

# NUTRITIONAL REGULATION AND INTERNATIONAL TRADE IN APEC ECONOMIES: THE NEW CHILEAN FOOD LABELING LAW

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## ABSTRACT

*In many countries, economic growth has induced a general change in eating patterns, from high rates of malnutrition, to recurrent obesity problems and other health related issues in the population. Changes to nutritional labeling regulations that are aimed at providing more information to the consumer have been part of the strategy to fight obesity. Mandatory labeling schemes constitute a technical barrier to trade (hereinafter “TBT”), which must respect the principles of the WTO TBT Agreement. This article examines the new Chilean Food Labeling Law and the accompanying regulation in effect since 2016 which together form one of the earliest methods to mandate front-of-pack food labeling, while focusing on its compatibility with WTO law and its implications for other APEC economies. We present a review of the origin and content of the Chilean regulation and the discussion of the WTO TBT Committee, complemented with the analysis of related WTO jurisprudence and the response from the food industry.*

**KEYWORDS:** *Chile, TBT Agreement, food labeling, overweight, obesity, NCDs, international trade, TBT Committee, WTO, APEC*

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## I. INTRODUCTION

According to the World Health Organization (WHO), almost 40% of the world's adult population is overweight, and 13% is obese. An inadequate nutritional condition is a major risk factor for non-communicable diseases (hereinafter "NCDs"), especially for cardiovascular diseases and diabetes, which together lead to more deaths worldwide than all of the remaining causes combined.<sup>1</sup> Childhood obesity is likely to persist into adulthood.<sup>2</sup> The high prevalence of overweight and obese people is a relevant concern for public health policy. Legal intervention that aims to motivate individuals who are at a high risk of NCDs to change their lifestyle, and specifically diet, are increasingly common. Some authors consider that conditioning personal behavior in areas that affect only the individual, and assuming that policy makers know which choices are best, is a paternalistic and even coercive attitude.<sup>3</sup> Government policies that intend to influence individuals to make healthy choices are common not only for diet, but also for tobacco and alcohol consumption. Until now, because the initiatives in several cases have not been sufficiently based on an advanced knowledge of health related behavior, the results have been limited.<sup>4</sup> As a consequence, an interdisciplinary dialogue that encompasses behavioral sciences, such as psychology and economics, in addition to law and nutrition, is highly recommended for the design of measures.<sup>5</sup> Authorities also have to consider the interaction between public health policy and trade. Under the binding rules of the World Trade Organization (hereinafter "WTO"), and in particular of the Agreement on Technical Barriers to Trade (hereinafter "TBT Agreement"), it is necessary to balance the "market-access interests of exporters with the public health interests of importers".<sup>6</sup>

The Asia-Pacific Economic Cooperation (hereinafter "APEC") members are very diverse in terms of overweight and obesity rates. Oceanic and American countries have a prevalence that currently doubles that of

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<sup>1</sup> WORLD HEALTH ORGANIZATION [hereinafter WHO], GLOBAL STATUS REPORT ON NONCOMMUNICABLE HEALTH DISEASES 2014, 79 (2014).

<sup>2</sup> See generally William Dietz, *Childhood Weight Affects Adult Morbidity and Mortality*, 128 J. NUTRITION 411 (1998).

<sup>3</sup> See generally Fernando D. Simões, *Paternalism and Health Law: Legal Promotion of a Healthy Lifestyle*, 4 EUR. J. RISK REG. 347 (2013).

<sup>4</sup> See generally Mike Kelly & Mary Barker, *Why Is Changing Health-related Behavior So Difficult?* 136 PUB. HEALTH 109 (2016); See generally Jennifer Matjasko et al., *Applying Behavioral Economics to Public Health Policy: Illustrative Examples and Promising Directions*, 50 (5 Suppl 1) AM. J. PREV. MED. 13 (2016).

<sup>5</sup> See generally Elsa Savourey, *Supermarket Heuristics Behavioral Insights into the U.S. Nutrition Labeling Policy*, 23 VA. J. SOC. POL'Y & L. 89 (2016).

<sup>6</sup> BENN MCGRADY, *TRADE AND PUBLIC HEALTH: THE WTO, TOBACCO, ALCOHOL, AND DIET* 25 (1st ed. 2011).

Asian countries.<sup>7</sup> One of the APEC members with the highest rates of obesity is Chile. The 2017 National Health Survey showed that 39.8% of the adult population is overweight and 34.4% is obese. Women and less educated people are significantly more likely to be obese.<sup>8</sup> Three million Chileans suffer from chronic diseases related to obesity, which costs an estimated 0.2% of the GDP in productivity losses and health care, and is expected to reach 0.4% in the next years.<sup>9</sup> For children, the situation is not much better. According to the Nutritional Map Report, 23.9% of students in first grade are obese and 26.4% are overweight.<sup>10</sup> Socioeconomic level greatly influences the probability of being obese in this age group.<sup>11</sup>

In 2007, a group of five Chilean Senators introduced legislation for the regulation of unhealthy food. The document defended consumers' right to receive clear, standardized information. After a long discussion and various modifications, the Chilean Food Labeling and Advertising Law (hereinafter "Law 20606") was finally approved in July 2012.<sup>12</sup> Law 20606 establishes that any processed food which exceeds a certain level of energy, sugar, fat or sodium as defined by the Ministry of Health must exhibit a compulsory front-of-pack (hereinafter "FOP") warning label.<sup>13</sup> In addition, advertising of labeled products to children under fourteen years old is restricted in any form, as is their sale inside schools.<sup>14</sup> Since its publication, Law 20606 has remained a contentious issue. One of the controversies derives from its implications to international trade. In 2013 the Chilean Government informed the WTO about the implementation of Law 20606.<sup>15</sup> Since then, its legality has been a recurring topic of discussion at meetings of the WTO Committee on Technical Barriers to Trade (hereinafter "TBT Committee"). More than ten WTO Members, including the United States (hereinafter

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<sup>7</sup> *Global Health Observatory (GHO) Data*, WHO, [http://www.who.int/gho/ncd/risk\\_factors/overweight/en/](http://www.who.int/gho/ncd/risk_factors/overweight/en/) (last visited Nov. 8, 2018).

<sup>8</sup> For further information: Minsal Chile, *Encuesta Nacional de Salud 2016-2017: Primeros resultados*, [National Health Survey 2016-2017: First Results] (2017), [http://www.minsal.cl/wp-content/uploads/2017/11/ENS-2016-17\\_PRIMEROS-RESULTADOS.pdf](http://www.minsal.cl/wp-content/uploads/2017/11/ENS-2016-17_PRIMEROS-RESULTADOS.pdf).

<sup>9</sup> U.N. ECON. COMM'N FOR LAT. AM. AND THE CARIB., *Impacto Social y Económico de la Malnutrición: Modelo de Análisis y Estudio Piloto en Chile, el Ecuador y México* [Social and Economic Impact of Malnutrition: Analysis Model and Pilot Study in Chile, Ecuador and Mexico], at 86, 102, U.N. Doc. LC/TS.2017/32 (Nov. 2017).

<sup>10</sup> Junta Nacional de Auxilio Escolar y Becas [National School Aid and Scholarship Board], *Mapa Nutricional 2017* [Nutritional Map 2017] 3 (2017), <https://www.junaeb.cl/wp-content/uploads/2013/03/Mapa-Nutricionalpresentacio%CC%81n2.pdf>.

<sup>11</sup> See generally Ariel Azar et al., *Determinantes individuales, sociales y ambientales del sobrepeso y la obesidad adolescente en Chile* [Individual, Social and Environmental Determinants of Overweight and Obesity Among Chilean Adolescents], 143 REV. MED. CHILE 598 (2015).

<sup>12</sup> Law No. 20606 On Nutritional Composition of Food and Food Advertising [hereinafter Law 20606], Julio 6, 2012 (Chile).

<sup>13</sup> *Id.* art. 2.

<sup>14</sup> *Id.* art. 6.

<sup>15</sup> Committee on Technical Barriers to Trade [hereinafter TBT Committee], *Notification*, WTO Doc. G/TBT/N/CHL/219 (Jan. 16, 2013) [hereinafter G/TBT/N/CHL/219].

“US”) and the European Union (hereinafter “EU”), formally presented concerns. According to them, Law 20606 violates several principles in the TBT Agreement,<sup>16</sup> including non-discrimination, harmonization, prevention of unnecessary obstacles to trade, and transparency.

Chile is not the only country in the APEC who has developed FOP nutritional labeling specific regulations. Of the twenty-one APEC members, eleven have implemented or are preparing the implementation of FOP labeling.<sup>17</sup> Most of them have introduced voluntary schemes where each company can choose whether or not to join. Australia, New Zealand, Brunei, South Korea, Malaysia, Mexico, Singapore and Thailand all have voluntary labeling. The most common form under such schemes adopted is emphasize the health attributes of a product based on its nutritional profile. For example, a scheme may include a sign of approval that appears accompanied by the legend “healthy choice” or “healthier choice”. Another option is the one used by Australia and New Zealand with the “health star” rating system. In this case, products are ranked according to how healthy they are. The number of stars can range from half to five. The label will include the number of stars rated but also the energy declaration and the content of saturated fats, sugar, sodium and fiber per 100 grams. South Korea introduced voluntary “traffic light” FOP labeling in 2011, but only for children’s preferred food products. Three colors—red, amber and green—are displayed according to the content of fat, saturated fat, sugar and salt.<sup>18</sup> In the U.S. and China, there is voluntary use of FOP, but it does not stem from any specific regulation. Instead, they emerged from the private sector or specialized organizations.

The first initiatives relating to mandatory FOP nutritional labeling have recently appeared among APEC members. While Chile is still the only country with legislation in effect, there are important advances in Peru and Canada. In addition to restrictions on advertisements, the Peruvian regulation mandates FOP food labeling in the form of a warning sign for products that exceed a certain threshold of “critical nutrients”.<sup>19</sup> This labeling was introduced by Law 30021, published in 2013,<sup>20</sup> whose accompanying regulation was issued in 2017 to assist with its

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<sup>16</sup> Agreement on Technical Barriers to Trade, Apr. 15, 1994, 1868 U.N.T.S. 120 [hereinafter TBT Agreement].

<sup>17</sup> Rebecca Kanter et al., *Front-of-package Nutrition Labelling Policy: Global Progress and Future Directions*, 21 PUB. HEALTH NUTRITION 1399, 1402-04 (2018).

<sup>18</sup> SEUNG AH CHUNG & STEPHEN L. WIXOM, REPUBLIC OF KOREA, FOOD AND AGRICULTURAL IMPORT REGULATIONS AND STANDARDS-NARRATIVE, FAIRS COUNTRY REPORT 13-14 (2013).

