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Full Research Article

Geographical indications, food safety, and sustainability: conflicts and synergies

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Abstract. This paper examines the legal and policy relationships amongst international standards for GIs, food safety requirements, and voluntary claims related to a food's attributes. The paper addresses those relationships within the context of international trade agreements protecting GIs, such as the 1994 TRIPS Agreement, the EU-Canada Comprehensive Economic and Trade Agreement (CETA), and the chapter on intellectual property and geographical indications in the Transatlantic Trade and Investment Partnership (TTIP) currently under negotiation. Trade agreements also discipline food safety measures and non-GI indications of quality or safety such as "organic" and "GMO-free." Accordingly, the paper also considers the extent to which international trade agreements such as the WTO Agreements on the Application of Sanitary and Phytosanitary Standards (SPS Agreement) and Technical Barriers to Trade (TBT) might interact with the analysis.

Keywords. Geographical indications, Transatlantic Trade and Investment Partnership (TTIP), TRIPS, World Trade Organisation, Sanitary and Phytosanitary Standards

JEL codes. K32, K33, Q18

1. Introduction

Reports over the past few years of widespread contamination in French wines,[1] and prosecution of organic wine producers from Bourgogne for failure to use pesticides,[2] have

[1] "Des pesticides dans les vins (Pesticides in Wines)," Que Choisir (October 2013) (reporting on study of French wines conducted by Excell enology laboratory); "Lab Tests on French Wines Find Pesticide Residue in Every Bottle," Food Safety News, 20 September 2013 (reporting that even organic wine contained pesticide residues), http://www.foodsafetynews.com/2013/09/lab-tests-on-french-wines-find-pesticide-residue-in-every-bottle/#.VRb-GefzF8rU. Accessed 2 March 2016.

[2] "French organic winegrower fined for refusing to spray grapes with pesticide," The Guardian, 7 April 2014, http://www.theguardian.com/world/2014/apr/07/french-organic-winegrower-fined-refusing-spray-grapes-pesti-

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highlighted the previously under-appreciated potential for contrary messages or even outright conflicts amongst various regulatory schemes for foodstuffs. These include:

- Geographical indications (GIs);
- Substantive food safety standards; and
- Non-GI label indications of quality, safety, or sustainability such as "organic," "GMO-free," and "sustainably produced."

These tensions have always been latent in the multiplicity of arrangements for communicating information about foodstuffs. To that end, this paper:

- Identifies the varying purposes of these schemes;
- Categorizes the various sources of policy and law that apply to them; and
- Compares their treatment in various contexts, including the Transatlantic Trade and Investment Partnership (TTIP) and other free trade agreements.

The paper consequently examines the potential for conflict or reinforcement amongst GIs, food safety standards, and other claims of quality or safety. These claims of food safety and quality share a common feature in that they are transmitted to consumers through labels on the packaging of the product itself, and consequently are representations by the manufacturer or processor as to the identity, safety, or quality of that product. They differ, however, in their underlying policy aims. And they vary greatly in the sources of international law and policy that govern their treatment, including but not limited to international trade.

Amongst other things, the paper will address those relationships within the context of international trade agreements protecting GIs, such as the 1994 TRIPS Agreement, the EU-Canada Comprehensive Economic and Trade Agreement (CETA), and the chapter on intellectual property and geographical indications in the Transatlantic Trade and Investment Partnership (TTIP), currently under negotiation.

Trade agreements also discipline food safety measures and, potentially, non-GI indications of quality or safety such as "organic" and "GMO-free." Consequently, the paper examines the extent to which free trade agreements such as the WTO Agreements on the Application of Sanitary and Phytosanitary Standards (SPS Agreement) and Technical Barriers to Trade (TBT Agreement) might interact with the analysis.

The paper first identifies sources of law and policy related to each of these three categories of indications of food safety and quality. Then the paper examines the relationship amongst these three categories of attributes from the point of view of the variety of sources of law and policy governing them. Last, the paper makes recommendations for reconciling these disparate sources of law and policy, as well as policy goals, in the context of free trade agreements such as TTIP. The paper examines these questions from a structural and institutional, as contrasted with an empirical, point of view.

