

The Mexican Front-of-Pack Labeling Reform: Is it Compatible with International Trade Law?

Abstract:

Mexico has by far the world's highest death rate linked to obesity and other chronic diseases. As a response to the growing obesity pandemic, Mexico has adopted a new compulsory front-of-pack labeling regulation for pre-packaged foods and non-alcoholic beverages. This article provides an assessment of the regulation's consistency with international trade law and the arguments that might be invoked by either side in a hypothetical trade dispute on this matter.

Keywords: Mexico, Front-of-Pack, Labeling, International Trade Law, Technical Barriers to Trade, Health

I. Introduction

Latin America is considered to be the epicenter of the obesity pandemic, with widespread obesity amongst children and adults caused mainly by unhealthy diets and insufficient physical activity.¹ Obesity is a precursor to a number of chronic non-communicable diseases (NCDs); it is usually concomitant with cardiac problems, high blood pressure, type B diabetes, cancer or sleep apnea.² Mexico in particular has by far the world's highest death rate linked to obesity and other chronic diseases mainly caused by consumption of sugary drinks.³ In the recent decades, México has experienced a continued increase in the rates of obesity: in 5 to 11 years old children, the obesity

¹ Juan Ángel Rivera, Teresita González de Cossío, Lilia Susana Pedraza, Tania Cony Aburto, Tania Georgina Sánchez, and Reynaldo Martorell, 'Childhood and adolescent overweight and obesity in Latin America: a systematic review' (2014) 2 The Lancet Diabetes Endocrinol 321; EA Traboulay, OP Hoyte, "Mini-review: obesity in Caribbean youth" (2015) 64(3) West Indian Med Journal 250; Nadia R Bennett, Damian K Francis, Trevor S Ferguson, Anselm JM Hennis, Rainford J Wilks, Eon Nigel Harris, Marlene MY MacLeish, and Louis W Sullivan, 'Disparities in diabetes mellitus among Caribbean populations: a scoping review' (2015) 14(23) International Journal of Equity Health; Maria Victoria Anauati, Sebastian Galiani & Federico Weinschelbaum, 'The rise of noncommunicable diseases in Latin America and the Caribbean: challenges for public health policies' (2015) 24(11) Latin American Economic Review 11

² Marco D DiBonaventura, Henrik Meincke, Agathe Le Lay, Janine Fournier, Erik Bakker and Allison Ehrenreich, 'Obesity in Mexico: Prevalence, comorbidities, associations with patient outcomes, and treatment experiences' (2017) 11 Diabetes Metab Syndr Obes; Peter Kopelman, 'Symposium 1: Overnutrition: Consequences and solutions. Foresight report: The obesity challenge ahead' (2010) 69(1) Proceedings of the Nutrition Society 80; Otilia Perichart-Perera, Margie Balas-Nakash, Esther Schiffman-Selechnik, Annarella Barbato-Dosal, and Felipe Vadillo-Ortega, 'Obesity increases metabolic syndrome risk factors in school-aged children from an urban school in Mexico City' (2007) 107(1) Journal of the American Dietetic Association, 81; 'Obesity Update 2017' (see note 4)

³ Emma Luxton, 'Which Countries Consume the Most Sugary Drinks?' (*World Economic Forum*, 3 December 2015) <<https://www.weforum.org/agenda/2015/12/which-countries-consume-the-most-sugary-drinks>>

rate has increased from 9% in 1999 to 17.5% in 2018; in adolescents from 14.1 to 15.1% and in adults from 30.0% to 36.1%.⁴

Several Latin American countries have responded to this public health concern in different ways; one significant intervention in this respect has been the modifications in the regulation of front-of-pack (FOP) labeling for pre-packaged food and non-alcoholic beverages. Several countries have considered mandatory FOP warnings and information-disclosures as an effective and evidence-based way to improve diets.⁵ Others have employed voluntary labeling guidelines in this respect.⁶ Chile, Peru and Ecuador have led this change by adopting mandatory FOP labeling requirements.⁷

In August 2014, the Ecuadorian Government implemented legislation requiring packaged food labels to bear traffic light stickers, framed and put on a white or gray background. Ecuador is the first country in Latin America to adopt the traffic light system for labeling food products, thus alerting consumers to the amount of fats, sugars and salts the food contains.⁸ The traffic light system is based on the use of colors to indicate the toxicity of products: “red” is the highest alert about excess salt, sugar or fat in a food; “yellow” a warning; and the “green” ones, zero risk.⁹ Moreover, Peru in 2016 reformed its regulation to require all packaged food and beverage products sold in Peru to have a 'stop-sign' warning (in the form of black octagonal marks) if they are high in salt, sugar and saturated fat or if they contain trans-fat.¹⁰ The United Nations has

⁴ ‘Encuesta Nacional de Salud y Nutrición 2018: Presentación de resultados’ (*Instituto Nacional de Salud Pública*) <https://ensanut.insp.mx/encuestas/ensanut2018/doctos/informes/ensanut_2018_presentacion_resultados.pdf>; OECD, ‘Obesity Update 2017’ <www.oecd.org/health/obesity-update.htm>; World Health Organization, ‘Mexico Key indicators’ <<https://apps.who.int/gho/data/node.cco.ki-MEX?lang=en>>

⁵ ‘Nutrition Labelling as a Trade Policy Issue’ (*Obesity Evidence Hub*, 6 June 2019) <<https://www.obesityevidencehub.org.au/collections/prevention/nutrition-labelling-as-a-trade-policy-issue>>

⁶ JOINT FAO/WHO FOOD STANDARDS PROGRAMME, CODEX COMMITTEE ON FOOD LABELLING, Forty-fourth Session Asunción, Paraguay, 16-20 October 2017 (CX/FL 17/44/7, September 2017)

⁷ ‘Front of Pack Labelling around the World’ (*IGD*, 16 January 2019) <<https://www.igd.com/articles/article-viewer/t/front-of-pack-labelling-around-the-world/i/23126>>

⁸ Sofía Boza, Mónica Guerrero, Rocío Barreda and Macarena Espinoza, ‘Recent Changes in Food Labelling Regulations in Latin America: The Cases of Chile and Peru’ (*World Trade Institute*, March 2017) <https://www.wti.org/media/filer_public/3e/93/3e932c57-0f39-4f99-885e-20b5f7231748/working_paper_no_04_2017_boza_et_al.pdf>

⁹ Peter Scarborough, Vyas Adhikari, Richard A. Harrington, Ahmed Elhoussein, Adam Briggs, Mike Rayner, Jean Adams, Steven Cummins, Tarra Penney, and Martin White, ‘Impact of the Announcement and Implementation of the UK Soft Drinks Industry Levy on Sugar Content, Price, Product Size and Number of Available Soft Drinks in the UK, 2015-19: A Controlled Interrupted Time Series Analysis’ (2020) 17(2) PLOS Medicine <<https://journals.plos.org/plosmedicine/article?id=10.1371/journal.pmed.1003025>>

¹⁰ Niamh Michail, ‘Peru: Nutrition warning labels become mandatory’ (*FoodNavigator-Latam*, 17 June 2019) <<https://www.foodnavigator-latam.com/Article/2019/06/17/Peru-Nutrition-warning-labels-become-mandatory>>; Niamh Michail, ‘An ‘outstanding contribution’ to health: Peru wins United Nations award for nutrition label’ (*FoodNavigator-Latam*, 26 September 2019) <<https://www.foodnavigator-latam.com/Article/2019/09/26/United-Nations-awards-Peru-for-nutrition-label>>

awarded Peru's Ministry of Health for its "outstanding contribution" to preventing NCDs through its mandatory nutrition warning label.¹¹

