

FROM PACKAGE TO POLICY: NUTRITIONAL LABELLING IN LATIN AMERICA AND WTO COMPLIANCE^{1*}

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ABSTRACT

This article examines the compatibility of the new front-of-package nutritional labelling (FOPNL) regulations in Latin American countries with World Trade Organization (WTO) law. Over the past decade, FOPNL has been implemented to combat obesity and non-communicable diseases (NCDs). These labels are intended to provide consumers with clear, concise information about high fat, sugar, and sodium content in ultra-processed foods. Despite the potential public health benefits of improved consumer awareness, the food industry raises concerns about potential trade restrictions and compliance with WTO obligations. To assess these concerns, we examine the compatibility of FOPNL with the relevant WTO Agreements: the Agreement on Technical Barriers to Trade (TBT) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Although FOPNL does impose certain trade restrictions, such regulations are justified by their significant contribution to public health objectives. We conclude that FOPNL measures comply with WTO obligations, provided they only restrict trade as necessary to achieve their objectives.

Keywords: Front-of-package labelling; Nutritional labels; Latin America; World Trade Organization (WTO); Technical Barriers to Trade (TBT) Agreement; Trade-Related Aspects of Intellectual Property Rights (TRIPS); Public health; Obesity prevention; Non-communicable diseases (NCDs); International trade regulations.

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^{1*} Thanks to Hugo Gabriel Romero Martínez for his comments on an earlier version of this article.

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I. INTRODUCTION

Obesity has become a serious global health challenge in recent decades. In Latin America, around 57% of the region's adult population is overweight, and 19% is obese.⁴ Overweight, obesity, and their associated non-communicable diseases ("NCDs")⁵ can be prevented through effective public health interventions. With that in mind, several Latin American countries have implemented innovative and multi-sectoral policies to improve health statuses.⁶ Among these, front-of-package nutritional labelling ("FOPNL")⁷ stands out. FOPNL provides clear information and persuasive signals about the nutritional content of ultra-processed foods⁸—calling out high levels of fat, sugar, and sodium, which may contribute to poor health outcomes. The information is intended to not only inform consumers but also influence their behavior—nudging them towards more balanced dietary choices.

The implementation and use of FOPNL has sparked debate regarding the policy's efficacy and impact on international trade. Stakeholders from the food industry argue that FOPNL regulation does not address the multi-factorial problem of obesity, imposes unnecessary trade barriers, and fails to comply with World Trade Organization ("WTO") obligations. Through national governments, the food industry has raised specific trade concerns at the WTO regarding the compatibility of FOPNL with international standards.⁹ Transnational food and beverage companies exert enormous pressure on Latin American governments to stop, delay, or dilute labelling measures. In Mexico, for example, Nestlé, Kellogg, and Coca-Cola have opposed FOPNL by threatening legal challenges based on WTO obligations.¹⁰

Considering bold industry opposition and the public health stakes, this article explores the compatibility of Latin American FOPNL with WTO obligations. Section 2 examines the motivations underlying the adoption and implementation of FOPNL. We consider risk factors for obesity in adults and children; the broader health, economic, and social impacts of obesity observed

⁴ World Health Organization, *Obesity and Overweight*, WHO (Mar. 9, 2024), <https://www.who.int/news-room/fact-sheets/detail/obesity-and-overweight> [https://perma.cc/PWA3-HDJT].

⁵ Non-communicable diseases ("NCDs") are chronic diseases that are not transmitted from person to person. Examples of NCDs include cardiovascular diseases, cancers, chronic respiratory diseases, and diabetes. A key risk factor for NCDs is an unhealthy diet, particularly one that consists of many foods that are high in sugar, fats and salt and is low on fruits and vegetables.

⁶ Examples of such policies include school food regulations and marketing restrictions.

⁷ FOPNL is the acronym for "front of package nutrition labelling" used by the Codex Alimentarius Commission. See Report of the forty-sixth session of the Codex committee on food labelling.

⁸ "Ultra-processed food" refers to industrially formulated edible products that contain little to no whole food ingredients. They tend to have high sugar, fat, salt, and contain additives like artificial flavors, colors, and preservatives. They are designed to be convenient, highly appealing, and ready to eat or require minimal preparation.