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cide. Accessed 2 March 2016. "Pesticides in French Wine," New York Times, 2 Jan. 2014 (noting that "[o]rganic wine producers in the Burgundy region of France are facing prosecution for refusing to use pesticides."), http://www.nytimes.com/2014/01/03/opinion/pesticides-in-french-wine.html. Accessed 4 October 4 2015.

2. International Protections for Geographic Indications

As is well-known, designations of origin and geographical indications (collectively "GIs") have been protected through legislation adopted at the European Union level since 1992 (European Council, 1992), as amended through 2012 (European Parliament and Council, 2012). At present, any number of wines, beers, spirits, cheeses, and processed meats are protected at the European level, including Cognac, Sherry, Roquefort and Parmigiano Reggiano cheeses, and Teruel and Parma hams (Hughes, 2006).

According to the EU, "[t]he protection of geographical indications matters economically and culturally. They can create value for local communities through products that are deeply rooted in tradition, culture and geography. They support rural development and promote new job opportunities in production, processing and other related services (European Commission, 2013)." Conversely, "geographical names with commercial value are exposed to misuse and counterfeiting. The abuse of geographical indications limits access to certain markets and undermines consumer loyalty. Fraudulent use of geographical indications hurts both producers and consumers."

An alternative view is that protections for GIs by countries in which they originate operate as trade barriers. A letter from 50 U.S. Senators, expressing concern for American agricultural interests, summarizes this position:

> In country after country, the EU has been using its free trade agreements (FTAs) to persuade its trading partners to impose barriers to U.S. exports under the guise of protection for its geographical indications…
> Reportedly, the EU now seeks to more directly impair U.S. competition by imposing restrictions on the use of common food names through TTIP. In the states that we represent, many small or medium-sized family owned farms and firms could have their business unfairly restricted by the EU's push to use geographical indications as a barrier to dairy trade and competition. As we begin to engage in TTIP negotiations that are ultimately intended to bring about a better economic climate on both sides of the Atlantic by lowering barriers to trade, we strongly oppose the EU's gratuitous use of GIs as a protectionist measure.[3]

Trade disputes over non-tariff barriers frequently arise from differences in national regulatory approaches (Wirth, 2013), as in the protection of GIs. The EU and the United States protect names of origin in different ways. EU law protects "geographical indications," whilst U.S. law allows producers to protect these names as trademarks. Nonetheless, many EU GIs are not protected in the United States, and may not be registrable as trademarks because of their widespread generic use.

This means that products can be sold in the United States which use GIs protected in Europe, but which were not produced in that region. For example, although the GI "Parmigiano Reggiano" is registered under the EU system, "Parmesan" cheese produced in the United States is regularly sold there under that name.[4] According to one view, this situa-

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[3] Letter from 50 U.S. Senators to Tom Vilsack, Secretary of Agriculture and Michael Froman, United States Trade Representative (11 March 2014). http://www.donnelly.senate.gov/download/usda-ustr-cheese-letter. Accessed 2 March 2016.

[4] Larry Olmstead, Most Parmesan Cheeses In America Are Fake, Here's Why, Forbes, 19 November 2012 (noting that Kraft was prohibited from selling its Parmesan cheese on European markets). http://www.forbes.com/

tion may mislead consumers in the United States. According to the other, the exclusionary use of a term such as "Parmesan" is a protectionist measure that disadvantages potential competitors, to the detriment of consumers as well.

Although other organizations such as the World Intellectual Property Organization (WIPO) have established international legal standards with respect to GIs (Lisbon Agreement, 1958), the most important legal context for addressing GIs has been trade agreements, chief amongst them the World Trade Organization (WTO) Agreement on Trade-Related Aspects of International Property Rights (TRIPS) (WTO, 1994a). With the collapse of the WTO's Doha Agenda, the TRIPS Agreement is the sole potentially global trade authority establishing rules for GIs, and pending the adoption of the TTIP, the only one governing EU-U.S. trade.

