be subject to *TBT Agreement* disciplines.[936]

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[932] For example see WTO, Committee on Technical Barriers to Trade, *Ninth Annual Review of the Implementation and Operation of the TBT Agreement*, Note by Secretariat, G/TBT/14, 5 March 2004.
[933] *TBT Agreement*, Annex 1, Article 1.
[934] *TBT Agreement*, Annex 1, Article 2.
[935] WTO, Module 3 Goods: rules on NTM at E3-2.
[936] See also European Communities, *Labelling*, Submission by the European Communities, G/TBT/W/150; 2 November 2000 at para. 5.

Paragraph 2 – The test for a WTO-compatible TBT food labelling measure

Under the *TBT Agreement*, a "technical regulation" will be WTO-compatible if it: (1) accords treatment no less favourable than that accorded to like products of national origin (national treatment);[937] (2) accords treatment no less favourable than that accorded to like products originating in any other country (most-favoured nation status);[938] (3) is not more trade-restrictive than necessary;[939] and (4) advances legitimate objectives which include, *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.[940] Finally, compatible technical regulations will be stripped of their compatibility if they are maintained after the objectives for their adoption no longer exist or have changed.[941]

As under the *SPS Agreement*, Member States are encouraged to adopt or use international standards as the basis for their national technical measures. Article 2.5 of the *TBT Agreement* states that: "Whenever a technical regulation is prepared, adopted or applied for one of the legitimate objectives explicitly mentioned in paragraph 2, and is in accordance with relevant international standards, it shall be rebuttably presumed not to create an unnecessary obstacle to international trade." States are not however bound by the *TBT Agreement* to use only international standards. They are permitted, pursuant to Article 2.4, to deviate from international standards "when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems".

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[937] *TBT Agreement*, Article 2.1.
[938] *TBT Agreement*, Article 2.1.
[939] *TBT Agreement*, Article 2.2.
[940] *TBT Agreement*, Article 2.2.
[941] *TBT Agreement*, Article 2.3. In a communication by Canada to the TBT Committee, the Canadian government sets out five TBT requirements for labelling measures in the form of technical regulations. Such measures (1) must not discriminate against imported like products; (2) must not be more trade restrictive than necessary to fulfil a legitimate objectives; (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; and (5) must specify technical regulations based on product requirements in terms of performance rather than design or descriptive characteristics, where appropriate. *Labelling and Requirements of the Agreement on Technical Barriers to Trade (TBT): Framework for Informal, Structured Discussions*, Communication from Canada, Revision, G/TBT/W/174/Rev.1, 31 May 2002 at para. 10.

When a Member State chooses to create a national technical regulation that deviates from an international standard or where no such standard exists, that State must give notice of the measure to the WTO Secretariat.[942] The *TBT Agreement* also obliges Member States to ensure that their procedures for assessment of conformity by central government bodies (Canadian Food Inspection Agency and Health Canada, in Canada for example) is non-discriminatory.[943]

For non-internationally recognized standard, the test for TBT measure compliance is set out in Articles 2.1 and 2.2. These Articles require the measure must (1) not violate MFN or national treatment; (2) not create unnecessary obstacles to international trade; (3) not be more trade-restrictive than necessary to fulfill a legitimate purpose taking account of the risks non-fulfillment would create, and (4) consider all relevant elements of available scientific and technical information, related processing technology or intended end-uses of products in assessing such risks.

Some guidance as to how these provisions will be interpreted is given by the WTO Appellate Body in the *European Communities – Trade Description of Sardines (EC-Sardines)* case.[944] In this case, a WTO Panel was asked to consider whether an EC labelling Regulation[945] was WTO-compliant given that the Regulation's labelling requirements were different from an existing international standard (in this case, Codex Standard 94).[946] Three aspects of the decision shed light on how national measures will be examined to determine their TBT Agreement-compatibility:

> (a) What is a "technical regulation" such that it will be subject to the provisions of the TBT Agreement?

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[942] *TBT Agreement*, Article 2.9.
[943] *TBT Agreement*, Article 5.
[944] (WT/DS231/AB/R), Report of the Appellate Body, 26 September 2002.
[945] *CE, Règlement n° 2136/89 du Conseil, du 21 juin 1989, portant fixation de normes communes de commercialisation pour les conserves de sardines,* [1989] J.O. L.212/79.
[946] Codex Alimentarius Commission, Joint FAO/WHO Food Standards Programme, "Codex Standard for Canned Sardines and Sardine-Type Products Codex Stan 94-1981, Rev. 1-1995" (Rome: FAO/WHO), online: Codex Current Official Standards < http://www.codexalimentarius.net/web/ standardlist.jsp>.

(b) What is a "relevant international standard" and do Codex Standards meet this definition?

(c) With respect to food labelling that differs from a relevant international standard, when will it be found to be necessary because the international standard is "ineffective or inappropriate"?

A. are mandatory naming, labelling and trade descriptions "technical regulations" under the TBT Agreement?

The Appellate Body agreed with the Panel decision that the EC Regulation was a "technical regulation" within the meaning assigned to that term under the *TBT Agreement.* At para. 176, with respect to the meaning of "technical regulation", the Appellate Body states as follows:

> We interpreted this definition [the definition of 'technical regulation' as found in Annex 1 of the *TBT Agreement*] in *EC-Asbestos.*[947] In doing so, we set out three criteria that a document must meet to fall within the definition of "technical regulation" in the *TBT Agreement.* First, the document must apply to an identifiable product or group of products. The identifiable product or group of products need not, however, be expressly identified in the document. Second, the document must lay down one or more characteristics of the product. These product characteristics may be intrinsic, or they may be related to the product. They may be prescribed or imposed in either a positive or a negative form. Third, compliance with the product characteristics must be mandatory. As we stressed in *EC - Asbestos*, these three criteria are derived from the wording of the definition in Annex 1.1.

Thus there are three criteria: an identifiable product; a product characteristic; and, mandatory compliance with product characteristic. These three criteria are easily met with all mandatory food labelling requirements present in national legislation. Without meeting the requirements for mandatory labelling, food products cannot be marketed. This will be true for food products in any of the three countries studied in Part I.

The Appellate Body rejects the EU argument that products considered under a "technical regulation" could only speak to products positively identified in the regulation. In that case, the EC tried unsuccessfully to argue that a regulation that identified only one

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[947] *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products (EC-Asbestos)* (WT/DS135/AB/R), Report of the Appellate Body, 12 March 2001 at paras. 66-70.

species of fish did not relate to any other species. The Appellate Body held that a "product does not necessarily have to be mentioned explicitly in a document for that product to be an identifiable product." The Appellate Body decided that because the EC Regulation prohibited anything other than a certain type of fish from being called "sardines", it did speak to those products which might otherwise be referred to as "sardines" or "x kind of sardines".[948]

The case of *EC-Sardines* also unequivocally states that mandatory labelling requirements will generally be found to be technical regulations subject to the *TBT Agreement.* The Panel held that "based on the ordinary meaning, we consider that labelling and naming requirements are essentially "means of identification" of a product and as such, they come within the scope of the definition of "technical regulation"."[949] The Appellate Body reiterated that "product characteristics include not only "features and qualities intrinsic to the product" but also those that are related to it, such as "means of identification."[950]

B. are Codex Standards "relevant international standard" under the TBT Agreement?

The *EC-Sardines* decision upholds the importance of international standards in any determination of what will be viewed as an acceptable national standard. The EC alleged that the Codex Stan 94 was neither "an international standard", nor a "relevant international standard" for the purposes of determining WTO-compatibility of its Regulation. The Appellate Body found that it was both. It adopted the Panel's definition of "relevant" as "bearing upon or relating to the matter in hand, pertinent" and thus found that the Codex Stan 94 was a relevant international standard as it bears upon, relates to, or is pertinent to the EC Regulation.[951]

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[948] *EC-Sardines*, Appellate Body, para. 184.
[949] *EC-Sardines*, Panel decision, para. 7.40-7.41.
[950] *EC-Sardines*, Appellate Body, para. 189.
[951] *EC-Sardines*, Appellate Body, para. 229, 232, and 233.

C. if national food labelling requirements differ from a relevant international standard, when will they be found to be necessary because the international standard is "ineffective or inappropriate"?

The Appellate Body did not explicitly answer this question. Instead, it set out an evidentiary test for proving that an international standard is not "ineffective or inappropriate" to fulfill the "legitimate objectives" of a Member State.[952] The Appellate Body, which overruled the Panel on this point, held that the burden of proof lay with Peru, the complainant, to establish that Codex Stan 94 had not been used "as a basis for" the EC Regulation and that Codex Stan 94 would have been effective and appropriate to fulfil the "legitimate objectives" pursued by the European Communities if they had been enacted through the EC Regulation.[953] The Appellate Body held that Peru did adduce sufficient evidence to demonstrate that Codex Stan 94 is not "ineffective or inappropriate" to fulfill the "legitimate objectives" of the EC Regulation.[954] While the EC argued that its Regulation pursued legitimate objectives (market transparency, consumer protection and fair competition[955]), it failed to rebut the evidence that the Codex Stan 94 was an "ineffective or inappropriate means" for the fulfillment of the legitimate objective that it pursued. The Appellate Body thus found that the EC Regulation did not meet the obligations of Art. 2.4 of the *TBT Agreement*[956] and recommended that the EC bring its Regulation into conformity with its obligations under the *TBT Agreement*.[957]

From the *EC-Sardines* case, the importance of international standards in determining what will constitute a *TBT Agreement*-compatible measure becomes patently obvious. When national measures are more stringent than international standards, the State defending their measures will have to rebut evidence presented by the challenging State as to why the international standard is not appropriate. This test provides the standard that a State must meet but it does not reveal what a WTO Panel will consider as sufficient evidence that an

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[952] *EC-Sardines*, Appellate Body, para. 291.
[953] *EC-Sardines*, Appellate Body, para. 275.
[954] *EC-Sardines*, Appellate Body, para. 291.
[955] *EC-Sardines*, Appellate Body, para. 263. Peru agreed that these objectives were within the meaning of "legitimate objectives" outlined in Art. 2.4.
[956] That is, that national measures are permitted where international standards are ineffective or inappropriate.
[957] *EC-Sardines*, Appellate Body, para. 313 and 315.

international standard is inappropriate. While still onerous, this test for *TBT Agreement* compliance is less stringent than for SPS measure compliance under the *SPS Agreement*. Unlike the *SPS Agreement*, technical measures subject to the scrutiny of the *TBT Agreement* are not strictly required to be based on a risk assessment.[958] This distinction between the *SPS* and *TBT Agreements* is highly significant. It makes measures under the latter more difficult to attack as non-conforming as compared to the former, where both the risk assessment and the link between the SPS measure and the risk assessment can be attacked to defeat the SPS measure.

Most food labelling regulations from the three study countries, examined in Part I, would fit within the definition of technical regulations and thus would be subject to the limitations imposed by the *TBT Agreement*. However, some of the mandatory labelling elements in each country would, arguably, be better classified as SPS measures. Table 11 below provides the author's classification of which national labelling measures might be best considered either an SPS measure, or a TBT measure, or both (although theoretically, under the WTO it must be one or the other). If the element is a technical regulation its "legitimate objective" is suggested.

Table 11 - Mandatory labelling elements found in three country case studies as TBT or SPS measures

mandatory element[959]	legitimate objective under TBT Agreement[960]	directly related to food safety under SPS Agreement
1. name/common name	preventing deceptive practices; or protecting human health	argument for a measure directly related to food safety
2. net quantity or content	preventing deceptive practices	X
3. list of ingredients	preventing deceptive practices; or protecting human health	argument for a measure directly related to food safety
4. name and address of producer	preventing deceptive practices	X
5. date marking	X	strong argument for a measure directly related to food safety
6. production lot number	protecting human health	argument for a measure directly related to food safety

[958] McMahon, "SPS Agreement" at 17.
[959] Identical elements to those referred to in Table 9, Part I Summary and Conclusions.
[960] From Article 2.2 of the *TBT Agreement*. Member states now also list other legitimate objectives in their TBT measure notifications such as "consumer information and labelling". As such almost all the elements of mandatory labelling could be subsumed under this "legitimate objective". See WTO, Committee on Technical Barriers to Trade, *Ninth Annual Review of the Implementation and Operation of the TBT Agreement*, Note by Secretariat, G/TBT/14, 5 March 2004 at para. 12.

7. price	preventing deceptive practices	X
8. place or country of origin	preventing deceptive practices	X
9. instruction and precautions for use	X	strong argument for a measure directly related to food safety
10.storage conditions	protecting human health	argument for a measure directly related to food safety
11.declaration of special characteristics of food (a) additives	X	strong argument for a measure directly related to food safety
(b) processing (frozen/irradiated)	preventing deceptive practices; or protecting human health	argument for a measure directly related to food safety
(c) presence of GM matter	preventing deceptive practices; or protecting human health	argument for a measure directly related to food safety
12.nutrient fact table	argument for a measure protecting human health	strong argument for a measure directly related to food safety

Furthermore the rules that exist in all three study countries that prevent false and misleading labelling could be grounded in the objective of "preventing deceptive practices", while the rules limiting the use of restricted marks could likely also be grounded on the same basis.[961]

While the objective of "providing consumer information" is not one of the enumerated legitimate objectives, the TBT Committee now accepts a variety of non-enumerated objectives. In its *Ninth Annual Review of the Implementation and Operation of the TBT Agreement*,[962] the TBT Committee reported that amongst the 794 notifications of new TBT measures received in the year 2003 several provided as their "legitimate objective", one which was neither mentioned in the TBT Preamble or in Article 2.2. These non-enumerated objectives included "adoption of new domestic law", "consumer information and labelling", "harmonization", and "trade facilitation". TBT measures which used one of these non-enumerated objectives constituted over one quarter of all notifications received in 2003.

Arguably, with the TBT Committee receiving country notifications of measures justified by a wide variety of "legitimate purposes" for national technical regulations, it will

[961] Some Member States also ground TBT measures under non-enumerated TBT Agreement objectives such as "quality requirements" and "consumer information and labelling". See WTO, Committee on Technical Barriers to Trade, *Ninth Annual Review,* para. 12.
[962] Note by Secretariat, G/TBT/14, 5 March 2004.

be more difficult for the language of the *TBT Agreement* to set clear parameters between those technical barriers that are unnecessarily trade-distorting from those which are not.

Section 4 – Food labelling measures and the obligation of non-discrimination: labelling PPMs

The *TBT Agreement* and the *GATT 1994* contain provisions requiring national measures to be non-discriminatory.[963] Like goods must be treated alike. Technical measures, such as labelling requirements that apply to imports from one country, must be applied to all countries and requirements applied to imported goods must also be applied to domestic goods. A particular problem that is germane to the discussion of the international regulation of food labelling is whether national measures will be WTO-compatible if they discriminate between products with different production and processing methods (PPMs). Many of the most potentially difficult international trade issues involving food labelling today—the labelling of genetically modified foods, the labelling of high-value foods such as organic foods or foods marked by "les signes de qualité" and eco-labelling— involve issues relating to the PPM debate. Labelling is often used to tell the consumer about PPMs because such information is either demanded by the consumer or supplied voluntarily by producers to realize market premiums for high value products. PPM labelling provides useful information that tells the consumer "how" the product is made. Such labelling can however be trade-distorting. For this reason, such labelling measures are a concern with respect to their WTO-compatibility.

Paragraph 1 – What is a PPM? distinguishing between prPPMs and nprPPMs

PPMs are often divided into two distinct categories: product-related production and processing methods (prPPMs) and non-product related production and processing methods (nprPPMs). The prPPMs include those methods that contribute to the final characteristics present in a product, while nprPPMs do not. The distinction is sometimes subtle but at other times it is obvious. "Product-related PPMs refer to process and production methods which affect the nature, properties, or qualities of the product itself ... It typically describes a

[963] *TBT Agreement*, Art. 2.1; *GATT 1994*, Art. I and Art. III. The *SPS Agreement*, in its Art. 2.3, also requires national measures to be non-discriminatory.

process or production method which changes the characteristic of the final product and that PPM is discernible in the change. In any case, the PPM has an expression in the product."[964] The pasteurization of milk is a typical prPPM. Milk which is pasteurized is qualitatively different than milk which is not. In many countries, milk must be labelled to indicate to the consumer this prPPM.

On the other hand, nprPPMs "describe a process or production method which does not affect or change the nature, properties, or qualities of (nor discernible traits in or on) a product."[965] Examples of nprPPMs germane to food labelling would include "fairtrade" products that suggest certain labour practices among producers, "shade-grown coffee" that suggests friendly environmental practices, or "free-range chickens" testifying to animal welfare in farming practices.

It may at times be difficult to determine if a labelling requirement relates exclusively to a prPPMs or only a nprPPMs. Does the AOC emblem on every piece of Roquefort cheese relate to a production method, every stage of which changes the nature of the final product? Does mandatory labelling of foods made from ingredients of genetically modified organisms relate to a production method which has changed the nature of the final product? Organic production is another interesting hybrid of both prPPMs and nprPPMs. Organic production may change the product characteristics (ex. lower pesticide levels) and therefore relate to a prPPM, but it need not do so. The organic production methods may simply make the agricultural production methods more sustainable and healthier for the producers, thus making the labelling of organic produce a nprPPM.

Why is the distinction so important? As a matter of national law, it is not. If States wish to require the labelling of certain PPMs, they simply define the PPM and pass legislation requiring that labels include that information. Under the WTO, the situation is much more complicated.

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[964] *Labelling and Requirements of the Agreement on Technical Barriers to Trade (TBT): Framework for Informal, Structured Discussions*, Communication from Canada, Revision, G/TBT/W/174/Rev.1, 31 May 2002, Annex 1.
[965] WTO, *Labelling*, Communication from Canada, Annex 1.

Paragraph 2 - Treatment of prPPMs versus nprPPMs under the WTO

The difficulty which has arisen with respect to WTO compatibility of PPM labelling is that the WTO has inherited a jurisprudence from the *GATT 1947* which held that national measures regulating prPPMs are fundamentally different from national measures regulating nprPPMs. The effect of this distinction is as follows: products with different prPPMs are considered "different" products which permits states to require different labelling regimes for products with different prPPMs. On the other hand, products with only different nprPPMs are considered "like" products. Consequently, any national labelling measure which requires different treatment for two products different only because of their nprPPMs are considered discriminatory and contrary to the GATT rules prohibition discrimination.[966]

In the pre-WTO period, "likeness" was determined by an examination of external characteristics of products.[967] In the *Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, the GATT Panel examined properties, nature and the quality of products and their end-use.[968] In the *United States – Restrictions on Imports of Tuna*[969] the Panel held that a regulation directed at production and processing was not directed at the product.[970] As such products could not be distinguished on this basis alone. One author comments that during the pre-WTO period "provided that the actual end-use of the products in question was the same, the ... consequences of use would not have

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[966] There has been a significant amount of literature on the meaning of "like" products under the WTO/GATT. See particularly, Robert Howse & Donald Regan, "The Product/Process Distinction—An Illusory Basis for Disciplining Unilateralism in Trade Policy", (2000) 11(2) Eur. J. Int'l. L. 249. (Paper presented to the University of Michigan Law School/European Journal of International Law Symposium on Unilateralism, Ann Arbor, September 1999 also available online at << http://www.wto.org/english/res_e/reser_e/eradsem.htm>>); McMahon, "SPS Agreement" at 17; Joshi, Manoj. "Are Eco-Labels Consistent with World Trade Organization Agreements?" 38(1) Journal of World Trade 69 at 74; Jan-Erik Burchardi, "Labelling of Genetically Modified Organisms: A Possible Conflict with the WTO?" (2001) 1 ZLR 83 at 99; Rex J. Zedalis, "Labelling of Genetically Modified Foods: The Limits of GATT Rules" (2001) 35(2) Journal of World Trade 301 at 310; Cora Dankers, *Environmental and Social Standards, Certification and Labelling for Cash Crops*. (Rome, FAO, 2003) at 76.

[967] Donald M. McRae, "Trade and the Environment: The Development of WTO Law" (1998) 9(2) Otago Law Rev. 221 at 225.

[968] *Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, L/6216 adopted on 10 November 1987, BISD 34S/83, para. 5.6.

[969] (unadopted Panel Report), 30 I.L.M. 1594 (1991),.

[970] *United States – Restrictions on Imports of Tuna*, para.5.11-5.16.

been a relevant basis for concluding that the products were not "like".[971] By extension, occurrences at the beginning of the product's lifecycle that did not affect the product's end-use would not be a relevant basis for concluding that the products were not "like" products either.

The interpretation of "like" product continues to evolve under the WTO. In *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products (EC- Asbestos)*[972] the Appellate Body sets out a four-part test for the determination of "like products". "Like products" are determined by reference to: (1) physical properties of the products; (2) the extent to which the products are capable of serving the same or similar end-uses; (3) 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; and (4) international tariff classification.[973]

This definition for "like products" cuts a new swath from older GATT/WTO jurisprudence which focused primarily, if not exclusively on the physical attributes of the products and their end-use when comparing their "likeness". It focuses on whether there are differences between the products that might justify different regulation.[974] Certainly the third criterion—consumer perception of the two products—allows for more flexible approach to determining whether products with different nprPPMs might be perceived to be different by consumers and thus might justifiably be subject to different sets of regulations. Of course this new flexibility permits a degree of subjectivity to creep into the definition that formerly did not exist. The reaction of consumers and their perceived wants and demands must be pitted against the more objective tests of physical characteristics and end-uses of the product. How might a WTO Panel deal with evidence that European consumers have different reactions, wants and demands for certain products than do North American consumers? Would such evidence be sufficient to justify a EU mandatory labelling measure with respect to a particular PPM?

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[971] McRae, "Trade and the Environment" at 225-226.
[972] (WT/DS135/AB/R), Report of the Appellate Body, 12 March 2001.
[973] EC-Asbestos at para. 101. However, the Appellate Body did indicate that this was not a closed list and the significance of each criterion may vary with the case; para. 102.
[974] Howse & Regan, "The Product/Process Distinction" at 11; McMahon, "SPS Agreement" at 22.

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The establishment of the WTO has ushered in a new set of international obligations governing international rule. What do these new obligations mean for national measures concerning food labelling? What is really covered by the WTO Agreement and what obligations are in need of clarification and even reform?

What is covered by the WTO Agreement?

In principle, all national food labelling measures are now subject to WTO scrutiny. Food labelling measures which do not conform to WTO obligations will, if challenged, have to be repealed. However, the rules of compliance for some food labelling measures are stricter than for others. Labelling measures "directly related" to food safety are subject to the obligations outlined in the *SPS Agreement*. The primary goal of the *SPS Agreement* is to promote the harmonization of the international standards. Measures in excess of existing international standards will have to pass a strict science-based test and a mandatory risk assessment to prove WTO compatibility.

Other national labelling measures will have to meet the requirements of the *TBT Agreement*. As technical regulations, national food labelling measures must pursue a legitimate objective and not create unnecessary obstacles to trade. While the *TBT Agreement* also seeks to promote the harmonization of international standards, its provisions for compliance for national measures not in accordance with international standards are not nearly as stringent as those under the SPS.

Finally, all labelling measures will have to obey the obligations prohibiting non-discrimination found in the *SPS Agreement*, the *TBT Agreement* and the *GATT 1994*.[975]

What is not covered?

In spite of the fact that, theoretically at least, all labelling measures are covered by either the *SPS Agreement*, the *TBT Agreement* or the general provisions of the *GATT 1994*

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[975] *SPS Agreement*, Art. 2.3, *TBT Agreement*, Art. 2.1; and *GATT 1994*, Art. I and Art. III.

prohibiting non-discrimination, there is still considerable "slippage" with respect to disciplining national food labelling measures. The *SPS Agreement* provides a very tight, science-based system to discipline measures that are not science-based. However, the kinds of labelling provisions that will be held to constitute an SPS measure are extremely limited. Moreover, given that the *TBT Agreement* admits that one of its legitimate objectives for national measures is the protection of human health, it will be easier for States to defend all of their labelling legislation as "technical regulations" subject to the obligations of the *TBT Agreement* than to subject them to the scrutiny of the *SPS Agreement*.

The *TBT Agreement* is still sufficiently vague as to how exactly it will treat food labelling measures with trade restricting effects. This is especially true for mandatory labelling schemes for nprPPMs or combined nprPPM/PPM characteristics, an issue that continues to lack resolution within the WTO.[976]

Reform through WTO Panel interpretation vs. multilateral negotiations?