<sup>19</sup> See generally Sofía Boza et al., *Recent Changes in Food Labelling Regulations in Latin America: The Cases of Chile and Peru* (SECO/WTI Acad. Corp. Project, Working Paper No.04/2017, 2017).

<sup>20</sup> Law No. 30021, Mayo 17 2013 (Peru).

implementation.<sup>21</sup> Although both were supposed to come into effect in December 2017, it was delayed for further discussion in the Congress. Finally, in June 2018 an Advertising Warnings Manual was published, and it was announced that the FOP labeling will be in effect in June 2019.<sup>22</sup>

In 2016, the Canadian government agency Health Canada advanced the introduction of mandatory FOP labeling and initiated a public consultation to help formulate the strategy. In February 2018 a first proposal was unveiled. The warning label consists of a rectangle on a white background with the words “high in” accompanied by the list of exceeded critical nutrients in English and French. The nutrient thresholds are established per serving and not per 100 grams as in Chile and Peru.<sup>23</sup>

The impact of the proliferation of FOP nutritional labeling is a matter of concern at a supranational level. The Codex Alimentarius Committee on Food Labeling created a working group which is developing general guidelines for national initiatives on FOP. In Europe, there are already several FOP schemes in operation, all of them voluntary. Some are a distinction for healthier products as the “Nordic Keyhole” in Sweden, Norway, Denmark, Iceland and Lithuania, the “Heart Symbol” in Finland and the Healthy Choice Program labeling in Netherlands, Belgium, Poland and Czech Republic. In the United Kingdom and France, there are schemes of the “traffic light” type. The main legal framework at European level is the Food Information for Consumers Regulation of 2011. In its Article 35.5 establishes that “the European Commission shall submit a report to the European Parliament and the Council on the use of additional forms of expression and presentation, on their effect on the internal market and on the advisability of further harmonization”. Since April 2018, the European Commission is preparing its report promoting discussion through specialized meetings on FOP nutritional labeling.<sup>24</sup> For APEC, despite the proliferation of FOP labeling among its members, no specific joint initiatives have been identified.

This article presents a critical analysis of the Chilean Law 20606 and its compatibility with WTO law, which in turn can contribute to identifying the potential implications of similar regulations in other countries, especially those within APEC. For this purpose, we address the origin and

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<sup>21</sup> Supreme Decree No. 017-2017-SA that approves the regulation of Law 30021, Junio 17 2017 (Peru).

<sup>22</sup> DIARIO OFICIAL EL PERUANO SÁBADO 16 DE JUNIO DE 2018 [THE PERUVIAN OFFICIAL DAILY, SATURDAY, JUNE 16, 2018] (June 16, 2018), <https://busquedas.elperuano.pe/download/url/aprueban-manual-de-advertencias-publicitarias-en-el-marco-de-decreto-supremo-n-012-2018-sa-1660606-1>.

<sup>23</sup> Kanter et al., *supra* note 17, at 1401.

<sup>24</sup> Heidi Moens, *EC Report on Front-of-pack Nutrition Labeling* (June 1, 2018), [https://ec.europa.eu/health/sites/health/files/nutrition\\_physical\\_activity/docs/ev\\_20180531\\_co03\\_en.pdf](https://ec.europa.eu/health/sites/health/files/nutrition_physical_activity/docs/ev_20180531_co03_en.pdf); Regulation No. 1169/2011 of the European Parliament and of the Council, Oct. 25, 2011.

content of the law and its regulation with their compatibility to the WTO, specifically in: (i) necessity and restrictiveness, (ii) non-discrimination, (iii) harmonization, (iv) transparency, and (v) implementation related issues. Finally, in the conclusion we propose some lessons on food labelling for other APEC economies that were uncovered in the development and implementation of the Chilean law.

APEC countries have shown interest in FOP labeling and are also in the process of developing FOP labeling laws, including even mandatory ones. This is the basis of our interest in discussing this specific Chilean law in the context of APEC countries. In fact, APEC is the region that up to now has implemented or is in the process of developing more initiatives in FOP nutritional labeling; among them, three of the few mandatory schemes worldwide.<sup>25</sup> In addition, APEC economies are of key relevance to international food trade. Together, they comprise of 41% of world agricultural exports and 36.5% of imports by value.<sup>26</sup> Therefore, it is relevant to generate quality inputs for an increasingly necessary but still largely unexplored discussion.

## II. ORIGIN, CONTENT AND REGULATION OF LAW 20606

The results of a joint WHO/Food and Agriculture Organization of the United Nations (hereinafter “FAO”) Expert Consultation on Diet, Nutrition and the Prevention of Chronic Disease held in Geneva in 2002, motivated a group of Chilean researchers to discuss the actions that the country could take to address its growing overweight and obese population.<sup>27</sup> The discussion was continued in the Chilean Congress, and in March of 2007, the Senate Health Committee presented legislation for the regulation of unhealthy food. The strategy proposed by Chilean legislators was focused on informing consumers about nutrient content according to the recommendations in the final report of the joint WHO/FAO meeting, so that they could make informed decisions about what they were eating. More specifically, the bill stated that consumers have the right to receive clear and standardized information about food, as it will allow them to make healthier purchasing decisions. Consequently, it would be justified to regulate the way in which food suppliers deliver the information about their products. The draft also proposed to discourage the use of advertising

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<sup>25</sup> Kanter et al., *supra* note 17, at 1402-1404.

<sup>26</sup> According to data for 2016 on World Integrated Trade Solution (WITS), WORLD BANK, <https://wits.worldbank.org/default.aspx?lang=es> (last visited Feb. 19, 2019).

<sup>27</sup> WHO, DIET, NUTRITION AND THE PREVENTION OF CHRONIC DISEASES FINAL REPORT OF THE JOINT WHO/FAO MEETING (2003); Camila Corvalán et al., *Structural Responses to the Obesity and Non-communicable Diseases Epidemic: The Chilean Law of Food Labeling and Advertising*, SUPPL. 2 OBESITY REV. 79, 87 (2013).

targeted at children for unhealthy foods, as it takes advantage of their credulity.<sup>28</sup>

During the five years following its introduction, the legislation and its subsequent versions and modifications were extensively discussed. The different representatives agreed on the need to reduce the levels of obesity in the Chilean population. However, some legislators felt that the proposed strategy was insufficient as it did not address certain structural causes that influence food consumption, e.g. the low purchasing power of much of the Chilean population. Professional associations linked to food production and advertising also expressed their concerns very explicitly.<sup>29</sup>

The Law 20606, as finally approved in 2012, is based in three pillars: (i) FOP nutritional labeling, (ii) ban on advertising aimed at children, and (iii) education and promotion of healthy life, including a prohibition of the sale of unhealthy foods in schools. Its scope of application is food production, distribution, commercialization and consumption. Given the fact that the first pillar is the most broadly addressed in the law and generates the highest implications for trade, it will be discussed in greater depth in this section compared to the latter two.

(i) FOP nutritional Labeling: Four “critical nutrients” including sodium, sugar, saturated fat and energy content were identified for the evaluation of nutritional quality, as their excessive intake may constitute a risk to human health. The scope, nutrient content thresholds and design of the FOP labeling were in the hands of the Ministry of Health through their power to modify the Chilean Sanitary Regulation of Food (hereinafter “RSA”, for “Reglamento Sanitario de los Alimentos”).<sup>30</sup> An early attempt to modify the RSA by Decree N° 12 was published in December 2013,<sup>31</sup> but never came into effect. Law 20606 was implemented by Decree N° 13, which was published on June 2015, and came into effect exactly one year later.<sup>32</sup>

For every food product sold in the Chilean market, whether local or imported, Decree N° 13 establishes that a warning label must be used when “critical nutrients” exceed the thresholds specified in the regulation. Energy

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<sup>28</sup> BIBLIOTECA DEL CONGRESO NACIONAL DE CHILE [THE LIB. OF CONGRESS OF CHILE], *Diario de Sesiones del Senado de la República de Chile, Sesión 5ª, miércoles 21 de marzo de 2007* [Journal of Sessions of the Senate of the Republic of Chile, Session 5, Wednesday, Mar. 21, 2007], <https://www.bcn.cl/laborparlamentaria/wsgi/consulta/verDiarioDeSesion.py?id=646377>.

<sup>29</sup> See generally BIBLIOTECA DEL CONGRESO NACIONAL DE CHILE [THE LIBRARY OF CONGRESS OF CHILE], HISTORIA DE LA LEY NO. 20.606: SOBRE COMPOSICIÓN NUTRICIONAL DE LOS ALIMENTOS Y SU PUBLICIDAD [HISTORY OF LAW 20606: ON FOOD NUTRITIONAL COMPOSITION AND ADVERTISEMENT] (2012) [hereinafter BCN].

<sup>30</sup> Supreme Decree No. 977/1996 approving Food Health Regulations, Agosto 6, 1996 (Chile).

<sup>31</sup> Decree No. 12 Amending Supreme Decree No. 977/1996 on Food Health Regulations [hereinafter Decree N° 12], Diciembre 17, 2013 (Chile).

<sup>32</sup> Decree No. 13 Amending Supreme Decree No. 977/1996 on Food Health Regulations [hereinafter Decree N° 13], Junio 26, 2015 (Chile).

content must be labeled when sugars or saturated fats have been added and the cutoff value is exceeded. Sodium addition is excluded since it does not increase natural energy content. Some food products are exempted from this labeling obligation, such as foods that are sold in bulk, broken down and prepared at the point of sale, i.e. not packaged prior to be sold; infant formulas and baby food, except those containing added sugars; processed cereal-based infant food; food for medical use; food for weight control; sports supplements; and calorie free sweeteners.<sup>33</sup>

Decree N° 13 also establishes the thresholds for critical nutrients. For this, products are divided in two categories: solids and liquids, and thresholds are set by portions of 100 grams for solids, or 100 milliliters for liquids. Regulated thresholds were designed to come into effect progressively, becoming increasingly restrictive over time (Table 1).<sup>34</sup>

Products which exceed the thresholds set by law must exhibit an octagonal label with a black background and white border that contains the text “High in” followed by the name of the “critical nutrient” and the words “Ministry of Health” for each nutrient in excess (Figure 1). Decree N° 13 details the location and size of the labels depending on the type of packaging. The Decree allows labels to be printed directly on the packaging of the product or be superimposed by a sticker.<sup>35</sup> In both cases they must be in Spanish.<sup>36</sup> The Decree N° 13 grants micro and small enterprises (hereinafter “SMEs”), defined according to Chilean Law 20416 which sets special rules for smaller companies, an initial delay of thirty-six months in the application of these labeling obligations. This grace period will end in June 2019.<sup>37</sup>

(ii) Ban on Advertising: According to Law 20606, the free sampling of labeled products is prohibited for children under fourteen years old.<sup>38</sup> Decree N° 13 also prohibits all kinds of advertisement of labeled foods targeted to children, as well as the use of free toys or any other promotional strategy due to their credulity.<sup>39</sup>

(iii) Education And Promotion: The Decree N° 13 bans the sale and distribution of labeled products inside pre-school, primary or secondary education facilities<sup>40</sup> and Law 20606 introduces a school monitoring system coordinated by the Ministry of Health and the Ministry of Education.<sup>41</sup> In this context, the National Board of School Assistance and

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<sup>33</sup> *Id.* art. 6.