The theory of the TRIPS Agreement is unique amongst WTO agreements, in that it establishes affirmative obligations for members to enact identified legal protections for intellectual property, such as patents, trademarks, and copyrights. This approach in effect reifies intellectual property, such as creative products like motion pictures, by creating goods that can be identified as such in international trade. Other provisions in trade agreements are typically "negative," in that they constrain governmental behavior.

The TRIPS Agreement treats GIs as a form of intellectual property requiring affirmative governmental protection and mutual recognition in international trade. Article 22 applies to all goods, and provides a standard level of protection. Article 23 provides enhanced protection to GIs related to wines and spirits. Article 24 provides for exceptions, as for products where the indication of origin has become generic, or has already been registered as a trademark.

The Doha mandate identified two agenda items, both of which would have resulted in enhanced protections for GIs: (1) the creation of a multilateral register for wines and spirits; and (2) extension of the higher level of protection found in article 23 beyond wines and spirits to such products as cheeses and dried meats, both of which are now covered only by the generic provisions of article 22.[5] GI protections in the EU-Canada Comprehensive Economic and Trade Agreement (CETA) provide a higher level of protection to a wider array of products, including cheeses and dried meats, than does TRIPS.

As of this writing the entire negotiating text of the TTIP is not public, and the EU has released only a portion of its negotiating text addressing customs enforcement of GIs (European Commission 2015a). Based on their previously-stated objectives, is nonetheless probably reasonable to assume that in the TTIP negotiations the EU is seeking further protections for GIs and that the United States is likely to oppose that agenda. According to the official EU fact sheet on the subject, "We want the US to improve its system in several important ways. These include: protecting an agreed list of EU GIs, with rules to stop other producers misusing them; [and] enforcing those rules effectively (European Commission, 2015b)."

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sites/larryolmsted/2012/11/19/the-dark-side-of-parmesan-cheese-what-you-dont-know-might-hurt-you/. Accessed 4 October 2015.

[5] Even before the Doha Agenda, article 23.4 of the TRIPS Agreement called for the TRIPS Council to establish multilateral system of notification and registration of geographical indications.

3. International Standards for Food Safety

International efforts to address food safety generally fall into one of two categories: (1) affirmative ("positive") efforts to establish minimum standards; and (2) the establishment of trade-based ("negative") disciplines designed to prevent abuse.

3.1 Harmonized International Food Safety Standards

In contrast to intellectual property rights, including GIs, affirmative international undertakings to assure food safety are generally non-binding or hortatory in nature. One such effort, Codex Alimentarius, has been undertaken in the context of existing multilateral, government-to-government negotiations, representing the highest level of governmental involvement. Another major forum, the International Organization for Standardization is something of a hybrid, with mixed business and governmental inputs, the relative proportions of which vary from country to country. Others are purely private voluntary standards, ranging in coverage from potentially global consortia to individual firms such as importers and retailers.

3.1.1 Codex Alimentarius

Codex Alimentarius is an international standard-setting body whose members are states. The Codex Alimentarius Commission was created in 1962 as a joint undertaking of the UN Food and Agriculture Organisation (FAO) and the World Health Organisation (WHO). The Commission, membership in which is open to all FAO and WHO member states and now numbers 188 (including the EU), has a dual function: "protecting the health of the [*sic*] consumers and ensuring fair practices in the food trade (Codex Alimentarius, 2015)." To this end, the Commission is specifically charged with adopting advisory multilateral "good practice" standards on such matters as the composition of food products, food additives, labelling, food processing techniques, and inspection of foodstuffs and processing facilities. In the food safety area, as of 2006, in the form of non-binding standards, guidelines, and codes of practice, Codex had evaluated 218 pesticides, establishing 2,930 maximum residue limitations, and published 1,112 food additive provisions for 292 substances (Codex Alimentarius, 2006).