Should reform of the provisions affecting food labelling provisions come through WTO Panel decisions or through negotiations? Some countries have already called for further discussions and negotiations to clarify the *TBT Agreement*'s ambit,[977] but other countries do not appear to be interested.[978] One negotiator has commented that the negotiations for the *SPS Agreement* and *TBT Agreement* were so charged that to reopen them would be difficult.[979] However, the current state of affairs of having food labelling relating to food safety and human health covered by both the *SPS Agreement* and the *TBT Agreement* cries out for reform. Perhaps one area for "judicial" clarification from a WTO

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[976] For an interesting discussion of how the product/process distinction at the WTO is too "thin and formalistic", see Douglas A. Kysar, "Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice" (2004) 118 Harvard L. R. 525. The author concludes that in the future process preferences will indeed become very important and will require new techniques for their regulation, both domestically and internationally.

[977] WTO, *Labelling*, Submission by the European Communities, G/TBT/W/150; 2 November 2000; WTO, *Labelling*, Submission by the European Communities, G/TBT/W/175; WT/CTE/W/212, 12 June 2002.

[978] WTO, *Labelling,*, Communication from Canada. Developing countries also appear not to be in favour of reopening the negotiations to have the *TBT Agreement* permit countries to enact labelling measures that would recognize and distinguish on the basis of nprPPMs. See Manoj Joshi, "Are Eco-Labels Consistent with World Trade Organization Agreements?" 38(1) Journal of World Trade 69.

[979] Greg Orriss, Canadian Codex Contact and Director, Bureau of Food Safety and Consumer Protection, Programs Branch, Canadian Food Inspection Agency (interviewed in Ottawa 5 March 2002 and 2 May 2005).

Panel would be to provide direction to Member States on the types of food labelling measures relating to food safety that will be scrutinized under the *SPS Agreement*. Such a determination will permit States to know in advance when the *SPS Agreement*'s precise rules will apply to national food labelling measures and when such measures will only attract the attention of the obligations contained in the *TBT Agreement*. Such a demarcation is essential as States are increasingly proposing food labelling requirements with food safety elements in their national food labelling regimes. Where WTO SPS food labelling measures are in excess of international standards, States should be held accountable under the *SPS Agreement* to defend to their trading partners why additional labelling requirements do not constitute a disguised restriction on trade.

However, when it comes to other food labelling measures that are considered technical regulations under the *TBT Agreement*, such measures have less clear standards against which they are to be measured. The *TBT Agreement* must become more precise with respect to the disciplining of food labelling. Although not explicitly mentioned in the *TBT Agreement* text, increasingly countries are openly stating that the purpose of their TBT food labelling measures is for "consumer information". Satisfying consumer demands for information, however, does not lend itself to the exactness of a science-based approach that can be established for protecting human health. States would be better to negotiate what they want in the way of more precise *TBT Agreement* rules. A judicially correct, but politically charged decision in the area of clarifying *TBT Agreement* obligations might not be in the long-term interest of a strong, credible, and comprehensive system of international trade rules. As one commentator puts it, labelling regulation must be generally compatible with consumer concerns which fit squarely with the goals of the *TBT Agreement*, for otherwise "to suggest that market access should be liberalised but consumer concerns kept fenced off squarely behind national borders risks public support for trade liberalisation and confidence in the WTO itself."[980]

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[980] Vangelis Vitalis, "Eco-labelling and WTO Rules: What Needs to be Done". *OECD Round Table on Sustainable Development: Trade and the Environment Held in Paris, France 11 January 2001* (Paris: OECD, 2001). The author was writing in the context of eco-labels generally but the same concern might be applied to specific consumer concerns like GM labelling.

The exact extent of the *TBT Agreement* obligations for Member States remains a concern of the WTO Secretariat and Member States who are both very active in the surveillance of labelling issues and their effect on international trade.[981] In a submission to the TBT Committee, the European Communities stated:

> There appears to be a tendency for labelling requirements and schemes to increase. This is reflected in growing concerns over the impact of labelling on trade. In 2001, the EC has calculated there was both a higher number and a higher percentage of TBT notifications relating to labelling than in any previous year. The mechanisms that countries impose, including at their borders, to control the respect of some labelling requirements are in some instances contributing to slowing down the flow of trade.[982]

Canada echoed similar remarks:

> In recent years, the number of labelling proposals notified and adopted by WTO Members has grown significantly. It is difficult to estimate precisely the impacts that such measures have on trade, and whether the measures are being designed, and implemented, to ensure that they do not become unnecessary obstacles to trade. Nevertheless, there is strong evidence that certain labelling measures have not been without consequences to the international flow of goods.[983]

Action on clarifying *TBT Agreement* obligations would greatly assist States in determining the kind and extent of food labelling measures that they can reasonably expect to be able to support and defend under the *WTO Agreement*.

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[981] WTO, Committee on Technical Barriers to Trade and Committee on Trade and Environment, *Specific Trade Concerns Related to Labelling Brought to the Attention of the Committee Since 1995*, Note by the Secretariat, G/TBT/W/184; 4 November 2002; *Notifications Related to Labelling (1 January 1995 – 31 August 2002)*, G/TBT/W/183, 8 October 2002; *Labelling and Requirements of the Agreement on Technical Barriers to Trade (TBT): Framework for Informal, Structured Discussions*, Communication from Canada, Revision, G/TBT/W/174/Rev.1, 31 May 2002; *Labelling*, Submission by the European Communities, G/TBT/W/150; 2 November 2000; *Labelling*, Submission by the European Communities, G/TBT/W/175; WT/CTE/W/212, 12 June 2002.

[982] WTO, *Labelling*, European Communities, at para. 4.

[983] WTO, *Labelling*, Canada at para. 2.

Chapter 2 – Bringing New Elements Within the WTO Framework

The *WTO Agreement* expands the trade facilitation rules that existed under the *GATT 1947* but it also folds in elements from both intellectual property treaties (Section 1) and from international standards (Section 2) as part of the package of new obligations assumed by Member States.

Section 1 - The Marriage of Intellectual Property and Trade within the WTO

The XIXth century treaties protecting intellectual property enjoyed varying degrees of success through the XXth century, with some enjoying broad international support and others considerably less so. [984] The creation of the World Intellectual Property Organization (WIPO) as overseer of intellectual property agreements in 1967 has received mixed reviews as to its success in improving the administration and enforcement of the intellectual property protection at the international level. Rule-making has been too slow[985], dispute resolution

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[984] As of 2005, the 1883 *Paris Convention* has 169 Member States while the 1891 *Madrid Convention* has only 34.

[985] Rule making at WIPO occurs in one of three ways. First, much of the corpus of WIPO rules for the protection of intellectual property has been inherited from existing treaties that predated the existence of WIPO. Second, new rules are made in one of two ways. The formal route continues to be the preparation, discussion and elaboration of new treaties or amendments to existing ones for the protection of intellectual property. This process is relatively slow and requires huge investments of human capital. It starts with some initiative from member states of WIPO and some consensus for change. Then the WIPO secretariat or a committee of experts prepares draft articles for negotiations and discussions. Member States and Standing Committees (of which the most important for labelling matters is the Standing Committee on the Law of Trademarks, Industrial Design and Geographical Indications) will comment on the draft and when there is wide consensus on the appropriateness of the new draft, the Member States will authorize the preparation of a diplomatic conference to finalize and adopt the draft as a new treaty which will then be opened for signature, ratified and come into force.

Alternatively, the WIPO may develop soft law instruments. These instruments will not be binding as treaty obligations, but they can be expeditiously adopted in the form of WIPO resolutions, recommendations, declarations and guidelines. They are of general application to all WIPO Member States particularly where the soft law instrument has received significant or even unanimous support from WIPO members during discussions and debates prior to their adoption. Sisule F. Musungu & Graham Dutfield, "Multilateral agreements and a TRIPS-plus world: The World Intellectual Property Organization (WIPO)" *TRIPS Issues Papers 3* (Geneva: Quaker United Nations Office, Geneva and Quaker International Affairs Programme, Ottawa, 2003) at 6.

and enforcement were weak[986], and some countries simply did not appear to put their full trust in the WIPO to carry out its mandate.[987]

Of far greater impact in recent years for the protection of intellectual property has been the marriage of intellectual property protection with trade rules that occurred with the coming into force of the WTO's *Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement* in 1995. While some commentators argue that one must not overstate the importance of the WTO in protecting intellectual property and that this role, at the international level, still belongs to the WIPO,[988] others see the evolution of international intellectual property law under the WTO as an enormously important and ambitious event. Prof. Gervais describes the *TRIPS Agreement* undertaking as:

> "the broadest and most extensive multilateral agreement in the field of intellectual property, covering basically the entire area and adding enforcement, acquisition and most-favoured nation obligations to new and existing rules and incorporating those rules in what could only be considered the only truly effective and binding dispute settlement mechanism between states..."[989]

Even those authors who would see the *TRIPS Agreement*'s importance in less than glowing terms admit that "ultimately, the circumstances leading to the adoption of the *TRIPS Agreement* in the WTO demonstrate that for WIPO to remain the main forum on intellectual property matters, it must show to the USA and its industry that it can deliver new standards faster and more efficiently."[990] WIPO, with its focus on the promotion of the protection of intellectual property, now must walk a delicate path, given its involvement with the WTO

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[986] "The two fundamental perceived flaws of the Paris and Berne Conventions were (a) the absence of detailed rules on enforcement of rights before national judicial administrative authorities; and (b) the absence of a binding and effective dispute settlement mechanism (for disputes between states)." Daniel Gervais, *The TRIPS Agreement: Drafting History and Analysis*, 2nd ed. (London: Sweet & Maxwell, 2003) at 10.

[987] This is particularly true of the United States. Musungu & Dutfield, "Multilateral agreements and a TRIPS-plus world" at 11.

[988] While the WTO trade rounds framework and the concept of single undertaking proved important in pushing TRIPS through, WIPO remains the main international institution that is involved in the continuous development of intellectual property standards and rules. Musungu & Dutfield, "Multilateral agreements and a TRIPS-plus world" at 10.

[989] Gervais, *The TRIPS Agreement"* at 11.

[990] Musungu & Dutfield "Multilateral agreements and a TRIPS-plus world" at 11.

with its focus on trade liberalization.[991] The *TRIPS Agreement*, in the meantime, steams ahead.[992]

The *TRIPS Agreement* builds upon existing international intellectual property agreements and in many cases updated those rules.[993] While the *TRIPS Agreement* is a complex document with a complicated negotiating history,[994] the objectives of the agreement include: the applicability of the basic principles of *GATT 1994* and of relevant international intellectual property agreements; the provision of adequate standards concerning trade-related intellectual property rights; the provision of effective enforcement of such rights at a national level; and the provision of effective state-to-state dispute settlement.[995]

The *TRIPS Agreement* contains three core commitments: national treatment, MFN treatment and minimum standards, all of which can be enforced through the dispute settlement system of the WTO. The first two commitments are inherited from the disciplines championed by the *GATT 1947* while the third was introduced to deal with the "free-rider" problem ever-present in the quest to grant innovators protection for their inventions and creations.[996] The minimum intellectual property standards applies to all WTO Member

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[991] However some advocates think that the solution is not in molding the WIPO operations to dovetail with those of the WTO, but rather to broaden them to fit with the objectives of the other United Nations Agencies. These advocates believe the ultimate purposes which should be served by WIPO's activities should include broad development objectives and measures to ensure that developing countries benefit from modern scientific and technological advances in health, environment, communication, information technology and food and nutrition among others. Musungu & Dutfield, "Multilateral agreements and a TRIPS-plus world" at 18.

[992] Several authors are critical of the WIPO and the WTO citing examples of how new international intellectual property rules will be to the detriment of many, particularly developing, countries. See Susan Sell, "Intellectual property protection and antitrust in the developing world: Crisis, coercion, and choice". (1995) 49 Int'l Org. 315; Susan Snell, *Private Power, Public Law* (Cambridge: Cambridge University Press 2003); Peter Drahos, "Trading in Public Hope" (2004) Annals of the American Academy 1; Keith E. Maskus, "Intellectual property rights and economic development", (2000) 32 Case Western Reserve J. I. L. 471.

[993] Gervais, *The TRIPS Agreement* at 68.

[994] Gervais, *The TRIPS Agreement* at 10-48.

[995] Preamble, TRIPS Agreement. Gervais rightly points out that Annex 1C is not a "stand-alone" document. He states that: "to have a complete picture of multilateral disciplines on trade-related aspects of intellectual property rights, one must also refer to the relevant provisions of the Paris, Berne and Rome Conventions and of the IPIC Treaty, as well as related provisions of the WTO Agreement and other annexes thereto, in particular as regards dispute settlement." Gervais, *The TRIPS Agreement* at 70.

[996] Andreas Lowenfeld & Rochelle Cooper Dreyfuss, "Two Achievements of the Uruguay Round: Putting TRIPS and Dispute Settlement Together", Chapter I(7) in *The Role of Government in International Trade: Essays Over Three Decades* (London: Cameron May, 2000) 60 at 62.

States as does the implementation and enforcement of those rules through the multilateral trading system.[997]

While labelling issues are not at the core of the *TRIPS Agreement*, obligations undertaken by States under the Agreement can have an impact upon the marking of products which are identified by trademarks (paragraph 1) and by other marks such as collective or quality marks (paragraph 2).[998]

Paragraph 1 - The protection of trademarks and food labelling

A. setting out the rules for the protection of trademarks

The *TRIPS Agreement* sets out the rules with respect to trademarks in two ways. First, it obliges Member States in Art. 2 to "comply with Articles 1 through 12, and Article 19, of the *Paris Convention* (1967)." Member States under the WTO must therefore bring their national law into conformity with the provisions of the *Paris Convention* even if they are not parties to that treaty.[999] The WTO Appellate Body in *United States – Section 211 Omnibus Appropriations Act of 1998* upheld this interpretation stating that "WTO Members, whether they are countries of the Paris Union or not, are obliged, under the *WTO Agreement,* to implement those provisions of the *Paris Convention* (1967) that are incorporated into the *TRIPS Agreement.*"[1000] The relevant obligations of the *Paris Convention* now brought under

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[997] Musungu & Dutfield, "Multilateral agreements and a TRIPS-plus world" at 3.

[998] Interestingly, the obligations undertaken by Member States under the TRIPS relate almost exclusively to property issues, with some limited consideration of what have been referred to above as commercial issues (preventing general marketplace fraud and setting marketplace standards), and almost no consideration of food safety and other consumer-oriented issues (such as additional information to satisfy consumer fears). Sometimes however, food quality can be considered a consumer issue and is related objective of the protection of intellectual property marks that consumers find to demonstrate quality. This is contrast to early intellectual property treaties that attempted to do deal with all three sorts of issues. See Part II, Title 1, Chapter 1, *supra.* The *TRIPS Agreement* indirectly however incorporates the more commercial objectives of the *Paris Convention*, such as its Art. 10 and 10bis (protection from unfair competition) through the former's incorporation by reference of much of the Paris Convention. See Gervais, *The TRIPS Agreement* at 88 and 166.

[999] For the situation in Canada in this regard, see Kelly Gill & Scott R. Jolliffe, *Fox on Canadian Law of Trade-marks and Unfair Competition* (4ed.) (Toronto: Carswell 2002) at 2-37. Generally, see Gervais, *The TRIPS Agreement* at 88 and 166.

[1000] *United States – Section 211 Omnibus Appropriations Act of 1998*, (WT/DS176/AB/R), Report of the Appellate Body, 2 January 2002 at para. 125. As well, the same Appellate Body Report held that violations of the incorporated *Paris Convention* Articles can be brought before the WTO Dispute Settlement Body, at para.238.

the WTO umbrella require Member States to provide a system of trademark registration,[1001] grant national treatment to nationals from other countries when seeking registration of trademarks,[1002] grant protection to well-known marks[1003], allow for the registration of collective marks[1004] and protect against the importation of goods bearing false indications as to their source[1005] as well as against unfair competition.[1006]

Second, the *TRIPS Agreement* in Articles 15-21 enhances the international rules for the recognition and protection of trademarks, creating a "Paris-plus" international regime for trademarks. [1007] The basic parameters of trademark law regarding protectable subject matter, rights conferred, permissible exceptions, terms of protection and the meaning of the requirement of use are set out. Art. 15 defines "trademark" (a term left undefined by the *Paris Convention*) in a broad manner which focuses on "capacity to distinguish" one good from another and the fairly universal criterion of distinctiveness.[1008] Art. 16 outlines the basic rights of an owner of a registered trademark to "have the exclusive right to prevent all third parties not having the owner's consent from using ... identical or similar signs". The remainder of the Articles pertaining to trademarks set out limits to the owner's rights such as fair use of descriptive terms,[1009] requirements for registration[1010], requirements for use[1011] and state limits on requirements for encumbered use[1012] and licensing of registered trademarks.[1013]

From a substantive rule perspective then, the *TRIPS Agreement* has achieved the creation of a near-universal system for the protection of intellectual property in trademarks. With 148 of the nations of the world now members of the WTO, the vast majority of trading

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[1001] *Paris Convention*, Art. 6.
[1002] *Paris Convention*, Art. 2.
[1003] *Paris Convention*, Art. 6bis.
[1004] *Paris Convention*, Art. 7bis.
[1005] *Paris Convention*, Art. 10.
[1006] *Paris Convention*, Art. 10bis.
[1007] Gervais, *The TRIPS Agreement* at 95.
[1008] Gervais, *The TRIPS Agreement* at 167.
[1009] *TRIPS Agreement*, Art. 17.
[1010] *TRIPS Agreement*, Art. 18.
[1011] *TRIPS Agreement*, Art. 19.
[1012] *TRIPS Agreement*, Art. 20.
[1013] *TRIPS Agreement*, Art. 21.

nations are bound to bring their national laws into conformity with these international obligations. The *TRIPS Agreement* requires Member States to enact national measures that reflect a common minimum standard for the protection of trademarks.[1014] Moreover, the rules pertaining to trademarks outlined in the *TRIPS Agreement* can be the subject of State complaints to the WTO's Dispute Settlement Mechanism. Access to dispute resolution for international intellectual property disputes is seen as one of the crowning achievements of the bringing together of the WTO and international intellectual property regimes[1015] and offers the hope of a reduction in unilateral actions against international intellectual property violations.[1016]

B. the general impact of the TRIPS rules on national food labelling law

Without having a specific effect on certain food products, the *TRIPS Agreement* has a general effect on the way trademark law is formulated and enforced in Member States. The registration and use of trademarks to identify a producer's goods and to inform consumers of a product's corporate origin is founded upon common minimum standards for all Member States. It is no longer possible, for example, for a Member State not to maintain a system of trademarks, or one that is out of "synch" with the standards set out in the "Paris-plus" formulation of the *TRIPS Agreement*. Rules that allow trademarks to appear on food labels in one country will to a large degree have to be mirrored in all other countries.

The *TRIPS Agreement* also incorporates several substantive provisions from the *Paris Convention* (1967) that may impact food labelling. As noted above, these provisions require the establishment of legal processes for the acceptance and protective of collective marks,[1017] rights of action against goods that bear unlawful marks, name or indications

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[1014] Of course, various national legal systems still retain some latitude as to how they will enact the necessary substantive provisions but the obligation to enact a common body of rules is clear. See Woolcock, Steve. "Has the WTO gone too far?" (Paper prepared for the International Trade Policy Unit, London School of Economics, London, undated), online: LSE <http://www.lse.ac.uk/collections/InternationalTradePolicyUnit/pdf/hasTheWTOgoneTooFar.pdf>.

[1015] Lowenfeld & Dreyfuss, "Two Achievements of the Uruguay Round" at 60.

[1016] T.P. Stewart (ed.), *The GATT Uruguay Round: A Negotiating History (1986-1992)*, (The Hague: Kluwer,1993) at 2313.

[1017] *Paris Convention*, Art. 7.

entitled to protection,[1018] and protection against unfair competitive practices.[1019] There is however, less of a clear standard as to how such protection will be ensured. The *TRIPS Agreement* does not lay down specific mechanisms for such protection. So, for example with respect to the protection of indications of source, the *TRIPS Agreement* obligation is that Member States have some mechanism as part of national law. As Gervais notes "[m]any countries protect indication not by a "*sui generis*" or specific intellectual property right such as rights in appellation of origin, but as collective or certification marks, or under the doctrine of unfair competition (or passing off)."[1020] Consensus on how to set a minimum standard for this issue is still beyond the grasp of the international community, something that used to be the case for the protection of geographical indications as an intellectual property right as well. The *TRIPS Agreement* has, however, made some progress on this latter matter as is explored below.

Paragraph 2 – The effects of other provisions of the TRIPS Agreement on food labelling

Prior to the conclusion of the *TRIPS Agreement* the protection of geographical indications was only a matter of national law and of certain international treaties that had few Member States.[1021] With the coming into force of the *TRIPS Agreement*, all Member States undertook obligations to protect certain geographical indications.

A. recognition and protection for geographical indications (GIs)

Articles 22 - 24 of the *TRIPS Agreement* begin the process of harmonizing international rules pertaining to GIs by adopting a standard definition. Art. 22(1) states that:

> Geographical indications are, for the purposes of this Agreement, indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.

[1018] *Paris Convention* Art. 9, 10 and 10ter.
[1019] *Paris Convention*, Art. 10bis.
[1020] Gervais, *The TRIPS Agreement* at 206.
[1021] As discussed in Part II, Title 1, Chapter 1, *supra.*

This definition differs slightly from the definitions of GIs protected under the *Lisbon Agreement*,[1022] under European law,[1023] and under the *North American Free Trade Agreement*.[1024] Under the *TRIPS Agreement*, only those goods whose quality, reputation or other characteristic is essentially attributable to its geographic origin have an internationally recognized property right to use an indication to identify those goods as originating in the country, or region or locality in that country.

Article 22(2) requires Member States to provide legal mechanisms in their national laws to prevent the designation of goods that suggests that they originate in an area other than their true place of origin "in a manner which misleads the public as to the geographical origin of the good". This Article tacitly provides protection to "geographical indications" by requiring every Member State to have a legislative scheme which protects these intellectual property rights. However, the requirement that actions against a violator can only be commenced "when the unjustified indication misleads the public" means that prosecutors or private litigants will always have to prove a mental element, either of the public being mislead or the violator willfully attempting to mislead the public. One commentator has attributed this phraseology to a fundamental disagreement between different groups of industrialized countries and "that for some, protection should be accorded whenever use of an indication constituted unfair competition, while for others, an element of deception (misleading the public) is necessary.[1025]

This general TRIPS rule is in contrast to the specific protection offered to wines and spirits with geographic indications. Article 23, which applies only to wines and spirits that enjoy an approved geographical indication, contains the additional requirement for Member States to provide legal mechanisms to prevent the misuse of such geographical indications "even where the true origin of the goods is indicated".

[1022] Art. 2 defines "appellation of origin", *Lisbon Agreement for the Protection of Appellations of Origin and their International Registration*, October 31, 1958, as revised at Stockholm on July 14, 1967, and as amended on September 28, 1979, online: WIPO <http://www.wipo.int/lisbon/en/legal_texts/lisbon_agreement.htm>.
[1023] Both "designation of origin" and "geographical indication" are defined terms in European law under *EC Regulation n° 2081/92 of 14 July 1992 concerning the Protection of Geographical Indications and Designations of Origin for Agricultural Products and Foodstuffs*, [1992] J.O. L. 208/1.
[1024] *North American Free Trade Agreement*, Art. 1721(2) defines "geographical indication".
[1025] Gervais, *The TRIPS Agreement* at 191.

Article 24 includes provisions that permit Member States to request consultation with any other Member States concerning the application of Articles 22 and 23, although the more logical recourse would be directly to the WTO Dispute Settlement Mechanism when serious conflicts arise.[1026]

What direct effects do these TRIPS provisions have on food labelling? The short answer is none for now. Unlike under the *Lisbon Agreement*[1027] and under European law, the TRIPS provisions for geographical indications do not create a registration system for the intellectual property created by them. As a result, geographical indications do not enjoy an "exclusive right of use" as is protected under the trademark provisions of the *TRIPS Agreement.* No name can be registered that can be protected as such.