The Chilean labeling system is considered to be the pioneer in this field, as it is stricter than its predecessors.¹² Chile has been waging a fight against unhealthy foods with a flood of advertising restrictions, mandatory packaging redesigns and labeling rules designed to transform the eating habits of its people.¹³ In 2016, it adopted and implemented the mandatory labeling requirements; they require that the pre-packaged food with elevated calorie levels and with ingredients of concern for diet-related diseases must display warning marks (in the form of black octagonal marks) on the FOP labels.¹⁴ Products can be labeled with four warning signs; the more labels there are on the product, the less healthy the product is. In addition, such items cannot be sold or provided in schools and cannot be marketed to those with less than 14 years of age.¹⁵ The new labeling requirements also prohibit the use of icons or characters or offering of gifts on sale of products that mainly cater to children and young consumers. Food and nutrition experts view the Chilean measures as the world's most ambitious attempt to reform the country's food culture and as a potential blueprint for impacting the global obesity epidemic.¹⁶

Another ambitious attempt to reform a country's food culture was recently made by Mexico. In March 2020, Mexico passed an ambitious new regulation that will require compulsory FOP labels with "warning signs" to highlight excessive content of calories, sugars, saturated fats, trans-fats or sodium in products (see figure 1).¹⁷ These warning signs are aimed at alerting the

¹¹ Redacción PERÚ21, 'Semáforo Nutricional: ¿Cómo Funciona El Sistema En Ecuador y Lo Que Debe Aprender El Perú?' (*Peru21*, June 14, 2017) <<https://peru21.pe/lima/semaforo-nutricional-funciona-sistema-ecuador-debe-aprender-peru-80971-noticia/?ref=p21r>>

¹² Lindsey Smith Taillie, Marcela Reyes, M. Arantxa Colchero, Barry Popkin, and Camila Corvalán, 'An Evaluation of Chile's Law of Food Labeling and Advertising on Sugar-Sweetened Beverage Purchases from 2015 to 2017: A before-and-after Study' (2020) 17(2) PLOS Medicine <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7012389/>>

¹³ Lorena Rodriguez, 'The Implementation of New Regulations on Nutritional Labelling in Chile' (WTO) <https://www.wto.org/english/tratop_e/tbt_e/8_Chile_e.pdf>

¹⁴ 'Tercera etapa de la ley de etiquetado entra en vigencia con límites más estrictos para nutrientes de los alimentos envasados' (*Ministerio de Salud*, 27 junio 2019) <<https://www.minsal.cl/tercera-etapa-de-la-ley-de-etiquetado-entra-en-vigencia-con-limites-mas-estrictos-para-nutrientes-de-los-alimentos-envasados/>>; FAO, 'La ley chilena de etiquetado de alimentos – Conferencia celebrada en la Sede de la FAO sobre el papel de los frentes parlamentarios en la mejora de la nutrición en el mundo' (FAO Dialogues, 2018), 7-11 <<http://www.fao.org/3/CA1962B/ca1962b.pdf>>

¹⁵ Marcela Reyes, María Luisa Garmendía, Sonia Olivares, Claudio Aqueveque, Isabel Zacarías and Camila Corvalán, 'Development of the Chilean front-of-package food warning label' (2019) 19 BMC Public Health 906; Caitriona Braw, 'Chile's package of policies: A before and after study' (*Safe Food*, 13 February 2020) <<https://www.safefood.eu/Professional/Nutrition/News-en/Nutrition-News-en/February-2020/Chile-s-package-of-policies-A-before-and-after-study.aspx>>; Taillie et al (see note 12)

¹⁶ Teresa Correa, Camila Fierro, Marcela Reyes, Francesca R. Dillman Carpentier, Lindsey Smith Taillie and Camila Corvalán, 'Responses to the Chilean Law of Food Labeling and Advertising: Exploring Knowledge, Perceptions and Behaviors of Mothers of Young Children' (2019) 16 International Journal of Behavioral Nutrition and Physical Activity 21

¹⁷ Secretaría de Economía, 'Fue aprobada la modificación a la NOM 051 sobre etiquetado de alimentos y bebidas' (*Comunicado Conjunto Economía-Salud-Cofepris*, 26 enero 2020)

consumers on the use of contents in a given product that may be injurious to their health. It also requires the use of additional legends to warn young consumers about the use of caffeine and sweetener in a given product (see figure 2 and 3). These precautionary legends are required to be displayed on the packages of all those products that contain sweeteners or caffeine, irrespective of their quantity or quality.¹⁸



Figure 1: Warning Signs: For Exceeding Specified Limits of Nutrients¹⁹

CONTIENE EDULCORANTES, NO RECOMENDABLE EN NIÑOS

Figure 2: Precautionary legend for added sweeteners²⁰

CONTIENE CAFEÍNA – EVITAR EN NIÑOS

Figure 3: Precautionary legend for caffeine²¹

Another important aspect of this new regulation is that it restricts the display of certain marketing elements on the front packaging of products; this restriction aims to ensure that marketing gimmicks cannot divert the consumers' attention from any warning signs a product may carry. It requires that if a product exceeds the limits established for given nutritional contents, and as a result contains "warning signs", its packaging cannot contain any reference to recommendations or acknowledgments or endorsements made by professional organizations, individuals or other entities.²² This requirement also precludes the use of marketing elements

¹⁸ This specific alert for children is based on scientific studies that show that the consumption of sugar is not recommended for children. Impact of sugar intake on children's health discussed in: 'Guideline: Sugars intake for adults and children' (World Health Organization, 2015); Theresa A. Nicklas and Carol E. O'Neil, 'Prevalence of Obesity: A Public Health Problem Poorly Understood' (FAO and WHO, 2013)

¹⁹ In English, Exceso Calorias (excessive calories); Exceso Azucares (excessive sugar); exceso grasas saturadas (excessive saturated fats); exceso grasas trans (excessive trans-fats); Exceso sodio (excessive sodium). Source: Ministry of the economy. AMENDMENT to the Official Mexican Standard NOM-051-SCFI / SSA1-2010, General labeling specifications for prepackaged food and non-alcoholic beverages-Commercial and health information, published on April 5, 2010. pp. 24

²⁰ In English, "Contain sweeteners, not recommended for children". Source: AMENDMENT to the Official Mexican Standard NOM-051-SCFI (see note 20)

²¹ In English, "contains caffeine, avoid for children's consumption", Source: AMENDMENT to the Official Mexican Standard NOM-051-SCFI (see note 20)

²² Ibid, 4.1.4

directed at children, including children's characters, animations, cartoons, celebrities' images, images of athletes or pets, or interactive elements as they can 'incite, promote or encourage the consumption, purchase or choice of products which may contain excessive nutrients'.²³ This measure is very similar to the Chilean measure, which prohibits the use of similar marketing techniques.

This compulsory labeling system is one of the world's most ambitious attempts to remake a country's food culture and turn the tide of global obesity pandemic in Mexico. However, what remains to be seen is whether this regulation conflicts with international standards and trade agreements, including the World Trade Organization's (WTO) agreements and the newly ratified United States Mexico Canada Agreement (USMCA), as they seek to ensure that technical regulations do not create unnecessary trade barriers or be more restrictive than necessary to achieve their objective.²⁴ A WTO dispute challenging this measure is well in sight as several WTO Members have raised concerns against this measure in several WTO meetings.²⁵ In particular, the United States, Costa Rica, European Union, Switzerland and El Salvador have notified specific trade concerns relating to this measure in the very first Technical Barriers to Trade (TBT) Committee Discussion post Mexico's adoption of this measure.²⁶ These recent developments, pointing to a possible WTO litigation challenging this reform, reflect the importance of assessing the WTO-consistency of this labeling reform for Mexico. In addition, such an assessment could guide policy-making in those countries that may currently be considering employing or revising their labeling requirements to combat obesity and related NCDs.