Codex standards are primarily intended as hortatory guidance to governments in the establishment of their own national regulations. Although it performs a variety of functions and reaches a range of constituencies, Codex tends to be an institutional setting to which developing countries with less rather than more regulatory infrastructure can look in establishing national requirements. More specifically, developing country agricultural exporters, typically small and without much political leverage, can also look to Codex for assistance in creating export markets.

3.1.2 ISO 22000

The International Organization for Standardization (ISO), created immediately after World War II with headquarters in Geneva, is an international federation of standardizing bodies from 162 countries. ISO is not an intergovernmental organization, such as

the United Nations, constituted by multilateral agreement whose members are states represented by governmental authorities. Although the ISO member from some countries is a governmental entity, ISO is primarily a forum for coordinating standardizing efforts by private business. The U.S. member of ISO is the American National Standards Institute (ANSI), a private entity. For the United States, the primary, although not sole, participants in ISO processes are representatives of private industry. ISO's principal work product consists of voluntary standards adopted by consensus. In contrast to some of the output of intergovernmental organizations, ISO standards are strictly hortatory and are not binding under international law. ISO standards are both adopted by and addressed to private parties.

ISO has adopted its 22000 series of standards on food safety, which establish procedurally-oriented requirements for food safety management systems based on HACCP (hazard analysis and critical control points) principles (ISO, 2005 & 2014). ISO 22000 series standards address traceability in the feed and food chain and specific prerequisites for food manufacturing, catering, farming, and food packaging manufacturing (ISO, 2007, 2009, 2011, 2013a, 2013b). A distinctive feature of ISO 22000 is that it is "auditable" or subject to verification by appropriately accredited private, third-party auditors or certifiers (ISO/TS, 2013c). ISO's 17000 series also establishes standards for "conformity assessment," which includes such activities as testing and inspection (ISO/IEC 2015, 2013, 2004a, 2004b).

3.1.3 Global Food Safety Initiative

The Global Food Safety Initiative (GFSI) is an industry-initiated effort commenced in 2000 after a number of food safety scares, organized as a Belgian non-profit. The original members were eight major retailers: Carrefour, Tesco, ICA, Metro, Migros, Ahold, Wal-Mart and Delhaize. Others that have since joined include Cargill, Coca Cola, Starbucks, and McDonald's, although the latter has subsequently withdrawn. Originally European in its focus, GFSI subsequently became increasingly accepted in the United States, to the point that it is now arguably the principal scheme for coordinated industry action on voluntary food safety standards in North America.

GFSI responded to a concern that many of the larger food suppliers and retailers were simultaneously complying with, and being audited by reference to, a variety of private voluntary food safety standards. Instead of attempting to harmonize these standards or "schemes," GFSI "benchmarks" existing food safety schemes. "Benchmarking" is "the method by which a food safety scheme is compared to defined [GFSI] requirements . . . to determine equivalence (GFSI, 2013)." Currently there are four benchmarked (i.e., determined by GFSI to be equivalent) private voluntary schemes: (1) British Retail Consortium (BRC) Global Standard for Food Safety; (2) Dutch HACCP; (3) International Featured Standards (IFS) for Food; and (4) Safe Quality Food (SQF) Standards.

GFSI has a defined internal governance system addressing the roles of participating industry members. One of GFSI's principal missions is to reduce costs by minimizing duplication of audits, as suggested by its slogan "once certified, accepted everywhere." GFSI does not itself perform any audits or certifications, but it has adopted and enhanced the requirements of ISO standards as a model for audits of GFSI standards.

3.1.4 Other Voluntary Food Safety Standards

In addition to the four GFSI-benchmarked schemes, there are a variety of other sets of private, voluntary food safety standards. One important one is Global GAP, roughly an analogue of GFSI, although with many more members, both producers/suppliers and retailers. Additionally, various industry sectors have undertaken to establish private voluntary standards. For example the American Spice Trade Association has developed its own guidance. There has recently been concern voiced about the capacity of private voluntary standards established by industry consortia to operate as trade barriers, in effect constricting market access for agricultural exporters in developing countries.[6]