However, it would be wrong to conclude that the *TRIPS Agreement* has no effect on food labelling for two reasons. First, Member States have at least agreed on a common definition of GIs which gives the concept international legal recognition and validity. Despite the great gulf in understanding and acceptance of GIs as valid interests to be protected by national and international regulations, Member States of common law traditions, continental civil law traditions and other legal traditions may agree to negotiate additional international standards for GIs.[1028] Member States, some of whom are enthusiastic about the recognition of geographical indications as well as others which are considerably less so, have a considerable way to go before the debate over the international protection of GIs is concluded. A current example of just one such debate concerns the question of the desirability of the extension of the disciplines under Art. 23 to products beyond wine and spirits.[1029]

[1026] Lowenfeld & Dreyfuss, "Two Achievements of the Uruguay Round" at 73.
[1027] The Lisbon Agreement creates rights and obligations with respect to "appellations of origin" rather than "geographical indications." Gervais outlines four ways in which the two terms differ. As well, the Lisbon Agreement provides for the registration of "appellations of origin", something that the TRIPS Agreement does not. Gervais, *The TRIPS Agreement* at 188.
[1028] International Food and Agricultural Trade Policy Council, "Geographical Indications" (Washington: IPC, 2003).
[1029] Communication from Bulgaria, Cuba, Cyprus, the Czech Republic, the European Communities and their Member States, Georgia, Hungary, Iceland, India, Kenya, Liechtenstein, Malta, Mauritius, Pakistan, Romania, the Slovak Republic, Slovenia, Sri Lanka, Switzerland, Thailand and Turkey, "The Extension of the

Second, Member States can use the WTO dispute settlement procedures to determine the meaning of *TRIPS Agreement* obligations for the protection of GIs and for testing the validity of national measures protecting GIs. In fact this is what Member States have done in the recent *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs (EC-GIs)* case.[1030]

B. the impact of the *EC-GIs* case on food labelling

The *EC-GIs* case was brought by the United States and Australia alleging that *EC Regulation n° 2081/92 of 14 July 1992 concerning the Protection of Geographical Indications and Designations of Origin for Agricultural Products and Foodstuffs*[1031] was inconsistent with the EC's obligations under the *TRIPS Agreement*[1032] and under the *GATT 1994*.[1033] The case canvasses many arguments, but the upshot of the American and Australian position is that the EC's system for the registration and use of GIs discriminates against non-EC nationals and has the effect of limiting import competition for the European food and farming sectors. The case, argued on the basis of several very technical points, was in fact viewed as a full frontal attack on the European system for the registration and protection of GIs.

The WTO Panel found that parts of the EC regulatory structures for GIs are discriminatory and recommended that those parts be amended so as to be WTO-compatible. Other parts of the Regulation were upheld as being WTO-compatible.[1034]

Additional Protection for Geographical Indications to Products Other than Wines and Spirits", IP/C/W/353, 19 June 2002; Communication from Argentina, Australia, Canada, Chile, the Dominican Republic, El Salvador, Guatemala, New Zealand, Paraguay, the Philippines, Chinese Taipei and the United States, "Implications of Article 23 Extension", IP/C/W/386, 8 November 2002.

[1030] (WT/DS174/R), Report of the Panel, 15 March 2005, adopted 20 April 2005.

[1031] [1992] J.O. L. 208/1.

[1032] Art. 1.1, 3.1, 4, 16.1, 22.2, 41.1, 41.2, 41.1, 41.2, 42, 44.1, and 65.1 of the TRIPS Agreement and through its incorporation by Article 2.1 of the TRIPS Agreement, Article 2 (national treatment) of the Paris Convention (1967).

[1033] Art. I:1 and III:4 of the GATT 1994.

[1034] The decision also examined issues such as the inter-relationship between GIs and trademarks and whether the prior existence of one prevented the later recognition of the other. This part of the decision, found in para. 7.512 to 7.688, while shedding light on the question of the inter-relationship between these two types of intellectual property, had little direct effect on the outcome of the issue of whether the existing EU Regulations were WTO-compatible.

The arguments presented and the findings of the Panel on two particular issues are illustrative of the outcome of the case. The Panel was asked to examine the effects of *EC Regulation 2081/92* on non-nationals of the EC compared with its effects on EC nationals. The Panel was urged by the United States to find that the EC Regulation requires that foreign GIs will only be registered as GIs within the EC system if the government from whose territory the foreign GI comes has adopted a system of GI protection equivalent to that in the EC and it must provide reciprocal protection to GI products from the EC.[1035] Although no foreign GI had ever been registered under the Regulation, the Panel did find that the EC Regulation would require the meeting of such conditions for a GI to be registered. As such, the effect of this provision was to treat nationals of non-EC States less favourably than those of EC States and was therefore in violation of the national treatment provision found in Article 3.1 of the *TRIPS Agreement.*[1036]

However, on the issue of the labelling of GI products, the WTO Panel found the *EC Regulation 2081/92* provisions requiring different labelling of GI products depending on their origin to be consistent with the EC's WTO obligations. The United States alleged that different requirements for labelling identical GIs from within the EC and for labelling identical GIs, one of which was within the EC and one of which came from outside the EC were inconsistent with national treatment obligations found in Art. III:4 of the *GATT 1994.* In fact the two provisions under examination[1037] differed only very slightly. The one applicable to foreign GIs stated that when two identical GIs existed, labelling would be required to show that "the country of origin of the product is clearly and visibly indicated on the label". The provision applicable to two similar EU GIs required that labelling show "a clear distinction in practice between the homonym registered subsequently and the name already on the register, having regard to the need to treat the producers concerned in an equitable way and not to mislead the consumer". The argument that the first provision was a mandatory labelling requirement that discriminated against foreign GI products compared to the treatment of EC GI products similarly situated was rejected by the Panel. "The Panel

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[1035] *EC-GIs,* para. 7.38.
[1036] *EC-GIs,* para. 7.213.
[1037] Art. 6(6) and Art. 12(2) of *EU Regulation 2081/92.*

does not consider the mere fact that imported products are subject to legal provisions that are different from those applying to products of national origin is in itself conclusive in establishing inconsistency with Article III:4."[1038] The Panel also appeared swayed by the fact that the EC, during the hearing, presented evidence that the domestic labelling standard of "a clear distinction in practice" would normally require labelling as to the country of origin.[1039] Thus from a practical perspective the labelling requirements in both cases would be mandatory "country-of-origin" labelling.

One commentator has praised the decision saying that both sides could claim victory and that the WTO Panel was able to resolve this politically-charged and legally and technically complex case to the satisfaction of both disputants.[1040] However, with respect to food labelling, the *EC-GI* case is noteworthy less for its detailed legal result than for the clear message that it sends to Member States. First, food labelling laws must be compliant both with obligations under the *TRIPS Agreement* and with *GATT 1994*'s obligations concerning national treatment. A second observation is that a WTO case can be brought on the basis of only one provision in one piece of legislation, or on the basis of several provisions in one piece of legislation as was the case in the *EC-GI* case. Third, the provision under attack might not actually be the current basis of any practical use—neither of the provisions explored above in this case had actually ever been used by producers of foreign GIs. The American and Australian case was presented for examination of the Regulation "as such."[1041] The EC was able to maintain its GI system that limits the use, within the EC, of non EC-origin products having the same basic characteristics as EC-origin products[1042] but not without making changes to it as required by the Panel for compliance with its WTO obligations.

[1038] *EC-GIs*, para. 7.508.
[1039] *EC-GIs*, para. 7.509.
[1040] Eliza Patterson, "WTO Rules on Geographical Indications" (ASIL Insights, 19 April 2005) (online: The American Society of International Law <http://www.asil.org/insights/2005/04/insights050419.html>) at 2.
[1041] *EC-GIs*, para. 7.52 with regards to the availability of GI protection issue and para. 7.472 and 7.507 with regards to the labelling of GIs issue.
[1042] Patterson, "WTO Rules on Geographical Indications" at 1.

Section 2 – From "Soft Law" to "Benchmark": Recognition of Codex Norms under the WTO

In the period prior to the establishment of the WTO, the role of the CAC and the legal status of Codex norms was a matter of some debate.[1043] With the coming into force of the *WTO Agreement*, suddenly "international standards, guidelines and recommendations developed by the relevant international organizations, including the Codex Alimentarius Commission"[1044] were thrust into prominence as harmonizing norms that could be used to facilitate international trade. Jurisprudence of WTO Panels confirmed that Codex Standards were indeed moving from "soft law" instruments to "quasi-legal" benchmarks by which national measures would be judged (Paragraph 1). The full implications of this new role for the CAC and the Codex norms it develops, is yet to be fully teased out but the effects of the WTO's recognition of Codex norms will have important ramifications for the determination of the WTO-compatibility of national food labelling laws (Paragraph 2).

Paragraph 1 – In theory and in practice: Codex norms, the SPS and the TBT Agreements

A. in theory – seeking harmonization through Codex norms

Among the important objectives pursued by the WTO is harmonization of national measures to facilitate international trade. The way in which State negotiators decided to have these Agreements "encourage" standardization of national measures was by making internationally recognized standards the norm, and national standards in excess of those norms the exception, under each of the Agreements. Art. 3(1) of the *SPS Agreement* states that: "[t]o harmonize sanitary and phtyosanitary measures on as wide a basis as possible, Members shall base their sanitary or phytosanitary measures on international standards, guidelines or recommendations...". Furthermore, Article 3(2) of the Agreement deems that SPS measures which conform to international standards will be deemed to be consistent with the *SPS Agreement* and the *GATT 1994 Agreement*.

[1043] See Part II, Title 1, Chapter 3 – Codex.
[1044] *SPS Agreement*, Preamble.

As well, the *TBT Agreement* contains provisions similar to those found in the *SPS Agreement* to give a WTO-compatibility preference to national measures conforming to international standards. Art. 2.4 states that "[w]here technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations...". According to Art. 2.5, a technical regulation that is prepared, adopted and applied for a legitimate objective and is in accordance with relevant international standards, is presumed not to create an unnecessary obstacle to international trade.

While both Agreements allow Members States to enact regulations that go beyond, or deviate, from those international standards,[1045] they will have to justify them to their trading partners or before a WTO Panel. The WTO Appellate Body in the *EC – Sardines* case[1046] articulated this principle succinctly:

> ... there are strong conceptual similarities between, on the one hand, Article 2.4 of the TBT Agreement and, on the other hand, Articles 3.1 and 3.3 of the SPS Agreement... The heart of Article 3.1 of the SPS Agreement is a requirement that Members base their sanitary or phytosanitary measures on international standards, guidelines, or recommendations. Likewise, the heart of Article 2.4 of the TBT Agreement is a requirement that Members use international standards as a basis for their technical regulations. Neither of these requirements in these two agreements is absolute. Articles 3.1 and 3.3 of the SPS Agreement permit a Member to depart from an international standard *if the Member seeks a level of protection higher than would be achieved by the international standard, 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.* Thus, under the SPS Agreement, departing from an international standard is permitted in circumstances where the international standard is ineffective to achieve the objective of the measure at issue. Likewise, under Article 2.4 of the TBT Agreement, a Member may depart from a relevant international standard *when it would be an "ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued" by that Member through the technical regulation* (emphasis added).[1047]

[1045] *SPS Agreement*, Art. 3.1 and 3.3; *TBT Agreement*, Art. 2.4 and 2.9.
[1046] *European Communities – Trade Description of Sardines* (WT/DS231/AB/R), Report of the Appellate Body, 26 September 2002.
[1047] *EC-Sardines at* para. 274.

Both the *SPS* and the *TBT Agreements* promote the use of international standards as the straight-forward benchmark for national measure WTO-compatibility. From a theoretical perspective at least, provisions of both Agreements[1048] make national labelling measures based on Codex Standards immune from a finding that such measures were WTO-incompatible.

B. In practice: the *EC-Sardines* case

Practice has also borne out the new importance and legal status attributed to international norms under the WTO. Several WTO Panels[1049] have referred to Codex Standards to determine whether national standards conform to international standards. The most important of these from a food labelling perspective is the *EC-Sardines* case. This case deserves special attention and a detailed examination of it is illustrative of how the WTO, through its recognition of the Codex norms, has significantly enhanced the reach of international law into national food labelling law.

The facts of the case are straight-forward. At issue was *EC Regulation 2136/89*[1050] which set out the name under which certain species of fish could be marketed in the European Communities. Under the Regulation, the trade description "preserved sardines" could only be used to describe the species "*Sardina pilchardus Walbaum.*"[1051] This fish

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[1048] Codex is acknowledged expressly as on of the "relevant international bodies" in the *SPS Agreement* in the Preamble and Art. 3(4) and only implicitly in the *TBT Agreement*'s Preamble "international standards", Art. 1 "international standardizing bodies" and Art. 2 "international standards".

[1049] *Australia – Measures Affecting Importation of Salmon* (WT/DS18/AB/R), Report of the Appellate Body, 20 October 1998; *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* (WT/DS135/AB/R), Report of the Appellate Body, 12 March 2001; *European Communities – Measures Concerning Meat and Meat Products* (WT/DS26/AB/R), Report of the Appellate Body, 16 January 1998; *EC-Sardines*; and *Japan – Measures Affecting Agricultural Products* (WT/DS76/AB/R), Report of the Appellate Body, 22 February 1999. It is likely, given the nature of the dispute that Codex standards were also central in the case of *European Communities – Trade Description of Scallops* (WT/DS7/1 (Canada); WT/DS12/1 (Peru); and WT/DS14/1 (Chile). However, only a private Interim Panel Report in this case was issued to parties 14 March 1996 with no Final Panel Report ever released because parties came to mutually agreed solution as reported in WT/DS7/R, 5 August 1996.

[1050] *EEC, Regulation No 2136/89 of 21 June 1989 laying down common marketing standards for preserved sardines* [1990] O.J. L. 212 /79 adopted by the Council of the European Communities and entering into force in 1 January 1990.

[1051] Art. 2 of the Regulation.

species is found mainly around the coasts of the Eastern North Atlantic Ocean, in the Mediterranean Sea, and in the Black Sea.[1052]

Peru, on the other hand, exports preserved fish products of the "*Sardinops sagax sagax*" species. This species is found mainly in the Eastern Pacific Ocean, along the coasts of Peru and Chile.[1053] In terms of biological classification the "*Sardina pilchardus*" and the "*Sardinops sagax*" both belong to the same family and subfamily but each belongs to a different genus.[1054]

In 1978, the CAC "adopted a world-wide standard [Codex Standard 94][1055] for preserved sardines and sardine-type products, which regulates matters such as presentation, essential composition and quality factors, food additives, hygiene and handling, labelling, sampling, examination and analyses, defects and lot acceptance."[1056] Codex Stan 94 covers preserved sardines or sardine-type products prepared from 21 species, including both the "*Sardina pilchardus*" and the "*Sardinops sagax*" In its Section 6, Codex Stan 94 sets out very specific rules for the naming of sardines and sardine-type products:

> 6. LABELLING
> In Addition to the provisions of the Codex General Standard for the Labelling of Prepackaged Food (CODEX STAN 1-1985, Rev.1-1991) the following specific provisions apply:
>
> 6.1 NAME OF THE FOOD
> The name of the food shall be:
> 6.1.1 (i) "Sardines" (to be reserved exclusively for Sardina pilchardus (Walbaum)); or
> (ii) "X sardines" of a country, a geographic area, the species, or the common name of the species in accordance with the law and custom of the country in which the product is sold, and in a manner not to mislead the consumer.

[1052] *EC-Sardines*, para. 4.
[1053] *EC-Sardines*, para. 7.
[1054] *EC-Sardines*, para. 8.
[1055] Codex Alimentarius Commission, Joint FAO/WHO Food Standards Programme. "Codex Standard for Canned Sardines and Sardine-Type Products Codex Stan 94-1981, Rev. 1-1995" (Rome: FAO/WHO), online: Codex Current Official Standards < http://www.codexalimentarius.net/web/ standardlist.jsp>(Codex Stan 94).
[1056] *EC-Sardines*, para. 5.

Thus the effect of the EC Regulation was to prohibit the sale of Peruvian sardines of the species "*Sardinops sagax*" in its Member States under the name or trade description of "sardines" or "preserved sardines".

Before a WTO Panel, Peru alleged that the EC Regulation violated the national treatment provisions in Article 2.1 of the *TBT Agreement* and of Article III:4 of the *GATT 1994*). As well, Peru alleged that the EC measure was inconsistent with the *TBT Agreement*'s Articles 2.4 and 2.2 which required national measures more stringent than existing international standards to fulfill a legitimate purpose and not create unnecessary obstacles to international trade. The Panel found that the *EC Regulation* was inconsistent with Art. 2.4 since there were no compelling reasons proved as to why the international measure would have been an ineffective means to fulfill the objective of the *EC Regulation.* The Panel did not need to consider Peru's claims under the other provisions. [1057] The Panel accordingly recommended that the WTO's Dispute Settlement Body (DSB) request the EC bring its measure into conformity with its obligations under the *TBT Agreement.*

Paragraph 2- The EC-Sardines case and the status of Codex norms

The EC appealed the Panel decision on several grounds, one of which being whether the Panel erred in the characterization of Codex Stan 94 as a "Relevant International Standard" in determining the WTO-compatibility of the EC measure. The Appellate Body was obliged to address this question and consequently shed new light on the status of Codex norms under WTO law.

A. "legal" status of Codex norms and interpretation of them by the WTO

The Appellate Body decision in the *EC-Sardines* case recognizes that Codex norms have a significant legal status under the *TBT Agreement.* The EC alleged that the Codex Stan 94 was neither "an international standard", nor a "relevant international standard" for the purposes of determining WTO-compatibility of its Regulation. The Appellate Body found

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[1057] *EC-Sardines*, para. 10.

that it was both. On the first issue, the Appellate Body did not accept the EC's argument that only "international standards" accepted by international consensus would meet the definitional test. Instead the Appellate Body held that "the *TBT Agreement* does not require approval by consensus for standards adopted by the international standardization community"[1058] for such standards to be "international standards" under the *TBT Agreement.*

Furthermore the Codex Standard in question was determined by the Appellate Body to be a "relevant international standard". The EC alleged that it was not because its product coverage was different from that of the EC Regulation, the former covering 21 fish species and the latter only one. The Appellate Body was not persuaded by this argument and gave a wide meaning to the term "relevant". It adopted the Panel's definition of "relevant" to mean "bearing upon or relating to the matter in hand, pertinent". The Appellate Body thus found that the Codex Stan 94 was a relevant international standard as it bears upon, relates to, or is pertinent to the EC Regulation.[1059]

The Appellate Body, moreover, treated the Codex Standard like a document that required legal interpretation. For example, the Appellate Body found that it was obliged to interpret section 6.1.1(ii) of the Standard. It then held that the section had to be read distinctively, that is that the Codex Standard permitted the naming of "X sardines" was satisfied if "X" equalled any of the name of a country, the name of a geographic area, the name of the species or the common name of the species.[1060] Both the Panel and the Appellate Body appear to have acknowledged that the Codex Standard was a document of some legal status that they were obliged to consider and interpret to determine compliance with a WTO obligation. Such a need may appear obvious. However, the impact of the WTO-sanctioned interpretation of the Codex Stan 94 gives the Standard an interpretation which extends beyond the reach of the international organization that drafted it. It also raises the question of which organization ultimately oversees the interpretation and implementation of Codex instruments.

[1058] *EC-Sardines*, para. 227.
[1059] *EC-Sardines*, para. 229, 232, and 233.
[1060] *EC-Sardines*, para 238-239.

Second, the Appellate Body set out a test for proving when an international standard will be "ineffective or inappropriate" to fulfill the "legitimate objectives" of a Member State.[1061] The Appellate Body, which overruled the Panel on this point, held that the burden of proof lay with Peru, the complainant. Peru was required to establish that Codex Stan 94 had not been used "as a basis for" the EC Regulation and that Codex Stan 94 would have been effective and appropriate to fulfil the "legitimate objectives" pursued by the European Communities if they had been enacted through the EC Regulation.[1062] The Appellate Body found that Peru did adduce sufficient evidence to demonstrate that Codex Stan 94 is not "ineffective or inappropriate" to fulfill the "legitimate objectives" of the *EC Regulation.*[1063] While the EC argued that its Regulation pursued legitimate objectives (market transparency, consumer protection and fair competition[1064]), it failed to rebut the evidence that the Codex Stan 94 was an "ineffective or inappropriate means" for the fulfillment of the legitimate objective that it pursued. The Appellate Body thus found that the *EC Regulation* did not meet the obligations of Art. 2.4 of the *TBT Agreement* and recommended that the DSB request that the EC bring its Regulation into conformity with its obligations under the *TBT Agreement.*[1065]

B. the law-making role of the CAC and the CCFL

The decision in the *EC-Sardines* case confirms what some negotiators, academics, and diplomats had predicted when the new *SPS* and *TBT Agreements* were taking form during the Uruguay Round of Multilateral Trade Negotiations. By recognizing in the two Agreements a new role for international standards, the WTO would be granting to the relevant international standards setting bodies a "law-making" role. To be sure, the recognition granted by the WTO of Codex norms means that the standards set out in any of the 300 instruments developed by the Codex to date do have legal relevance as international instruments. Whether one considers Codex vertical standards, such as the one recognized in the *EC-Sardines* case, or the horizontal Codex Standard 1 for the labelling of pre-packaged

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[1061] *EC-Sardines*, para 291.
[1062] *EC-Sardines*, para. 275 and 282.
[1063] *EC-Sardines*, para. 291.
[1064] *EC-Sardines*, para. 263. Peru agreed that these objectives were within the meaning of "legitimate objectives" outlined in Art. 2.4.
[1065] *EC-Sardines*, para. 313 and 315.

food, there seems no plausible reason why they will not all be recognized as international benchmarks against which national food labelling regulations will now be measured.

As for new measures, States who are members of the CAC now fully appreciate that the international standards they approve will be used as international benchmarks under the WTO. This will have two important ramifications for the CAC. First, States will have to devote more energy and vigilance to the development of Codex standards within the CAC Committees. Member States may also spend correspondingly less energy formally adopting Codex Standards into national law knowing that the Codex Standards form part of their international legal obligations under the *SPS* and *TBT Agreement* obligations.[1066] This leads to the second conclusion. The new status of "law-maker" accorded to the international standard setting bodies will also likely lead to the politicization of the CAC.[1067] This has certainly proved to be the case with the particularly prickly issue of developing a Codex Standard for the labelling of genetically modified food.[1068] States may become more reluctant to adopt, and may even openly oppose the development of, standards at the CAC that they know will be applied to their national measures in any event in the case of a dispute that makes its way to a WTO Panel.

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The establishment of the WTO brought with it not only new rules for trade facilitation but also brought under the WTO "roof" disciplines for protection of intellectual

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[1066] This is already the case for Canada. Interview with Greg Orriss, Canadian Codex Contact and Director, Bureau of Food Safety and Consumer Protection, Programs Branch, Canadian Food Inspection Agency (interviewed in Ottawa 5 March 2002 and 2 May 2005).

[1067] Stewart, Terence P. & Johanson, David, S. "The SPS Agreement of the World Trade Organization and International Organizations: The Roles of the Codex Alimentarius Commission, the International Plant Protection Convention, and the International Office of Epizootics" (1998) 26 Syracuse. J.Int'l.L.& Com. 27 at 29.

[1068] Anne A. MacKenzie, "The Process of Developing Labeling Standards for GM Foods in the Codex Alimentarius" (2000) 3(4) AgBioForum - [Electronic] Journal of Agrobiotechnology Management & Economics, Article 4. Donald Buckingham, "The Labelling of GM Foods – The Link Between Codex and the WTO" (2000) 3(4) AgBioForum - [Electronic] Journal of Agrobiotechnology Management & Economics, Article 5; Donald E. Buckingham, "Hot Potato, Hot Potato: Regulating Products of Biotechnology by the International Community" (2001) 35(1) J. World Trade 1.

property and for the recognition of international standards that formerly had been under separate international regulatory schemes.

While the *TRIPS Agreement* has contributed greatly to the harmonization of international rights and obligations of Member States in the formulation of their trademark law, the same is not true for the law protecting other intellectual property. The limited contribution of the *TRIPS Agreement* to sorting out international obligations for protecting geographical indications is perhaps a reflection of how far apart Member States are in their approaches to regulating certain aspects of commerce, particularly when it comes to the commodities that one eats and drinks.