This article provides an assessment of whether this reform is consistent or inconsistent with the WTO law. In particular, it looks at whether the compulsory FOP labeling requirement entailed in this reform constitutes an unnecessary barrier to international trade or whether it is more restrictive than necessary to protect the growing public health concern of obesity-induced diseases in Mexico. The most relevant international trade law provisions underpinning the issue of labeling are found in the WTO's Agreement on Technical Barriers to Trade (TBT Agreement), General Agreement on Tariffs and Trade (GATT) and Agreement on the Trade-Related Aspects of Intellectual Property Rights.²⁷ This article examines whether the Mexican labeling regulation is consistent with the WTO's TBT Agreement. An examination of the

²³ Ibid, 4.1.5

²⁴ Julia C and Serge Hercberg, 'Front-of-Pack Nutrition Labels: Why Are Certain Agro-Industrial Firms Resisting?' (*The Conversation*, 27 November 2017) <<https://theconversation.com/front-of-pack-nutrition-labels-why-are-certain-agro-industrial-firms-resisting-87975>>; For further details on USMCA, see Amrita Bahri and Monica Lugo, 'Trumping Capacity Gap with Negotiation Strategies: The Mexican USMCA Negotiation Experience', (2020) 23(1) *Journal of International Economic Law* 1

²⁵ Discussion on this measure is included in the proposed agenda of WTO's Council for Trade in Goods (G/C/W/781, 5 June 2020)

²⁶ Included in the 13-14 May TBT Committee Meeting – Written Procedure on STCS

²⁷ Agreement on Technical Barriers to Trade, 1868 U.N.T.S. 120; General Agreement on Tariffs and Trade 1994; Agreement on the Trade-Related Aspects of Intellectual Property Rights' 1976 UNTS 389 (22 April 1991).

measure's consistency with the WTO's TBT Agreement will also allow us to assess whether this measure is consistent with the relevant TBT provisions of the newly signed USMCA. This is because the USMCA incorporates (by reference) the most relevant provisions from the WTO's TBT Agreement into its TBT Chapter.²⁸ Moreover, the Parties to the USMCA cannot invoke the agreement's dispute settlement mechanism for disputes that arise under the provisions incorporated from the WTO's TBT Agreement.²⁹

In this article, the authors identify the arguments that complainants in a future litigation can make against this reform and the counterarguments that Mexico can avail in its defense to justify the legal-consistency of this measure. If this matter leads to a WTO complaint, strong arguments would be available to both sides of the dispute. The most convincing trade law arguments that may be invoked against this reform could be grounded in Articles 2.2 and 2.4 of the TBT Agreement; the arguments mainly being that the measure or some aspect of it is not necessary to achieve the objective and that the measure is not consistent with a relevant international standard.³⁰

II. The New Labeling Requirements: A Possible Violation of WTO's TBT Agreement?

Labeling falls within the scope of the TBT Agreement which seeks to achieve two different objectives. On one hand, the TBT Agreement aims to protect the objective of trade-liberalization, by ensuring that technical regulations 'do not create unnecessary obstacles to international trade'.³¹ On the other hand, it carves out a policy space for WTO members to pursue their legitimate policy objectives at the levels they consider appropriate.³²

The TBT Agreement allows WTO members to implement technical regulations to achieve various legitimate objectives, such as the protection of health, safety of people and the environment, prevention of deceptive practices, and protection of their essential security interests. The very definition of "technical regulation" recognizes labeling as a common tool that a country can use to protect human health.³³ Mainly, the TBT Agreement contains five

²⁸ The most relevant substantive disciplines of TBT Agreement in respect of labeling (i.e., Articles 2.1, 2.2, 2.4, 2.9, 2.10 2.11 and 5.6 of TBT Agreement) are incorporated by reference into USMCA's chapter 11, Article 11.3.1(a) and (c). Hence this article will only assess the consistency of the labeling reform with WTO's TBT Agreement. Assessment of the measure's consistency with other applicable agreements remains outside the article's scope.

²⁹ Article 11.3.2, USMCA

³⁰ Paula O'brien and Andrew D Mitchell, 'On the Bottle: Health Information, Alcohol Labelling and the WTO Technical Barriers to Trade Agreement', (2018) 18(1) QUT Law Review, 124

³¹ Fifth recital, Preamble

³² Sixth recital, Preamble

³³ Annex 1 of the Agreement states that technical regulation is a document which among other things 'deals exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method'.

substantive principles to determine its consistency with a labeling regulation. These are as follows: Principle of Non-Discrimination, Requirement of Legitimate Objective, Principle of Necessity, Harmonization Principle, and Principle of Transparency.³⁴ The following sub-sections provide an assessment of the TBT-consistency of the new FOP labeling measure in light of these five principles.

II.1 Principle of Non-Discrimination

The issue of labeling entrenches upon the cornerstone principles of non-discrimination (most-favored-nation and national treatment) laid down in Article 2.1 of the TBT Agreement. Article 2.1 provides that in respect of technical regulations, WTO Members shall conform to their national treatment and most-favored-nation obligations. As per the principle of national treatment (NT), foreign like products cannot be treated less favorably than domestic like products once they have crossed the national frontiers. The most-favored-nation (MFN) principle implies that imported like products from all WTO members shall be treated alike. In this manner, the former prohibits discrimination against imports, and the latter prohibits discrimination amongst imports. With respect to labeling, WTO members can only require those labeling standards from foreign goods that are applicable to national like products. Also, if a member applies a labeling requirement to imported products from one WTO Member, it has to apply the same requirements to like products imported from other WTO Members.

The new labeling requirements in Mexico apply equally to both domestic and imported like products. They are also the same for all trading partners and WTO members. Hence, the reform appears to be consistent with MFN and NT requirements. However, it may be possible to argue that it can amount to *de facto* discrimination against imported like products and hence could amount to a possible violation of NT obligation. This is because the application of the regulation can disproportionately impact the foreign industries more than domestic industries, because foreign industries that would like to keep exporting to Mexico need to adapt their products solely and exclusively for the markets of Mexico, even if Mexican market represents only a fraction of its sales.³⁵ This would increase the cost of production, thereby increasing the price of foreign products. Moreover, the law leaves several food distribution channels unregulated, mainly, the sale of bulk food and prepared food served by restaurants, street vendors, hotels or collective catering. Bakery products, for example, are bulk food products that are high in carbohydrates, salt, and added sugars. In Mexico, bulk food and prepared foods at restaurants, street vendors, and hotels are substantial sources for food consumption.³⁶ Hence, leaving the bulk and prepared

³⁴ TBT Agreement, Art 2

³⁵ A similar argument identified in Nicolas F. Diebold, 'Standards of Non-Discrimination in International Economic Law' (2011) 60(4) The International and Comparative Law 831

³⁶ Bernardo Turnbull, Sarah Frances Gordon, Gloria Oliva Martínez-Andrade, and Marco González-Unzaga, 'Childhood obesity in Mexico: A critical analysis of the environmental factors, behaviours and discourses contributing to the epidemic' (2019) 6(1) Health Psychology Open 2

food industry in Mexico out of this regulation's ambit can be seen as a favorable treatment in favor of the domestic food industry. This could especially be the case when imported bulk products that compete with domestic bulk products are subject to the labeling requirements. Moreover, there could be a possible *de facto* violation of NT or MFN obligation if the products that would warrant the inclusion of warning signs on their front package predominantly come from abroad or are imported from a specific country.³⁷

To determine whether or not labeling distorts competition to the detriment of imported products, the WTO's Appellate Body (AB) in *US-COOL* decided that such an examination 'must 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'³⁸. Hence, a Panel must look at the operation of the challenged technical regulation in the particular market in which it is applied. The implicit exceptions for bulk products and pre-prepared food could be considered to be discriminatory if we follow this line of argument, as domestic producers have a far greater share in those market segments in Mexico. If this argument is accepted, the detrimental impact on imported products may reflect *de facto* discrimination prohibited under Article 2.1.