⁹ Anne Marie Thow, *Trade, standards and politics: global pressures on front-of-pack nutrition labelling interventions*, 30 EUR. J. OF PUB. HEALTH, 30 (2020).

¹⁰ As well as Codex standards, and regional trade agreements like NAFTA/USMCA. See Eric Crosbie, Angela Carriedo & Laura Schmidt, *Hollow Threats: Transnational Food and Beverage Companies' Use of International Agreements to Fight Front-of-Pack Nutrition Labelling in Mexico and Beyond*, 11 INT'L OF HEALTH POL'Y & MGMT., 722, 722 (2020).

globally and within Latin America; and how the ultra-processed food industry facilitates unhealthy dietary habits and exacerbates obesity. Then, we discuss the strategies governments and international organizations deploy to combat the public health crisis produced by obesity, including FOPNL.

Next, we analyze provisions of the Agreement on Technical Barriers to Trade (“TBT Agreement”) and of the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS Agreement”) that FOPNL engages. In Sections 3 and 4, the analysis examines relevant WTO obligations to pressure test the trade-related concerns raised by industry stakeholders. Specifically, we consider the nine FOPNL measures. Our analysis extends the understanding of concepts such as “unnecessary restrictiveness” and “unjustifiability” within the context of trademark use under WTO law. Further, we provide actionable guidance for developing national public health regulations that comply with international trade regulations and significantly contribute to public health objectives, such as mitigating obesity and NCDs. We demonstrate that the health-beneficial policy rationale for FOPNLs can justify trade-restrictive effects under WTO law.

II. THE NEED FOR FRONT-OF-PACKAGE NUTRITION LABELLING IN LATIN AMERICA

Latin America¹¹ has the highest rates of obesity and NCDs in the world, a position it has held since 1990.¹² There has been a notable increase in childhood obesity and related NCDs, such as cardiovascular disease and Type 2 diabetes, in recent decades.¹³ Being overweight or obese is an important modifiable risk factor for NCDs, and there is an urgent need for public health interventions in Latin America to address this.¹⁴

The consumption of ultra-processed foods has been identified as a significant contributor to the rising prevalence of obesity and NCDs in Latin America.¹⁵ It is also associated with metabolic disorders and inflammatory processes that may contribute to colorectal cancer.¹⁶ Recently, GLP-1 receptor agonists have garnered attention due to their effectiveness in reducing obesity (and other health conditions). This is one example of new pharmaceutical drugs developed to reduce appetite and cravings, leading to significant weight

¹¹ Herein, “Latin America” includes the regions of Mesoamerica, South America, and the Caribbean.

¹² WORLD HEALTH ORG., WORLD HEALTH STATISTICS 2024: MONITORING HEALTH FOR THE SDGs, SUSTAINABLE DEVELOPMENT GOALS 68-70 (World Health Organization ed., 2024).

¹³ Lydia Kline, Jessica Jones-Smith, Jamie Miranda, Michael Pratt, Rodrigo S. Reis, Juan A. Rivera-Dommarco, James F. Sallis & Barry Popkin, *A research agenda to guide progress on childhood obesity prevention in latin America*, 18(S2) OBESITY REVIEWS 19, 19 (2017).

¹⁴ Laura Webber, Fanny Kilpi, Tim Marsh, Ketevan Rveladze, Martin Brown & Klim McPherson, *High Rates Of Obesity and Non-Communicable Diseases Predicted across Latin America*, 7 PLoS ONE 1, 1 (2012), <https://doi.org/10.1371/journal.pone.0039589> [<https://perma.cc/XZC8-R5PC>].

¹⁵ Rodrigo A. Matos, Michelle Adams & Joan Sabaté, *Review: The Consumption of Ultra-Processed Foods and Non-communicable Diseases in Latin America*, 8 FRONTIERS IN NUTRITION, 1, 1 (2021).

¹⁶ Peel, M., *Scientists find potential link between ultra-processed foods and cancer*. FINANCIAL TIMES (December 10, 2024), <https://www.ft.com/content/15ff9221-5007-4e0d-85a1-320d3567a601> [<https://perma.cc/K654-67J3>].

loss. However, these drugs do not address the root causes of obesity for individuals, which are often linked to dietary habits and environmental or socio-economic conditions. Also, studies have shown that discontinuing these drugs can result in weight gain, sometimes exacerbating the problem and leading to more severe health consequences. The prevalence of obesity and its associated health risks demand preventive measures that tackle its root causes, rather than superficial fixes like weight loss pills.