Adoption of the *WTO Agreement* means that all Member States are now bound to recognize the relevance and importance (as well as the potentially binding nature) of all of the international standards of Codex. While they may enact national standards that differ from those Codex standards, States will have to be prepared to defend such national measures and, when challenged by trading partners, to explain why the international measures are inappropriate. Codex standards are no longer free-standing voluntary suggestions for the way in which states develop their national labelling policy. To ignore the Codex standards is to run the risk of developing national measures which, like those for sardines promulgated by the EC, will be held to be non-compatible with WTO standards. Although no cases concerning food labelling issues relating to food safety have yet come before WTO panels, similar conclusions can be drawn about the importance of international standards under the *SPS Agreement*. Both recognize and depend heavily on content of international standards as drawing the "line in the sand" between permissible and non-conforming national food labelling standards.

Even the CAC recognizes its new function and importance in the international trading system. As stated by the CAC, "The adoption of Codex standards as scientifically justified norms for the purpose of the *SPS* and the *TBT Agreements* are of immense significance. The standards have become an integral part of the legal framework within which international trade is being facilitated through harmonization. Already, they have

been used as the benchmark in international trade disputes, and it is expected that they will be used increasingly in this regard."[1069]

[1069] Codex Alimentarius Commission, Joint FAO/WHO Food Standards Programme. *Understanding the Codex Alimentarius* (Rome: FAO and WHO, 1999), online: FAO Information Division <http://www.fao.org/docrep/W9114E/W9114E00.htm> "Codex and the international food trade" at p. 3.

Part II Conclusions / Les Conclusions de la Partie II

Part II's detailed review of the evolution of international legal obligations affecting food labelling supports three major findings. First international legal obligations, prior to the establishment of the WTO, had little impact on national food labelling regimes. Second, the establishment of the WTO consolidated international legal commitments relating to intellectual property protection, non-tariff barrier elimination and food standard setting. The effect of this consolidation, given the enforcement mechanism available under the WTO, is to provide WTO Members with the ability to challenge their trading partners' national food labelling rules, something that was largely beyond their grasp before the establishment of the WTO. A third conclusion is that developing countries may have been able to realize greater benefits from the internationalization of rules affecting food labelling obligations than have developed countries.

1. International Obligations Prior to the WTO Had Little Impact On National Food Labelling Law

National food labelling law is a complex web of provisions that requires certain elements to appear on all food products, reserves certain claims to be used on food labels for approved users only and totally prohibits the use of other claims on food labels. The study of three national food labelling regimes shows that there is often a balancing that occurs between producer-oriented objectives protecting property and facilitating commerce, with objectives protecting consumer-oriented objectives protecting human health and providing consumer information.

International legal obligations that have come into force over the past two centuries show no such balancing between producer and consumer objectives. Initiatives to protect consumer-oriented objectives have been almost non-existent. Such legal initiatives have remained almost exclusively within the competence of States' national legislatures. Legal regulation affecting food labelling at the international level thus relates primarily to States' goals to seek international legal recognition of producer-oriented objectives.

1.1 International obligations affecting food labelling advance producer-oriented objectives

While detailed food labelling regulation was being developed as a standard feature of national legal systems during the XIXth and XXth centuries, there was no direct parallel at the international level. Before World War II, few international treaties were signed that even touched on the subject of food labelling. Treaties that did, sought to advance producer-oriented objectives like the harmonization of national laws relating to the protection of trademarks and the standardization of products to facilitate international trade.

Furthermore, early international regulation to advance producer-oriented objectives rarely enjoyed universal participation. Treaties to harmonize national laws for the protection of trademarks and the prevention of unfair competition had broad participation but there have always been rogue States where trademarks were routinely violated. On the other hand, other treaties relating to the recognition of geographical indications and product standardization did not have wide participation. None of these treaties targeted national food labelling obligations but rather encouraged harmonization of producer-oriented objectives that were already part of national laws.

The *GATT 1947* continued the trend of advancing international initiatives for the producer-oriented objective of trade facilitation. Again, although not targeting national food labelling legislation, the *GATT 1947* included rules to discipline any non-tariff barrier that might unnecessarily restrict trade. While the *GATT 1947* rules could be used to "condemn" instances of national food labelling measures that were discriminatory, only one national labelling measure was ever brought before a GATT panel for consideration. The reserved use of the term "dolphin-friendly tuna" for producers who meet U.S. regulatory requirements was approved by the GATT panel, but its report was never adopted by the Contracting Parties.[1070] Thus even the *GATT 1947* with its objectives of trade facilitation, provided little in the way of binding legal obligations that affected national food labelling regulation.

[1070] *United States – Restrictions on Imports of Tuna* (unadopted Panel Report), 30 I.L.M. 1594 (1991).

1.2 Mandatory food labelling, a producer and consumer concern, remains a matter of national paramountcy

The heart of national food labelling law, as seen above in Part I, is the regulation of mandatory labelling. Serving to advance both producer- and consumer-oriented objectives, mandatory labelling is acknowledged by States as having the potential to become a barrier to trade.[1071] Yet prior to the establishment of the WTO, international agreements did not attempt to specifically address when such national labelling measures might become unnecessarily trade distorting. The *GATT 1947* provided clear exceptions for national measures that related to the protection of human life and health. It also provided, as GATT jurisprudence demonstrated, more complex exceptions for measures protecting the environment. On the whole, however, national food labelling regulations setting out mandatory labelling requirements were left largely unaffected by *GATT 1947* trade facilitation obligations. States continued to pursue national labelling objectives with new regulations without a significant fear of GATT scrutiny of such provisions.

1.3 International food labelling standards are optional but influential

One international initiative in the pre-WTO period did influence the development of national food labelling law—the development of international standards for food labelling by the Codex Alimentarius Commission (CAC). The CAC's goals, both for the advancement of the producer interest of trade facilitation and of the consumer interest of health protection and marketplace fairness, led to the rapid development of a few horizontal, and many vertical, standards for the labelling of foods. When developed, these Standards were presented to participating States as optional standards that could be, but were not required to be, adopted into national law.

The Codex Standards, while optional, had an effect on the development of national food labelling laws. While a final analysis of cause and effect is beyond the scope of this

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[1071] WTO, Committee on Technical Barriers, *Labelling and Requirements of the Agreement on Technical Barriers to Trade (TBT): Framework for Informal, Structured Discussions*, Communication from Canada, Revision, G/TBT/W/174/Rev.1, 31 May 2002 and WTO, Committee on Technical Barriers to Trade and Committee on Trade and Environment, *Labelling*, Submission by the European Communities, G/TBT/W/175; WT/CTE/W/212, 12 June 2002.

study, it is interesting to note that two of the three countries have national standards that almost identically mirror the CAC General Standard for the Labelling of Prepackaged Foods.[1072] In Table 10 "Comparing mandatory elements for food labelling in the three study countries and Codex" set out above,[1073] one notes that only Canada is significantly out of step with the Codex Standard. The Standards of Codex have therefore had a significant impact in influencing the development of national food labelling regulation, even if they have not done so by way of the creation of treaty obligations.

As a first general conclusion then, international legal initiatives undertaken in the period 1850-1995 did not significantly impede the development and implementation of national food labelling laws, but may have provided an impetus for some degree of standardization of national food labelling laws amongst certain countries.

2. WTO Obligations Have a Direct Effect on National Food Labelling Measures

The establishment of the WTO signals a radical reorientation of the role of international law in the regulation of food labelling law. The reach of international law into national regulatory affairs affecting food labelling is now direct for three reasons. The WTO system for liberalizing trade: (1) requires States to submit disputes to mandatory dispute resolution; (2) clarifies existing rules for acceptable instances of non-complying national measures; and (3) creates or incorporates new international legal obligations that States are bound to follow in designing national legal measures. All three of these changes have a direct impact upon the ability of States to develop national food labelling measures.

[1072] Codex Alimentarius Commission, Joint FAO/WHO Food Standards Programme. "Codex General Standard for the Labelling of Prepackaged Foods Codex Stan 1-1985 (Rev. 1 -1991)" *Codex Alimentarius, Vol. 1A: General Requirements*, 2nd ed. (Rome: FAO and WHO, 2000) 25-35.
[1073] Part II, Table 10, page 286.

2.1 Mandatory dispute resolution at the WTO puts national measures under scrutiny

Under the single undertaking commitment that established the WTO, States are fully aware that all national measures, including food labelling measures, can be scrutinized for WTO-compatibility.[1074] Trading partners have the ability to challenge national measures that appear to be in violation of WTO obligations. With mandatory dispute resolution now a permanent future of the WTO, States are required to adjust their standard of review from a level of scrutiny that previously could have been described as a "predominantly-national-and-sometimes-international" standard to a more evenly balanced "must-vet-national-for-international-compliance" standard.

State legislators and regulators can no longer assume that national measures will not be scrutinized for compliance with WTO obligations, and that scrutiny may, if unresolved, result in mandatory dispute settlement. Even such culturally-sensitive matters as national requirements for the mandatory naming of food products will not be beyond WTO scrutiny. When the EU Regulation regarding the trade description of sardines was found to be non-compliant with *TBT Agreement* rules, the EU Regulation had to be revised. This kind of interaction between international obligations and (supra)national regulation was not a feature of international discourse before the establishment of the WTO.

2.2 Clarification of key WTO rules limits design options for national food labelling measures

Whereas the *GATT 1947* focused its initial energies on tariff reductions with non-tariff barrier reduction mechanisms slower to evolve, new WTO rules address non-tariff barriers directly. The *SPS Agreement* and the *TBT Agreement* set out the parameters to be applied to determine if national food labelling measures are WTO-compatible. The new SPS rules provide a narrow and exacting definition of what constitutes a legitimate SPS measure

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[1074] See for example, International Centre for Trade and Sustainable Development. "WTO Committees Scrutinize GMO Regulations and EU Wine Labelling", 6(25) Bridges Weekly Trade News Digest (3 July 2002), online: ICTSD <http://www.ictsd.org/weekly/02-07-03/story4.htm>.

(a measure based on science supported by a valid risk assessment), leaving much less opportunity to justify national labelling measures as permissible SPS measures.

The *TBT Agreement* sets out rules, albeit in a more expansive way than the *SPS Agreement*, to discipline other non-tariff barriers, including food labelling measures. When national labelling measures are unable to meet the threshold test to be considered a legitimate SPS measure, such as will be the case for several consumer-oriented and culturally sensitive food labelling rules, they will be subject to meeting the test for being legitimate TBT measures. While the *TBT Agreement* provides a larger degree of latitude for Member States to justify national technical measures than does the *SPS Agreement* to justify health and safety measures, the fact remains that the new rules under each Agreement will subject each and every food labelling measure to scrutiny under the WTO rules.

2.3 Incorporation of legal obligations and initiatives from other international institutions under WTO law make previously voluntary standards mandatory

Legal disciplines under the WTO also include multilateralized obligations concerning intellectual property and competition. Rules in the *Paris Convention* concerning the protection of trademarks and for the prevention of unfair competition are now incorporated by reference into the *WTO Agreement*, and violation of those rules could lead to a case coming before the WTO Dispute Settlement Body. States without the necessary national legislation for the protection of trademarks or for the prevention of unfair competition have had to introduce new legislation.

More significant for food labelling, however, has been the recognition and incorporation of Codex Standards in WTO Panel decisions as a standard by which compliance with WTO obligations can be determined. The use of a Codex Standard for the resolution of a dispute about the trade description of sardines was illustrative of this approach. The use by WTO Panels of Codex Standards is clearly mandated by both the *SPS Agreement* and the *TBT Agreement*, but the practice poses the more general question of whether compliance with all Codex Standards has now become the standard to which States

will be held for WTO-compatibility of national food labelling measures. If this is the case, it is indeed arguable that Codex Standards have been elevated from their "optional" status under the CAC to a "mandatory minimum standard" under the WTO. As the *EU-Sardines* case dealt only with a "vertical" standard for sardines, it remains to be determined if only these specific standards or all standards and guidelines of the CAC will become "mandatory minimum standards" for determining the WTO-compatibility of national food labelling measures.

3. Developing States Benefit From International Obligations Affecting Food Labelling

International legal obligations affecting food labelling benefit developing countries in two distinct ways: internationally-recognized labelling standards are available as "off-the-shelf" standards for adoption directly into the national law of developing countries thereby saving the time and expense of developing unique national standards, and; developing countries can use international standards that they adopt into national law as the trading rules that "level the playing field" so that non-conforming national food labelling laws in developed countries will not be used to restrict imports from developing countries.

3.1 The adoption of internationally-recognized food labelling standards provides benefits to developing countries in their home markets

Vertical and horizontal food labelling standards of CAC are developed through a negotiating process that examines the national opinion and practice of all participating States. These standards, thus, represent an internationally accepted scientific and political consensus on how food might be acceptably labelled for internal markets and for international trade. The CAC's three goals of protecting consumer health, ensuring fair practices in the food trade and facilitating international trade demonstrate a sensible balance between producer-oriented and consumer-oriented objectives.

The elaboration of food labelling standards at the national levels also requires considerable expertise—scientific, administrative, legal—as well as political sauvé to get from policy to legal instrument. For developing countries, where human and capital

resources are often insufficient to meet competing economic and social demands, the adoption of "off-the-shelf" international food labelling standards offers countries the opportunity for considerable savings. Human and capital resources that would have been allocated to developing "home-grown" food labelling standards can then be deployed for other pressing needs.

Opting to adopt international food labelling standards from the CAC is not, however, without its own costs. First, CAC standards must still be incorporated into national law. Second, vertical CAC standards may not be available for all products that are produced in a country and must still developed at home. Finally, there may be a "cultural cost" implicit in the adoption of internationally developed CAC standards in that they may not represent the policy needs and concerns of the developing country. To adopt "ready-made" international standards may lead to allegations of a "sell-out" to the economic and cultural perspectives of other States' and their notions of what kind of food labelling is appropriate. One way however, to counter such allegations is for developing countries to be well represented at the CAC. With a cadre of competent and skilled individuals ready to negotiate new standards, including standards relating to food labelling, developing States can contribute to the formulation of Standards that take into consideration the vital and important objectives of their State, be they producer- or consumer-oriented food labelling objectives.

3.2 The adoption of internationally-recognized food labelling standards provides benefits to developing countries when trading food products internationally

Adopting international food labelling standards will also assist developing countries in international trade. When a developing country has adopted CAC food labelling standards, it can rest assured that any measures it takes to implement those standards on products imported into its market are WTO-compatible. Furthermore, if its exports, which conform to its national CAC-based food labelling standards, are denied entry into another State for failing to meet that other State's more stringent food labelling requirements, then there will be a basis for commencing a WTO challenge. This is precisely the situation that Peru found itself in with respect to the EU in the *EU-Sardines* case. The developing country,

in that case, was able to use the mechanisms of the WTO to force the EU to change its measure.

Again opting to challenge an importer's "more-stringent-than-Codex food labelling standard" is not without its costs. [1075] National expenditure must be incurred to train a cadre of nationals who can formulate a WTO case even if that case is later managed and argued by non-national WTO litigators.[1076]

[1075] Prasidh, H.E. Cham. "Food Trade and Implementation of the SPS and the TBT Agreements: Challenges for Developing Countries in Meeting the Obligations of the SPS and TBT Agreements and the Codex Alimentarius" *Conference on International Trade Beyond 2000: Science-Based Decisions, Harmonization, Equivalence and Mutual Recognition Held in Melbourne, Australia 11-15 October 1999* (Rome: FAO, 1999), online: FAO <http://www.fao.org/docrep/meeting/X2666E.htm>.

[1076] For an excellent account of the actual process of bringing a WTO case, see David Palmeter & Petros C. Mavroidis, C. *Dispute Settlement in the World Trade Organization: Practice and Procedure* (The Hague: Kluwer, 1999).

FINAL CONCLUSIONS AND THE FUTURE OF FOOD LABELLING REGULATION

[Ce même texte se trouve en version française ci bas.]

Food and the ability to produce it, allows a nation to retain its sovereignty. This is precisely why the people who produce and prepare food are so very important.

-Anita Stewart, "Food for the Soul", *Motion Magazine*, p. 23, Fall, 2002.

Because the state, while internally supreme, wishes to maintain its sovereignty externally and needs to cultivate other states in an increasingly interdependent world, so it must acknowledge the rights of others. This acceptance of rights possessed by all states, something unavoidable in a world where none can stand alone, leads inevitably on to a system to regulate and define such rights and, of course, obligations."

-Malcolm Shaw, *International Law*, 5th ed. (Cambridge: Grotius Publications, 2003).

Here on Mount Zion the Lord Almighty will prepare a banquet for all nations of the world—a banquet of the richest foods and the finest wine.

- The Holy Bible, Isaiah 25:6

"A banquet for all nations of the world—a banquet of the richest foods and the finest wine" is what the Prophet Isaiah promises. If such a banquet is ever to be prepared for all nations, it will indeed require significant coordination and international cooperation. It will be individual nations, each with their own particular histories and cultural idiosyncrasies, not one global monolithic community that will attend this glorious banquet! Nations and the international community remain distinct.

In the last half century, the international community has taken some important strides to increase international cooperation and to facilitate international trade. International obligations undertaken by States now penetrate into the deepest recesses of national regulation, even into the manner in which States develop and implement national measures affecting food production and food marketing. Increasingly these international initiatives and obligations touch upon the legal regulation of food labelling which until very recently was exclusively within the legal domain of national States alone. Still many individuals, as well as State representatives, would support the position that "food and the ability to produce it, [and market it,] allows a nation to retain its sovereignty". This study's review of three national legal regimes and of obligations under international law demonstrates that national sovereignty and international agreements both now shape the content and implementation of food labelling regulation.

This last section of the dissertation canvasses two overarching conclusions which can be drawn from this study of food labelling regimes from France, Canada, Ghana and that developed by States cooperatively and primarily encapsulated in the Agreements of the WTO.

The first conclusion is that international obligations now have a significant impact on national food labelling regimes where once they had virtually none. This conclusion can be concretized through an illustration of the penetration of international labelling obligations into the food labelling regimes of each of the three study countries.

A second overarching conclusion is that the WTO's role as an institution which sets rules for international trade and oversees the compatibility of national food labelling measures does have limits. The WTO cannot and should not attempt to "do it all". Current WTO rules are sufficient to identify certain non-compliant national food labelling measures. But for other measures, predominantly national ones seeking to achieve non-health related consumer objectives, the WTO rules are simply not sufficiently clear to permit WTO Panels to make appropriate rulings. To ask WTO Panels to do so would be to ask them to proceed into territory where Member States have not yet negotiated rules. Until States negotiate clearer rules that could be applied to determine if certain national food labelling measures are illegitimate barriers to international trade, national sovereign rights to enact food labelling legislation would remain paramount over international rules. If the dispute settlement system is employed to resolve "hard cases", questions as to the credibility and appropriateness of the WTO as a forum for dispute settlement of sensitive food labelling issues will be raised.

1. Response to the Problematique – International legal obligations for trade liberalization increasingly affect the national food labelling regimes of France, Canada and Ghana

The Problematique of this dissertation posed two questions that this study would address:

> **(1) What internal influences have shaped the development of national food labelling regimes in the particular country examples of France, Canada and Ghana? and**
>
> **(2)What impact has international law's increasing focus on trade liberalization had on the national food labelling regimes of France, Canada and Ghana?**

Part I addressed the first question through its examination of the legal basis and content of three national food labelling law regimes. Every State, whether it is France from the "Old World", Canada from the "New World" or Ghana from the "Third World", develops a legal matrix of food labelling rules from a unique blend of social, cultural and historic developments that vary from country to country. While each State develops its own

set of food labelling rules, some elements are common to all three States. With respect to consumer-oriented objectives of protecting consumer health and providing consumer information, each State requires six of the same mandatory elements for the food labels of pre-packaged food.[1077] With respect to producer-oriented objectives of protecting product value, each of the three States protects certain kinds of intellectual property in food products. To serve both producer and consumer objectives, each State also has promulgated rules and enforcement procedures to prevent uncompetitive practices and the fraudulent or misleading use of food labels.

On the other hand, each national system retains its own unique features which highlight the pursuit of certain objectives over others. France continues its tradition of maintaining strong food labelling rules (now largely through EU regulation) that protect quality and value attributes of food. Recognition of these quality signs has strong support from both producers and consumers and, as a result, little conflict arises in efforts to extend food labelling rules to signal food quality in France.

Canadian food labelling regulation is currently turning away from the advancement of producer-oriented interests to the pursuit of new consumer objectives now manifested, for example, in a requirement for nutrition fact labelling for all prepackaged food products. Rules for more consumer nutritional information have resulted in Canada assuming a position of international leadership in the area of nutritional labelling, but one that puts Canadian requirements in excess of both the other two study countries and international standards.

Ghanaian food labelling law is unique from that found in either France or Canada. Its origins are in colonial labelling rules that were meant to facilitate agricultural exports and to protect the intellectual property of incoming British food products. However, most of the old rules, inherited from the colonial period, have now largely been swept away with a system of food labelling rules which mirrors international standards developed by expert committees of the CAC in Rome.

[1077] Part II, Table 10, page 286.

Part II of this study addressed a second source of influences on national food labelling law—international rules for the liberalization of trade. These international rules are having increasingly important effects upon the national food labelling regimes of France, Canada and Ghana. These effects are both of a general and specific nature. Generally, as noted above in the Part II Conclusions, all national legislation which affects international trade must conform to Member States' obligations under the WTO. Thus food labelling laws must comply with WTO rules particularly those set out in the *SPS Agreement* or the *TBT Agreement*.

While the common elements of the national food labelling regimes of each of France, Canada and Ghana are not likely to be challenged under the WTO rules, some of the unique features of each of the study countries food labelling regime have, or may in the future, come under direct scrutiny of the WTO. Below is a brief review of one such example from each of the study countries.

1.1 France – A current challenge to labelling requirements relating to food quality

One common theme in the French system of regulatory control of food labelling (now enshrined in the EU regulations) is a focus on the labelling of "quality products". The earliest French laws related to labelling controls on bread, wine and cheeses to prevent the sale of inferior products as the sale of goods of a certain higher quality. Safety and health are only part of the bigger notion of quality in France. This larger notion of quality and its legal protection is not a notion shared by all of its trading partners, nor is it reflected in the trade obligations under the WTO. The issue of "quality" and the labelling rules that might accompany its marking are regulated under WTO rules pertaining to commercial objectives, such as preventing fraudulent activities that will hurt the integrity of the marketplace and injure honest buyers and sellers, or to property issues, such as protecting intellectual property in quality goods.

The preoccupation of the French with the identification and protection of food quality is reflected in their domestic legislation. This preoccupation has found limited expression at the international level in the *Madrid Agreement* and the *Lisbon Agreement*, both of which have limited membership and lack enforcement mechanisms. However, these agreements reflect the same perspective with respect to the protection of quality attributes through the recognition and protection of indications of source and appellations of origin. The WTO now recognizes such marks to a limited degree, but it does not grant legal protection of such marks to the same level as is enshrined in French and EU law.[1078]

The French focus on marking quality is not one of the values reflected in *WTO Agreements*. The *TRIPS Agreement* recognizes product quality in a very limited way and as such labelling measures to facilitate these quality markings may well be permitted under the *TBT Agreement*. Already France's trading partners have attacked this system of marking quality as not being WTO-compatible, although with only limited success. [1079] The *EC-GIs case* and the *EC-Sardines case* indicate a willingness of States to use the WTO to impose limitations on the discretion of national regulators under French (and EU) law to set standards for the use of certain types of quality/value marks on food labels.

1.2 Canada – A potential challenge to labelling requirements relating to consumer health

Canada's food labelling requirements for the mandatory inclusion of a nutrient fact table on prepackaged food products is the most onerous of the three countries, requirements that are even in excess of the Codex General Standard for the Labelling of Prepackaged Food[1080] and of the Codex Guidelines on Nutritional Labelling.[1081]

In the 1970s, with the coming into force of the *CPLA*, Canadian regulators increased their attention on food labelling laws that would advance consumer interests. These

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[1078] Although it begins to do so in respect of wines and spirits.
[1079] *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs (WT/DS174/R), Report of the Panel, 15 March 2005.*
[1080] Codex Alimentarius Commission, Joint FAO/WHO Food Standards Programme. "Codex General Standard for the Labelling of Prepackaged Foods Codex Stan 1-1985 (Rev. 1 -1991)".
[1081] Codex Alimentarius Commission, Joint FAO/WHO Food Standards Programme, "Codex Guidelines on Nutritional Labelling CAC/GL 2-1985 (Rev. 1-1993)".

provisions, together with those in the *FDA* to protect against misleading and deceptive labelling, provided consumers with basic standardized information on all food products. This trend towards consumer protection was quite in keeping with similar laws found in other States and quite compatible with the *GATT 1947*'s objectives and its Chapter XX exceptions for national measures relating to human health and the prevention of deceptive practices.