<sup>34</sup> *Id.* art. 6.

<sup>35</sup> *Id.* art. 6.

<sup>36</sup> *Id.* art. 2.

<sup>37</sup> *Id.* transitory art. 3.

<sup>38</sup> Law 20606, *supra* note 12, art. 6.

<sup>39</sup> Decree N° 13, *supra* note 32, art. 3.

<sup>40</sup> *Id.* art. 3.

<sup>41</sup> Law 20606, *supra* note 12, art. 6.

Scholarships (hereinafter “JUNAEB”), an independent unit of the Ministry of Education, has coordinated a national strategy to prevent childhood obesity since 2016 (hereinafter “*Plan Contrapeso*”) in which the Ministry of Health is also involved.<sup>42</sup> One of the initiatives in the strategy has been the publication of a guide for the implementation of “healthy kiosks” in schools. The main characteristic of these kiosks is that they substitute the sale of products with warning labels for healthier alternatives, such as fresh fruit, sugar-free juices, bottled water, dried fruit, non-fat yogurt, salads and other fruit and vegetable based preparations.<sup>43</sup>

### ***A. Implementation of Law 20606***

Decree N° 13 established that, less than eighteen months after its publication, the Chilean Undersecretary of Public Health was to produce a report evaluating: (i) the implementation of Law 20606, (ii) the adaptation of technical procedures and (iii) the changes in consumers’ attitudes and perceptions.<sup>44</sup> This report was presented on January 2017 in an open event and published in June the same year.<sup>45</sup> The impact of the Law on consumers’ behavior and the food industry were evaluated as generally satisfactory, as was the progress of the implementation strategy.

Concern remains about the capacity of micro and small enterprises to comply with the regulations despite the three years’ grace period. In Chile, there are more than 1.5 million SMEs, which are responsible for half of the private employment rate.<sup>46</sup> Most of those SMEs are informal, comprising of 77% of the primary sector in 2017. For these businesses, a lack of sufficient financial resources is a recurring problem preventing their growth.<sup>47</sup> It is reasonable to suggest that they might be vulnerable to changes in the regulatory framework, especially if they imply variations to their processes.

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<sup>42</sup> JUNAEB, *Plan Contrapeso [Counterweight Plan]*, <https://www.junaeb.cl/wp-content/uploads/2016/11/Pol%C3%ADtica-Contra-la-Obesidad-Estudiantil-JUNAEB.pdf>.

<sup>43</sup> KIOSKOS SALUDABLES [HEALTHY KIOSKS] (Sept. 10, 2015), [http://www.minsal.cl/kioscos\\_saludables/](http://www.minsal.cl/kioscos_saludables/).

<sup>44</sup> Decree N° 13, *supra* note 32, transitory art. 4.

<sup>45</sup> See generally MINISTERIO DE SALUD [MINISTRY OF HEALTH], INFORME DE EVALUACIÓN DE LA IMPLEMENTACIÓN DE LA LEY SOBRE COMPOSICIÓN NUTRICIONAL DE LOS ALIMENTOS Y SU PUBLICIDAD [REPORT ON THE EVALUATION OF THE IMPLEMENTATION OF THE LAW ON FOOD LABELING AND ADVERTISEMENT] (2017) [hereinafter MINSAL].

<sup>46</sup> MINISTERIO DE ECONOMÍA, FOMENTO Y TURISMO (SERCOTEC) [THE MINISTRY OF ECONOMY, DEVELOPMENT AND TOURISM], LA SITUACIÓN DE LA MICRO Y PEQUEÑA EMPRESA EN CHILE [SITUATION OF MICRO AND SMALL ENTERPRISES IN CHILE] 12 (2013).

<sup>47</sup> See generally INSTITUTO NACIONAL DE ESTADÍSTICAS CHILE, INFORME FINAL QUINTA ENCUESTA DE MICROEMPREDIMIENTO [NATIONAL INSTITUTE OF STATISTICS, FINAL REPORT MICRO ENTREPRENEURSHIP SURVEY] (2017), <https://www.economia.gob.cl/wp-content/uploads/2018/02/Informe-Final-EME-5.pdf>.

In addition, the Chilean food industry disagreed with the use of 100 grams or milliliters as a standard portion for measurement. It was questioned that a product sold in a package that contains less than 100g must carry a warning label if a 100g portion would exceed the established thresholds for critical nutrients. Moreover, some products may be sold in units above 100 grams, but the usual consumption portion is much lower, for example, butter and certain dressings.<sup>48</sup> The nutrient thresholds in Decree N° 13 were also questioned because they only separate solid and liquid products. In the industry's opinion the classification of foods should have included many more categories, like in the RSA, e.g. yogurt, butter, ice cream, breakfast cereals, ketchup, etc. The food industry also expressed their concern in relation to the consumer's ability to compare when making purchasing decisions. They affirm that if every product within the same typology is labeled, for example chocolates, cookies or mayonnaise, even in their gourmet or light versions, the incentives to market higher quality varieties decrease.<sup>49</sup> In short, the industry considers an initiative such as the labeling law positive, but not the specific form in which it was implemented because they believe that it does not help the consumer make better decisions.<sup>50</sup>

Chilean professional associations linked to food production and advertising pointed out during the legislative discussion that the new labeling may lead to stigmatizing certain foods and cause confusion among consumers. In their view, prohibiting or restricting advertising would limit freedom of expression and hinder the development of economic activities.<sup>51</sup> The Chilean Food Companies Association ("Chile Alimentos") criticized the lack of transparency surrounding the rules which the Ministry of Health will use to monitor compliance with the regulation.<sup>52</sup>

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<sup>48</sup> See generally BCN, *supra* note 29.

<sup>49</sup> See generally MACARENA DEL PILAR ESPINOZA ROMERO, ESTUDIO DE LA LEY 20.606 "SOBRE COMPOSICIÓN NUTRICIONAL DE LOS ALIMENTOS Y SU PUBLICIDAD" DE CHILE [STUDY OF LAW 20606 ON FOOD NUTRITIONAL COMPOSITION AND ADVERTISEMENT] (2016).

<sup>50</sup> Daniela Pradel A., *Ley de Etiquetado sigue golpeando: Dulces y snacks registraron mayores caídas en ventas*, [Labeling Law Continues Hitting: Sweets and Snacks Registered Greater Falls in Sales], ECONOMÍA Y NEGOCIOS (Sept. 19, 2017), <http://www.economiaynegocios.cl/noticias/noticia.s.asp?id=399140>.

<sup>51</sup> ANDA Chile, *No perdamos una oportunidad*, [Don't Lose an Opportunity], MARZO-ABRIL, REVISTA DE LA ASOCIACIÓN NACIONAL DE AVISADORES [MARCH-APRIL, NATIONAL ADVERTISEMENT ASSOCIATION JOURNAL], 3 (2013).

<sup>52</sup> DEVELOPING IDEAS & AMO, CHILE'S LAW ON FOOD LABELLING AND ADVERTISING: A REPLICABLE MODEL FOR LATIN AMERICA? 6 (May 2016), [http://www.desarrollando-idea.s.com/wp-content/uploads/sites/5/2016/05/160504\\_DI\\_report\\_food\\_chile\\_ENG.pdf](http://www.desarrollando-idea.s.com/wp-content/uploads/sites/5/2016/05/160504_DI_report_food_chile_ENG.pdf).

### ***B. The Discussion of the Law 20606 at the TBT Committee***

As Law 20606 establishes mandatory labeling requirements for products and affects not only domestic production, but also imports, it is considered to be a technical regulation.<sup>53</sup> In January 2013, Chile notified the TBT Committee of the amendment to its Food Health Regulations in accordance with Law 20606.<sup>54</sup> In August 2014, Chile declared this first notification null and void<sup>55</sup> being substituted by a new one which was referred to in Decree N° 12.<sup>56</sup> The WTO was notified of the replacement of Decree N° 12 by Decree N° 13 in July 2015.<sup>57</sup>

The number of meetings in which a concern is raised is an important measure. It could indicate the “seriousness” of such concern and the technical and political complexity of the measure, as well as the number of countries involved.<sup>58</sup> The content of the Law 20606 and its accompanying regulation was discussed in every TBT Committee meeting from the first notification in 2013 to November 2016. There was no discussion about it in 2017 or in 2018. During those meetings, eleven WTO members, including Argentina, Australia, Brazil, Canada, Colombia, Costa Rica, the EU, Guatemala, Mexico, Switzerland and the U.S., raised their concerns. In the review of Chile’s trade policy at the WTO in 2015, concerns over Law 20606 were one of the main topics discussed.<sup>59</sup> Such concerns can be summarized as: (i) the necessity and restrictiveness of the measure, (ii) the compliance with the principles of: harmonization, non-discrimination and transparency, and (iii) the implementation of the legislation.<sup>60</sup> They will all be examined in the following section.

It is important to note that the Law 20606 is not the first food labeling regulation to generate controversy amongst WTO members. Food labeling measures have even been challenged at the WTO Dispute Settlement Mechanism, invoking violations to the TBT Agreement. Two paradigmatic cases are the US — Certain Country of Origin Labeling (hereinafter “COOL”) Requirements; and the US — Measures Concerning the

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<sup>53</sup> TBT Agreement Annex 1.

<sup>54</sup> G/TBT/N/CHL/219, *supra* note 15.

<sup>55</sup> TBT Committee, *Notification*, WTO Doc. G/TBT/N/CHL/219/Add.4 (Aug. 20, 2014).

<sup>56</sup> TBT Committee, *Notification*, WTO Doc. G/TBT/N/CHL/282 (Aug. 22, 2014).

<sup>57</sup> TBT Committee, *Notification*, WTO Doc. G/TBT/N/CHL/282/Add.1 (July 6, 2015).