The *de facto* discrimination argument may come across as quite ambitious because acceptance of such an argument might put in question the WTO-consistency of any domestic measure (minor or substantial) that would require changes in labeling requirements. Moreover, the AB has clarified that if the respondent can show that the detrimental impact on imported products exclusively stems from a legitimate regulatory distinction rather than discrimination, then the challenged measure is not inconsistent with Article 2.1.³⁹ Hence, Article 2.1 does not prohibit and therefore permits any detrimental impact on 'competitive opportunities for imports in cases where such detrimental impact on imports stems exclusively from legitimate regulatory distinctions'.⁴⁰ Therefore, to counter an argument in respect of *de facto* discrimination, Mexico could argue that its measure has some detrimental impact but this impact stems exclusively from legitimate regulatory distinction rather than discrimination against a particular group of imported products. This line of argument would be persuasive as long as the challenged technical

³⁷ In 2018, the USDA's Foreign Agricultural Service ranked Mexico as the 2nd largest export market for US consumer ready products. In 2017 alone, Mexico imported \$5.8 Billion worth of U.S. processed foods. These included food preparations, syrups and sweeteners, prepared meats, fats and oils, chocolate and confectionary, snack foods and non-alcoholic beverages. [Mexico: Food Processing Ingredients 2019, USDA Foreign Agricultural Service (3/27/2019, MX9303)]

³⁸ Appellate Body Reports, United States – Certain Country of Origin Labelling (COOL) Requirements, (WT/DS384/AB/R / WT/DS386/AB/R, adopted 23 July 2012), para 269

³⁹ AB Report, US — Tuna II (Mexico), para. 216

⁴⁰ AB Report, US — Clove Cigarettes, para. 174, 175

regulation is even-handed and its 'design, architecture, revealing structure, operation, and application' does not reflect anything otherwise.⁴¹

II.2 Requirement of Legitimate Objective

Article 2.2 provides an open list of objectives that may be considered to be “legitimate”. The AB has consistently held that it is for the complainant to establish that the identified objective is not legitimate under Article 2.2 of TBT Agreement. For this assessment, a Panel first looks at whether the identified objective is listed as “legitimate” under the third sentence of Article 2.2.⁴² Protection of human health is listed as one of the legitimate objectives. Hence, at a first glance, the literal interpretation of this text would appear to show that labeling regulation imposed with the objective of improving public health is a legitimate objective.

However, at this stage, it is premature to identify the precise “objective” that parties might present at a future litigation, as the “objective” is not solely determined by the statements of the responding party.⁴³ In *US-Tuna*, the AB confirmed that the determination of the challenged measure’s objective is based on the arguments provided by both parties, as well as on the basis of the design, structure, and characteristics of the measure at issue. In this case, the AB found that the objectives were the following: '(a) "ensuring that consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins" and (b) "contributing to the protection of dolphins, by ensuring that the US market is not used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins".'⁴⁴ Moreover, the AB in *US – COOL* observed that providing information to consumers is closely related to the objective of preventing deceptive practices such as provision of inaccurate or misleading information, and hence a labeling measure that seeks to increase consumers’ awareness and information may be seen as a legitimate objective.⁴⁵ Following this rationale, it might be possible for Mexico to argue that the measure has two-fold objective: (a) protection of public health, and (b) increasing consumer awareness and information. Both objectives could be presented as interdependent and inseparable, as latter can be argued as the means to achieve the former. Mexico’s objective to increase consumers’ awareness about what they consume, curb practices of providing misleading information to consumers, and thereby encourage healthy consumption can most likely be considered as a legitimate objective.

II.3 Principle of Necessity

⁴¹ Ibid, paras. 181–182, 215

⁴² AB Reports, *US - COOL*, para 442. See also Panel Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/R, adopted 24 April 2012, as modified by Appellate Body Report WT/DS406/AB/R, para 7.346

⁴³ Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, paras. 242, 302 and 325,

⁴⁴ Ibid, 302

⁴⁵ AB Reports, *US – COOL*, para 445

Article 2.2 establishes the requirement of “necessity”. In particular, the first sentence of the provision states that technical regulations must not create unnecessary obstacles to international trade. The second sentence of Article 2.2 elaborates on the first sentence by providing that ‘technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfillment would create’.⁴⁶ The assessment of risks should be based on available scientific and technical information, related processing technology, or end uses of the products concerned.⁴⁷

To determine whether the trade-restrictiveness of a measure at issue is “necessary”, the measure should first be analyzed in light of three guiding factors⁴⁸: (i) The trade-restrictiveness of the challenged measure; (ii) The degree of contribution made by the challenged measure to the legitimate objective; (iii) The importance of the objective and the gravity of the consequences that would arise from non-fulfillment of the objective. After balancing and systemically weighing these factors, a comparison analysis should be conducted to see if there are any reasonable alternatives to the measure in question.

The AB has interpreted the word “restrictiveness” as something that restricts ‘someone or something, a limitation on the action, a limiting effect’.⁴⁹ In conjunction with the word “trade”, ‘the term means something having a limiting effect on trade’.⁵⁰ However, Article 2.2 does not prohibit measures that have any trade-restrictive effect at all. It merely prohibits “unnecessary obstacles” to trade, and hence allows for some trade-restrictiveness. In other words, Article 2.2 provides that technical regulations shall not be ‘more trade-restrictive than necessary to fulfil a legitimate objective.’ It is likely that the new FOP regulation in Mexico could be seen as a limitation on international trade as its future application may have a restrictive impact on the import of pre-packaged goods and non-alcoholic beverages. In this case, Mexico could argue that even if it is restrictive, this restrictiveness is not more restrictive than necessary and that it is necessary to achieve the required objective. The future application of this measure and the impact its application might have on the trade of pre-packaged goods and non-alcoholic beverages may provide concrete evidence to argue whether it leads to trade restrictiveness or not. The recent AB Reports in *Australia – Tobacco Plain Packaging* affirm that a future Panel may assess the impact the challenged measure’s application may have on the overall volume of imports and the magnitude of this impact.⁵¹

⁴⁶ Article 2.2, TBT Agreement

⁴⁷ Panel Report, *Australia – Certain Measures concerning Trademarks, Geographical Indications and other Plain Packaging Requirements applicable to Tobacco Products and Packaging*, WT/DS435/R, para 7.220-228

⁴⁸ *US - COOL* (AB), para 471

⁴⁹ Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, adopted 13 June 2012, at para 319

⁵⁰ *Ibid*, para 319

⁵¹ Appellate Body Reports, *Australia – Certain Measures concerning Trademarks, Geographical Indications and other Plain Packaging Requirements applicable to Tobacco Products and Packaging*, WT/DS435/AB/R, WT/DS441/AB/R, circulated 9 June 2020, Para 7.3

The second factor that guides this analysis is the importance of interests. When the interests at issue are very important, such as human health or life, the measure could be found to be necessary even if there are possible alternatives that may make an equivalent contribution to the objective and may also be less trade-restrictive. When the importance of interests at issue is low, the comparison analysis would be a crucial determinant in assessing the necessity of the measure.⁵² In other words, ‘[t]he more important the value is, the more likely that the Panel will show deference to the domestic regulation’.⁵³ This understanding is in line with the Agreement’s Preamble that provides a Member with a right to pursue legitimate objectives through technical regulations at the level it considers appropriate.⁵⁴