3.2 Trade-Based Disciplines on Food Safety Standards

The treatment of food safety in international trade agreements is designed to discipline otherwise non-discriminatory measures to prevent their abuse as non-tariff barriers to trade. The negotiation of the Uruguay Round of Trade Agreements in GATT coincided with a long-running conflict between the United States and the EU over the EU's prohibition of the sale of meat and meat products treated for growth promotion with any of three synthetic or three natural hormones. The United States, where use of the same hormones is permitted for these purposes, for more than a decade objected to the EU hormone ban as a non-tariff barrier to trade unsupported by scientific evidence. Because of concerns such as these, a new Agreement on the Application of Sanitary and Phytosanitary Standards (SPS Agreement) (WTO, 1994b) was adopted as part of the package of instruments creating the World Trade Organization (WTO).

The SPS Agreement governs measures applied to protect the life or health of humans, animals, or plants from pests, disease-causing organisms, additives, contaminants, and toxins. Consequently, the agreement disciplines or governs both food safety measures and agricultural quarantines. An SPS measure that is based on international standards, where they exist – in the case of food safety standards, as identified in the Codex Alimentarius – is entitled to a presumption of validity. If an international standard does not meet a member's nationally-determined "appropriate level of protection," and the member's food safety measure is therefore more rigorous than the international standard, then the measure must be justified by reference to a series of science-based tests.

Such a measure must be supported by "a scientific justification." A challenged measure must be "based on scientific principles," must not be "maintained without sufficient scientific evidence," and the regulatory process leading to the measure must "take into account available scientific evidence." A central feature of the SPS Agreement, is a requirement for a risk assessment, and the principal operative test in the agreement is the need for the measure to be "based on" that risk assessment. The SPS Agreement consequently codifies requirements for an approach to regulation roughly commensurate with a risk assessment/risk management duality, which confines scientific questions

[6] WTO Doc. G/SPS/R/62 paras 132-146 (27 May 27, 2011) (report of WTO Committee on Sanitary and Phytosanitary Measures expressing concern about private and commercial standards for food). See also Members take first steps on private standards in food safety, animal-plant health (WTO News, 30 & 31 March 2011), http://www.wto.org/english/news_e/news11_e/sps_30mar11_e.htm. Accessed 2 March 2016.

to the risk assessment stage. The choice and design of a measure designed to prevent or ameliorate actual or potential harms are frequently identified as attributes of "risk management."

Not surprisingly, the first dispute under the Uruguay Round SPS Agreement was initiated by the United States and Canada against the EU over hormone-treated beef (WTO, 1998 & 2008), which became one of the longest-running disputes in WTO history because of the EU's refusal to remove the measure. Another important dispute concerned the EU's treatment of genetically modified foods and crops (WTO, 2006). The North American Free Trade Agreement (NAFTA, 1992) and other regional and bilateral trade agreements to which the United States is party (CAFTA, 2004) contain provisions on sanitary and phytosanitary measures, as does the EU-Canada Comprehensive Economic and Trade Agreement (CETA, 2014).

The TTIP negotiations include a portion on sanitary and phytosanitary measures. According to the EU's official fact sheet (European Commission, 2015c) and its proposed negotiating text (European Commission, 2015d), the EU does not appear to anticipate new substantive disciplines for food safety measures. Indeed, the fact sheet states that standards for food safety, GMOs, and animal welfare will not be relaxed. The EU proposal seems to be more focused on streamlining the process for entry of EU agricultural exports into the U.S., particularly as the United States implements new food safety legislation (U.S. Congress, 2010). The U.S. for its part appears to be seeking enhanced substantive disciplines on food safety measures (USTR, 2014).

4. Other International Standards for Labeling of Food

In contrast to GIs and food safety standards, many of which have been in place for some time, foodstuffs are now voluntarily labeled for any number of other attributes, including:

- Organically produced;
- Sustainably produced;
- Natural or all-natural;
- GMO-free;
- Antibiotic-free;
- Hormone-free or no hormones added;
- Free-range or cage-free;
- Grass-fed or pasture-raised; and
- Humane raised and/or handled.