<sup>58</sup> Henrik Horn et al., *In The Shadow of The DSU: Addressing Specific Trade Concerns in The WTO SPS and TBT Committees* 29-30 (Columbia L. & Econ. Working Paper No. 494, 2013).

<sup>59</sup> WTO Secretariat, *Trade Policy Review Report by the Secretariat Chile*, WTO Doc. WT/TPR/S/315 (May 5, 2015).

<sup>60</sup> Some members expressed also concern on the compliance with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) article 20. That because of the potential impact on trademarks of the ban of the use of advertising involving children’s characters, animations, cartoons, animals and toys on products protected by property rights. Although interesting, this discussion is not in the extent of this article, since it does not specifically refer to the FOP labeling and, therefore, is outside the scope of the TBT Agreement.

Importation, Marketing and Sale of Tuna and Tuna Products (hereinafter “Tuna II”), which will, together with other relevant disputes, be used to complement the analysis of the Law 20606 in the following sections.

### III. COMPATIBILITY WITH WTO LAW

#### *A. Necessity and Restrictiveness of the Measure*

Under the TBT Agreement, Art. 2.2, WTO Members shall “ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfillment would create”.

The concept of “necessity” in the context of trade measures was already present in the General Agreement on Tariffs and Trade (“GATT”)<sup>61</sup> and was later incorporated into WTO agreements.<sup>62</sup> In order to determine whether a measure is necessary to achieve policy objectives and is consistent with the WTO rules, the so-called “necessity test” is used.<sup>63</sup> WTO agreements contain different necessity tests, which are not interchangeable, so they must be interpreted in their own context.<sup>64</sup> To date, no WTO member has been found to be acting in a manner inconsistent with the TBT Agreement article 2.2, and the fact that a measure is trade restrictive does not automatically make it inconsistent with that provision.<sup>65</sup> Despite differences in the interpretation of necessity among agreements, there are three common elements that make up the core of this concept: the justifiability of the measure, the level of trade-restrictiveness, and the comparison with other alternatives.<sup>66</sup>

*1. The Justifiability of the Measure* — After examining the discussion about Law 20606 at the WTO TBT Committee, it seems that there is consensus, even among concerned members, that the intention to reduce overweight, obesity and related diseases is a legitimate objective. The question is whether the Law 20606 fulfills that objective. The Appellate

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<sup>61</sup> GATT art. XX (b) supports the adoption or enforcement of measures “necessary to protect human, animal or plant life or health”.

<sup>62</sup> TBT Agreement arts. 2.2 & 2.5; The WTO Agreement on the Application of Sanitary and Phytosanitary Measures, arts. 2.2 & 5.6, Apr. 15, 1994, 1867 U.N.T.S. 493 [hereinafter SPS Agreement].

<sup>63</sup> Working Party on Domestic Regulation, “*Necessity Tests in the WTO*” Note by the Secretariat, ¶ 4, WTO Doc. S/WPDR/W/27 (Dec. 2, 2003).

<sup>64</sup> *Id.* ¶ 50.

<sup>65</sup> PETER VAN DEN BOSSCHE & WERNER ZDOUC, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS* 913 (2017).

<sup>66</sup> Panagiotis Delimatsis, *The Principle of Necessity in the WTO – Lessons for the GATS Negotiations on Domestic Regulation*, TILEC DISCUSSION PAPER NO. 2013-026, 1, 7 (2013).

Body (hereinafter “AB”) on US-COOL concluded that this type of assessment “should focus on ascertaining the degree of contribution achieved by the measure, rather than on answering the question of whether the measure fulfills the objective completely or satisfies some minimum level of fulfillment of that objective”.<sup>67</sup> On US-Tuna II, the AB ruled that the question of whether a regulation “fulfills” an objective “is concerned with the degree of contribution that the technical regulation makes toward the achievement of the legitimate objective”. The degree to which a particular objective is achieved “may be discerned from the design, structure, and operation of the technical regulation, as well as from evidence relating to the application of the measure”.<sup>68</sup> At the TBT Committee, concerned WTO members have pointed to several aspects of the design, structure and operation of the Law 20606, claiming they are unclear, incomplete or without sufficient background or justification.

Mexico has criticized the definition of “critical nutrients” for lacking technical, scientific and legal support.<sup>69</sup> The EU recognizes that certain nutrients are more likely to promote disease development, but affirms that there is no scientific evidence suggesting an identifiable threshold above which the risk existed.<sup>70</sup>

Considering 100g/100ml as the portion of reference has also been questioned. The US recommended that Chile use a product/category method instead, otherwise, misleading information would be given to the consumer, especially when the average portion of the food consumed was typically significantly larger or smaller than the 100g or 100ml or when the food provides other valuable nutrients.<sup>71</sup> Canada also suggested that the thresholds of “critical nutrients” should be based on “actual serving sizes normally consumed at one sitting”.<sup>72</sup>

WTO Members have also pointed out that the Law 20606 stigmatizes certain products even though they can be part of a healthy diet if consumed in a balanced way. An element they think contributes to stigmatization is the design of the label. The octagonal shape is associated with a stop sign,

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<sup>67</sup> Appellate Body Report, *United States — Certain Country of Origin Labelling Requirements*, ¶ 468, WTO Doc. WT/DS384/AB/R, WT/DS386/AB/R (adopted June 29, 2012) [hereinafter *COOL JUNE Report 2012*].

<sup>68</sup> Appellate Body Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, ¶¶ 315, 317, WTO Doc. WT/DS381/AB/R (adopted May 16, 2012) [hereinafter *TUNA MAY Report 2012*].

<sup>69</sup> See generally TBT Committee, *Statement by Mexico at the Meeting of the Committee on Technical Barriers to Trade of 6-7 March 2013*, WTO Doc. G/TBT/W/361 (Mar. 20, 2013).

<sup>70</sup> TBT Committee, *Note by the Secretariat: Minutes of the Meeting of 17, 19 and 20 June 2013*, ¶ 3.147, WTO Doc. G/TBT/M/60 (Sept. 23, 2013).

<sup>71</sup> TBT Committee, *Note by the Secretariat: Minutes of the Meeting of 5-6 November 2014*, ¶ 2.135, WTO Doc. G/TBT/M/64 (Feb. 10, 2015).

<sup>72</sup> TBT Committee, *Note by the Secretariat: Minutes of the Meeting of 4-6 November 2015*, ¶ 2.111, WTO Doc. G/TBT/M/67 (Feb. 3, 2016).

which can imply that intake of that product should be completely avoided. In different meetings, Australia, the EU, and the U.S. have urged Chile to reconsider the size, color and position of the labels.

Chile has addressed these concerns in the TBT Committee meetings, during a public consultation on the Law in 2014,<sup>73</sup> at the WTO review of Chile's trade policy in 2015<sup>74</sup> and at a thematic session on food labeling at the WTO in November 2016.<sup>75</sup>

Firstly, the country's representatives have called overweight and obesity an intractable health problem and an epidemic, emphasizing the high incidence of NCDs that their proliferation entails, as well as their alarming prevalence in children. Therefore, Chile believes that its population needs to be able to make informed decisions about food consumption. Secondly, Chile has argued that there is abundant evidence that the excessive intake of "critical nutrients" is related to the prevalence of overweight and obesity, and consequently, with NCDs. It has documented that the sale of ultra-processed food products high in "critical nutrients" has significantly increased in the country from 1999 to 2013, according to the results of a project commissioned by the Pan American Health Organization ("PAHO").<sup>76</sup> Likewise, Chile has cited international research which agrees that the information available on food products has an impact on consumers' decisions. To be more effective, that information should be communicated in a simple manner, preferably by graphics or evaluative expressions in order to avoid quantitative data.<sup>77</sup>

2. *The Level of Trade-Restrictiveness* — The other contentious issue to test Law 20606's fulfillment of article 2.2 is whether or not it is more trade restrictive than necessary. For this purpose, we should examine the issues of applicable standard of review, burden of proof, and the possibility for WTO Members to take experimental actions.

Regarding the standard of review, it is important to observe the level of intrusiveness that WTO panels and the AB have had in the examination of

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<sup>73</sup> *Consolidado de Respuestas a Observaciones Recibidas Durante Consulta Pública Nacional e Internacional Sobre Propuesta de Modificación del Decreto Supremo N° 977/96, Reglamento Sanitario de los Alimentos, del Ministerio de Salud de Chile, para la Ejecución de la Ley N° 20.606, Sobre Composición Nutricional de los Alimentos y Su Publicidad*, [Responses to Observations Received During National and International Public Consultation on the Proposal to Amend Supreme Decree No. 977/96, Sanitary Regulation of Foods, of the Ministry of Health of Chile, for the Execution of Law No. 20,606, on Nutritional Composition of Foods And Their Advertising], MINSAL 6-10 (2014), <http://www.minsal.cl/wp-content/uploads/2015/08/CONSOLIDADO-DE-RESPUESTAS-A-OBSERVACIONES-RECIBIDAS-DURANTE-CONSULTA-PUBLICA.pdf>.

<sup>74</sup> WTO Secretariat, *supra* note 59.

<sup>75</sup> WTO, *Regulatory Cooperation Between Members: Food Labelling*, [https://www.wto.org/english/tratop\\_e/tbt\\_e/tbtnov16\\_e.htm](https://www.wto.org/english/tratop_e/tbt_e/tbtnov16_e.htm) (last visited Nov. 10, 2018).

<sup>76</sup> PAHO & WHO, *ULTRA-PROCESSED FOOD AND DRINK PRODUCTS IN LATIN AMERICA: TRENDS, IMPACT ON OBESITY, POLICY IMPLICATIONS* 45 (2015).

<sup>77</sup> See generally MINSAL, *supra* note 45.

factual determinations made at the national level. How much deference should a panel or the AB give to fact-finding and legal interpretation provided by national authorities?<sup>78</sup> In particular, the scientific studies from which FOP measures are based is relevant in determining the willingness (or unwillingness) of the panels and the AB to substitute the assessment of national bodies exercising authority with its own assessments.<sup>79</sup>

On Article 11 of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (“DSU”), WTO panels are required to make “an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements . . .”.<sup>80</sup> However, there is no clear guidance in the text on what “an objective assessment” should be and whether, and to what extent, they should defer to national government decisions. In practice, such standards can lead to two extremes: it can either be completely deferential with the national decision, with the panels or the AB being only entitled to check the procedural compliance of the body that adopted the measure, or extremely intrusive, with the adjudicators testing the substantive merits of an examined decision and substituting prior determinations with its own (“*de novo* review”).<sup>81</sup>

From the analysis of WTO case law it is increasingly clear that the standard of review is now a *de facto* balancing exercise, which is decided on a case-by-case basis. Through this exercise, the adjudicators look at a number of factors, including the structure, design and architecture of the measure in dispute, the value protected by it, the amount of scientific uncertainty on the effects of the challenged measure, its trade impact, and the proportionality between the potential risk and rewards of the disputed measures. The WTO panels and the AB then weigh everything together and decide whether, and to what extent, they should differ with the WTO member’s analysis.<sup>82</sup>

In *Australia — Tobacco Plain Packaging*, the Panel was mindful that its role was “not to make scientific determinations or otherwise seek to

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<sup>78</sup> Michael M. Du, *Standard of Review in TBT Cases*, in RESEARCH HANDBOOK ON THE WTO AND TECHNICAL BARRIERS TO TRADE 164, 164 (Tracey Epps & Michael J. Trebilcock eds., 2014).