However, new provisions requiring the compulsory provision of nutrient fact table labelling break new ground in Canada's approach to labelling food. Although it is often alleged that one of the primary motivations for food labelling in Canada in the past was the promotion of food safety and consumer health, very little of the history of the legislation prior to the nutrient fact table legislation specifically addressed labelling issues to enhance food safety.

Is Canada's bold step open to challenge under the WTO? The facts appear clear. Canada requires a new mandatory food labelling element to advance the objective of human health protection and the provision of enhanced consumer information for healthy eating choices. Canada's new requirements are more onerous that those set out by Codex both in terms of contents for the nutrient fact table and in terms of making their provision mandatory. The *EC-Sardines* case held that trade descriptions that were out of step with internationally agreed standards could constitute an unnecessary obstacle to trade and would be ordered removed.

Could the Canadian government defend its new regulations before a WTO panel or would this be another example of international obligations limiting the ability of national government policymakers to implement domestic food labelling legislation that is demanded the Canadian public? If challenged, Canada will be forced to defend its new measure either as a "labelling requirement directly related to food safety" and therefore subject to the obligations under the *SPS Agreement* or as a "technical regulation" and subject to the disciplines set out under the *TBT Agreement*.

In either case, a key reference for the WTO Panel examining the case will be the Codex Guidelines on Nutrition Labelling. Given that the Canadian nutrient fact table information is more stringent than the recommendations in the Codex Guidelines, it is arguable that the Canadian measure constitutes "an unnecessary obstacle to trade". This is the issue that had to be addressed in the *EC-Sardines* case. If the same reasoning is applied, mandatory Canadian nutritional labels could be considered an obstacle to trade.

1.3 Ghana – Requirements to modernize national intellectual property rules

Ghana has a sophisticated food labelling regulatory regime with legislative components comparable with those found in France or Canada. Its food labelling regime, more than the other two countries', is already a product of the international influences of the CAC in Rome. Ghana has adopted and implemented food labelling standards at a cost far lower than if it had developed its own standards. It has not needed to expend resources on scientific and policy analyses to update its existing food labelling law. As well, by adopting standards developed by international consensus, Ghana has positioned itself well for its food labelling laws to withstand international scrutiny before any WTO Panel[1082] and to have its products labelled to internationally accepted standards and accepted into other countries' markets.

Ghana's membership in the WTO has required it to significantly modernize its intellectual property law regime. This legislative reform will have a direct impact on food labelling in that country. Since the establishment of the WTO, to meet its obligations under the *TRIPS Agreement*, Ghana has revamped its *Patent Act*, its *Copyright Act* and has passed its first *Geographical Indicators Act*. A revised *Trade Marks Act* is currently before Parliament. WTO obligations have resulted in Ghana having to make expenditures for implementation that might not otherwise have been a priority for legislative action.

[1082] However, Ghana has not yet been a complainant or a respondent for any WTO dispute. It was however a third party in *European Communities – Regime for the Importation, Sale and Distribution of Bananas* (WT/DS27/AB/R), Report of the Appellate Body, 9 September 1997. Source: email communication with Lucie Giraud, Information Officer, Information & Media Relations Division, WTO.

2. The Future of Food Labelling Regulation – State Sovereignty and the Limits of International Rules

What lies ahead for the future of food labelling? How will current and new food labelling issues be resolved between national food labelling initiatives and international legal obligations? There is no evidence to suggest that regulation at either the national or the international level will simply fade away. The dynamic history of the evolution of national food labelling law, the cultural and economic attachment of States to their food production and consumption systems and the notion of national food sovereignty will not wither away any more than the notion of the State itself will. Nor does there appear to be any sign that efforts to continue the facilitation and liberalization of international trade, including trade in food products, is losing momentum.

Food labelling will continue to be regulated at both the national and international levels. The scrutiny of national measures by international organizations and the trend towards the harmonization of national measures to international standards, however, cannot proceed faster than the consensus of trading States. One author has aptly summed up the situation as follows:

> Certainly, in the end, food labelling decisions must be respectful of provisions that are intended to give individual nations the right to protect health at levels their authorities find to be appropriate. But this apparent inconsistency with the goal of harmonization can often be resolved by identifying as a principle the likelihood that increased understanding and scientific data are the key to harmonizing such national decisions. ... Harmonization cannot be superimposed, it must evolve and will entail adjustment of laws, regulations, policies standards, and practices between difference jurisdictions so as to minimize dissonance and facilitate commercial activity.[1083]

The future of food labelling regulation and the appropriate balance to be struck between national autonomy and international regulation will be the subject of ongoing international negotiations. Ongoing negotiations at the WTO and at the CAC demonstrate that the

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[1083] Christine, J. Lewis, "Harmonization, Mutual Recognition and Equivalence: Labelling and Nutritional Requirements – How Much Information is Necessary?" *Conference on International Trade Beyond 2000: Science-Based Decisions, Harmonization, Equivalence and Mutual Recognition Held in Melbourne, Australia 11-15 October 1999* (Rome: FAO, 1999), online: FAO <http://www.fao.org/docrep/meeting/X2673E.htm> para. 46.

international community is capable of agreeing to standards and rules that are of mutual benefit and that this body of rules is constantly growing.

It is important to note, however, that States have not been able to agree to international rules that set out the appropriate balance between national rules and international obligations for all aspects of food labelling law. As noted in Part I, there still exists significant differences in the national food labelling regimes. As noted in Part II, international obligations now exist that address food labelling measures and require them to conform to certain rules. But tensions between these international rules and specific national food labelling measures continue to arise. Tensions in relation to new labelling challenges can be grouped into the following three categories: (1) tensions between trade facilitation rules and national objectives for measures to provide producer-oriented information; (2) tensions between trade facilitation rules and national objectives for measures to protect human health; and (3) tensions between trade facilitation rules and national objectives for measures to provide non-health consumer information. For each of these categories, the extent to which international obligations are now clearly in place for determining the limits of national sovereignty is different. Consequently, the role of international obligations in adjudicating international disputes concerning each category will be different. Put more simply, the WTO should be seen to have limits as to which national labelling measures are reviewable under current international legal obligations.

2.1 The tension between trade facilitation and national objectives for enhanced producer-oriented information

The obvious strength of the international trading system is in its ability to eliminate national measures that are unnecessary barriers to trade. The *EC-Sardines* case was one such case where the (supra)national labelling rule under scrutiny was of particular commercial significance. The labelling requirement was of a particular benefit to one group of producers, European sardine fishermen, and detrimental to another group of producers, Peruvian sardine fishermen. The national labelling rule was not in accord with the established international Codex Standard. The WTO's primary objective is to facilitate international trade. A national rule which prefers one set of producers over another flies in

the face of general trade facilitation. Thus, here is a clear example of a labelling regulation that was a non-tariff barrier that was an unnecessary obstacle to trade within the meaning of the *TBT Agreement*. States have all agreed to bring their national laws into conformity to avoid such measures and thus Peru's use of the WTO system to challenge the national rule is a totally appropriate use of international trading rules to challenge a producer-oriented labelling rule.

The WTO has become particularly adept at this sort of determination. Where food labelling measures relate solely to producer-oriented and commercial objectives, then such measures will fall fully under the gaze of the WTO and its rules facilitating trade. Thus where food labelling rules have the sole purpose of promoting domestic producer interests and are more restrictive than international standards for intellectual property protection under the *TRIPS Agreement* or than international standards for food labelling under the Codex, the WTO is serving an appropriate role in disciplining non-conforming, producer-oriented food labelling measures.

As well, negotiations on future rule changes at the WTO will give States an opportunity to lobby for new rules that might favour the retention of certain national measures that they view as essential for furthering producer-oriented objectives. At present, it is difficult to conceive of national producer-oriented measures that would be WTO-compatible. It is possible to imagine, however, that in the future Member States might negotiate an exception to WTO rules to permit national food labelling measures that highlighted products of developing country producers.

2.2 The tension between trade facilitation and national objectives for human health protection

The WTO is also well-situated to mediate between national measures to protect human health and international rules to facilitate international trade. The *SPS Agreement* has delineated clear rules which permit States to enact national requirements to protect health in excess of international standards if they meet the requirements of the *SPS Agreement*. It seems to make good sense that new food labelling measures with the central objective of

promoting human health should be subject to SPS requirements. Thus if Canada wishes to enact mandatory legislation for nutritional labelling because it promotes human health, then it should be prepared to defend such legislation before a WTO Panel. Given that the new Canadian standards are more onerous than an existing Codex Standard, Canada would have to provide evidence as to why a measure in excess of international standards is necessary.

However, even with clear rules under the *SPS Agreement*, difficulties of interpretation can arise. First, there is the issue of scientific uncertainty. Take the example of genetically modified (GMO) foods. The labelling of GMO foods has been in part generated by disagreement about whether GMO foods pose a human health risk. Since scientific opinion differs, some States feel that labelling GMO foods will inform consumers of a potential health risk. The *SPS Agreement* contains rules to permit measures where scientific evidence is insufficient, but such measures are permitted only on a provisional or temporary basis.

A second, and potentially more difficult, challenge facing the WTO is the current lack of clarity as to whether a food labelling measure will be considered a human health protection measure or simply a technical barrier to trade. Countries have been filing notifications of national food labelling measures to both the SPS and the TBT Committees at the WTO. From the examination of national food labelling regimes in Part I, it appears that very few national labelling rules relate exclusively to human health protection. Many labelling measures provide both health information and consumer choice information. Even nutritional labelling, which at first glance appears to be related only to the protection of human health, can be argued to be supply both as it supplies consumers with information about what might be valuable for *long-term* human health outcomes. This information is clearly not of the same nature as is food labelling for allergens or for "best-before" dates which are measures designed to prevent immediate human health risks.

Thus, even with respect to food labelling measures that seek to advance human health objectives, current WTO rules are not clear on which disciplines will apply to measures that pursue goals of both health information and consumer information.

With respect to food labelling requirements, the Member States have tried to address the issue of when national measures to protect human health will be compatible with international trade obligations. However, when labelling measures address issues for which there is divided scientific opinion, like the mandatory labelling of GMO foods, or where national labelling measures pursue more than just human health objectives, as nutritional labelling can be argued to do, then the application of WTO rules becomes difficult. Until States negotiate clearer rules, or until Codex Standards are negotiated for a particular type of food labelling issue, the role of the WTO should be limited to the application of the *SPS Agreement* rules only to food labelling measures directly relating to the protection of human health.

2.3 The tension between trade facilitation and national objectives for enhanced non-health related consumer information

Current and future conflicts with respect to national and international obligations are likely to continue, however, with respect to labelling issues not relating to human health and safety. It is in the area beyond human health and safety that the historical, political and cultural factors of individual states most colour national food labelling law. Some States clearly attribute to "food and food issues" a more important position in their national culture than do others. Some States have more developed consumer movements that demand more information on food labels. Information about food product lifecycles, production methods, effects on the environment, effects on the humans that produced them, are issues about which States will have difficulty developing an international consensus.[1084] States will continue to develop their own rules to suit their own national exigencies—recognition of quality, enhanced consumer information, etc. As well, it is here that the non-health and safety labelling rules necessarily collide with the objective of facilitating international trade. Deciding between national labelling measures that unnecessarily restrict trade and those which do not is no easy task. There will continue to be conflicts between national measures and international obligations because the rules in the *TBT Agreement* are not currently

[1084] Although the work of Codex on the labelling of organic products is testimony that even in this area international consensus is possible.

precise enough to separate legitimate measures from those that unnecessarily restrict trade under this rubric. It appears that either WTO rules must be further refined to deal with these sorts of labelling issues or that such measures must remain beyond the purview of WTO obligations.

2.4 The challenge – recognizing the limits of WTO intervention into national food labelling regimes

Without question, the ability of countries to maintain unique elements in their national labelling regimes is increasingly constricted. However, the WTO has been created to facilitate trade and States regularly use it to ferret out national measures that offend WTO rules. With respect to purely commercial measures, like the *EC-Sardines* case where the EU was attempting to use labelling to protect its own fishermen from international competition, the WTO's role is clear. Trade-distorting national measures that prefer one set of producers over another will not be WTO-compatible. WTO rules have not yet been sufficiently well developed, on the other hand, to deal with national consumer-oriented food labelling measures. It is unlikely that domestic legislation that responds to consumer concerns that are not supported by sound science will be able to meet current WTO rules which refer to the international standards of Codex. Should however, a State or block of States succeed in "codifying their national health measures" into a Codex Standard, then such standards will become WTO-compatible.

With respect to non-health related consumer information labelling requirements, the WTO simply has inadequately developed rules. To force such issues to WTO dispute settlement will probably deliver a result that many of the Member States do not feel was part of the Uruguay Round Negotiations "bargain". Such decisions as well would be difficult to implement and make bad precedents for WTO jurisprudence. *TBT Agreement* rules on non-health related consumer information labelling requirements need further negotiation both at the WTO for general rules and at the CAC for the development of particular Codex Standards. Negotiations, for example, have been used by the EU to have limited international recognition of geographical indications as part of the *TRIPS Agreement*. Other States with strong interests to protect certain consumer interests through mandatory food

labelling could do the same. Whether France and the EU can successfully negotiate an international consensus on the need for mandatory GMO food labelling or whether Canada can promote its new higher standards for nutritional labelling into a revised Codex Standard remains to be seen.

With respect to food labelling, then, the WTO has limitations. It cannot and should not be viewed as an institution that can eliminate all trade-distorting national measures. Where clear disciplines have solidified into WTO obligations, then the WTO mechanisms may rightfully be employed to remove non-conforming national food labelling measures. For the moment, however, those rules likely only exist for food labelling measures that relate to the protection of consumer health and the protection of producer objectives like maintaining market fairness and protecting internationally recognized intellectual property rights. To ask the WTO to do more than this, is to threaten its long term sustainability. As in other areas of international discourse, if the WTO is asked to reach into areas of national sovereignty for which Member States are not yet prepared to surrender national control, the result will be predictable: conflict and dissension among Member States that will undermine the WTO's general credibility and effectiveness in overseeing the development and implementation of the rules governing international trade.

THE END

[Annexes and Bibliography follow at page 372 after the French version of the above]

LES CONCLUSIONS FINALES ET LE FUTUR DE LA RÉGLEMENTATION DE L'ÉTIQUETAGE DES DENRÉES ALIMENTAIRES

[This same text is set out in English above.]

Food and the ability to produce it, allows a nation to retain its sovereignty. This is precisely why the people who produce and prepare food are so very important.

- Anita Stewart, « Food for the Soul», *Motion Magazine*, p. 23, Automne 2002.

Because the state, while internally supreme, wishes to maintain its sovereignty externally and needs to cultivate other states in an increasingly interdependent world, so it must acknowledge the rights of others. This acceptance of rights possessed by all states, something unavoidable in a world where none can stand alone, leads inevitably on to a system to regulate and define such rights and, of course, obligations."

-Malcolm Shaw, *International Law*, 5th ed. (Cambridge: Grotius Publications, 2003).

L'Éternel des armées prépare à tous les peuples, sur cette montagne, Un festin de mets succulents, Un festin de vins vieux, De mets succulents, pleins de moelle, De vins vieux, clarifiés.

- La Sainte Bible, Ésaïe 25 :6

Le prophète Ésaïe promet « Un festin de mets succulents, Un festin de vins vieux, De mets succulents, pleins de moelle, De vins vieux, clarifiés.» Si un tel festin devait effectivement être préparé pour toutes les nations, il demanderait certainement une coordination et une coopération internationale importante. Mais, ce serait des nations individuelles, chacune avec leur histoire et avec leurs particularités culturelles, et non pas une communauté homogène globale qui assisteraient à ce banquet glorieux! Les nations et la communauté internationale demeurent distinctes.

Au cours des cinquante dernières années, la communauté internationale s'est engagée de manière significative dans l'optique d'une augmentation de la coopération internationale pour faciliter le commerce international. Les obligations internationales prises par les États pénètrent profondément dans la réglementation nationale, au point même d'influencer la façon dont les États développent et mettent en vigueur les mesures nationales qui affectent la production et le marketing des aliments. De plus en plus, les initiatives internationales et les obligations qui étaient, jusqu'à tout récemment, du ressort juridique exclusif de l'État affectent la réglementation juridique de l'étiquetage des denrées alimentaires. Toutefois, plusieurs experts et représentants étatiques sont d'accord pour dire que les aliments et la capacité de produire des aliments ainsi que d'en faire le marketing, permet à une nation de conserver sa souveraineté. L'examen qu'effectue cette thèse des trois régimes juridiques nationaux et des obligations découlant du droit international, démontre que la souveraineté nationale ainsi que les accords internationaux conditionnent le contenu et la mise en vigueur de la réglementation de l'étiquetage alimentaire.

La dernière partie de ce travail permet de tirer deux conclusions de l'étude des systèmes d'étiquetage des denrées alimentaires en France, au Canada et au Ghana à la lumière des *Accords de l'OMC*.

La première conclusion est, comme nous venons de le rappeler, que les obligations internationales ont actuellement un impact important sur les systèmes nationaux d'étiquetage alimentaire, alors qu'elles n'avaient pas d'impact auparavant. Cette

constatation est concrétisée d'avantage par les exemples de la pénétration des obligations internationales sur l'étiquetage dans les systèmes de chacun des trois pays étudiés.

La seconde conclusion d'ensemble est que l'OMC en tant qu'institution qui détermine les règles du commerce international et qui surveille la compatibilité des mesures nationales d'étiquetage alimentaire joue un rôle qui doit avoir des limites. L'OMC ne peut pas et ne devrait pas « tout faire ». Les règles actuelles de l'OMC sont suffisantes pour identifier certaines mesures nationales d'étiquetage des denrées alimentaires qui ne respectent pas ces règles. Cependant, en ce qui a trait à d'autres mesures, principalement les mesures nationales cherchant à atteindre des objectifs visant les consommateurs sur des sujets autres que la santé, les règles de l'OMC ne sont pas suffisamment claires pour permettre aux Groupes Spéciaux de l'OMC de trancher sur ces questions. En leur demandant de trancher ces questions, on leur demanderait de s'ingérer dans un domaine dans lequel les États membres n'ont pas encore négocié de règles.

1. Réponse à la Problématique – Les obligations juridiques internationales sur la libéralisation du commerce affectent de plus en plus les systèmes d'étiquetage national de la France, du Canada et du Ghana

La Problématique de ce travail a soulevé deux questions :

(1) Quelles influences internes ont façonnées le développement des systèmes d'étiquetage alimentaire dans les trois pays étudiés, soit la France, le Canada et le Ghana ?

(2) Quel impact l'importance accrue, accordée par le droit international à la libéralisation du commerce, a-t-elle sur les systèmes juridiques nationaux de l'étiquetage alimentaire en France, au Canada et au Ghana ?

La première partie répond à la première question à travers l'examen du fondement juridique et du contenu de trois systèmes d'étiquetage alimentaires nationaux. Que ce soit la France, de l' « Ancien Monde », le Canada, du « Nouveau Monde » ou le Ghana, du « Tiers Monde », chaque pays développe une structure législative et réglementaire régissant l'étiquetage alimentaire à partir d'une combinaison unique de développements sociaux,

culturels et historiques, qui varient entre pays. Bien que chaque État développe un modèle de réglementation qui lui est propre, certains éléments de cette réglementation sont communs aux trois États.

D'une part, en ce qui a trait aux objectifs destinés à protéger la santé des consommateurs et à leur fournir de l'information, chaque État applique six éléments obligatoires qui sont les mêmes pour les étiquettes alimentaires des aliments préemballés.[1085] Ensuite, pour les objectifs destinés aux producteurs face à la protection de la qualité des produits, chacun des États protège certains éléments de la propriété intellectuelle pour les aliments. Enfin, afin de répondre aux objectifs visant les producteurs et les consommateurs, chacun des États a aussi promulgué des règlements et des mesures d'application dans le but de prévenir les pratiques anti-concurrentielles et l'utilisation d'étiquettes alimentaires frauduleuse ou mensongère.

D'autre part, chacun des systèmes nationaux conserve des caractéristiques qui lui sont propres et qui favorisent la poursuite de certains objectifs. La France continue sa tradition et maintient des règles strictes sur l'étiquetage alimentaire (principalement à travers la réglementation de l'UE) qui protègent la qualité et la valeur des aliments. Les producteurs et les consommateurs approuvent grandement l'existence de marques qui reflètent la qualité et, en conséquence, peu de différends résultent des efforts qui visent à étendre les règles sur l'étiquetage qui signale la qualité des aliments en France.

La réglementation des étiquettes alimentaires au Canada abandonne actuellement les objectifs visant l'avancement des intérêts des producteurs afin de poursuivre de nouveaux objectifs à l'intention des consommateurs, qui se manifestent, par exemple, dans les normes sur l'étiquetage de la valeur nutritive pour tous les aliments préemballés. Les règlements concernant les renseignements sur la valeur nutritive sont fait de telle sorte que le Canada occupe une position de leadership au niveau international en matière d'étiquetage sur la valeur nutritive. Cependant, les normes canadiennes excèdent les exigences des deux autres pays étudiés ainsi que les normes internationales.

[1085] Partie II, Table 10, à la p. 286.

Le droit de l'étiquetage alimentaire ghanéen est différent du droit français et canadien sur le sujet. Il tire ses origines des règles d'étiquetages coloniales qui visaient à faciliter l'exportation des produits agricoles et à protéger la propriété intellectuelle des produits alimentaires britanniques. Toutefois, la plupart des anciennes règles, héritées de la période coloniale, ont majoritairement été replacées par un système d'étiquetage alimentaire reflétant parfaitement les normes internationales développées par le comités d'experts de la Commission du Codex Alimentarius à Rome.

La deuxième partie de ce travail a permis d'identifier les règlements internationaux pour la libéralisation du commerce comme la deuxième source ayant des influences sur le droit de l'étiquetage alimentaire national. Ces règlements internationaux ont des effets de plus en plus importants sur les systèmes nationaux d'étiquetage alimentaire de la France, du Canada et du Ghana. Ces effets sont de nature générale et spécifique. En général, et tel que noté à la conclusion de la Partie II, toute la législation qui affecte le commerce international doit se conformer aux obligations des États partie de l'OMC. Or, les lois sur l'étiquetage alimentaire doivent se conformer aux règles de l'OMC, et en particulier, celles qui sont énoncées dans *l'Accord sur les mesures sanitaires et phytosanitaires* (SPS) ainsi que dans *l'Accord sur les obstacles techniques au commerce* (TBT).

Il est peu probable que les éléments communs aux systèmes nationaux d'étiquetage des denrées alimentaires de la France, du Canada et du Ghana soient contestés en vertu des règles de l'OMC. Cependant certaines des caractéristiques uniques des systèmes de chacun des pays étudiés ont déjà fait l'objet, ou risquent de faire l'objet, de critiques directes de la part de l'OMC. Un exemple d'une telle situation pour chacun des pays étudiés permet de mieux comprendre ce problème.

1.1 La France – Une contestation actuelle vis-à-vis les exigences relatives à la qualité des aliments

Un des thèmes récurrents dans le système de réglementation français sur l'étiquetage alimentaire (présentement enchâssé dans les règlements de l'UE) est l'attention portée à l'étiquetage des « produits de qualité ». Les premières lois françaises visaient à établir des règles sur l'étiquetage du pain, du vin et du fromage afin de prévenir la vente trompeuse de produits de qualité inférieure à la place de produits reconnus pour leur qualité. La sécurité et la santé sont seulement une partie des composantes de la notion de qualité en France. Cette définition plus large de la notion de qualité et de sa protection juridique n'est pas une définition qui est partagée par tous les partenaires commerciaux de la France et on ne la retrouve dans les obligations commerciales de l'OMC. La question de la « qualité » et les règles sur l'étiquetage qui la définissent sont établies par les règles de l'OMC sur les objectifs commerciaux (tels que celles visant à prévenir les activités frauduleuses qui risquent de fausser la régularité du marché et causer des préjudices aux acheteurs et aux commerçants honnêtes) et par les règles sur les objectifs relatifs aux biens (telles que les règles sur la protection de la propriété intellectuelle relative aux marchandises de qualité).