It is clear that the FOP labeling measure in Mexico constitutes a “technical regulation”.⁵⁵ It is also clear that the objective that Mexico aims to pursue through this measure is to improve public health by ‘informing the consumer clearly and truthfully about the content of critical nutrients that pose risks to their health in excessive consumption.’⁵⁶ Article 2.2 of the TBT Agreement further provides that the possible risks from non-fulfillment of the objective shall be taken into account in determining its necessity and that the relevant elements of consideration in this assessment could be inter alia: available scientific and technical information, related processing technology or intended end-uses of products.⁵⁷ Mexico, in this respect, can argue that the risks of non-fulfilling the objective could be grave, especially because of the acuteness of problem related to obesity, overweight, and obesity-induced diseases in Mexico. In Mexico, more than 80,000 lives are lost every year due to diabetes. This is one of the highest rates of lives lost due to obesity-induced chronic diseases in the world. There is no other country in the world that has experienced such a sharp increase in obesity, especially amongst children.⁵⁸ Moreover, Mexicans on an average get a quarter of their daily calories from sugary drinks and junk food and eat more ultra-processed food than anywhere else in Latin America.⁵⁹ This throws light on the need to inform Mexican consumers about the nutritional contents they might be consuming, as this information can help them make healthier dietary choices. Hence, satisfying this factor (i.e., importance of interests) seems straightforward for Mexico. However, what may not be that

⁵² Donald H. Regan, ‘The Meaning of ‘Necessary’ in GATT Article XX and GATS Article XIV: The Myth of Cost-Benefit Balancing’ (2019) 6 *World Trade Review*, 347, at 352

⁵³ Michael Ming Du, ‘Domestic Regulatory Autonomy under the TBT Agreement: From Non-Discrimination to Harmonization’ (2007) 6 *Chinese Journal of International Law* 269, 306

⁵⁴ Federico Ortino, *Basic Legal Instruments for the Liberalisation of Trade: A Comparative Analysis of EC and WTO Law* (First Edition 2004, Bloomsbury), 468

⁵⁵ As per the definition of technical regulation, provided in n 33.

⁵⁶ “NOM-051-SCFI/SSA1 on general specifications of labelling for food and non-alcoholic beverages pre-packaged – commercial and sanitary information” published on 11 October 2019 <http://www.dof.gob.mx/nota_detalle.php?codigo=5575205&fecha=11/10/2019>

⁵⁷ US –Tuna II, para 321

⁵⁸ Ibid

⁵⁹ Ketevan Rtseladze, Tim Marsh, Simon Barquera, Luz Maria Sanchez Romero, David Levy, Guillermo Melendez, Laura Webber, Fanny Kilpi, Klim McPherson, and Martin Brown, ‘Obesity Prevalence in Mexico: Impact on Health and Economic Burden’ (2013) 17(1) *Public Health Nutrition*, 233

straightforward for Mexico would be to show a clear and close causal connection between the new labeling requirements and the achievement of the objective.

The AB has clarified that a Panel should determine the degree of contribution of a measure at issue to the identified objective on the basis of the design, structure, and operation of the technical regulation.⁶⁰ This assessment should also take account of the evidence relating to its application. In the case of the Mexican labeling regulation (for which the first stage of modification came into force in October 2020), evidence relating to the application of this measure that shows its degree of contribution may not be available in the near future as the contribution of such measures cannot be seen soon after they are applied. The results of contribution in case of such preventive measures can only be evaluated with the benefit of time.⁶¹ However, if there is no such evidence available at the time of assessment, , then the adjudicators can look at a number of factors relating to the pre-implementation evidence pertaining to the anticipated effects of the measure, measure's architecture, the value being protected by it, the available scientific information including expert reviews and opinions, and the causal relationship between the potential risk and anticipated benefits of the measures in question.⁶²

The AB in *US Tuna II (Mexico)* and *US - COOL* have clarified that the complainant must provide evidence and arguments to show that the challenged measure does not contribute to its objective.⁶³ In *Australia - Tobacco Plain Packaging*, the AB confirms the Panel's finding that tobacco plain packaging measure contributes to the achievement of the measure's objective. The AB confirms that the objective behind the measure in question was threefold: (a) reduce the appeal of tobacco products to consumers; (b) increase the effectiveness of health warnings on the retail packaging of tobacco products; and (c) reduce the ability of the retail packaging of tobacco products to mislead consumers about using tobacco products.⁶⁴ In deciding that the measure contributes to its underlying objective, the AB confirmed the Panel's approach of looking at the structure, legislative history, accompanying guidelines, and operation of the relevant Australian regulation.⁶⁵

It could be argued that there is a lack of evidence on the effectiveness of labeling to achieve the intended objective of enhancing consumer information and awareness. Contradictory evidence is found on the causal relationship between the potential risk and benefits of strict labeling regimes

⁶⁰ US –Tuna II, para 317

⁶¹ Appellate Body Report, Brazil—Measures Affecting Imports of Retreaded Tyres, WT/DS332/AB/R (adopted 17 December 2007), para 151. The Appellate Body accepted that a measure could be considered "necessary" even if the contribution of the measure "is not immediately observable".

⁶² Appellate Body Reports, Australia — Tobacco Plain Packaging, paras 6.354, 6.358, 6.360, 6.365

⁶³ US –Tuna II, para. 216

⁶⁴ Appellate Body Reports, Australia — Tobacco Plain Packaging, para 6.98 (confirming the Panel's finding in Panel Reports, Australia - Tobacco Plain Packaging, para 7.228.

⁶⁵ Ibid, Para 7.233

on consumer awareness and consumption habits. On one hand, some studies show that labeling can have a positive impact on dietary habits and health.⁶⁶ On the other hand, some reports and studies rebut such a finding.⁶⁷ If challenged at the WTO, Mexico can use a handful of reports to show this causal connection between the means and the desired end. Moreover, Mexico can argue that even though it may be difficult to establish a causal link between improving health and labeling requirements, there is such a connection between influencing consumer behavior (the intended objective) and labeling regulation (the means to achieve the objective).⁶⁸ This argument could also establish the required relation, but it may not be a “walk in the park” for Mexico to establish this causal link as several WTO members have already questioned the measure’s effectiveness to achieve the objective of consumer awareness.⁶⁹ They have pointed to the absence of scientific and technical information on this connection, and whether alternative measures have been considered by Mexico before employing the new measure.⁷⁰ The US in particular has expressed concerns that the measure is not based on any robust scientific evidence that reflects effectiveness of such a mandatory measure.⁷¹ Switzerland has also stressed that a better understanding of the rationale behind choosing a label with negative warning, such as “exceso en”, was necessary. ‘By using such a warning, consumers might assume that these food products should be avoided altogether, even as part of a balanced and healthy diet.’⁷² It also expressed that Swiss authorities share Mexico’s goal regarding the promotion of public health and consumer information, but it urges Mexico to consider less restrictive measures such as issuing recommendations on daily nutrient intake, determining voluntary nutrient threshold for different food categories, and display of “Nutri-Score” on packaged foods on a purely voluntary basis.⁷³

If the analysis of measure’s trade-restrictiveness, its contribution to the objective and the objective’s importance leads to a preliminary conclusion that the measure is necessary, a comparison analysis follows. At this stage, the complainant has the burden to present the