<sup>79</sup> Michael Ioannidis, *Beyond the Standard of Review: Deference Criteria in WTO Law and the Case for a Procedural Approach*, in DEFERENCE IN INTERNATIONAL COURTS AND TRIBUNALS: STANDARD OF REVIEW AND MARGIN OF APPRECIATION 91, 94 (Lukasz Gruszczynski & Wouter Werner eds., 2014).

<sup>80</sup> DSU, Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes art. 11, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226.

<sup>81</sup> Valentina Vadi & Lukasz Gruszczynski, *Standard of Review and Scientific Evidence in WTO Law and International Investment Arbitration: Converging Parallels?*, in DEFERENCE IN INTERNATIONAL COURTS AND TRIBUNALS: STANDARD OF REVIEW AND MARGIN OF APPRECIATION, *supra* note 79, 152, 155.

<sup>82</sup> Michael M. Du, *supra* note 78, 202-203.

resolve scientific debates”, but make an objective assessment, based on the arguments and evidence. Furthermore, the Panel did not consider being in a position “to draw definitive conclusions on the methodological merits of each individual study referred to in relation to the impact of plain packaging on various relevant measured outcomes”. Rather, it considered the extent to which the body of evidence provided a “reasonable basis in support of the proposition that it is being invoked”; in this case, that plain packaging of tobacco products will lead to a reduction in the appeal of tobacco products for consumers.<sup>83</sup>

The panel finally held that the “assessment of whether a technical regulation is more trade-restrictive than necessary under Article 2.2 of the TBT Agreement involves the holistic weighing and balancing of various elements, including the degree of contribution made by the challenged measure to the legitimate objective, the trade-restrictiveness of the measure and the nature of the risks as well as the gravity of the consequences that would arise from non-fulfilment of the objective pursued by the member through the measure”.<sup>84</sup>

It is important to note that in the eventual scenario that a case is brought before the WTO for the implementation of the Chilean FOP labeling, the burden of proof is on the side of the claimant. The AB in both US — Tuna II (Mexico) and US — COOL, as well as the Panel Report in Australia — Tobacco Plain Packaging (Indonesia), have stated that the complainant must present evidence and arguments that the challenged measure creates an unnecessary obstacle to international trade. The claimant must establish that the challenged measure is more trade restrictive than necessary to achieve the contribution it makes to the legitimate objective (in this case, the reduction of obesity), taking into account the risks non-fulfilment would create.<sup>85</sup>

The evidence so far shows that the consumers’ reaction to the Chilean FOP labeling was immediate. In December 2016, a survey conducted on 1067 individuals at the Metropolitan Region of Santiago showed that 43.8% of the population compared the number of warning labels between products before buying, and that this process influenced the purchasing decisions of more than 90% of them.<sup>86</sup> According to another study by the

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<sup>83</sup> Panel Report, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, ¶¶ 7.514, 7.516, WTO Doc. WT/DS435/R; WT/DS441/R; WT/DS458/R; WT/DS467/R (adopted June 20, 2018) [hereinafter TOBACCO JUNE Report 2018].

<sup>84</sup> *Id.* ¶ 7.1724.

<sup>85</sup> Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, ¶¶ 301-331, WTO Doc. WT/DS381/AB/RW (adopted Nov. 20, 2015) [hereinafter TUNA NOVEMBER Report 2015]; *COOL JUNE Report 2012*, ¶ 379; *TOBACCO JUNE Report 2018*, ¶ 7.27.

<sup>86</sup> MIREYA VALDEBENITO ET AL., INFORME DE RESULTADOS: DESCRIPCIÓN DE LAS PERCEPCIONES Y ACTITUDES DE LOS/AS CONSUMIDORES RESPECTO A LAS MEDIDAS ESTATALES EN EL MARCO DE

Institute of Nutrition and Food Technology (“INTA”) at the University of Chile, in a sample of 900 mothers of preschool children and 800 teenagers in Santiago, for 35% percent of the mothers and 11% of teenagers, the presence of warning labeling was the most important factor in their purchasing decisions. For 23% of the teenagers and 26% of the mothers, the absence of labeling indicated that a food item is healthy. The official evaluation report issued by the Ministry of Health in 2017 highlighted that the Law 20606 has also had a notable impact on the reformulation of food products.<sup>87</sup>

Therefore, *a priori*, it seems that Law 20606 has had an impact on consumers’ perceptions and behavior. To evaluate if overweight and obesity in Chile are significantly reduced as a consequence, however, we need to observe over a longer period of time. Many of the arguments that Chile has provided to date, not only in the initial evaluation of the law, but in its justification during the regulatory process, have focused on consumers’ purchase intentions with the assumption that that will contribute to the reduction of obesity. But the causal link between the labelling and its impact on obesity has not yet been proven.

In this regard, the Panel Report in Australia — Tobacco Plain Packaging has hinted that WTO members have room to undertake experimental actions to achieve a legitimate regulatory objective. Even so, the relevant evidence underlying a policy intervention should seek to reflect the conditions under which the intervention will take place as closely as possible. The absence of a study, prior to the implementation of a measure or using an “ideal” experimental design would constitute a flaw that fundamentally undermines its probative value and the evidentiary base underlying the adoption of a measure. Practical and ethical constraints could also affect the possibility of conducting experiments on people, particularly children, which may be considered to have the highest level of predictive value.<sup>88</sup>

3. *The Comparison with Other Alternatives* — Where a comparison of the questioned measure and possible alternative proposed by the complainant is undertaken, consideration must be given to whether the proposed alternative would be less trade-restrictive; whether it would make an equivalent contribution to the relevant legitimate objective, taking into account the risks that non-fulfilment would create; and whether it is reasonably available to the member country.<sup>89</sup>

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LA IMPLEMENTACIÓN DEL DECRETO 13/15 [REPORT OF RESULTS: DESCRIPTION OF THE PERCEPTIONS AND ATTITUDES OF THE CONSUMERS ON THE MEASURES IN THE FRAMEWORK OF THE IMPLEMENTATION OF DECREE 13/15] 15-16 (2017).

<sup>87</sup> MINSAL, *supra* note 45, at 15.

<sup>88</sup> TOBACCO JUNE Report 2018, ¶¶ 7.562, 7.613.

<sup>89</sup> TOBACCO JUNE Report 2018, ¶ 7.1724.

Now the burden of proof partially shifts. As explained in US — Tuna II (Mexico), “It is then for the respondent to rebut the complainant’s *prima facie* case, by presenting evidence and arguments showing that the challenged measure is not more trade restrictive than necessary to achieve the contribution it makes toward the objective pursued and by demonstrating, for example, that the alternative measure identified by the complainant is not, in fact, “reasonably available”, is not less trade restrictive, or does not make an equivalent contribution to the achievement of the relevant legitimate objective”.<sup>90</sup> In US — COOL, art. 21.5, the AB added that the claimant should provide a sufficient indication that their implementation would not render the proposed alternatives merely theoretical in nature, or that entail undue burden because they involve prohibitively high costs or substantial technical difficulties.<sup>91</sup>

Several WTO Members have proposed alternative labeling strategies for Chile. One of the most mentioned is the use of voluntary standards. The US referred to the Codex Alimentarius work on health and diet claims as “low”, “free” or “no added”, for which thresholds have already been established. Another suggestion was to present nutritional content as the percentage of daily recommended intake, in combination with a comprehensive strategy for consumer education.<sup>92</sup> The use of educational campaigns on healthy habits and strategies that improve nutritional information instead of the proposed mandatory labeling was also suggested by Mexico.<sup>93</sup>

In response to these alternative strategies, Chile expressed that it considered some of them as appropriate to complement the measures entailed in Law 20606, but not as a substitute.<sup>94</sup> Chilean delegates made clear that Law 20606 is part of an integrated strategy, which includes further initiatives in education and the promotion of healthy habits such as exercise.<sup>95</sup> Chile addressed concerns about the design of the warning label in particular; pointing out that it is based on the results of a study conducted by the University of Chile in 2012 at the request of the Ministry of Health. The study concludes that the chosen label has a higher impact on purchase decisions compared with the alternatives.<sup>96</sup> Chile also noted that comments received from national and international sources, especially the

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<sup>90</sup> TUNA NOVEMBER Report 2015, ¶ 323.

<sup>91</sup> COOL JUNE Report 2012, ¶¶ 5.324, 5.340.

<sup>92</sup> TBT Committee, *supra* note 71, ¶ 2.136.

<sup>93</sup> TBT Committee, *Note by the Secretariat: Minutes of the Meeting of 18-19 June 2014*, ¶ 3.125, WTO Doc. G/TBT/M/63 (Sept. 19, 2014).

<sup>94</sup> MINSAL, *supra* note 73, at 34.

<sup>95</sup> TBT Committee, *supra* note 72, at ¶ 2.116.

<sup>96</sup> INSTITUTE OF NUTRITION AND FOOD TECHNOLOGY [INTA] & MINISTERIO DE SALUD [MINSAL], ESTUDIO SOBRE EVALUACIÓN DE MENSAJES DE ADVERTENCIA DE NUTRIENTES CRÍTICOS EN EL ROTULADO DE LOS ALIMENTOS [STUDY ON EVALUATION OF WARNING MESSAGES OF CRITICAL NUTRIENTS IN FOOD LABELING] 86 (2012) [hereinafter INTA & MINSAL].

national food industry and the concerned WTO Members, were influential for the modifications made to the original labeling proposal.<sup>97</sup>

It seems clear that Chile aimed to have the highest impact in consumers' behavior, and in any case, minimize the law's restrictiveness to trade. Therefore, the evidence used to compare different labeling strategies was oriented toward observing the reactions of consumers. To date, Chile has not published any official report analyzing Law 20606's impact on international trade particularly or comparatively. In a theoretical case against Law 20606, that kind of analysis could be crucial. At the moment, however, there is no precedent or evidence available to affirm or refute that Law 20606 is a less trade restrictive measure than other alternatives.