La préoccupation des Français face à l'identification et la protection des aliments de qualité sont reflétées dans leur législation nationale. Cette préoccupation a seulement été traitée de façon étroite au niveau international dans *l'Arrangement de Madrid* et dans *l'Arrangement de Lisbonne*, qui ont seulement un nombre limité de membres et qui manquent de mécanismes visant à les faire respecter. Cependant, ces arrangements reflètent la même perspective relative au respect de la protection des attributs de qualité de par la reconnaissance et la protection d'indications de provenance et les appellations d'origine. L'OMC, dans une certaine mesure, reconnaît maintenant de telles marques, mais elle ne leur accorde pas une protection juridique au même niveau que ce qui est prévu la législation de la France et de l'UE.[1086]

L'attention que les Français portent aux indicateurs de qualité n'est pas une la même que celle qui est prévue dans l'*Accord de l'OMC*. Comme nous venons de le voir, *l'Accord*

[1086] Cependant, cette protection est en train de développer pour les vins et les eaux-de-vie.

sur les aspects des droits de propriété intellectuelle qui touchent au commerce (TRIPS) reconnaît la qualité des produits de façon très limitée et, de fait, des mesures visant à faciliter l'application de ces marques de qualité seront permises en vertu de *l'Accord TBT.* Déjà les pays partenaires du commerce de la France et de l'UE contestent le système de l'application des marques de qualité, avec des succès limités.[1087] À la lumière de la *cause l'CE sur les IG* et de la *cause de l'CE sur les sardines*, on constate une volonté chez les États partenaires de la France d'utiliser les règles de l'OMC et d'imposer des limites à la discrétion des législateurs français mais aussi à la discrétion de la Commission européenne pour imposer des normes lors de l'utilisation de certaines sortes de marques de qualité et de valeur sur les étiquettes alimentaires.

1.2 Le Canada – Une contestation potentielle face aux exigences d'étiquetages relatives à la santé des consommateurs

L'exigence d'étiquetage alimentaire du Canada prévoyant l'inclusion obligatoire sur les produits alimentaires préemballés d'un tableau de la valeur nutritive est la plus contraignante existant dans un des trois pays étudiés et excède la norme générale du Codex pour l'étiquetage des denrées alimentaires préemballés[1088] et les directives du Codex pour l'étiquetage nutritionnel.[1089]

Pendant les années 1970, avec l'entrée en vigueur de la *Loi sur l'emballage et l'étiquetage des produits de consommation*, les législateurs canadiens prirent en compte de manière spectaculaire les intérêts des consommateurs. Ces dispositions, appliquées de concert avec celles de la *Loi sur les aliments et drogues*, pour assurer une protection contre l'étiquetage trompeur et déceptif, fournissaient aux consommateurs une information de base standardisée sur tous les produits alimentaires. Cette tendance vers la protection du consommateur était conciliable avec des lois d'autres États et très compatible avec les

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[1087] *Communautés Européennes - Protection des marques et des indications géographiques pour les produits agricoles et les denrées alimentaires* (WT/DS174/R), - Rapport du Groupe Spécial, 15 mars 2005.
[1088] La Commission du Codex Alimentarius, Programme mixte FAO/OMS sur les normes alimentaires. « Norme générale Codex pour l'étiquetage des denrées alimentaires préemballés Codex Stan 1-1985 (Rev.1-1991) ».
[1089] La Commission du Codex Alimentarius, Programme mixte FAO/OMS sur les normes alimentaires. « Lignes directrices concernant l'étiquetage nutritionnel CAC/GL 2-1985 (Rev.1-1993) ».

objectifs du *GATT de 1947* ainsi qu'avec les exceptions pour les mesures nationales relatives à la santé humaine et la prévention de pratiques déceptives incluses dans son chapitre XX.

Toutefois, les nouvelles dispositions prévoyant l'inclusion, sur l'étiquette, d'un tableau obligatoire de valeur nutritive est très novateur dans l'approche canadienne de l'étiquetage alimentaire. Même si on allègue parfois que l'une des motivations principales de l'étiquetage alimentaire au Canada dans les années passées était la promotion de la salubrité des aliments et la santé des consommateurs dans l'histoire de la législation antérieure à la législation prévoyant l'inclusion du tableau de valeur nutritive, très peu de dispositions concernaient spécifiquement l'amélioration de la salubrité des aliments.

L'OMC peut-elle contester cette audacieuse initiative canadienne? Les faits semblent clairs. Le Canada a besoin d'un nouvel outil obligatoire relatif à l'étiquetage alimentaire afin de faire avancer son objectif concernant la protection de la santé humaine et la fourniture de meilleures informations à l'intention des consommateurs, pour les encourager à faire des choix alimentaires éclairés et sains. Les nouvelles exigences canadiennes, face au contenu du tableau des valeurs nutritives et au caractère obligatoire de telles exigences, sont plus exigeantes que celles qui ont été établies par le Codex. La *cause de l'CE sur les sardines* a soutenu que les désignations de fabrique qui n'étaient pas conformes aux normes internationales établies pouvaient constituer des obstacles inutiles au commerce et pouvaient être abolies.

Le gouvernement canadien pourrait-il défendre sa nouvelle législation devant un Groupe Spécial de l'OMC, ou cette situation serait-elle un autre exemple d'exigences internationales qui limitent la compétence des responsables de l'élaboration de politiques publiques visant à mettre en vigueur une législation nationale sur l'étiquetage alimentaire appropriée pour les citoyens canadiens? Si on conteste la législation, le Canada sera obligé de défendre son nouvel outil en soutenant qu'il est « une exigence d'étiquetage directement reliée à la salubrité des aliments » qu'il est soumis aux obligations de *l'Accord SPS* ou qu'il est un « règlement technique » soumis aux mesures élaborées dans *l'Accord TBT.*

Dans chacun des cas, une référence clé pour le Groupe Spécial de l'OMC effectuant l'évaluation serait les directives du Codex pour l'étiquetage nutritionnel. Étant donné que l'exigence canadienne relative à l'inclusion des informations au tableau des valeurs nutritives est plus rigoureuse que les recommandations des directives du Codex, on pourrait soutenir que la mesure canadienne est « un obstacle inutile au commerce ». C'est cette question qui a dû être tranchée dans la *cause de l'CE sur les sardines*. Si le même raisonnement est appliqué à la situation du Canada, les étiquettes nutritionnelles obligatoires pourraient être considérées comme un obstacle au commerce.

1.3 Le Ghana – Les exigences pour la modernisation des règles nationales sur la propriété intellectuelle

Le Ghana a un régime de réglementation sophistiqué sur l'étiquetage alimentaire avec des composantes législatives comparables à celles de la France et du Canada. Son système d'étiquetage alimentaire reflète, encore plus que ceux des deux autres pays, les influences du CAC à Rome. Le Ghana a adopté et mis en vigueur des normes sur l'étiquetage alimentaire à un coût beaucoup moins que s'il avait développé ses propres standards. Il n'a pas eu besoin d'élargir ses ressources pour effectuer les analyses scientifiques et politiques nécessaires pour faire la mise à jour du droit sur l'étiquetage des denrées alimentaires. De plus, puisqu'il a adopté des normes développées par consensus international, le Ghana se voit presque assuré que ses lois résisteront à un examen critique par la communauté internationale devant un Groupe Spéciale de l'OMC[1090] et se voit ainsi presque assuré que ses marchandises, étiquetées selon les normes internationales seront accueillis au sein des marchés d'autres pays.

Ceci dit, le fait d'être membre de l'OMC a forcé le Ghana à moderniser, de façon importante, son régime du droit de la propriété intellectuelle, dont certaines parties ont un impact direct sur l'étiquetage alimentaire. Depuis la création de l'OMC, le Ghana a modifié sa loi sur les brevets (*Patent Act*), sa loi sur le droit d'auteur (*Copyright Act*) et a mis en

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[1090] Il faut noter que jusqu'au présent, le Ghana n'a jamais été ni défendeur, ni plaignant dans un cause devant un Groupe Spécial de l'OMC. Il a été, cependant, une tiers partie une seule fois dans la *cause Communautés européennes - Régime applicable à l'importation, à la vente et à la distribution des bananes* (WT/DS27/AB/R), Rapport de l'Organe d'appel, 9 septembre 1997 ; communication de courriel avec Lucie Giraud, Responsable d'information, Division de l'information et les relations de presses, OMC.

vigueur sa première loi sur les indices géographiques (*Geographical Indicators Act*). Les modifications de sa loi sur les marques de commerce (*Trade Marks Act*) est devant le Parlement. Les obligations de l'OMC ont fait en sorte que le Ghana a dû engager des procédures afin de légiférer sur des matières qui n'auraient peut-être pas été parmi ses priorités du point de vue législatif.

2. Le futur de la réglementation de l'étiquetage alimentaire – La souveraineté étatique et les limites des règles internationales

En quoi consiste l'avenir de l'étiquetage alimentaire? Comment les nouvelles questions d'actualité sur l'étiquetage seront-elles résolues entre les initiatives nationales sur l'étiquetage alimentaire et les obligations juridiques internationales? Rien ne suggère que la réglementation nationale ou internationale s'éteindra tout simplement. L'histoire dynamique de l'évolution du droit national sur l'étiquetage alimentaire, le lien culturel et économique des États avec leurs systèmes de production et de consommation d'aliments et la notion de la souveraineté alimentaire nationale ne s'éteindront pas plus que la notion de l'État. Les efforts pour continuer à faciliter et à libéraliser le commerce international, incluant le commerce au niveau des produits alimentaires, ne semblent pas prêts de diminuer d'intensité.

Il semble alors évident que l'étiquetage alimentaire continuera à être réglementé aux niveaux national et international. Mais, la critique des mesures nationales par les organisations internationales et les tendances visant à rendre les mesures nationales conformes aux normes internationales, ne pourrons pas faire évoluer les choses plus rapidement que le nécessaire consensus des partenaires commerciaux. Un auteur a résumé la situation avec justesse :

> Certainement, au bout du compte, les décisions sur l'étiquetage alimentaire doivent respecter les dispositions qui visent à donner aux États individuels le droit de protéger la santé aux degrés que leurs autorités considèrent comme étant appropriés. Mais cette contradiction apparente avec l'objectif visé par l'harmonisation peut souvent être résolue en identifiant comme point de départ, la probabilité qu'une meilleure compréhension et des données scientifiques sont les éléments clés pouvant contribuer à harmoniser de telles décisions nationales. La notion de

> l'harmonisation ne peut pas être superposée à d'autres notions. Elle doit évoluer et occasionnera des modifications au niveau de la législation, des règlements, des normes de politiques et des pratiques entre les différentes juridictions dans le but de minimiser la dissonance et de faciliter l'activité commerciale [notre traduction].[1091]

Le futur de la réglementation de l'étiquetage alimentaire et l'équilibre approprié qui doit être établi entre l'autonomie nationale et la réglementation internationale sera le sujet de négociations internationales continues. Les négociations à l'OMC et au CAC démontrent que la communauté internationale est capable de s'entendre sur des standards et des règles qui ont des bénéfices mutuels et que le nombre de standards et de règles sur lesquels on s'entend continue à augmenter.

Cependant, il est important de noter que les États n'ont pas été capables de s'entendre sur des règles internationales qui établissent l'équilibre entre les règles nationales et les obligations internationales pour tous les aspects du droit de l'étiquetage des denrées alimentaires. Tel que noté à la Partie I, il existe encore des différences importantes au niveau des régimes nationaux d'étiquetage alimentaire. Tel que noté à la Partie II, certaines obligations internationales existantes adressent des mesures d'étiquetage alimentaire qui les obligent à se conformer à certaines règles. Mais les tensions entre ces règles internationales et les mesures nationales spécifiques sur l'étiquetage continuent à être soulevées. Les tensions relatives aux nouveaux défis de l'étiquetage peuvent être regroupés en trois catégories: (1) les tensions entre les règles facilitant le commerce et les objectifs nationaux des mesures visant à fournir de l'information à l'intention des producteurs; (2) les tensions entre les règles facilitant le commerce et les objectifs nationaux des mesures visant à fournir de l'information sur la protection de la santé; et (3) les tensions entre les règles facilitant le commerce et les objectifs nationaux des mesures visant à fournir de l'information aux consommateurs sur des sujets autres que la santé. Pour chacune de ces catégories le niveau de la mise en vigueur des obligations internationales pour déterminer les limites de la souveraineté nationale est différent. En conséquence, le rôle des obligations internationales

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[1091] Christine J. Lewis, "Harmonization, Mutual Recognition and Equivalence: Labelling and Nutritional Requirements – How Much Information is Necessary?" *Conference on International Trade Beyond 2000: Science-Based Decisions, Harmonization, Equivalence and Mutual Recognition Held in Melbourne, Australia 11-15 October 1999* (Rome: FAO, 1999), en ligne: FAO <http://www.fao.org/docrep/meeting/X2673E.htm> para. 46.

dans la gestion des disputes internationales concernant chacune des catégories est différent. On devrait considérer que l'OMC a des limites concernant la révision de mesures régissant l'étiquetage alimentaire à la lumière des obligations juridiques internationales.

2.1 La tension entre les règles facilitant le commerce et les objectifs nationaux pour la fourniture d'informations à l'intention des producteurs

La force évidente du système commercial international est sa capacité d'éliminer les mesures nationales qui sont des obstacles inutiles au commerce. La *cause de l'CE sur les sardines* est une cause dans laquelle la règle d'étiquetage (supra)nationale faisant état d'un examen approfondi avait une importance commerciale particulière. L'exigence d'étiquetage bénéficiait à un groupe de producteurs, soit les pêcheurs de sardines européens, et était préjudiciable envers un autre groupe de producteurs, soit les pêcheurs de sardines péruviens. La règle nationale n'était pas en harmonie avec la norme internationalement reconnue du Codex. Étant donne l'objectif de l'OMC qui est de faciliter le commerce, un règlement national qui favorise un groupe de producteurs au détriment d'un autre groupe, est évidemment contraire à l'ouverture générale du commerce. Cet exemple est un exemple clair d'un règlement sur l'étiquetage qui était un obstacle non tarifaire et un obstacle inutile au commerce en vertu de *l'Accord TBT*. Les États se sont mis d'accord pour rendre leurs lois conformes aux règles de l'OMC et le fait que le Pérou ait employé le système de l'OMC pour contester la validité d'une règle nationale constitue une utilisation très appropriée du système international pour écarter une règle à l'intention des producteurs.

L'OMC est devenue particulièrement habile lorsqu'il s'agit de rendre une telle décision. Lorsque les mesures sur l'étiquetage alimentaire visent uniquement des objectifs concernant les producteurs et des objectifs commerciaux, de telles mesures peuvent être critiquées par l'OMC en vertu des règles facilitant le commerce. Ainsi, lorsque les règles sur l'étiquetage des denrées alimentaire ont comme seul utilité la promotion des intérêts des producteurs nationaux et sont plus restrictives que les normes internationales pour la protection de la propriété intellectuelle en vertu de *l'Accord TRIPS* et plus restrictives que les normes internationales sur l'étiquetage alimentaire en vertu du Codex, l'OMC joue un

rôle approprié en écartant les mesures favorisant les producteurs qui ne se conforment pas aux normes internationales.

De plus, les négociations à l'OMC sur les modifications futures donneront aux États l'opportunité de revendiquer de nouvelles règles qui favoriseront la préservation de certaines mesures nationales qu'ils considèrent essentielles à l'avancement des objectifs à l'intention des producteurs. Il est difficile de concevoir des mesures nationales qui seraient compatibles avec les règles de l'OMC, mais il est possible d'imaginer que certaines mesures à propos de l'étiquetage puissent être créées dans le but de protéger les producteurs de pays en voie de développement.

2.2 L'affrontement entre faciliter le commerce et protéger la santé humaine

L'OMC est bien placé pour mener une médiation entre les mesures nationales qui visent à protéger la santé humaine et les règles internationales qui facilitent le commerce international. *L'Accord SPS* a déterminé des règles claires qui permettent aux États de mettre en vigueur des dispositions nationales pour la protection de la santé qui surpassent les normes internationales si ces dispositions s'opposent aux exigences établies par *l'Accord SPS*. Or, il semble acceptable que les nouvelles mesures régissant l'étiquetage alimentaire et qui ont comme objectif principal la promotion de la santé humaine soient sujettes aux exigences de l'Accord. Si le Canada souhaite mettre en vigueur de la législation obligatoire sur l'étiquetage de valeurs nutritives parce que cela promeut la santé humaine, il doit être prêt à défendre cette législation devant un Groupe Spéciale de l'OMC. Étant donné que les nouveaux standards canadiens sont plus exigeant que les standards du Codex, le Canada aura à fournir les preuves démontrant les raisons pour lesquelles les mesures surpassant les normes internationales sont nécessaires.

Cependant, même avec des règles claires en vertu de *l'Accord SPS*, on peut soulever certaines difficultés dans l'interprétation de ces règles. Il y a d'abord la question de l'incertitude. Prenons l'exemple des aliments génétiquement modifiés (OGM). L'étiquetage des OGM a, en partie, été engendré à cause du désaccord consistant à savoir si oui ou non

Lorsque les mesures d'étiquetage soulèvent des questions sur lesquels il y a des opinions scientifiques divergentes, tel que sur l'étiquetage obligatoire des OGM, ou lorsque les mesures nationales sur l'étiquetage visent plus que les objectifs relatifs à la santé humaine, tel que pour l'étiquetage nutritionnel, l'application des règles de l'OMC devient difficile. Jusqu'à ce que les États négocient des règles plus claires ou qu'on négocie sur les standards du Codex pour un type de question spécifique, le rôle de l'OMC sera limité à l'application des règles de *l'Accord SPS* aux mesures d'étiquetage alimentaire relatives à la protection de la santé humaine.

2.3 La tension entre les objectifs visant à faciliter le commerce et les objectifs nationaux visant à la fourniture d'informations sur des sujets autre que la santé

Il est probable que les conflits actuels sur les obligations nationales et internationales continuent, mais sur des questions qui ne sont pas reliées à la santé et à la sécurité humaine. C'est dans ce domaine, à l'extérieur des questions sur la santé et la sécurité, que les facteurs historiques, politiques et culturels des États individuels influencent le plus le droit de l'étiquetage alimentaire. Certains États attribuent, au niveau de leur culture nationale, une plus grande importance « aux aliments et aux questions sur les aliments ». Certains États ont des organisations de consommateurs plus organisées qui revendiquent l'inclusion de plus d'information sur les étiquettes alimentaires. Les États seront moins portés à arriver à un consensus sur les questions visant « les cycles de vie de produits », les méthodes de production, les effets des produits sur l'environnement et les effets des produits sur les êtres humains. Les États continueront à développer leurs propres règles afin de satisfaire leurs exigences nationales – sur la reconnaissance de la qualité, sur la communication informations à l'intention des consommateurs, etc. Cependant, c'est ici que les règles d'étiquetage portant sur des questions autres que la santé et la sécurité humaines s'affrontent à un autre objectif, soit celui de faciliter le commerce international. Déterminer quelles mesures d'étiquetage national restreignent inutilement le commerce n'est pas une tâche facile. Il y aura toujours des conflits entre les mesures nationales et les obligations internationales puisque les règles dans *l'Accord TBT* ne sont pas suffisamment précises pour distinguer les mesures légitimes des mesures qui restreignent inutilement le commerce dans

cette rubrique. Il faudrait soit définir davantage les règles de l'OMC afin qu'elles puissent traiter de telles questions, soit laisser de telles questions hors de la portée des obligations de l'OMC.

2.4 Le défi – Reconnaître les limites de l'intervention de l'OMC dans les régimes nationaux d'étiquetage alimentaire

Sans doute, la compétence des États de préserver les éléments uniques de leurs régimes nationaux d'étiquetage est de plus en plus restreinte. Cependant, l'OMC a été créée afin de faciliter le commerce et les États l'utilisent régulièrement pour traquer des mesures nationales qui vont à l'encontre des règles internationales. En ce qui a trait à l'utilisation de mesures uniquement commerciales, tel que dans la *cause de l'UE sur les sardines*, où l'UE tentait d'utiliser l'étiquetage pour protéger les pêcheurs européens face à la compétition internationale, le rôle de l'OMC a été clair. Les mesures nationales qui attaquent le commerce et qui favorisent un groupe de producteurs par rapport à un autre ne sont pas compatibles avec les règles de l'OMC. Les règles de l'OMC n'ont, cependant, pas encore été suffisamment bien développées pour traiter de mesures nationales sur l'étiquetage alimentaire à l'intention des consommateurs. Il est peu probable que la législation nationale qui répond aux préoccupations des consommateurs qui ne sont pas supportées par de solides données scientifiques sera en mesure de rencontrer les règles de l'OMC qui se rattachent aux standards internationaux du Codex. Si, cependant, un État ou un groupe d'États réussissaient à « codifier ses mesures nationales sur la santé » dans un standard Codex, de telles normes deviendraient compatibles avec les règles de l'OMC.

En ce qui a trait aux exigences d'étiquetage pour l'information à l'intention des consommateurs qui porte sur des sujets autre que la santé, les règles de l'OMC ne sont tout simplement pas suffisamment développées. Forcer l'OMC à trancher une question d'une telle nature amènerait probablement plusieurs des États à considérer un quelconque résultat comme incompatible avec les négociations du Cycle d'Uruguay. De telles décisions sont difficiles à mettre en vigueur et sont de mauvais précédents jurisprudentiels. Les règles de *l'Accord TBT* sur les exigences de l'étiquetage relatives à l'information à l'intention des consommateurs sur des sujets autres que la santé, requièrent que l'on entreprenne d'autres

négociations à l'OMC (pour le développement de règles générales) et au CAC (pour le développement de standards Codex particuliers). Le processus de négociation, par exemple, a été utilisé par l'UE afin de se voir accordée une reconnaissance limitée d'indicateurs géographiques en vertu de *l'Accord TRIPS*. D'autres États, voulant protéger certains intérêts des consommateurs par la voie de l'étiquetage alimentaire obligatoire, pourraient faire de même. Il reste à voir si la France et l'UE peuvent, avec succès, négocier un consensus international sur le besoin d'étiqueter les aliments OGM ou si le Canada peut promouvoir ses nouveaux standards exigeants pour l'étiquetage nutritionnel et les inclure dans un standard révisé du Codex.

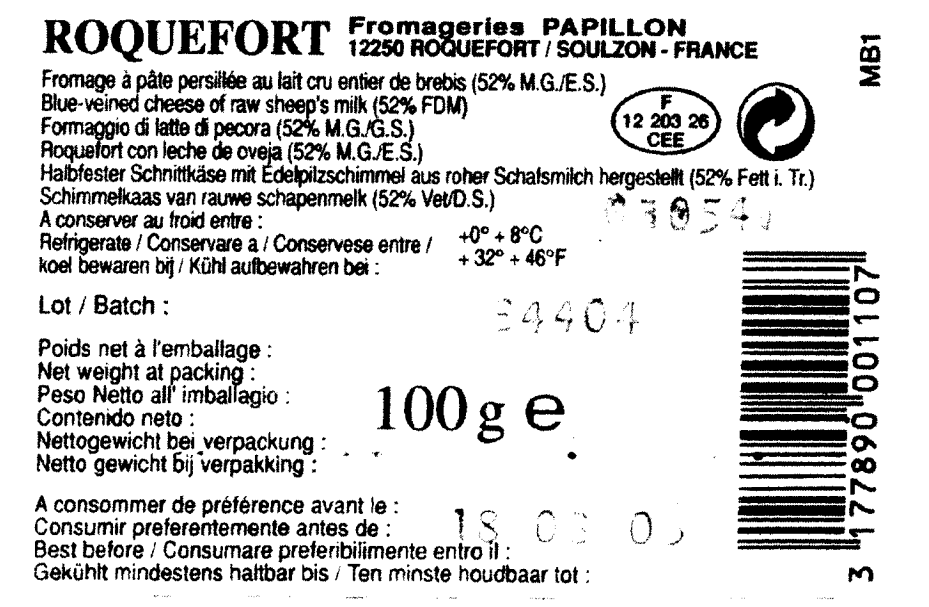
En ce qui a trait à l'étiquetage alimentaire, l'OMC connaît des limites. L'organisation ne doit pas et ne devrait pas être considérée comme étant une institution qui peut éliminer toute mesure nationale qui ne favorise pas le commerce. Dans les domaines où les règles ont été confirmées et lorsqu'elles sont devenues des exigences de l'OMC, l'Organisation peut légitimement être utilisée pour abolir les mesures nationales d'étiquetage alimentaire qui ne se conforment pas à ses exigences. Cependant, pour le moment, il est probable que ces exigences existent seulement au niveau des mesures d'étiquetage alimentaire visant la protection de la santé du consommateur et la protection des objectifs du producteur. Demander à l'OMC d'en faire plus menacerait son efficacité et ferait en sorte qu'elle empièterait sur des questions de souveraineté nationale sur lesquels les États membres sont loin d'être arrivés à un consensus.