Some consumers also seem to be particularly interested in purchasing locally-produced food, lending greater importance to non-GI indications of the locality of origin. Such claims or labels are specific to foodstuffs, but there are many others for non-food articles in commerce, including those awarded by private voluntary certifying organizations. Examples include fair trade coffee and sustainably harvested timber. Although the EU has mandatory standards for animal welfare (European Council, 1998), there are no comparable, comprehensive governmentally-established requirements for the treatment of farm animals during their lifetimes in the United States.

4.1 Codex Alimentarius Harmonized Standards for Food Labelling

Because of the proliferation in the range of claims that have been made with respect to an attribute of a foodstuff or the process by which it has been produced, the coverage of international standards is less than complete. Moreover, the source of labels can vary greatly, from unilateral claims that are basically advertising to governmentally-mandated requirements.

Although not directly applicable to food, ISO has developed a generally-accepted approach to categorizing labels. Unilateral claims made by manufactures are known as "type II" labels (ISO, 2000). "Type I" labels address governmentally- or privately-established schemes that include a single mark (ISO, 1999a), such as the EU ecolabel for identifying products and services that have a reduced environmental impact throughout their life cycle or the U.S. Energy Star logo for identifying energy-efficient personal computers. Both of these schemes are voluntary, with the standards for awarding the label established by a governmental authority. Type III labels transmit disaggregated quantified information in a manner similar to the identification of fat, carbohydrates, and protein on nutrition labels in the United States and other countries (ISO 1999b).

Although labeling for many of the quality attributes identified above is regulated at the national or supranational (EU) level, the efforts at more extensive international harmonization have been few (Czarnezki *et al.*, 2015) and are largely confined to Codex Alimentarius. The Codex Commission has established guidelines for a limited number of defined categories of labeling including:

- Nutrition Labeling (Codex Alimentarius, 1985);
- Organically produced foods (Codex Alimentarius, 1999);
- GMOs (Codex Alimentarius, 2011).

Because of Codex's government-to-government multilateral character and the structure of the instruments, Codex guidelines, although non-binding, in effect replace unregulated Type II (unilateral) claims with governmentally-established standards. The Codex guidelines may recommend mandatory labeling, as in the case of nutrition labeling, or voluntary labeling to governmentally-established requirements, as in the case of organically produced foods and GMOs.

The Codex guidelines for organically produced foods are very detailed and address such issues as restrictions on use of pesticides and synthetic fertilizers, absence of GMOs, prohibition of subtherapeutic doses of antibiotics and hormones for preventative purposes, and mandatory use of organic feed. The Codex guidelines for labelling of GMOs, which were under consideration for two decades, have been particularly contentious because of opposition by the United States, which eventually agreed to guidelines recommending a voluntary as opposed to mandatory requirement.

4.2 Trade-Based Disciplines on Food Labeling

All these claims relate to some attribute of the foodstuff concerned, and are typically contained in a label. The Uruguay Round Agreement on Technical Barriers to Trade (WTO, 1994c), which in many respects is similar in structure to the Uruguay Round SPS

Agreement, governs a wide variety of regulatory requirements that have environmental or public health implications, including specifications for consumer products and children's toys, appliance efficiency criteria, and vehicle fuel efficiency standards. The TBT Agreement specifically covers "packaging, marking or labelling requirements."

Similar in structure to the WTO SPS Agreement, the TBT Agreement requires the utilization of "relevant international standards" where they exist in promulgating governmentally–mandated regulatory requirements. "Standards," as that term is used in the Agreement, includes voluntary guidelines adopted by an "international standardizing body," a term which encompasses both Codex Alimentarius and ISO. Governmental regulations that conform to the standards adopted by such an international standardizing body are entitled to a rebuttable presumption of validity. To justify a departure from international standards, presumably because they are insufficiently rigorous, a WTO member would have to demonstrate that a harmonized international standard "would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued."