In conclusion, in the analysis of the necessity of Law 20606 we have to consider three aspects: the justifiability of the measure, the level of trade-restrictiveness, and the comparison with other alternatives. Regarding the first, there is no doubt that reducing obesity and NCDs is a legitimate objective. In terms of the degree to which the new Chilean law fulfills that objective, Chile submits that the proposed labeling is the strategy with the highest impact on consumer purchase decisions. It may be considered that there is still a lack of evidence on its effectiveness to achieve the legitimate objective. Chile gives more relevance to the means, namely changing consumer behavior, than to the ultimate legitimate objective of preventing obesity, thereby merely assuming a causal relation. Similarly, with regards to trade restrictiveness, the evidence presented so far does not allow for a comparison between Law 20606 and other similar alternatives.

### ***B. Harmonization with International Standards***

Under TBT Agreement Article 2.4, WTO Members must use relevant international standards, or parts of them, as a basis for their technical regulations, except when such international standards or relevant parts would be ineffective or inappropriate for the fulfillment of the legitimate objectives pursued. Furthermore, according to the second sentence of the TBT Agreement Article 2.5, whenever a technical regulation is prepared, adopted or applied for a legitimate objective mentioned in Article 2.2, *inter alia*, national security, the prevention of deceptive practices, protection of human health or safety, animal or plant life or health or the environment, and is in accordance with relevant international standards, it shall be rebuttably presumed not to create an unnecessary obstacle to international trade. This is known as the "harmonization" principle.

A technical regulation is in accordance with relevant international standards if two cumulative elements are met: first, these "relevant

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<sup>97</sup> Decree N° 13, *supra* note 32, art. 6.

international standards” exist, and second, the measures are “in accordance with” these international standards. The TBT Agreement does not specify the relevant international standardizing bodies. This lack of definition led the TBT Committee to state the principles that must be met to be considered as such.<sup>98</sup> The WTO case law has also addressed this issue, holding that while the term “international standard” is not defined in the TBT Agreement, Annex 1 to the agreement contains definitions of relevant related terms such as “standard” and “international body or system”, which can be used to define international standards as a document approved by a recognized body that provides “rules”, “guidelines” or “characteristics” for products or related processes and production methods for common and repeated use, and that “compliance” with these rules, guidelines or characteristics is “not mandatory”.<sup>99</sup> The Codex Alimentarius has already been recognized as an “international standardizing body” in the case of European Communities — Trade Description of Sardines (hereinafter “EC — Sardines”), and for food safety at the WTO Agreement on the Application of Sanitary and Phytosanitary Measures.<sup>100</sup> It is therefore undoubtedly a relevant international institution in this case.

The non-compliance of Law 20606 with the harmonization principle of the TBT Agreement has been another key concern debated at the TBT Committee. WTO Members have pointed out that Chile has not used existing and applicable guidelines of the Codex Alimentarius as a basis for its food labeling law; specifically the Codex Guidelines for Use of Nutrition and Health Claims<sup>101</sup> and the Codex Guidelines on Nutrition Labeling.<sup>102</sup> The U.S. referred to the Section 4 of the Codex Guidelines on Nutrition Labeling which establishes that supplementary nutritional information on food labels, which is how they interpret Law 20606 as being, should be optional. Brazil stated that Law 20606 seemed to be incompatible with the list of prohibited claims under Section 3 of the Codex General Guidelines on Claims, which forbids labels that “could give rise to doubt about the safety of similar food or which could arouse or exploit fear in the consumer”.<sup>103-104</sup> This position is supported by other members such as Mexico and Guatemala. Mexico added that the term “critical nutrient”, besides not being mentioned in Codex guidelines, causes

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<sup>98</sup> TBT Committee, *Second Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade*, annex 2, WTO Doc. G/TBT/9 (Nov. 13, 2000).

<sup>99</sup> *TOBACCO JUNE Report 2018*, ¶ 7.281.

<sup>100</sup> PETER VAN DEN BOSSCHE & WERNER ZDOUC, *supra* note 65, at 913.

<sup>101</sup> FAO, *Guidelines for Use of Nutrition and Health Claims*, U.N. Doc. Cac/GL 23-1997 (1997) [hereinafter CAC/GL 23-1997].

<sup>102</sup> FAO, *Guidelines on Nutrition Labelling*, U.N. Doc. Cac/GL2-1985 (1985).

<sup>103</sup> TBT Committee, *Note by the Secretariat: Minutes of the Meeting of 30-31 October 2013*, ¶ 2.125, WTO Doc. G/TBT/M/61 (Feb. 5, 2014).

<sup>104</sup> FAO, *General Guidelines on Claims*, ¶ 3.5, U.N. Doc. Cac/GL 1 1979 (1979).

unnecessary alarm for the consumer.<sup>105</sup> Mexico also asked Chile to replace the solid and liquid classifications for food products from Decree N° 13 with the specific categories that “take into account international parameters”.<sup>106</sup> Guatemala expressed concern that the increasing heterogeneity of labeling regulations among Latin American countries would reduce intra-regional trade. A similar concern was put forward by Switzerland, referring to the use of divergent negative messages and pictograms, and the multiplication of uncoordinated parameters worldwide for nutritional labeling.<sup>107</sup>

In the 2014 public consultation report, Chile explained that the use of 100g and 100ml as reference portions follows the Codex Alimentarius Guidelines for Use of Nutritional and Health Claims to declare the content of energy, fats, cholesterol, sugar and sodium.<sup>108</sup> The process to establish the specific thresholds for each “critical nutrient” was also detailed. For solids, a database on nutritional composition of foods with no “critical nutrients” added was compiled. That database was organized using the nutritional content of each food. The thresholds were established on the 90th percentile for each nutrient. In the case of liquid foods, the nutritional composition of cow milk in its natural state was taken as reference.

The 2014 report indicates that, for some nutrients in solid foods, the proposed values were compared to those of international health organizations, regulations and voluntary strategies in Chile and other countries. It is not stated to what extent the results of said comparison were considered, or which international organizations or sources specific to them were consulted. As a basis for the distinction between liquid and solid foods, the WHO is referenced, although the document cited addresses only the intake of sugar and not the other critical nutrients.<sup>109</sup> Regarding the design of the labels, the response to the concerns raised is based on the results of the aforementioned study carried out in 2012 by the University of Chile.<sup>110</sup> That report, however, does not address whether the label generates doubts about the safety of a product or fear in the consumer.

The Codex Guidelines for Use of Nutritional and Health Claims employs the 100g/100ml reference portion. The focus of Law 20606 is different, however. While the Codex guidelines are referring to the maximum nutrient content for claims of “low”, “very low” and “free”, thereby highlighting the positive qualities of the food item, Law 20606 is

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<sup>105</sup> TBT Committee, *supra* note 69, ¶ 2.7.

<sup>106</sup> TBT Committee, *Note by the Secretariat: Minutes of the Meeting of 10-11 November 2016*, ¶ 2.104, WTO Doc. G/TBT/M/70 (Feb. 17, 2017).

<sup>107</sup> TBT Committee, *supra* note 71, ¶ 2.138.

<sup>108</sup> CAC/GL 23-1997, *supra* note 101.

<sup>109</sup> *See generally* WHO, GUIDELINE: SUGARS INTAKE FOR ADULTS AND CHILDREN, (2015).

<sup>110</sup> *See generally* INTA & MINSAL, *supra* note 96.

classifying foods that are “high in” critical nutrients.<sup>111</sup> On EC — Sardines, the panel report says that a relevant international standard “must bear upon, relate to or be pertinent” to the technical regulation.<sup>112</sup> Therefore, the pertinence of the Codex standard to the Law 20606 may be questionable, given the significant differences in their intended uses. Additionally, regarding the “critical nutrient” thresholds, the 2014 report reveals that no international standard was used as a basis to specify the amounts. In this regard, the panel report from EC — Sardines concluded that the “principal constituents or fundamental principles of an international standard” and a technical regulation should be coincident to say it was used as a basis.<sup>113</sup> For the final design of the label, Chile presented more evidence since the impact of different FOP alternatives was compared in an *ad hoc* consumer study. In order for concerned countries to sustain the argument of non-compliance with Codex, it would be necessary to conduct more research on factors underlying consumers’ perception of Chilean labeling, and to verify that there is doubt or fear about the safety of the food. Research on the effects of FOP labeling to date concurs on the impact on consumer perception of food nutritional quality, and therefore healthiness, but not on perceived safety.<sup>114</sup>

However, in the case of Law 20606 it is possible to question whether a “relevant international standard” even exists. When Law 20606 was developed, the Codex did not have established nutrient reference values for FOP labeling purposes. That is to say, there was no existing reference standard. In this regard, the Codex Secretary himself stated that “the absence of Codex guidance on a topic does not automatically mean that a measure is not in line with Codex”.<sup>115</sup> Also, the Codex Committee on Food Labeling has recognized the need to address the increasing use of simplified FOP nutrition information. This is because the current provisions are not sufficiently adapted to allow for the use of FOP labeling

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<sup>111</sup> CAC/GL 23-1997, *supra* note 101, at 3.

<sup>112</sup> Panel Report, *European Communities — Trade Description of Sardines*, ¶ 7.68, WTO Doc. WT/DS231/R (adopted May 29, 2002) [hereinafter *SARDINES MAY Report 2002*].

<sup>113</sup> *Id.* ¶ 7.110.

<sup>114</sup> Catherine Hersey et al., *Effects of Front-of-package and Shelf Nutrition Labeling Systems on Consumers*, 71(1) NUTR REV. 1, 14 (2013); Michele Cecchini & L. Warin, *Impact of Food Labelling Systems on Food Choices and Eating Behaviours: A Systematic Review and Meta-analysis of Randomized Studies*, 17(3) OBES REV. 201, 210 (2016); Pauline Ducrot et al., *Impact of Different Front-of-Pack Nutrition Labels on Consumer Purchasing Intentions*, 50(5) AM. J. PREV. MED. 627, 636, (2015); Manuel Cabrera et al., *Nutrition Warnings as Front-of-pack Labels: Influence of Design Features on Healthfulness Perception and Attentional Capture*, 20(18) PUBLIC HEALTH NUTR 3360, 3371 (2017).

<sup>115</sup> *Technical Barriers to Trade*, CODEX ALIMENTARIUS: INTERNATIONAL FOOD STANDARDS, <http://www.fao.org/fao-who-codexalimentarius/roster/detail/en/c/387539/> (last visited Nov. 12, 2018).

in a way that potential trade barriers are minimized.<sup>116</sup> This is a matter in progress, for which there are likely to be relevant changes soon.