LA FIN

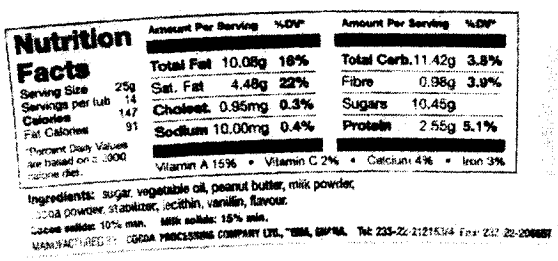
Annex 1 – Label Specimens / Les etiquettes spécimens

Label 1 – Canada – Maple Syrup

Etiquette 2 – La France – le fromage Roquefort



Label 3 – Ghana – Chocolate Spread



Annex 2 – Cotutelle Agreement / Convention du Co-tutelle

1

UNIVERSITE MONTPELLIER I

UNIVERSITE D' OTTAWA

CONVENTION de CO-TUTELLE de THESE de DOCTORAT

La présente Convention est conclue entre :

L' UNIVERSITE D' OTTAWA, représentée par le Doyen de la Faculté des études supérieures et postdoctorales (agissant comme représentant du Vice-recteur, Monsieur Robert MAJOR).

ET

L' UNIVERSITE MONTPELLIER I (UMI) représentée par son Président Monsieur Alain UZIEL.

AU

Elle concerne le doctorant : Donald BUCKINGHAM

Né le : 25 septembre 1958.

Nationalité : Canadienne.

Secteur de formation : Droit.

Spécialité : Droit international ; Droit de la consommation ; Droit communautaire ; Droit de la nourriture.

Sujet de thèse :

« La réglementation de la nourriture au niveau de l' étiquetage :commerce, salubrité ou droit de la personne » ;

« Evaluating food labelling laws : regulating trade, promoting health or protecting human rights » .

Université d' attache : Université d' Ottawa.

2

MODALITES ADMINISTRATIVES

Article 1

La première inscription en thèse de Monsieur BUCKINGHAM, est prise à compter de la rentrée universitaire 2002 - 2003.

L' intéressé devra rester inscrit pendant toute la période de préparation de sa thèse soit trois années consécutives ou six sessions.

L' intéressé devra prendre une inscription annuelle dans chacune des Universités partenaires.

L' étudiant devra payer les droits d' inscription uniquement dans l' Université où il réside .

-1ère année : UM1 et bénéficie de l'exonération des droits par l'autre établissement contractant.

-2ème année : Université d'Ottawa et bénéficie de l'exonération des droits par l'autre établissement contractant.

-3ème année : Université d'Ottawa et bénéficie de l'exonération des droits par l'autre établissement contractant.

AU

Article 2 -- Scolarité et thèse

Le doctorant effectue ses travaux de recherche en alternance entre les deux établissements.

La durée des périodes de travail en cotutelle de Donald BUCKINGHAM dans chacun des deux établissements se répartit comme suit :

- A l' UMI de septembre 2002 à septembre 2003.
- A l' Université d' Ottawa de septembre 2003 à septembre 2005.

La durée prévisionnelle des travaux pourra être prolongée en application des réglementations en cours.

La thèse donnera lieu à une soutenance unique, reconnue par les deux établissements.

Le jury de soutenance sera composé de scientifiques désignés à parité par les deux établissements. Il comprendra obligatoirement les deux directeurs de thèse et un membre extérieur aux deux établissements.

La thèse sera soutenue à l' Université d' Ottawa.

La thèse sera rédigée en français pour la partie concernant la réglementation en France et en Europe et en anglais pour le reste de la thèse.

La thèse sera soutenue en anglais et en français.

Le résumé de la thèse sera rédigé et présenté en français et en anglais.

A ()

Article 6 – Délivrance des diplômes.

Sur avis favorable du jury de soutenance Donald BUCKINGHAM se verra conférer :

- Par l' Université d' Ottawa le grade de « Docteur en droit (LL.D.) » .
- Par l' UMI le grade de « Docteur de l' Université de Montpellier I » .

La mention sera attribuée en fonction de la réglementation en vigueur .

Le libellé de chaque diplôme portera mention de la collaboration de l' établissement partenaire ainsi que de la cotutelle.

Article 7 – Dépôt, signalement et reproduction de la thèse

Il seront effectués dans chaque pays selon les modalités de la réglementation en vigueur :

-- Pour l' Université d' Ottawa, la section G des règlements généraux et le fascicule intitulé *Recherche et Thèse* de la FESP.

-- Pour l' UMI, l' arrêté ministériel du 25 septembre 1985 .

La protection du sujet de thèse ainsi que la publication, l' exploitation et la protection des résultats de la recherche, seront assujetties à la réglementation en

ANNEX 3 – NOTES ON THE EVOLUTION OF THE DISSERTATION / L'ÉVOLUTION DE LA THÈSE

Evolution of the Dissertation

(la version française suit)

From food to food labels

This dissertation did not begin as a detailed investigation of national food labelling regimes and the impact of international legal initiatives on such regimes. Nor did it begin as a multi-jurisdictional examination written in two languages that would require research on three continents. Instead, the project was originally conceived as a means to explore and understand the various dimensions of Canadian law impacting upon the production and sale of food in Canada. It was meant to form the basis of a companion volume to *Agriculture Law in Canada.*[1092]

An initial examination of the various aspects of food law in Canada revealed that the world of food law was vast and that treatment of each part of that body of law, while appropriate for a book did not lend itself easily to focused analysis and argument. A book on Canadian food law would have to describe how Canadian law, both federal and provincial affects the production of food as well as its processing, marketing and consumer rights. Food law, seen through a legal lens, encompasses strands of the private law of property, contracts and torts as well as the fabric of public law, more specifically constitutional, administrative, regulatory and criminal law. Nor could an analysis of Canadian food law be limited to a study of federal and provincial laws. Canada's international obligations under trade, environmental and intellectual property, and even human rights agreements shape its food laws. It quickly became apparent that any doctoral examination of the legal regulation of food would need to be sufficiently succinct and narrow to allow for a rigorous examination and critique of a smaller slice of the food law "pie".

[1092] Robert Fuller & Donald Buckingham, *Agriculture Law in Canada* (Toronto: Butterworths, 1999).

For several reasons, the issue of food labelling law presented itself as a more manageable area for legal analysis. First, food labelling law is clearly a central component of food law. Along with health and safety regulations and packaging requirements, food labelling regulations are central to the interests of both consumers and producers of food. Second, food labels are a central feature of our food purchasing and consumption experience. Most foods consumed in Canada carry labels. Other than foods sold in outdoor and farmers' markets, in restaurants and in bulk, few foods reach the consumer unlabelled. Third, the label is highly regulated and the legislation requiring such labelling has been around for a long time. Finally, the use of food labels and the elements of food labels continue to create controversy. States continue to try to find the right balance between market intervention and laissez-faire capitalism as they have for centuries.

Today, food labelling continues to be at the forefront of discussions of how to deal with new technology (genetic modification), new production processes (organics), new scientific discoveries about the effect of food on the human organism (nutritional labelling; the labelling of transfats), or even new types of property claims (geographical indications). The topic of food labelling law appears then not only to have a very real and evolving legal content worthy of examination, but given current trends, it seems that demands for new food labelling requirements to resolve emerging issues related to food are not likely to go away anytime soon. Regulators will continue to be required by consumers and food producers to provide solutions to requests for what must, what can and what must never appear on food labels.

From Canada to the world

It is becoming more difficult to consider any area of domestic law in isolation from international law. Given the millions of daily commercial transactions around the world involving food, the relevance of international law on the subject of food labelling should be self-evident. I am grateful to my thesis co-directors (both being experts in public international law) for first alerting me to this important dimension of food labelling law.

From their initial gentle nudge in the direction of including an analysis of the international law affecting food labelling, I quickly concluded that it would be this aspect—the interaction of national food labelling laws with international legal obligations affecting food labelling—that would take me into yet unplowed legal territory and yield new insights into the co-existence or conflict of national and international regimes.

Via France and Ghana

A nagging question bothered me. How could I be sure the interaction between one country's national food labelling regime with its international obligations was typical? Would the conclusions I might draw about the impact of international law on Canada's food labelling, be applicable to other nations? How could I know if international legal obligations affect the labelling laws of countries in the same manner and to the same extent? To address this concern, I felt that it was necessary to include more than just a study of Canadian law, so as to be able to establish some sort of national food labelling law baseline. Such a baseline would likely reveal the areas of general convergence of national food labelling laws. It might also show where countries developed different legislative responses to their own unique circumstances. Finally, it would permit some conjecture as to whether or not international legal obligations impose similar or differing constraints on the development and implementation of national food labelling law.

Conceptualizing the new comparative scope of the dissertation's analysis of food labelling law required the selection of study countries. Two was obviously a minimum and more than four, a gargantuan task. Three appeared optimal, particularly if these three countries could represent three different social, political, cultural, culinary and legal traditions from geographically diverse points on the globe. Initially, I felt an appeal for a study from each of, what in a Eurocentric perspective might be referred to as, the "Old World", the "New World" and the "Third World".

Canada was an obvious choice for the New World candidate as it is the one I know best. I was born and raised on a farm in Canada and have been trained as a Canadian lawyer. For the past 15 years I have been teaching, researching and writing in the area of agriculture and food law and have come to realize that agriculture and food production have been highly regulated since before Canada became a nation in 1867.[1093]

France was also an obvious choice because, not only is it my ancestral home,[1094] it is renowned for its food culture, has a long history of food regulation dating back to the XIVth century, and is part of the world's largest internal food trade region, the European Union.

A third study country was less obvious. Being able to read, understand, and speak the language of a country in the developing world limited my choices. Access to resources and resource people in the study country was also a necessary requirement. Avoiding areas of the world where civil conflict was a constant threat also narrowed my range of possible study countries. After initial consideration, two candidates emerged—Ghana and Senegal. Given an assurance of being able to meet key in-country contacts[1095] and the relative ease of conducting research in an English-speaking common law country, I chose Ghana. It soon became apparent that Ghana had been a good choice. Ghana has an important agricultural and food economy both for domestic consumption and for export. Through its British colonial past, it has had food regulation for more than a century and continues today to actively pursue an agenda which includes a number of pieces of food and food labelling legislation.

Culturally and politically, the three study countries are different in significant ways. Some selected statistics demonstrate these differences. From a population standpoint, France is the largest with 60 million inhabitants; Canada is next with 30 million, while Ghana has

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[1093] See Fuller & Buckingham, *Agriculture Law in Canada*. Note also that agriculture is one of only two subject matters (immigration being the other) for which the Canadian Constitution creates explicit shared powers between federal and provincial governments.

[1094] My grandparents arrived from Aveyron in the south of France to Western Canada in 1912.

[1095] The International Development Research Centre assisted me to a large degree in securing these contacts as part of application to the Centre which resulted in their awarding to me an Canadian Window on International Development Award. Without this grant, my research on Ghana food labelling law would have been impossible.

only 20 million. Adult literacy, an important factor in rendering food labelling meaningful, is practically 100% in France and Canada while it is only between 65 - 80% in Ghana.[1096]

Agriculture is largely industrialized in France and Canada with only about 2-3% of the French and Canadian populations[1097] actively involved in farming. These percentages are in stark contrast to the over 50% of Ghana's population who actively produce food. With respect to food production, Canada has the most arable land in terms of surface area, with France and Ghana each having significantly less. However, when one looks at the value of food production, France ranks far ahead of both Canada and Ghana. In fact, France's agriculture is intensive and highly developed with the agri-food sector being the biggest industrial sector in the French economy. In terms of trade, France is the largest exporter of food in the world, even ahead of the United States.[1098] Canada, while being a net exporter of food with important export flows in grains and meats, must import significant amounts of fruits and vegetables. Ghana is a net importer of food.

When it comes to the cultural aspects of food, France is commonly recognized for its cuisine, love of food and the importance that food plays in French life. One French food law author even speaks of the "hedonistic" value of food in France:

> L'aliment sert à se nourrir mais l'homme ne mange pas pour se nourrir: il répond à un *désir* (la faim) et (dans nos pays au moins), il assouvit ce désir par le *plaisir* de manger. Se nourrir est la conséquence, non la cause. Cette valeur hédonique tient une place importante dans le processus de commercialisation des matières premières comme des produits transformés, et le législateur doit aussi intégrer ces éléments dans l'esprit et la lettre de ses textes.[1099]

This type of commentary is difficult to find in Canadian food literature and impossible to detect in Canadian legal literature. The intimacy of food and culture in France

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[1096] Statistics vary but one source puts adult female literacy at 67.1% and adult male literacy at 82.7%.Béatrice Didiot & Serge Cordellier, eds. *L'état du monde: Annuaire économique géopolitique mondial 2005* (Montreal: Editions La Découverte & Editions du Boréal, 2004) *s.v.* « Golfe de Guinéee » p. 128.

[1097] If one adds in the number of people involved in the food processing sectors the numbers in Canada and France rise to just under 10% of the population.

[1098] Pierre-Marie Vincent, *Le droit de l'alimentation, Que sais-je?* vol. 3103 (Paris: Presses Universitaires de France, 1996).

[1099] Vincent, *Le droit de l'alimentation* at 10.

also finds expression in the recognition of the notion of "quality" in France, a term which is even defined in French legislation.[1100] This accent on defining and representing quality in foods occupies a central place in food labelling law in France but much less so in the other two study countries. Indeed, in France the labelling of food and food products is an extremely highly regulated area of the law and one worthy of a two-volume legal treatise on the matter![1101]

It is not then surprising perhaps that the subject of food law has received a more in depth analysis in France than in the other two study countries. In Canada, agricultural law has been recognized as a subject of legal inquiry[1102] but its accent is usually on the legal aspects of agricultural production rather than the relations between producer and consumer. Part of this lack of legal literature on the subject may be due to the different food cultures but part of it might also be attributable to the fact that Canada is a relatively recently settled country.[1103]

Modern farming methods and food regulation are of an even more recent vintage in Ghana. Unlike Canada, Ghana has been an independent State for less than a half-century. It still suffers dramatically from low levels of funds available to run the country. As a developing country, it faces many challenges that Canada and France do not. Particularly acute is the need for the strategic allocation of resources between many competing social and political needs. Among them are issues concerning food--agricultural production issues, consumer issues (including labelling) and trade issues. Food labelling may not be the most pressing need in Ghana. Whatever the reason, there is almost a total absence of academic writing on the subject even though there are several provisions in Ghanaian law pertaining to food production and consumption issues.

[1100] "La qualité d'un produit (ou d'un service) est son aptitude à satisfaire les besoins exprimés ou implicates des utilisateurs", AFNOR Standard x 50 – 120 in Norbert Olszak, *Droit des appellations d'origine et indications de provenance* (Paris: Tec & Doc, 2001) at 104.

[1101] Antoine de Brosses, *L'Etiquetage des denrées alimentaires, t. 1 : Mentions obligatoires, Mentions interdites ; t. 2 : Valoriser le produit, Pratique de l'étiquetage* (Paris: RIA, 2002).

[1102] Fuller & Buckingham, *Agriculture Law in Canada.*

[1103] The population of the prairie provinces—the agricultural heartland of Canada—increased five fold between the 1901 and 1911 censuses and doubled again between the 1911 and 1921 censuses of Canada. Source: Statistics Canada.

While food is obviously important to them, Canadians and Ghanaians are less likely than the French to define their culture with references to food. Even though certain domestic products enjoy some international status, such as maple syrup for Canadians and perhaps fufu and chocolate for Ghanaians, both countries are hard-pressed to demonstrate a national obsession with "la cuisine" in the way that the French can, although this may be changing.[1104]

At least four other reasons can be cited to support the selection of France, Canada and Ghana as excellent representative case studies for the portrayal of the development and current regulatory regimes in place for food labelling.

First, the three countries include representatives of the world's two major legal traditions—common law and civil law. French law is grounded in the Napoleonic Civil Code though vestiges of French food labelling law can be traced to the Ancien Regime as has been demonstrated in Part I *supra*. Canada, a bijuridical country has the English common law and civil law reflected in its provincial and federal laws both by the actual contents of the laws and by the lawyers trained in each tradition that draft, interpret and assist in implementation of these laws. Ghanaian law is directly descended from the English common law. As a colony of the United Kingdom until 1957, Ghana's law and legal tradition are based on English common law and English legislation.

Second, the three study countries provide representation for the two opposing worlds of economic development—the developed and the developing world. This economic attribute has major implications for the development of national legal regimes, including food labelling law. For example, literacy and administrative capacity are important limitations in developing a legal regime for food labelling in Ghana while it is not in the other two countries. On the other hand, the food labelling regimes of France and Canada

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[1104] J.M. Powers & A. Stewart, eds., *Northern Bounty: A Celebration of Canadian Cuisine* (Toronto: Random House, 1995); T. Hultman, ed., *The Africa News Cookbook: African Cooking for Western Kitchens* (New York: Penguin Books, 1985) which features many examples of Ghanaian cuisine, including one of Ghana's national dishes, fufu.

have become extremely complex as a result of the constant demands for risk reduction and specific consumer information. While adequate financial and human resources facilitate this precision, a question remains whether consumers' interests are advanced when labelling information becomes too complex.

Third, France, Canada and Ghana display very different cultural attitudes and traditions towards food. These differences are understandably reflected in the actions of government in determining how food is to be labelled in each country. In France, food holds a central position in the psyche of the state. The French have long been identified as a culture which attributes great importance to food generally, but specifically to its method of preparation and production. Thus, classic instruction in the basic preparation of food around the world is often based on the French tradition.[1105] French producers have for centuries enjoyed special legal protection for their quality products through the French system of "appellations d'origine contrôlée". Furthermore, producers and vendors of food products who attempt to dupe the consumer are systematically prosecuted.

The food cultures of Canada and Ghana are markedly less important in the overall cultural identity of the state. Inheriting English traditions as part of their colonial history and the difficult conditions of colonization, either in terms of coming to grips with the climate in Canada or with the need for embrace export-oriented agricultural production (Canada and Ghana), both countries have not put food at the forefront of their cultural values in the way that France has. In developing an independent nation, both Canada and Ghana have had to develop legislation for many competing political, cultural and economic goals. Food legislation, which has always had an important place in French law, has not enjoyed the same status in either Ghana or in Canada. Food and specifically food labelling, in these latter two countries is more often simply a part of a larger regulatory scheme protecting aspects of human health, market regulation and intellectual property protection. Rather than being exulted to any special position, Canadian food law has been shaped by responses to several food crises. Canada has a history of western expansion and of an agricultural policy

[1105] For example, a standard textbook for professional chef training is W. Gisslen, *Professional Cooking*, 4th ed., (New York: John Wiley, 1999) which is a collaborative work between an American author and the world famous Le Cordon Blue Institute of Paris.

promoting the development of extensive agriculture. Together with a wealth of bulk good production, food and food labelling tends to be regulated like any other commodity.

Ghana experienced economic and political turmoil during the first three decades after independence. This has had dramatic effects on resource allocation and the development of a clear body of law regulating food labelling. Securing adequate food supplies and promoting food production have been government objectives since independence. Other food laws and food labelling legislation have had to compete for attention and funding with the many other pressing national objectives that accompany nation building in developing countries.

Fourth and finally, the countries selected represent different economic positions in the world economy, come from different trading blocs with varying interests in the world trade system, and enjoy different levels of regional economic and political integration at the international level. France hails from the world's largest trading block—the European Union—where it has had a significant influence on the development of the EU food policy. Canada, of course is the northern participant in the North American trading block born out of the North American Free Trade Agreement (NAFTA)—a block that is far less legislatively integrated than the EU but which has significant economic integration in its food and other markets. Ghana is part of the Economic Community of West African States (ECOWAS), a group of 15 nations which to date have very limited regional integration and no common policies in the area of food regulation.

To greater or lesser degrees, these blocks are important in shaping national food policies and within each, different views on food are noteworthy. This can be seen not only by anecdotes contrasting French fine cuisine[1106] with North American fast food[1107] but also by international legal disputes involving food[1108] which are seemingly becoming more frequent and more difficult to resolve.

[1106] E. Neirinck & J.-P. Poulain, *Histoire de la Cuisine et des Cuisiniers : Techniques Culinaires et Pratiques de Table en France, du Moyen-Âge à nos jours* (Paris : LT Editions J. Lanore, 2000)

[1107] Eric Schlosser, *Fast Food Nation : The Dark Side of the All-American Meal* (New York : Harper Collins, 2002)

[1108] Beef, bananas, shrimp, scallops, sardines, tuna, salmon, apples, genetically-modified food products are among the subjects of World Trade Organization disputes amongst member states.

L'évolution de la thèse

(the English version of this text is above)

Des aliments aux étiquettes alimentaires

Cette thèse ne se veut pas une recherche détaillée sur les systèmes nationaux d'étiquetage de denrées alimentaires et sur les impacts des initiatives juridiques internationales sur ces systèmes. Elle n'est non plus, une étude multi-juridictionnelle, rédigée dans deux langues et qui exigerait qu'une recherche soit effectuée sur trois continents. En réalité, le projet a initialement été conçu comme moyen d'étudier et de comprendre les multiples dimensions du droit canadien ayant un impact sur la production et sur la vente des aliments au Canada. L'intention était de créer un travail qui constituerait le point de départ pour la rédaction d'un volume complémentaire à l'ouvrage *Agriculture Law in Canada.*[1109]

Une étude initiale des multiples aspects du droit de l'alimentation au Canada révéla que le monde du droit de l'alimentation est large et que l'étude de chaque partie de ce domaine du droit, bien que cela soit approprié pour la rédaction d'un ouvrage, ne se prêtait pas bien à l'analyse et à l'argumentation ciblées. Un ouvrage sur le droit de l'alimentation canadien serait tenu de décrire comment le droit canadien, aux niveaux fédéral et provincial, affecte la production des aliments ainsi que leur transformation, leur marketing et les droits des consommateurs. Le droit des aliments, selon une perspective juridique, touche des éléments du droit des biens privé, du droit des contrats, du droit des délits civils ainsi que le tissu du droit public, et plus particulièrement, le droit constitutionnel, le droit administratif, le droit réglementaire et le droit criminel. Une analyse du droit des aliments canadien ne pourrait pas être limitée à l'étude de la législation fédérale et provinciale non plus. Les obligations internationales du Canada, en vertu des accords sur l'environnement, sur la propriété intellectuelle et même sur les droits de la personne ont une influence sur les lois sur les aliments. Je me suis rapidement rendu compte qu'une étude de doctorat sur la réglementation juridique des aliments devait être suffisamment succincte et étroite pour

[1109] Robert Fuller et Donald Buckingham, *Agriculture Law in Canada* (Toronto: Butterworths, 1999).

permettre une étude rigoureuse et critique d'un plus petit morceau de « la tarte du droit des aliments ».

Pour plusieurs raisons, la question du droit de l'étiquetage des denrées alimentaires a paru être un domaine du droit plus facile à gérer. Premièrement, le droit de l'étiquetage alimentaire est clairement un élément central du droit des aliments. En plus des règlements sur la santé et la sécurité et les exigences d'emballage, les règlements concernant les étiquettes alimentaires sont un élément central de l'intérêt des consommateurs et des producteurs d'aliments. Deuxièmement, les étiquettes alimentaires sont un élément central de notre expérience d'achat et de consommation de nourriture. La majeure partie des aliments consommés au Canada a des étiquettes. À l'exception des aliments vendus dans des marchés en plein air et dans les marchés d'agriculteurs, dans les restaurants, et les aliments vendus en vrac, peu d'aliments parviennent au consommateur sans étiquette. Troisièmement, une étiquette est hautement réglementée et la législation exigeant un tel étiquetage existe depuis longtemps. Finalement, l'usage des étiquettes alimentaires et les éléments constitutifs de ces étiquettes continuent à créer de la controverse et les gouvernements tentent, depuis de siècles, de trouver le juste équilibre entre l'intervention dans le marché et le capitalisme « laissez-faire ».