The WTO jurisprudence interpreting the TBT Agreement suggests that the threshold for justifying a departure from an international standard is high. One of the first major disputes decided by the WTO Appellate Body concerned the labelling of sardines by the EU (WTO, 2002), which is the subject of a Codex Alimentarius standard. Although the WTO Appellate Body established that the burden is on the challenging party to demonstrate that the international standard is both effective and appropriate, the conclusion that the Codex standard met this test turned upon the EU's failure to establish facts related to consumers' perceptions as to the meaning of the term "sardine."

The Appellate Body has since addressed several disputes concerning labeling requirements established by the United States. As in the sardines dispute against the EU, U.S. labeling schemes for meat (WTO, 2012a) and tuna (WTO, 2012b) were found to be inconsistent with the TBT Agreement, although for failure to satisfy the national treatment requirement in the Agreement and not because of departures from international standards. The Appellate Body's report, reversing the panel's findings on this issue, clarified and narrowed the scope of a "relevant international standard" within the meaning of article 2.4. In particular, an international standardizing body must be open to the relevant body of every country. The Appellate Body also interpreted key terms in the TBT Agreement relating to international standards as used in article 2.4: "international;" "recognized activities in standardization;" and "body" as used in the term "international standardizing body."

Thanks to the structure of the TBT Agreement, those national regulatory requirements that are not based on the output, when it exists, of such a body are therefore particularly vulnerable to challenge as unnecessary obstacles to international trade. And the sorts of governmental requirements that are most likely to create impediments to international trade are those that are more rigorous than the international requirements, which may well be the product of a least-common-denominator consensus. In a setting such as ISO, those standards originate from an industry-dominated forum.

The result is that, through a trade agreement, the requirements of non-binding, hortatory guidance intended to establish minimum requirements in the form of good practice standards – a floor – are transformed by the TBT Agreement into a legally binding

outer limit of rigor—a ceiling. Conversely, those national measures that conform to international standards are effectively insulated from challenge. Within the TBT Agreement, international standards may operate either as a sword – a negative screen used to challenge a domestic regulatory action, as in EC-Sardines – or a shield – an internationally agreed reference point that bolsters the legitimacy of a national measure (Wirth, 2009).

As with sanitary and phytosanitary standards, the North American Free Trade Agreement (NAFTA, 1992) and other regional and bilateral trade agreements to which the United States is party (DR-CAFTA, 2004) contain provisions disciplining technical barriers to trade, as does CETA (CETA, 2014).

The TTIP negotiations include a portion on technical barriers. According to the EU's official fact sheet (European Commission, 2015e), it is seeking to:

- be able to use international standards (such as those agreed in the International Organization for Standardization-ISO) to make it easier to export to the US; such standards are widely used in the EU and around the world;
- eliminate or at least reduce unnecessarily duplicative or burdensome procedures for checking products;
- ensure easy access to information on regulations and standards that apply to goods in the US and the EU;
- improve cooperation between EU and US standardisation bodies when they draw up new standards; this will help reduce differences and they might even be able to agree on common standards;
- get more transparency in the US system on standards.

The EU's proposed negotiating text (European Commission, 2015f) would incorporate the WTO TBT Agreement by reference. Specifically with respect to labeling, after reiterating the requirements of article 2.2 of the WTO TBT Agreement, the EU would add a new discipline:

> Compulsory marking requirements, while continuing to provide the necessary information to the user or consumer as well as to public authorities regarding compliance of products with specific requirements, should be limited as far as possible to what is essential and to what is the least trade restrictive to achieve the legitimate objective pursued.

The U.S. for its part is seeking:

> to increase transparency and openness in the development of standards and technical regulations, ensure that U.S. bodies are permitted to test and certify products sold in Europe, promote EU recognition of international standards used to support global trade by U.S. exporters and producers, and establish an ongoing mechanism to discuss TBT concerns (USTR 2014).

5. Conclusion

As an aid in comparing and analyzing these three categories of regulatory provisions relating to food, it is useful clearly to summarize the sources of international requirements (Table 1).

Table 1. Comparison of international legal standards for GIs, food safety standards, and non-GI claims of food quality.