⁶⁶ See, Victoria Camron, ‘Food labels have positive but limited effect on consumers’ food choices’ (Supermarket News, 30 January 2019) <<https://www.supermarketnews.com/health-wellness/food-labels-have-positive-limited-effect-consumers-food-choices>>; Also, Iina Ikonen and others, ‘Consumer effects of front-of-package nutrition labeling: an interdisciplinary meta-analysis’ (2020) 48 Journal of the Academy of Marketing Sciences, 360; Also, Reyes et al (See note 15)

⁶⁷ Joachim J. Schouteten and others, ‘Impact of Health Labels on Flavor Perception and Emotional Profiling: A Consumer Study on Cheese’ (2015) 7(12) Nutrients, 10251

⁶⁸ See note 66

⁶⁹ US Statement, WTO TBT Committee meeting, November 2019; 2020 National Trade Estimate Report on Foreign Trade Barriers, USTR (March 2020) pg 345

⁷⁰ Committee on Technical Barriers to Trade - Minutes of the meeting of 12 - 15 November 2019 (G/TBT/M/79, 12 - 15 November 2019)

⁷¹ US Statement, WTO TBT Committee meeting, Minutes of the meeting of 26-27 February 2020 (G/TBT/M/80, 24 April 2020), para 2.9

⁷² Switzerland’s Statement, WTO TBT Committee meeting, Minutes of the meeting of 26-27 February 2020 (G/TBT/M/80, 24 April 2020), para 2.12

⁷³ Ibid

reasonably available alternatives that are less trade-restrictive than the challenged measure, that must make an equivalent degree of contribution to the legitimate objective, and that must be consistent with the WTO law.

Multiple alternatives could be identified in this respect. One alternative Mexico could have considered is the use of voluntary standards or guidelines in this respect, such as the voluntary traffic light labeling in the United Kingdom.⁷⁴ Another alternative could be to present nutritional content as the percentage of the daily recommended intake (such as the one employed by France and some other EU States)⁷⁵, together with a comprehensive strategy for consumer education.⁷⁶ The use of educational campaigns on healthy dietary habits and strategies could also be an alternative to the new mandatory labeling. Mexico could also consider the approach that the European Union (EU) has taken to empower its consumers to make informed choices.⁷⁷ The EU's labeling system imposes an obligation to provide nutritional information, but its placing on the FOP is not required. To avoid confusion amongst consumers, the EU Regulation clarifies which particulars of the nutrition declaration may be provided or repeated on the FOP; however, this requirement is not mandatory. Another alternative in this respect could be the use of the FOP Health Star Rating system, which is used in Australia and New Zealand to rate the overall nutrition profile of packaged foods and assign star ratings from half to five stars based on that.⁷⁸ Hence, there are a number of alternatives, and a complainant could argue that these alternatives are less trade restrictive and reasonably available to Mexico; however, each of these alternatives has its own pros and cons.

The Traffic Light system for example is clearly understandable by consumers, but the reference intakes, energy and portion size have a vast scope and could cover a variety of products in red zone for instance. The EU's reference intake scheme provides a lot of information about the contribution that nutrients make towards daily allowance, but it does not include the display of positive nutrients such as fibre. Mexico can argue that even though these possible alternatives can be found to be less trade-restrictive, they may not make an equivalent contribution to the measure's objective. Shaffer observes that 'it will be more difficult for complainants to win Article 2.2 claims because of the AB's focus on the 'degree' to which an alternative meets a

⁷⁴ For more info, see Nutrition Labelling Requirements under the Food Information to Consumers Regulation (EU) No.1169/2011, <https://www.food.gov.uk/sites/default/files/media/document/nutritionlabellinginformationleaflet.pdf>

⁷⁵ For more info, see Michel Chauliac, 'Nutri Score: The Front of Pack Nutrition Labelling', https://ec.europa.eu/food/sites/food/files/animals/docs/comm_ahac_20180423_pres4.pdf

⁷⁶ For example, nutrition content as percentage implemented by US. For more information, FDA, 'How to Understand and Use the Nutrition Facts Label' <<https://www.fda.gov/food/new-nutrition-facts-label/how-understand-and-use-nutrition-facts-label>>; Consumer Education Schemes- such as Pick the Tick (since 1989 in Australia and New Zealand), Green Keyhole (since 1989 in Sweden), Heart Check (since 1995 in the USA) and Health Check (since 1998 in Canada).

⁷⁷ Regulation (EU) No 1169/2011 on the provision of food information to consumers, which came fully into application at the end of 2016

⁷⁸ D Maganja, K Buckett, C Stevens and E Flynn, 'Consumer choice and the role of front-of-pack labelling: the Health Star Rating system' (2019) 29(1) *Public Health Research & Practice* 2911909

respondent's objective, which can be narrowly defined⁷⁹. Mexico could employ this argument to justify the necessity of the measure in question.

II.4 Harmonization Principle

Article 2.4 provides that in the formulation of national technical regulations and standards, the country in question shall comply with the established international standards. However, this may not be required if the existing international standards are ineffective or constitute an inappropriate means to achieve the legitimate objective being pursued. The TBT Agreement does not specify the relevant international standardizing bodies. 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". It defines the term "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". The Codex Commission has been recognized as an "international standardizing body" in the case of *European Communities - Trade Description of Sardines* and for food safety under the WTO's Agreement on the Application of Sanitary and Phytosanitary Measures.⁸⁰ The issue of what constitutes an "international standardizing body" was addressed in *US - Tuna II*. In this case, the issue of the existence of a relevant international standard to a large extent was determined as per the characteristics of the standard-setting body. The AB confirmed that a prospective international standard must be approved by an "international standardizing body", which it defined as 'a body that has recognized activities in standardization and whose membership is open to the relevant bodies of at least all Members'.⁸¹ Based on an interpretation of the definition of 'standard' set out in Annex 1 of the TBT Agreement and its explanatory note⁸², the AB clarified that the body is "open" if there are no restrictions on its membership (by WTO members), its membership is practically automatic, and that it is open at all stages of standard development.⁸³

The European Union has argued that Codex Commission is a relevant international standardizing body and that Mexico has not used the its applicable guidelines as a basis for its labeling law, in particular, the Codex Guidelines for the use of Nutrition and Health Claims and the Codex

⁷⁹ Gregory Shaffer, 'The WTO Tuna-Dolphin II Case (United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products)' (2013) 107(1) American Journal of International Law 192

⁸⁰ Art 3.4 and Annex A, Agreement on the Application of Sanitary and Phytosanitary Measures, 1867 U.N.T.S. 493; *European Communities – Trade Description of Sardines* (Panel and Appellate Body Reports (WT/DS231/R and WT/DS/231/AB/R), para 7.68, 231-233

⁸¹ AB Report, *US- Tuna*, para 359. For more information, see Wijkström, Erik; McDaniels, Devin (2013): *International standards and the WTO TBT Agreement: Improving governance for regulatory alignment*, WTO Staff Working Paper, No. ERSD-2013-06, World Trade Organization (WTO), Geneva, <http://dx.doi.org/10.30875/e572e62a-en>

⁸² Annex 1, para. 2

⁸³ AB Report, *US- Tuna*, paras 364, 386

Guidelines on Nutrition Labeling.⁸⁴ It contends that the ‘definition of "dietary fibre" mentioning "three or more monomeric units" is not fully in line with the definition in section 2 of the Codex Guidelines on Nutrition Labelling mentioning "ten or more monomeric units"'.⁸⁵ Moreover, several requirements do not provide the flexibility that the Codex Standard provides in this matter.⁸⁶ ‘The Codex guidelines [do] not foresee the mandatory declaration of added sugars, trans fat and dietary fibre.’ Similar concerns are shared by other WTO members including the US and Switzerland.⁸⁷ These arguments provide an early indication that a possible non-compliance with Codex may be a concern for the new regulation. However, Mexico could argue that the Codex standards are not relevant or not an effective means to achieve the objective being pursued.