### *C. Non-Discrimination*

The TBT Agreement recognizes most-favored nation and national treatment obligations under the principle of “non-discrimination”. WTO members should ensure that the enforcement of technical regulations on products imported from the territory of any member shall be accorded treatment “no less favorable” than that accorded to like products of national origin and to like products originating in any other country.<sup>117</sup>

The compliance of Law 20606 with the principle of non-discrimination has also been questioned by concerned members. The EU affirmed that it would have a discriminatory effect on foreign manufacturers that need to adapt their packaging exclusively for the Chilean market.<sup>118</sup> The US expressed the same view, adding that Law 20606 would entail higher costs for foreign companies, thereby favoring Chilean producers.<sup>119</sup> Meanwhile, Australia reiterated at various meetings that in Law 20606 there are some “inconsistencies” between requirements for national and imported products, although they did not specify what these were.<sup>120</sup>

Other countries have also argued that food markets and selling formats exempted from the law are less accessible for importers and monopolized by Chilean producers. Switzerland stated that Law 20606 discriminates by selling method.<sup>121</sup> Brazil noted that there is an inconsistency in Law 20606 between its goal and its content because it does not regulate meals sold in fast-food restaurants, which are normally rich in fat, sugar and salt.<sup>122</sup>

Law 20606 and its companion regulation leave important food distribution channels unregulated, mainly, the sale of bulk food and of prepared food served in restaurants, street food stalls, hotels or collective catering. Bakery products are a bulk food high in carbohydrates, salt and added sugars. In Chile that market is especially relevant as the country consumes 90 kilograms of bread per annum, which is the second most in the world and equates to an average expenditure of 2% of household budgets.<sup>123</sup> Bread consumption by itself contributes to 75% of the

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<sup>116</sup> See generally Codex Alimentarius Commission, *Discussion Paper On Consideration Of Issues Regarding Front-Of-Pack Nutrition Labelling*, U.N.Doc. CX/FL 17/44/7 (Sept. 2017).

<sup>117</sup> TBT Agreement art. 2.1.

<sup>118</sup> TBT Committee, *supra* note 70, ¶ 3.146.

<sup>119</sup> TBT Committee, *supra* note 103, ¶ 2.128.

<sup>120</sup> TBT Committee, *supra* note 93, ¶ 3.130.

<sup>121</sup> TBT Committee, *supra* note 93, ¶ 3.127.

<sup>122</sup> TBT Committee, *Note by the Secretariat: Minutes of the Meeting of 19-20 March 2014*, ¶ 2.155, WTO Doc. /TBT/M/62 (May 20, 2014).

<sup>123</sup> REPORTE MENSUAL DE PAN [MONTHLY BREAD REPORT], <http://www.sernac.cl/reporte-mensual-de-pan-area-metropolitana-octubre-2015/> (last visited Nov. 12, 2018).

maximum recommended daily salt intake which motivated the Ministry of Health to formulate joint strategies with bakers' associations that aimed to decrease the sodium content of bread.<sup>124</sup> Prepared foods are an important part of the Chilean diet as well, as 41% of Chileans over fifteen eat at fast food restaurants at least once a week, and 75% in the class between fifteen and twenty-four.<sup>125</sup> Many of them perceive eating at fast food restaurants as a kind of reward. Chilean adults, especially in the medium and low income classes, are more satisfied with their eating habits when they increase their consumption of fast food.<sup>126</sup> For Chilean children and university students, poor eating habits, including high consumption of fast food, are present at all economic levels.<sup>127</sup>

The Chilean Ministry of Health agreed with the concerned countries' comments that suggest the necessity of expanding the scope of Law 20606 to bulk products and prepared foods. In fact, adapting the regulation to include these segments is considered a challenge to face in the coming years.<sup>128</sup> At this time there have been no concrete changes.

WTO jurisprudence shows that to assess the fulfillment of TBT Agreement article 2.1, two aspects are essential: whether the imported and domestic products are like products and whether imported like products are treated less favorably than domestic products.<sup>129</sup> The discussion should therefore start by determining which products are alike. We can assume that concerned countries are looking at industrial food products such as snacks or sodas, for which they consider to have a greater market share, which could be substituted with exempt local products. However, along the TBT Committees meetings they did not explicitly declare those like

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<sup>124</sup> Karen Valenzuela & Eduardo Atalah, Estrategias globales para reducir el consumo de sal [*Global Strategies to Reduce Salt Intake*], 61(2) ARCHIVOS LATINOAMERICANOS DE NUTRICIÓN 111, 116 (2011).

<sup>125</sup> ¿Cuánta Comida Rápida Consumen los Chilenos? [*How Much Quick Food Do the Chileans Consume?*], ADIMARK 2-3 (2014), <http://www.adimark.cl/es/estudios/documentos/los%20chilenos%20y%20la%20comida%20r%C3%A1pida.pdf>.

<sup>126</sup> See generally Berta Schnettler et al., *Variables que afectan la satisfacción con la alimentación según nivel socioeconómico: un estudio exploratorio en el sur de Chile* [*Variables Affecting Food Satisfaction According to Socioeconomic Status: an Exploratory Study in Southern Chile*], 41(2) REV. CHILE NUTRITION 149, (2014); see generally Berta Schnettler et al., *Analyzing Food-Related Life Satisfaction and other Predictors of Life Satisfaction in Central Chile*, 18 SPAN. J. PHYSIOL. E38, (2015).

<sup>127</sup> See generally Fernando Rodríguez et al., *Hábitos alimentarios, actividad física y nivel socioeconómico en estudiantes universitarios de Chile*, [*Eating Habits, Physical Activity and Socioeconomic Level In University Students in Chile*], 28(2) NUTRITION HOSP. 447 (2013); See generally Victor Castillo et al., *Hábitos alimentarios en la población escolar chilena. Análisis comparativo por tipo de establecimiento educacional* [*Food Habits In Chilean Schoolchildren. Comparative Analysis By Type of Educational Establishment*], 43(11) REV. CHILE NUTRITION 6 (2016).

<sup>128</sup> FAO & PAHO, APROBACIÓN DE NUEVA LEY DE ALIMENTOS EN CHILE: RESUMEN DEL PROCESO [APPROVAL OF NEW FOOD LAW IN CHILE: SUMMARY OF THE PROCESS] 20 (2017).

<sup>129</sup> Jonathan Carlone, *An Added Exception to the TBT Agreement After Clove, Tuna II, and Cool*, 37(1) BOS. C. INT'L & COMP. L. REV. 103, 138 (2014).

products, and the range of possibilities is quite broad. This lack of a specific reference is a limitation, but the following analysis discusses whether there are indications of less favorable treatment in general terms.

Disregarding the exempted products, the new Chilean Food Labeling Law and its regulation does not discriminate between national and imported products, and unlike the COOL case, domestic products receive the same treatment as foreign products. In fact, the Chilean food industry has been very critical of the new food labeling requirements. Even the special rules that grant micro and small-size businesses a 36 months grace period for the implementation of the new labeling do not exclude foreign SMEs.

On the issue of whether or not labeling distorts competition to the detriment of imported products, the AB in US—COOL held that such an examination:

[M]ust take account of all the relevant features of the market, which may include the particular characteristics of the industry, the relative market shares in a given industry, consumer preferences, and historical trade patterns. A panel must examine the operation of the particular technical regulation at issue in the particular market in which it is applied.<sup>130</sup>

The exceptions for bulk products and for prepared food served in restaurants, street food stalls, hotels or collective catering could be considered discriminatory under that line of reasoning, as domestic producers have a greater share in those market segments.

In US—COOL, the panel found that a considerable portion of beef and pork was exempted from the meat labeling measure because food service establishments, such as restaurants, cafeterias, and enterprises providing ready-to-eat foods, were excluded. In practice, however, there was no differentiation based on the ultimate destination of the meat, as it is often unknown during production.<sup>131</sup> The Appellate Body held in the US-Clove Cigarettes case that: “If products that are in a sufficiently strong competitive relationship to be considered like are excluded from the group of like products on the basis of a measure’s regulatory purposes, such products would not be compared in order to ascertain whether less favorable treatment has been accorded to imported products. This would inevitably distort the less favorable treatment comparison, as it would refer to a “marketplace” that would include some like products, but not others”.<sup>132</sup>

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<sup>130</sup> *COOL JUNE Report 2012*, ¶ 269.

<sup>131</sup> *Id.* ¶¶ 242, 335, 344.

<sup>132</sup> *TUNA NOVEMBER Report 2015*, ¶ 116.

Because the Chilean FOP labeling does not include a *de jure* discrimination against imported products, the existence of a detrimental impact on competitive opportunities compared to domestic like products is not always evidence of less favorable treatment. Instead, further analysis is required to prove that there is a *de facto* detrimental impact on imports which stems exclusively from discrimination against the imported products, rather than a legitimate regulatory distinction. In that case, the detrimental impact will reflect discrimination prohibited under Article 2.1.<sup>133</sup>

Several factors need to be taken into account for this analysis, such as the design, architecture, revealing structure, operation, and application of the measure, and in particular, whether the technical regulation is even-handed.<sup>134</sup> Even-handedness is a relational concept, which must be tested through a comparative analysis to prove that a regulation has been designed and applied as a means of arbitrary or unjustifiable discrimination regarding an imported product.<sup>135</sup> Another concept related to even-handedness to be tested in this case is legitimate regulatory distinction. US—COOL, US—Tuna II and US—Clove Cigarettes introduced this concept for further interpretation of Article 2.1 of the TBT Agreement, specifically, as an exception to when the differentiated treatment to a national product compared to the imported like product is necessary to achieve the legitimate objective.<sup>136</sup> In the case of Chilean labeling, Chile's Ministry of Health has recognized its willingness to extend the scope of the law to bulk and prepared foods. Therefore, the current exceptions seem to be due to technical restrictions rather than being formed as part of an intentional strategy.

In conclusion, the discussion on whether the food labeling law implies a breach of the national treatment obligation and TBT Agreement Article 2.1 is based on proving that imported like products get less favorable *de facto* treatment when compared to domestic exempt products sold already prepared or in bulk. There are some aspects of Law 20606 that could be questioned in this respect. However, an explicit definition of the categories of like products is necessary in the first instance.

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<sup>133</sup> COOL JUNE Report 2012, ¶ 293.

<sup>134</sup> Appellate Body Report, *United States — Measures Affecting the Production and Sale of Clove Cigarettes*, ¶ 182, WTO Doc. WT/DS406/AB/R (adopted Apr. 4, 2012) [hereinafter CLOVE APRIL Report 2012].