	International Protections for National Measures	Affirmative (Positive) Harmonization	Trade-Based (Negative) Disciplines
GIs	TRIPS TTIP?	No need – international protection for nationally-established GIs in TRIPS	None
Food Safety Standards	Not applicable	Codex (non-binding) ISO (non-governmental, non-binding) Private certifying organizations	WTO SPS Agreement TTIP SPS chapter
Non-GI labeling of quality, sustainability, humane treatment, etc.	Not applicable	Codex (non-binding), but coverage very limited	WTO TBT Agreement TTIP TBT chapter

Table 1 is very revealing in highlighting one of the singular attributes of free trade agreements, namely their asymmetric character. By and large, free trade agreements contain no minimum standards of performance in the fields of food safety, food quality, or in most other areas of social and regulatory policy. Intellectual property is an important exception, in which unilateral, national measures are given international protection. Consequently, GIs are structurally favored, as they fall within the IP regime.

Returning to the examples at the beginning of this paper, the laboratory tests conducted on French wines detected residues of an insecticide (bromopropylate) and a fungicide (carbendazim) prohibited in France. But according to an EU Parliamentary question,[7] there are no maximum residue limitations for pesticides in wine, in contrast to those for food and other beverages.

Then there is M. Giboulot, who produces high-quality organic or "bio-dynamic" red and white wines from 35 acres of vines in Burgundy under the appellations "Côte de Beaune" and "Haute Côte de Nuits." He refused to spray his grapes with pesticides to fight flavescence dorée, a bacterial disease spread by the leaf hopper, *Scaphoideus titanus*. Although his conviction was overturned, there is a serious question about the consistency of the strict requirements of GIs, which are protected at the international level, and organic standards, which are subject at the international level only to non-binding affirmative harmonization in Codex.

If either of these considerations – minimal food safety standards for residues of prohibited substances or internationally-agreed requirements for the designation "organic" – were to be folded into the relevant GIs, the international situation would be entirely

[7] http://www.europarl.europa.eu/sides/getDoc.do?type=WQ&reference=E-2013-011147&language=HU. Accessed 2 March 2016.

different. In those situations the relevant standards, food safety or organic as the case may be, would be mandated as part of the GI requirements and then affirmatively protected through the TRIPS Agreement. One could even imagine utilizing the theory of GIs for the benefit of food safety, quality, sustainability and the environment. For instance, an "Appellation Nature Contrôlée" could be created for the promotion of organic wines.[8]

In any event, this analysis demonstrates that the long-held view that free trade agreements like TTIP are incompatible with affirmative obligations with respect to food quality, food safety, the environment, and sustainability is simply incorrect (Wirth, 1992). GIs receive affirmative benefits in trade agreements, and at the absolutely highest level in the form of a monopoly. At the end of the day, GIs are simply a protected indication of quality – albeit presumably high quality – and at an even more rudimentary level fundamentally the identification of the place of origin of a particular foodstuff. But as demonstrated in this paper, the high level of protection accorded GIs is unrelated to food safety or many other attributes that might be labeled as of concern to consumers, such as organic production methods or GMO-free content. At the same time, safety and other attributes are subjected to negative requirements designed to protect abuses, while GIs receive affirmative protection.

As a matter of principle, it is difficult to justify the highly disparate treatment of these indications of quality and safety. Although GIs are treated for trade purposes as having a proprietary component – hence the treatment as intellectual property – this is purely a legal construct designed to assure protections for particular interests and discrete social policy goals. At present, trade agreements are deployed in exactly the opposite direction with respect to all other domestically-established standards for food. The negative disciplines in the SPS and TBT Agreement exert downward pressure on excessively rigorous standards, which are entirely analogous to the demanding requirements set by the protected regime of GIs. It would be entirely consistent to extend such an approach to regulation designed to address other attributes of food safety and quality, and those regulations could even be incorporated into the existing regime of geographical indications treated as intellectual property.

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[8] A blog by this very name exists to promote the concept. http://appellationnaturecontrolee.com/. Accessed 2 March 2016.

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