In the *EC – Sardines* case, the AB agreed with the Panel’s following observation:

An ineffective means is a means which does not have the function of accomplishing the legitimate objective pursued, whereas an inappropriate means is a means which is not especially suited for the fulfilment of the legitimate objective pursued.... The question of effectiveness bears upon the results of the means employed, whereas the question of appropriateness relates more to the nature of the means employed.⁸⁸

Following this rationale, the Panel in *US - COOL* found that the standard at issue (Codex standard) did not have the capacity to accomplish the legitimate objective being pursued by the measure as it could not achieve the objective of providing information to consumers about the countries in which an animal was born, raised and slaughtered; hence, it was neither effective nor appropriate.⁸⁹ Using this line of argument, Mexico could argue that even if Codex is a relevant international standard, this may be an ineffective or inappropriate method for providing consumer information and influencing dietary consumption in Mexico, and hence there is no breach of Article 2.4 in not using that standard. It is also possible to argue that Codex is largely irrelevant as it does not provide for guidelines on the inclusion of warning signs or the precautionary legends. It does not contain guidelines for imposing limitations on marketing elements in the form of recognitions or endorsements or characters. Codex does not provide any standards on the kind of labeling countries could employ for prepackaged products; it also does not regulate the limits on the quantity of nutrients. It only contains a mandatory obligation to

⁸⁴ Statement by the European Union to the Committee on Technical Barriers to Trade, “Mexico - Draft Amendment to Mexican Official Standard NOM-051-SCFI/SSA1-2010: General Specifications for the Labelling of Pre-Packed Food and Non-Alcoholic Beverages” (4 March 2020 , G/TBT/W/715)

⁸⁵ *Ibid*, at 1

⁸⁶ Codex General Standard for the Labelling of Prepackaged Foods (CXS 1-1985)

⁸⁷ Fabiola Cortez, Mexico Front of Pack Labeling Warning Signs, USA Foreign Agricultural service (23 July 2019)

⁸⁸ Appellate Body Report, European Communities – Trade Description of Sardines, WT/DS231/AB/R, adopted 23 October 2002, paras 261 and 285

⁸⁹ Panel Report, *US-Cool*, para. 7.734 – 7.735. The AB refers in *ABR US-Cool* para. 190.

include list of ingredients and information on the quantity of ingredients (and some technical details that a label should display). Moreover, Mexico could argue that the Codex standards, based on a standard-setting process often led by profit-motivated industries, seek to protect the special economic interests and hence provide little guidance on how countries could regulate labeling to protect their nation's public health interests.⁹⁰

Another argument that Mexico could employ in respect of the harmonization requirement is that both the Food and Agriculture Organization (FAO) and World Health Organization (WHO) have already endorsed the use of similar FOP labeling employed by other countries such as Chile.⁹¹ They have established international standards and guidelines to regulate food labeling in this respect.⁹² These guidelines state that labeling must facilitate the understanding of ingredients and provide consumers with an effective means of identifying products' nutritional information. In this way, labeling should not contain misleading or false information or aspects that cause confusion with another product. Mexico could argue that the new regulation is in compliance with these standards, as it seeks to enhance the transparency of contents and a better understanding of consumers regarding nutritional information of prepackaged products. Moreover, to argue compliance with international standards, Mexico will have to demonstrate that the regulation also reduces the possibility of the use of misleading, inaccurate, or unintelligible information that may serve to misguide or confuse the consumers. If Mexico invokes this line of reasoning, it might have to counter the very same arguments Mexico itself had made to oppose similar labeling regulation in Peru at the TBT Committee discussions.

Until 2018, Mexico had staunchly resisted the "stop sign" labeling model employed by Peru, arguing at the Committee Meetings that the use of "stop sign" could cause confusion and mislead consumers as the guidance is not about the nutritional benefits of the food but about its classification as "good" or "bad".⁹³ Challenging similar measures imposed by Ecuador, Mexico has argued that a strict FOP labeling could deny 'a person's constitutional right to timely, clear, accurate and non-misleading information concerning the content and characteristics of these foods, thereby enabling consumers to make the correct choice when purchasing and consuming such products'.⁹⁴ Precisely the same arguments could now be used against Mexico if it argues

⁹⁰ Sam Halabi, 'The Codex Alimentarius Commission, Corporate Influence, and International Trade: A Perspective on FDA's Global Role', 41 Am. J.L. & Med. 406 (2015) 413; Elizabeth Smythe, 'In Whose Interests? Transparency and Accountability in the Global Governance of Food: Agribusiness, the Codex Alimentarius, and the World Trade Organization', in Jennifer Clapp & Doris Fuchs eds., *Corporate Power in Global Agrifood Governance* 93, 96 (The MIT Press, 2009).

⁹¹ FAO, 'La ley chilena de etiquetado de alimentos – Conferencia celebrada en la Sede de la FAO sobre el papel de los frentes parlamentarios en la mejora de la nutrición en el mundo' (FAO Dialogues, 2018)

⁹² Comisión del Codex Alimentarius, 'Etiquetado de los alimentos' (*Organización De Las Naciones Unidas Para La Agricultura Y La Alimentación Organización Mundial De La Salud*, 2007) <<http://www.fao.org/3/a-a1390s.pdf>>

⁹³ Committee on Technical Barriers to Trade, MINUTES OF THE MEETING OF 8-9 NOVEMBER 2017, G/TBT/M/73, 6 March 2018 (para. 2.2.4.11)

⁹⁴ Committee on Technical Barriers to Trade, MINUTES OF THE MEETING OF 14-15 JUNE 2017, MINUTES OF THE MEETING OF 14-15 JUNE 2017, G/TBT/M/72 25 September 2017 (PARA. 3.2.4.12); Committee on

that its measure in question harmonizes with the relevant international standards on the ground that they are used to ensure that labels can no longer misguide or confuse consumers.

II.5 Principle of Transparency

Articles 2.9, 2.10 and 2.11 provide that Members shall announce their intention to introduce or modify a measure and give a reasonable period of time to other members to present their comments. Members must notify in two conditions: (1) whenever a relevant international standard or guide does not exist, or the technical content of a proposed or adopted technical regulation is not in accordance with the technical content of relevant international standards or guides; and (2) if the technical regulation or conformity assessment procedure may have a significant effect on the trade of other Members (Articles 2.9 and 5.6). Draft regulations must be notified to WTO Members sixty days prior to their formal adoption so as to allow time for other Members to submit their comments.⁹⁵

The new regulation would likely qualify for the second condition, as it could be argued that the regulation could have a significant impact on the trade of other members. However, Mexico has seemingly complied with this obligation as it issued a notification to WTO members in October 2019 (almost four months before its adoption), giving members much more than the required sixty calendar days to comment on the reform.⁹⁶ This seems to be a reasonable period of time, and would likely satisfy the transparency requirement. Article 2.11 further requires that members publish the adopted technical regulations, in a manner that would allow other members to ‘become acquainted with them’.⁹⁷ It is through these transparency mechanisms that members become aware of developments in other member jurisdictions.⁹⁸ Mexico seems to have complied with this obligation as well, as it has published the modification of the labeling regulation in its official register on 27th March 2020, months before its gradual two-phased enforcement in October 2020 and then in April 2021.⁹⁹

III. A Hypothetical Challenge to the New Labeling Regulation: Could Mexico Win a WTO Case?

The discussions in this article outline and analyze different arguments that can be employed to argue either way in a possible WTO litigation challenging the Mexican labeling regime. This

Technical Barriers to Trade, MINUTES OF THE MEETING OF 29-30 MARCH 2017, G/TBT/M/71 2 June 2017 (para. 2.2.4.12); Committee on Technical Barriers to Trade, MINUTES OF THE MEETING OF 15-16 JUNE 2016, G/TBT/M/69 22 September 2016 (para. 3.2.3.15)

⁹⁵ Article 11.7 (para 14), TBT Agreement

⁹⁶ Committee on Technical Barriers to Trade, Notification, 14 October 2019, G/TBT/N/MEX/178/Add.9

⁹⁷ Art 2.11

⁹⁸ Art 2.11; art 10.3, which sets a requirement that each member create an ‘enquiry point’ that can answer questions and provide information to other members or ‘interested parties’ which would include industry.