De nos jours, l'étiquetage alimentaire continue d'être au premier rang lors des discussions sur la façon de gérer la nouvelle technologie (modification génétique), les nouveaux processus de production (aliments biologiques), les nouvelles découvertes scientifiques sur les effets des aliments sur l'organisme humain (étiquetage nutritionnel, l'étiquetage des gras *trans*), ou même les nouveaux types de propriété intellectuelle (indicateurs de provenance). Le sujet du droit de l'étiquetage alimentaire semble alors non seulement avoir un contenu juridique tangible et en état de l'évolution qui mérite d'être étudié, mais, compte tenu des courants actuels, il semblerait que les requêtes pour de nouvelles exigences relatives à l'étiquetage alimentaire, pour résoudre les questions émergentes, ne disparaîtront pas de ci-tôt. Les consommateurs et les producteurs d'aliments continueront à appeler les organismes de réglementation à fournir des solutions juridiques

aux questions concernant ce qui doit, ce qui peut, et ce qui ne doit jamais apparaître sur des étiques alimentaires.

Du Canada au monde entier

Il est de plus en plus difficile d'écarter les domaines du droit domestiques et du droit international. Étant donné les millions de transactions commerciales quotidiennes impliquant des aliments, la pertinence du droit international en ce qui a trait au sujet de l'étiquetage des denrées alimentaires devrait être évidente. Cependant, je suis reconnaissant envers mes conseillers académiques (qui sont tous les deux experts dans le domaine du droit international public) de m'avoir signalé cette dimension importante du droit de l'étiquetage alimentaire.

Suivant leur encouragement initial d'inclure une analyse du droit international affectant l'étiquetage des denrées alimentaires, j'ai rapidement conclu que ce serait cet aspect – l'interaction des lois nationales sur l'étiquetage alimentaire et des obligations juridiques internationales affectant l'étiquetage alimentaire – qui m'amènerait sur un nouveau territoire juridique non cultivé et qui offrirait la possibilité d'explorer d'avantage la co-existence ou le conflit entre les deux systèmes juridiques.

Via la France et le Ghana

Une question me dérangeait ! Comment m'assurer que l'interaction entre le système d'étiquetage alimentaire d'un pays et les exigences internationales était typique ? Est-ce que les conclusions que je tirerais sur les impacts du droit international sur l'étiquetage alimentaire au Canada seraient applicables à d'autres nations ? Comment savoir si les exigences juridiques internationales affectent les lois sur l'étiquetage dans les pays concernés de la même façon et dans la même mesure. Pour répondre à cette question, j'ai cru nécessaire d'inclure dans l'étude plus qu'une simple analyse du droit canadien, afin de pouvoir établir une sorte de modèle de base sur le droit nationale de l'étiquetage. Ce modèle de base serait alors apte à révéler les domaines de convergence générale du droit national de

l'étiquetage. Il pourrait aussi possiblement démontrer comment les pays ont développé des réponses législatives différentes pour répondre à leur circonstances uniques. Finalement, cela permettrait de proposer une conjecture à savoir si oui ou non les exigences juridiques internationales imposent des contraintes semblables ou différentes sur le développement et la mise en vigueur du droit nationale sur l'étiquetage alimentaire.

Conceptualiser un champ d'application nouvelle de l'analyse du droit de l'étiquetage alimentaire nécessitait la sélection des pays qui seraient visés par l'étude. Évidemment il fallait un minimum de deux pays et étudier plus de quatre pays présentait une tâche gigantesque. Faire l'étude de trois pays me paraissait idéal, particulièrement si ces trois pays pouvaient représenter trois traditions sociales, politiques, culturelles, culinaires, et juridiques différentes, ainsi que des emplacements géographiques divers. Originellement, j'ai ressenti un désir de considérer l'étude d'un pays de chacun des trois mondes, tels qu'on les conçoit dans la tradition européenne, soit « le vieux monde », « le nouveau monde » et « le tiers monde ».

Le Canada était un choix évident pour l'étude du « nouveau monde » car c'est celui que je connais le mieux. Je suis né et j'ai grandi sur une ferme au Canada et j'ai reçu une formation juridique au Canada. Depuis 15 ans, j'enseigne, je fais de la recherche et je rédige des textes et des ouvrages dans le domaine de l'agriculture et du droit des aliments. Je suis arrivé à la conclusion que l'agriculture et la production des aliments ont été hautement réglementées même avant que le Canada devienne un pays en 1867.[1110]

La France était aussi un choix évident non seulement parce qu'elle est le pays de mes ancêtres[1111] mais parce qu'elle est aussi reconnue pour sa culture gastronomique, sa longue histoire de réglementation des aliments qui date du XIVe siècle, et le fait qu'elle fasse partie de la plus vaste région de commerce interne, soit l'UE.

[1110] Voir Fuller et Buckingham, *Agriculture Law in Canada.* Veuillez noter que l'agriculture est l'une de seulement deux matières (l'autre étant l'immigration) pour laquelle la Constitution canadienne crée des pouvoirs partagés explicites entre le gouvernement fédéral et les gouvernements provinciaux.

[1111] Mes grands-parents ont quittés Aveyron, dans le sud de la France, pour s'installer dans l'ouest du Canada en 1912.

Choisir un troisième pays visé par l'étude était moins évident. L'exigence de pouvoir lire, comprendre et parler la langue d'un pays dans le monde en voie de développement limitait mes options. Il était aussi nécessaire d'avoir accès aux ressources et aux personnes ressources dans le pays visé par l'étude. Le fait de vouloir éviter les endroits où les conflits de nature civils étaient une menace constante a aussi limité la gamme de pays d'étude possibles. Suite à une considération initiale, deux pays candidats ont émergés – le Ghana et le Sénégal. Étant donné la possibilité de pouvoir communiquer avec des contacts clés à l'intérieur du pays[1112] et étant donné la facilité relative associée au fait de pouvoir effectuer de la recherche dans un pays de common law de langue anglaise, j'ai choisi le Ghana. En peu de temps, il est devenu apparent que le Ghana avait été un bon choix. Le Ghana a une économie importante basée sur l'agriculture et les aliments au niveau domestique ainsi qu'un niveau de l'exportation. Influencé par son histoire coloniale britannique, le pays a une réglementation alimentaire depuis plus d'un siècle et continue à poursuivre une réforme qui inclue de nombreuses réalisations législatives face aux aliments et à l'étiquetage des aliments.

D'un point de vue culturel et politique, les trois pays visés par l'étude sont très différents. Certaines statistiques démontrent ces différences. En ce qui a trait à la population, la France est le pays le plus grand avec 60 million d'habitants ; le Canada est deuxième avec 30 million d'habitants, tandis que le Ghana est troisième avec seulement 20 million d'habitants. L'alphabétisation des adultes, un facteur important pour l'appréciation de l'étiquetage alimentaire, est à presque 100% en France et au Canada tandis qu'il est seulement à entre 65% et 80% au Ghana.[1113]

[1112] Le Centre de recherches pour le développement international m'a beaucoup aidé en me permettant de trouver ses contacts dans le cadre de mon application au Centre qui m'a accordé une Bourse regard canadien sur le développement international. Sans cette bourse, ma recherche sur le droit de l'étiquetage des denrées alimentaires au Ghana n'aurait pas été possible.

[1113] Ce chiffre est quelque peu trompeur puisqu'il représente une moyenne nationale. Une source des chiffre met le taux d'alphabétisme à 67.1% pour les femmes et 82.7% pour les hommes. Béatrice Didiot & Serge Cordellier, eds. *L'état du monde: Annuaire économique géopolitique mondial 2005* (Montreal: Editions La Découverte & Editions du Boréal, 2004) *s.v.* « Golfe de Guinéee » p. 128. Mais les taux d'analphabétisme augmentent de façon importante lorsqu'on se déplace du sud au nord du Ghana et sont très différents lorsqu'on compare les hommes et les femmes. On estime que seulement environ 35% des femmes vivant dans le nord du Ghana savent lire.

L'agriculture est largement industrialisée en France et au Canada puisque seulement environ 2-3% des populations de la France et du Canada[1114] oeuvrent activement dans le domaine de l'agriculture. Ces pourcentages sont bien différents des chiffres rapportés au Ghana où plus de 50% de la population ghanéenne œuvre activement à la production des aliments. En ce qui a trait à la production des aliments, le Canada a le plus de sol arable en termes de sa superficie, tandis que la France et le Ghana en ont considérablement moins. Cependant, lorsqu'on étudie la valeur des aliments produits, c'est la France qui surpasse le Canada et le Ghana. En effet, l'agriculture est intensivement et hautement développée en France puisque le secteur agroalimentaire est le plus important secteur industriel dans l'économie dans la France. En ce qui a trait au commerce, la France est le plus important exportateur d'aliments au monde, surpassant même les États-Unis.[1115] Le Canada, bien qu'il soit un exportateur net d'aliments avec des flux d'échange importants au niveau des grains et des viandes, doit faire l'importation de montants importants de fruits et de légumes. Le Ghana est un importateur net d'aliments.

En ce qui a trait aux aspects culturels des aliments, la France est communément reconnue comme était parmi les deux ou trois meilleurs pays au monde pour sa gastronomie, son amour de la nourriture ainsi que pour l'importance que joue la nourriture dans la vie « française ».

> « L'aliment sert à se nourrir mais l'homme ne mange pas pour se nourrir : il répond à un désir (la faim) et (dans nos pays au moins), il assouvit ce désir par le plaisir de manger. Se nourrir est la conséquence, non la cause. Cette valeur hédonique tient une place importante dans le processus de commercialisation des matières premières comme des produits transformés, et le législateur doit aussi intégrer ces éléments dans l'esprit et la lettre de ses textes. »[1116]

Il est suffisamment difficile de trouver ce type de commentaire dans la littérature canadienne sur les aliments et impossible à le trouver dans la littérature juridique canadienne. L'intimité existant entre les aliments et la culture en France trouve aussi son

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[1114] Si on inclue les travailleurs oeuvrant dans le secteur de la transformation des aliments, ce chiffre augmentent à un peu moins de 10% au Canada et en France.
[1115] Pierre-Marie Vincent, *Le droit de l'alimentation*, Que sais-je? (Paris, Presses Universitaires de France, 1996).
[1116] Vincent, *Le droit de l'alimentation* à la p. 10.

expression dans la reconnaissance de la notion de « qualité » en France, un terme qui est même défini dans la législation française.[1117] L'emphase qui est mis sur le fait de définir et de représenter la qualité au niveau des aliments occupe une place centrale au niveau du droit de l'étiquetage des denrées alimentaires en France et beaucoup moins dans les deux autres pays visés par l'étude. En effet, en France, l'étiquetage des aliments et des produits alimentaires est un domaine du droit qui est extrêmement réglementé et qui mérite qu'on produise un traité juridique de deux volumes![1118]

Il n'est alors peut-être pas surprenant qu'on ait fait une analyse plus approfondie sur le droit de l'alimentation en France que dans les deux autres pays visés par l'étude. Au Canada, le droit de l'agriculture a été reconnu[1119], mais l'accent a habituellement été mis sur les aspects juridiques de la production agricole plutôt que sur les relations entre le producteur et le consommateur. Il est possible que, d'une part, la pénurie d'écrits juridiques sur la matière puisse être attribuée à la différence au niveau de la culture alimentaire, tel qu'expliqué ci-dessus, mais d'autre part, il est possible que le manque soit attribuable au fait que le Canada soit a pays relativement nouveau avec une population immigrante croissante depuis le XIXe siècle.[1120]

Les techniques agricoles modernes et la réglementation des aliments sont encore plus récentes au Ghana. Contrairement au Canada, le Ghana jouit de son indépendance des puissances coloniales depuis moins de 50 ans. Il souffre toujours en raison du manque de fonds gouvernementaux ainsi que du faible revenu généré par les entreprises qui permettrait au gouvernement de diriger le pays. En tant que pays en voie de développement, le Ghana fait face à plusieurs défis que le Canada et la France ne connaissent pas. D'importance particulière est la nécessité de faire une allocation stratégique des ressources entre des besoins sociaux et politiques concurrents. Parmi ces besoins ont peut cibler des questions

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[1117] "La qualité d'un produit (ou d'un service) est son aptitude à satisfaire les besoins exprimés ou implicites des utilisateurs", AFNOR Standard x 50 – 120 in Norber Olszak, *Droit des appellations d'origine et indications de provenance* (Paris: Tec & Doc, 2001) à la p. 104.

[1118] Antoine De Brosses, *L'Étiquetage des denrées alimentaires* (Paris, Dunod 2002).

[1119] Fuller et Buckingham, *Agriculture Law in Canada.*

[1120] Les statistiques démontrent que la population des provinces des prairies -- le cœur du territoire agricole canadien – a quintuplée entre les recensements de 1901 et de 1911 et qu'elle a doublé encore entre les recensements canadiens de 1911 et de 1921.

concernant les aliments – des questions de production agricole, des questions par rapport aux consommateurs (incluant l'étiquetage) et des questions de commerce. Évidemment, l'étiquetage des denrées alimentaires n'est peut-être pas le besoin le plus critique dans ce domaine. Toujours est-il qu'il y a une absence presque totale d'écrits académiques sur le sujet, même s'il existe plusieurs dispositions législatives relatives à la production et à la consommation des aliments dans le droit ghanéen.

Au Canada et au Ghana, bien que la nourriture soit évidemment importante, les canadiens et les ghanéens tendent moins que les français à définir leur culture en se référent à la nourriture. Bien que certains produits domestiques aient un certain statut international, tel que le sirop d'érable pour les canadiens et peut-être le fufu ou le chocolat pour les Ghanéens, ni l'un ni l'autre des pays démontre une obsession nationale avec « la cuisine » comme le font les français. Cependant, ceci est peut-être en train de changer.[1121]

Dans l'analyse finale, au moins quatre raisons peuvent être citées pour motiver le choix de la France, du Canada et du Ghana comme échantillon idéal pour démontrer le développement et les systèmes de réglementation actuels dans le domaine de l'étiquetage des denrées alimentaires.

Premièrement, ces trois pays représentent les deux traditions juridiques principales – la common law et le droit civil. Le droit français ressort du Code civil napoléonien bien que l'on puisse retracer certains vestiges du droit de l'étiquetage français à l'Ancien Régime comme le démontrais la Partie I. Au Canada, un pays bijuridique, la common law et le droit civil sont reflétés dans la législation provinciale et fédérale au niveau du contenu de la législation ainsi que par les avocats qui sont formés dans chacune des deux traditions et qui rédigent et défendent ces lois. Le droit ghanéen a évolué directement de la common law britannique. Puisque le Ghana était une colonie britannique jusqu'en 1957, son droit et sa tradition juridique britannique.

[1121] J.M. Powers et A. Stewart, éds. *Northern Bounty : A Celebration of Canadian Cuisine* (Toronto :Random House, 1995); T. Hultman, éd. *The Africa News Cookbook: African Cooking for Western Kitchens* (New York: Penguin Books, 1985), qui présente plusieurs exemples de la cuisine ghanéenne, incluant un des plats nationaux du Ghana, le fufu.

Deuxièmement, les trois pays visés par l'étude représentent les deux mondes opposés du développement économique – le monde développé et le monde en voie de développement. Cet attribut économique (avec le Ghana représentant le monde en voie de développement et la France et le Canada formant le monde développé) a des enjeux importants pour le développement de systèmes juridiques nationaux, incluant le droit de l'étiquetage des denrées alimentaires. D'une part, par exemple, l'alphabétisation et la capacité administrative sont des limites importantes dans le développement de systèmes juridiques et pour l'étiquetage alimentaire au Ghana, tandis qu'ils ne le sont pas dans les deux autres pays. D'autre part, les systèmes d'étiquetage alimentaire en France et au Canada sont devenus excessivement complexes en réponse aux requêtes constantes pour la réduction du risque et pour l'accès à des informations spécifiques pour les consommateurs. Bien que les ressources financières et humaines adéquates facilitent cette organisation, on peut se demander si les intérêts des consommateurs sont défendus lorsque l'information produite sur les étiquettes devient trop complexe.

Troisièmement, la France, le Canada et le Ghana démontrent des attitudes culturelles et des traditions bien différentes en ce qui a trait aux aliments. On peut comprendre que ces différences soient reflétées dans les initiatives des gouvernements concernant la détermination de la façon dont les aliments doivent être étiquetés dans chacun des pays. En France, les aliments sont au cœur du psychisme collectif. On identifie les français à une culture qui attribue une grande importance aux aliments, de façon générale, et plus spécifiquement encore aux méthodes de préparation et de production de nourriture. Ainsi, la formation classique en matière de préparation de nourriture partout au monde tire souvent ses origines de la tradition française.[1122] Les entreprises de production alimentaire françaises jouissent, depuis des siècles, d'une protection juridique spéciale pour leur production d'aliments de qualité en vertu du système des « appellations d'origine contrôlée ». De plus, ces entreprises de production ainsi que les commerçants de produits

[1122] Par exemple, un manuel standard utilisé dans la formation de chefs professionnels, W. Gisslen, *Professional Cooking*, 4 éd., (New York : John Wiley, 1999), est un ouvrage de collaboration entre un auteur américain et l'Institut Le Cordon Bleu de Paris, qui est renommé au plan international.

alimentaires qui tentent de tromper le consommateur sont systématiquement poursuivis en justice.

Les cultures alimentaires du Canada et du Ghana sont beaucoup moins importantes au niveau des identités culturelles de ces pays. Les traditions britanniques inhérentes, adoptées à travers l'histoire coloniale, en plus des conditions difficiles liées à la colonisation, soit l'adaptation au climat au Canada ou le besoin d'explorer la production agricole orientée (Canada et Ghana), ont fait que ces deux pays n'ont pas placé la nourriture au premier rang de leurs valeurs culturelles comme l'a fait la France.

En développant un pays indépendant (le Canada depuis 1867 et le Ghana depuis 1957), le Canada et le Ghana ont dû développer de la législation pour répondre à plusieurs objectifs politiques, culturels et économiques opposés. La législation concernant les aliments, qui revête beaucoup d'importance en France et qui est marquée dans l'histoire législative du pays, n'a pas connu le même statut au Ghana et Canada. Les aliments et, plus particulièrement, l'étiquetage des denrées alimentaires dans ces deux pays est le plus souvent associé à un modèle réglementaire plus large qui protège la santé humaine, la réglementation des marchés, et la protection de la propriété intellectuelle. Plutôt que d'être élevé à un statut spécial, le droit canadien sur les aliments a été formé en réponse à plusieurs crises. Étant donné l'histoire de l'expansion du Canada vers l'ouest et une politique agricole promouvant le développement extensif de l'agriculture et une richesse en matière de production d'aliments en vrac, les aliments et l'étiquetage alimentaire tendent à être réglementés comme tout autre produit.

Les troubles économiques et politiques au Ghana, existant pendant les trois premières décennies suivant l'indépendance du pays, ont eu des effets importants sur l'allocation des ressources et sur le développement d'un modèle juridique clair réglementant l'étiquetage des denrées alimentaires. Assurer un approvisionnement adéquat et faire la promotion de la production des aliments sont des objectifs gouvernementaux depuis que le Ghana est indépendant de la Grande-Bretagne. Les autres lois sur les aliments, ainsi que la législation sur l'étiquetage des denrées alimentaires doivent lutter pour recevoir de

l'attention et du financement parmi de nombreux autres objectifs nationaux qui accompagnent l'évolution d'un pays en voie de développement.

Quatrièmement et en conclusion, les pays sélectionnés représentent des positions économiques différentes dans l'économie mondiale, parviennent de différents blocs commerciaux ayant des intérêts divers dans le système commerciale mondial, et jouissent de différents niveaux d'intégration régionale, économique et politique dans la sphère internationale. La France fait partie du bloc commercial le plus important – l'UE – où elle a eu une influence significative sur le développement des politiques de l'UE sur les aliments. Le Canada, bien sûr, est le participant nordique du bloc commercial de l'Amérique du nord qui est naît de l'Accord de libre-échange nord-américain (ALENA) – un bloc qui est beaucoup moins intégré au point de vu législatif que l'UE mais qui a une intégration économique importante au niveau des aliments et des autres marchés commerciaux. Le Ghana fait partie de la Communauté économique des Etats de l'Afrique de l'Ouest (CEDEAO), soit un groupe de 15 pays qui connaissent, jusqu'à ce jour, très peu d'intégration régionale et encore moins de politiques communes en matière de réglementation des aliments.

Ces blocs, à des niveaux variés, sont importants dans la création de politiques nationales sur les aliments. À l'intérieur de chacun de ces blocs, on doit prendre note des différentes opinions sur les aliments, tel que démontré non seulement dans les anecdotes signalant le contraste entre la cuisine française[1123] et les repas-minutes américains[1124], mais aussi par les différends juridiques internationaux sur les aliments[1125], qui semblent devenir de plus en plus fréquents et qui sont davantage difficiles à résoudre.

LA FIN

[1123] E. Neirinck et J.-P. Poulain, *Histoire de la Cuisine et des Cuisiniers : Techniques Culinaires et Pratiques de Table en France, du Moyen-Âge à nos jours* (Paris : LT Éditions J. Lanore : 2000)

[1124] Eric Schlosser, *Fast Food Nation : The Dark Side of the All-American Meal* (New York : Harper Collins, 2002)

[1125] Le bœuf, les bananes, les crevettes, les pétoncles, les sardines, le thon, le saumon, les pommes et les aliments génétiquement modifiés sont parmi les aliments qui sont sujet de différends entre pays membres de l'Organisation mondiale du commerce.

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(Citations in this bibliography, and in the text and footnotes of body of the dissertation, follow the accepted Canadian standard for legal citation in English developed by the McGill Law Journal and found in the *Canadian Guide to Uniform Legal Citation*, 5th ed. (Montreal: Carswell, 2002).

(Les références qui se trouvent dans cette bibliographie et celles qui se trouvent dans le texte et les notes de bas de page de la thèse, suivent la forme prescrite pour les ouvrages de langue anglaise développée par la Revue de droit de McGill dans son *Manuel canadien de la référence juridique*, 5th ed. (Montreal: Carswell, 2002)).

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Lois et autres instruments législatifs

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Petit, M. Michel. Professeur, Département Sciences économiques et sociales, Institut national agronomique Paris-Grignon (entrevue à Montpellier le 9 avril 2003).

Pillot, M. Julien. Service juridique et international, Juriste, Institut National des Appellations d'Origine (entrevue à Paris 12 février 2003).

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Doering, Mr. Ronald. President, Canadian Food Inspection Agency (interviewed in Ottawa 4 April 2002).

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McCombs, Mr. Mark. General Counsel, Head Legal Services, Canadian Food Inspection Agency (interviewed in Ottawa 7 March 2002).

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Prince, Mr. Cameron. Acting Executive Director, Operations Coordination, Operations Branch, Canadian Food Inspection Agency (interviewed in Ottawa 4 March 2002).

Robinson, Mr. Richard. Chief, Livestock Identification and Legislation, Food of Animal Origin, Programs Branch, Canadian Food Inspection Agency (interviewed in Ottawa 5 March 2002).

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3) Ghana

Acheampong, Mr. Ike Edward. Regulatory Officer, Ghana Food and Drugs Board (interviewed in Kumasi 19 April 2004).

Achi, Ms. Theresa. Head Librarian, Ghana Standards Board (interviewed in Accra 3, 5 and 10 March 2003).

Adetola, Ms. Elizabeth. Acting Director, Standards & Certification, Ghana Standards Board (interviewed in Accra 20 April 2004).

Amoaka, Mr. Charles. Head, Marketing Department, Ghana Standards Board (interviewed in Accra 3 March 2003).

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Boateng, Mrs. Fori. Legal Officer, Ghana Ministry of the Attorney General, Legal Drafting Department (interviewed in Accra 5 March 2003 and 21 April 2004).

Botwe, Mr. Ben. Deputy Chief Executive, Ghana Food and Drugs Board (interviewed in Accra 27 February 2003).

Crabbe, Mr. Justice V.C.R.A. Ghana Ministry of the Attorney General, Commission for Statute Law Revision (interviewed in Accra 13 March 2003 and 21 April 2004).

Dadey-Adjei, Mr. Roderick. Regulatory Officer, Ghana Food and Drugs Board (interviewed in Accra 14 March 2003).

Darkey, Mr. E.M. Assistant Librarian, Law Library, Faculty of Law, University of Ghana (interviewed in Accra 26, 27 February and 12 March 2003).

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Nixon, Ms. Hannah. Research Economist, Cambridge Economic Policy Associates (interviewed in Cambridge 18 November 2002).

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