<sup>135</sup> TUNA NOVEMBER Report 2015, ¶ 7.125.

<sup>136</sup> Jason Houston-McMillan, *The Legitimate Regulatory Distinction Test: Incomplete and Inadequate for the Particular Purposes of the TBT Agreement*, 15(4) WORLD TRADE REV. 543, 562 (2016).

### *D. Transparency*

Whenever a relevant international standard does not exist, or the content of a proposed technical regulation is not in accordance with the content of relevant international standards, and the technical regulation may have a significant effect on trade of other WTO Members, the TBT Agreement imposes detailed transparency and notification requirements. These include: (i) publish a notice at an appropriately early stage to enable interested parties to become acquainted with it; (ii) notify other WTO Members early in the process through the Secretariat of the products to be covered by the proposed technical regulation, together with a brief indication of its objective and rationale at a time when amendments can still be introduced and comments taken into account; (iii) if requested, provide other members copies of the proposed technical regulation; (iv) allow a reasonable time for other members to make comments in writing, discuss these comments and take them into consideration without discrimination.<sup>137</sup> Furthermore, the TBT Agreement directs members to ensure that all technical regulations are published promptly or made available in such a manner as to enable interested parties from other member countries to become acquainted with them.<sup>138</sup> This allows a reasonable interval between the publication of technical regulations and the time when they come into effect, therein allowing producers in exporting member countries, and particularly in developing member countries, to adapt their products or methods of production.

Compliance with transparency under the TBT Agreement was also a cause of concern by WTO countries, especially during the first meetings after the notification of Law 20606. The EU and Guatemala expressed their concern about the lack of a sufficient time to present comments for consideration in the final version of the regulation.<sup>139</sup>

When the initial concerns about transparency were presented, the Chilean delegates indicated that they would pass them on to the national authorities, who would consider them when deciding the time-frame for when Law 20606 would become effective.<sup>140</sup> In subsequent meetings, they emphasized that the preparation of the final version of the law was still an open discussion which involved public and interested private parties.<sup>141</sup> Chilean representatives referred to the document containing the replies to the WTO Members' comments at the 2014 public consultation as an

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<sup>137</sup> TBT Agreement, *supra* note 16, art. 2.9.

<sup>138</sup> *Id.* art. 2.11.

<sup>139</sup> TBT Committee, *Note by the Secretariat: Minutes of the Meeting of 6-7 March 2013*, ¶¶ 2.31 and 2.39, WTO Doc. G/TBT/M/59 (May 8, 2013).

<sup>140</sup> *Id.* ¶ 2.42.

<sup>141</sup> TBT Committee, *supra* note 70, ¶ 3.154.

example of dialogue and transparency.<sup>142</sup> In a subsequent meeting they affirmed that Chile has complied with the transparency principle “by notifying to the WTO, as well as complying with recommendations of the Committee by responding the comments received from trading partners”.<sup>143</sup>

The TBT Agreement requires that members notify other members of their measures “at an early and appropriate stage”, with the objective that the other members “become acquainted” and have a “reasonable time for comments”. Chile notified the WTO about Law 20606, Decree N° 12 and Decree N° 13 after they were published. It could be reasonable, therefore, to question whether there was enough time for the other countries to be properly informed and to make comments that have an impact on the final version of the law and its related regulation. However, the delay in the completion of the regulatory process, seen as a continuum, and its entry into effect expanded *de facto* the time for comments and discussion of the law between Chile and WTO Members. In fact, at the TBT Committee the concerns on transparency stopped with the passing of more meetings.

### ***E. Implementation of the Law***

Finally, some WTO Members have expressed their concerns about the implementation period after the publication of the final FOP labeling regulation. The U.S. considered that at least a two-year window would be necessary to give the food industry sufficient time to adapt their production.<sup>144</sup> Guatemala expressed concerns about the time frame for compliance with Law 20606 for products already on the market when it came into effect.<sup>145</sup> The concerns at the TBT Committee on the “adaptation period” to the new labeling decreased over time, like concerns over transparency. This might be because the period initially provided between the publication of the Chilean law and its entry into effect was *de facto* delayed, and as a consequence, the acquaintance period for the private sector was extended.

Another aspect of the implementation of the law that was questioned in the TBT Committee was the capacity to monitor compliance. Chile responded that, since June 2016, the country has been training the auditors as well as having meetings with food companies.<sup>146</sup> The official evaluation report considered the results of audits at the first six months of implementation. There were 588 inspections in places of sale, 809 in

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<sup>142</sup> TBT Committee, *supra* note 72, ¶ 2.116.

<sup>143</sup> TBT Committee, *Note by the Secretariat: Minutes of the Meeting of 9-10 March 2016*, ¶ 2.122, WTO Doc. G/TBT/M/68 (May 12, 2016).

<sup>144</sup> *Id.* ¶ 2.117; TBT Committee, *supra* note 72, ¶ 2.113.

<sup>145</sup> TBT Committee, *supra* note 143, ¶ 2.119.

<sup>146</sup> TBT Committee, *Note by the Secretariat: Minutes of the Meeting of 15-16 June 2016*, ¶ 3.113, WTO Doc. G/TBT/M/69 (Sept. 22, 2016).

schools and a total of 3000 products were analyzed.<sup>147</sup> The TBT Agreement does not refer to the demonstration of monitoring capabilities for the enforcement of a measure. However, in the provisions on assistance and special and differential treatment in the agreement, the recognition of the gap in the technical capacities of member countries is implicit.<sup>148</sup> In the Latin American context, Chile is a country with a remarkably well functioning food control system, and has well developed technical regulation and participation at the WTO.<sup>149</sup> This background reduces, but does not preclude, the assumption of insufficient implementation and monitoring capacity.

#### IV. CONCLUSIONS AND LESSONS FOR APEC ECONOMIES

The number of overweight and obese people is growing worldwide. The use of FOP labeling is a public health policy alternative to which many countries are turning, and Chile is a pioneer in mandating FOP labeling on foods with added ingredients. The compatibility of Chilean regulation with WTO rules has been strongly questioned within the TBT Committee. This article analyzed that discussion in detail, considering arguments based on WTO rules and other related jurisprudence. The results obtained also allow us to derive some lessons for other APEC or WTO countries interested in FOP labeling. In the APEC there are already a significant number of economies that have implemented or are developing FOP labeling, some of them mandatory. However, the issue has not been addressed collectively.

Regarding the compatibility of the Chilean regulation with the WTO TBT Agreement, the discussion is focused on the possible violation of the principles of necessity, harmonization, non-discrimination, transparency and implementation of the new law.

**Necessity:** There is no question that reducing obesity and related NCDs is a legitimate objective. However, Chile has not presented sufficient information on the impact of its new regulation to allow an assessment as to whether it fulfills that objective and, to a greater extent, that it is the least trade restrictive alternative.

**Harmonization:** Chile has not based key aspects of its regulation on existing food labeling standards from international bodies, such as the Codex Alimentarius. There are even doubts about its compatibility with some provisions. However, the Codex Secretariat itself has acknowledged

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<sup>147</sup> MINSAL, *supra* note 45, at 5.

<sup>148</sup> TBT Agreement, *supra* note 16, arts. 11 & 12.

<sup>149</sup> Sofia Boza et al., *Implications of Non-Compliance with Technical Non-Tariff Measures: The Case of Chilean Food Related Export Refusals at the United States Border*, in NON-TARIFF MEASURES: ECONOMIC ASSESSMENT AND POLICY OPTIONS FOR DEVELOPMENT, 225, 230-231 (J. De Melo & A. Nicita eds. 2018).

the lack of specific guidelines for FOP labeling, which could mean that Law 20606 was exempt from harmonization because a “relevant international standard” doesn’t exist.

**Non-discrimination:** The Chilean law does not discriminate against imports for the products it regulates, however, its exemptions, for example, in relation to prepared and bulk foods, may constitute discrimination. Nevertheless, it is crucial to have an explicit definition of the categories of like products for further discussion on this topic.

**Transparency and implementation:** The notification process might have been considered late if the initial schedule of implementation had been respected. However, the delay in the regulatory process significantly extended the time for other members to become acquainted, make comments and discuss.

As mentioned, the Chilean experience leaves useful lessons to be considered for APEC economies and other WTO members. Reducing obesity is recognized as a legitimate objective for public health policies. It is very important, however, to assess the expected impact of different alternatives before implementation. Countries should address aspects such as: whether the labeling reflects the actual servings of the different food, minimizing the stigmatization of affected products, assessing if other alternatives such as “traffic lights” or highlighting healthy qualities of the food could achieve the same objectives.

Another lesson for APEC countries enacting labeling provisions for public health is that non-discriminatory treatment should not be limited to a *de jure* national treatment in the pertinent regulations, but also be extended to the *de facto* implementation of the rules and their exceptions. Also, it is recommended for APEC economies and other countries that have implemented or intend to implement FOP labeling to be engaged with the Codex Committee on Food Labeling during the development of new provisions. This is an on-going issue, so it is very important to be up to date on any developments.

To avoid concerns on transparency, countries planning to develop FOP labeling should consider designing an adequate time frame for providing notice and for receiving comments on the regulation. This process should embrace not only other countries, but also private stakeholders at a domestic and international level, including businesses, civil society and academia. Regarding the implementation of new FOP labeling, APEC countries should aim to provide adequate clarity to the industry, avoiding contradictory messages.

The Chilean food labeling law is a relevant innovation in public policies, which intends to prevent obesity by providing consumers with information. In fact, it is the most stringent nutritional labeling regulation in the world, purporting to mitigate a dramatic health crisis that needs to be

addressed in a decisive way. However, some aspects of its implementation could be improved to avoid potential infringements of WTO law, in particular with the TBT Agreement. Such improvements can facilitate the continuity of this initiative and the beginning of other similar innovations.

Table 1. Thresholds of “critical nutrients” in Decree N° 13

Nutrient	Classification	From date of implementation (June 26, 2016)	24 months after implementation (June 26, 2018)	36 months after implementation (June 26, 2019)
Energy	Solid (kcal/100 g)	350	300	275
	Liquid (kcal/100 ml)	100	80	70
Sodium	Solid (mg/100 g)	800	500	400
	Liquid (mg/100 ml)	100	100	100
Sugar	Solid (g/100 g)	22.5	15	10
	Liquid (g/100 ml)	6	5	5
Saturated fats	Solid (g/100 gr)	6	5	4
	Liquid (g/100 ml)	3	3	3

Figure 1. Warning labeling in Decree N° 13

From top left to bottom right: “High in Sugar”; “High in Saturated Fats”; “High in Salt”; “High in Energy”.



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