⁹⁹ Secretaria de Economía, ‘MODIFICACIÓN a la Norma Oficial Mexicana NOM-051-SCFI/SSA1-2010, Especificaciones generales de etiquetado para alimentos y bebidas no alcohólicas preenvasados-Información comercial y sanitaria, publicada el 5 de abril de 2010’ (*Diario Oficial*, 29 March 2020) <https://www.dof.gob.mx/2020/SEECO/NOM_051.pdf>

analysis is made solely by analyzing the plain language of the TBT Agreement. Every WTO case is fact-based, and hence we might need to reconsider or revise these conclusions based on the evidence that could be brought by claimants as well respondents in a potential WTO litigation. There may be other arguments or elements of analysis that could be brought against or in favor of Mexico in a future litigation.

To conclude this analysis, it is important to answer one more question: If it fails to satisfy the requirements provided in the TBT Agreement, can Mexico rest its case on the general exception of Article XX (b) of GATT 1994, which allows respondents to justify their WTO-inconsistent measures or practices on the ground of human health? The AB's following observation in *US - Clove Cigarettes* helps address this question

The balance set out in the preamble of the TBT Agreement between, on the one hand, the desire to avoid creating unnecessary obstacles to international trade and, on the other hand, the recognition of Members' right to regulate, is not, in principle, different from the balance set out in the GATT 1994, where obligations such as national treatment in Article III are qualified by the general exceptions provision of Article XX.¹⁰⁰

More specifically, the AB in this case observes that 'the TBT Agreement does not contain among its provisions a general exceptions clause. This may be contrasted with the GATT 1994, which contains a general exceptions clause in Article XX.'¹⁰¹ These observations confirm that the balance arrived at in the TBT Agreement is very similar (if not the same) as the balance GATT 1994 seeks to achieve. Hence, even though the TBT Agreement does not contain exceptions or general exceptions do not apply to this agreement, this balance is already maintained in the discussed provisions of the TBT Agreement.

The AB goes on to clarify this issue in *China - Rare Earths* wherein it states that Article XX of the GATT 1994 is not available to justify a breach of the TBT Agreement.¹⁰² These observations seem to confirm that the General Exceptions provided under GATT 1994 cannot be invoked to justify a violation of the TBT Agreement.¹⁰³ However, Art XX can be invoked to justify a

¹⁰⁰ See Appellate Body Report, *US – Clove Cigarettes*, para 96

¹⁰¹ Appellate Body Report, *US – Clove Cigarettes*, para 101

¹⁰² Appellate Body Reports, *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WT/DS431/AB/R / WT/DS432/AB/R / WT/DS433/AB/R, adopted 29 August 2014, at para 5.56

¹⁰³ Gian Franco Chianale, 'The General and Security Exceptions in the European Union's Free Trade Agreements', in Denise Prévost, Iveta Alexovicova, Jens Hillebrand Pohl (eds.), *Restoring Trust in Trade: Liber Amicorum in Honour of Peter Van den Bossch* (Hart Publishing, 2018) 245; Lorand Bartels, 'The Chapeau of the General Exceptions in the WTO GATT and GATS Agreements: A Reconstruction' (2015) 109(1) *American Journal of International Law* 95

violation of the relevant provisions of GATT 1994 (in particular, Articles I and III for instance that also relate the issue of labeling).¹⁰⁴

IV. Conclusion

It remains to be seen if any country would bring a dispute against the labeling reform in Mexico. There are some early indications for an upcoming WTO dispute as several Members are raising specific trade concerns relating to this measure at the TBT Committee discussions.¹⁰⁵ If it leads to a WTO complaint, this would be a highly contentious battle with strong arguments available to both sides of the dispute. The most convincing trade law arguments invoked against this reform would be grounded in Articles 2.2 and 2.4 of the WTO's TBT Agreement; the arguments mainly being that the measure or some aspect of it is not necessary to achieve the objective and that the measure is not consistent with a relevant international standard.¹⁰⁶ These arguments may also impact the position of other countries that may be exploring new ways to address obesity-related health concerns but at the same time wanting to avoid a cost- and time-demanding WTO litigation. Hence, a future dispute on this issue would not just impact the continuance of this law in Mexico; it would also throw open the flood-gates of similar disputes against similar regulations employed by other countries (such as Chile) and discourage those countries that may currently be considering employing or revising their labeling requirements to combat the obesity pandemic.

The current state of WTO's dispute settlement mechanism with a dysfunctional AB may deter the filing of a WTO dispute.¹⁰⁷ If a dispute is filed without a functional AB, a member facing an unfavorable Panel ruling would, in practice, be able to block its adoption by simply filing an appeal "into a void".¹⁰⁸ However, this may not be a deterrent for the parties to multi-party interim appeal arbitration arrangement (MPIA), a "stop-gap" measure created to rescue the two-

¹⁰⁴ GATT 1994 may be applicable and relevant when there is a labeling dispute involving TBT Agreement. But the parties must argue separately and panel must determine separately the WTO consistency of a labeling measure under GATT and TBT Agreement. (confirmed in Appellate Body Report, US – Clove Cigarettes, para 215). However, the AB recalled that the principle of judicial economy 'allows a panel to refrain from making multiple findings that the same measure is inconsistent with various provisions when a single, or a certain number of findings of inconsistency, would suffice to resolve the dispute'. [citing Appellate Body Report, Canada – Wheat Exports and Grain Imports, para. 133]. Consequently, it observed that a panel only needs to address those claims that are required to be addressed to resolve the dispute. At the same time, it also confirmed that if a measure is found to be inconsistent with TBT Agreement, the principle of judicial economy should not preclude the panel to assess its consistency with GATT 1994. [AB Report, US-Tuna, para 403, 405, 406] Since the applicability of GATT is not examined in this article, the possibility of invoking Article XX will not be addressed.

¹⁰⁵ Included in the 13-14 May TBT Committee Meeting – Written Procedure on STCS

¹⁰⁶ Paula O'Brien and Andrew D Mitchell, 'On the Bottle: Health Information, Alcohol Labelling and the WTO Technical Barriers to Trade Agreement', (2018) 18(1) QUT Law Review, 124

¹⁰⁷ For more details, see Amrita Bahri, 'Appellate Body Held Hostage: Is Judicial Activism at Fair Trial' (2019) 53(2) Journal of World Trade 293

¹⁰⁸ US has recently filed an appeal "into a void" in United States – Countervailing Measures on Softwood Lumber from Canada, Notification of an Appeal by the United States under Article 16 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") [WT/DS533/529 September 2020]

step dispute settlement system for disputes among the participating WTO Members.¹⁰⁹ They may still be able to have the Panel decisions reviewed by an appellate authority as Mexico is a member of MPIA.

¹⁰⁹ European Commission, Trade: EU and 16 WTO members agree to work together on an interim appeal arbitration arrangement (*European Commission*, 24 January 2020) <https://ec.europa.eu/commission/presscorner/detail/en/IP_20_113>