Despite the region's supply of healthy whole protein sources and crops, consumption of ultra-processed food prevails. This suggests there are issues of availability and integration between local food resources, consumers, and dietary patterns.¹⁷ Several factors, including urbanization, market deregulation, privatization, globalization of the food system, and a rise in non-agricultural employment, have exacerbated this misalignment.¹⁸

To combat the obesity epidemic in Latin America, it is vital to implement measures aimed at reducing the consumption of ultra-processed foods. Numerous strategies have been adopted to this end. One such strategy is taxation and pricing policies to increase the cost of ultra-processed food. Studies have shown that a one-percent increase in the price of ultra-processed foods can decrease the prevalence of overweight and obesity by 0.33% and 0.59%, respectively.¹⁹ These policies may also include subsidies to reduce the cost of healthy, balanced foods to increase their affordability and, in turn, consumption.²⁰ Another strategy leverages community-based programs and school interventions.²¹ These aim to promote physical activity and provide healthier meals. However, the persuasiveness and impact of these measures is outdone by the advertising and promotion of ultra-processed foods.²²

Studies show that the pervasive influence of ultra-processed food marketing undermines rational consumer choices²³ and encourages the consumption of unhealthy food. Moreover, misleading product descriptors such as “low-fat,” “light,” “fat-free” (or sugar-free) further complicate individuals’ judgement and policy efforts to promote healthier diets.²⁴ To be sure, these

¹⁷ FAO, PAHO, WFP & UNICEF, PANORAMA OF FOOD AND NUTRITIONAL SECURITY IN LATIN AMERICA AND THE CARIBBEAN 46 (2016).

¹⁸ Patricia Aguirre, *Alimentación humana: el estudio científico de lo obvio*, 11 SALUD COLECTIVA 463, 467 (2016).

¹⁹ Camila Mendes dos Passos, Emanuella Gomes Maia, Renata Bertazzi Levy, Ana Paula Bortoletto Martins & Rafael Moreira Claro, *Association between the price of ultra-processed foods and obesity in Brazil*, 30 NUTRITION, METABOLISM, AND CARDIOVASCULAR DISEASES 589, 595 (2019).

²⁰ *Id.* at 68.

²¹ Juliana Kain, Sonia Hernández Cordero, Diana Pineda, Augusto Ferreira de Moraes, Daniel Antiporta, Tatiana Collese, Elsie Costa de Oliveira Forkert, Laura González, Juan Jaime Miranda & Juan Rivera, *Obesity Prevention in Latin America*, 3 CURRENT OBESITY REPORTS 150, 150-155 (2014).

²² ORGANIZACIÓN PANAMERICANA DE LA SALUD, ALIMENTOS Y BEBIDAS ULTRAPROCESADOS EN AMÉRICA LATINA: VENTAS, FUENTES, PERFILES DE NUTRIENTES E IMPLICACIONES 44 (OPS ed., 2019).

²³ FAO, et al., *supra* note 17, at 76.

²⁴ See generally Rafaela Sayas-Contreras, Eliana Margarita, Alcalá-De Ávila, Ángela Patricia & San Martín-Gómez, *Configuración de la responsabilidad por publicidad engañosa en productos light, bajos en grasa o libres de grasa*, 14 REVISTA SABER, CIENCIA Y LIBERTAD 56, 59 (2019).

terms are often used strategically to create the impression of a healthier product, which often does not reflect the product's actual nutritional profile.²⁵ The packaging and labelling of these foods does not always understandably convey the (excessive) amounts of fats, sugar, and sodium they contain.²⁶

Nutritional labelling is intended to provide consumers with essential information about the nutritional content of food products. According to the FAO, nutritional labelling is defined as “a description intended to inform the consumer about the nutritional properties of a food.”²⁷ Such descriptions can be displayed as a label, tag, mark, image, or other descriptive or graphic material. It may be written, printed, stenciled, embossed, engraved, or attached to the packaging of a food or food product.²⁸

Nutritional labelling provides consumers with information about a food's nutrient content.²⁹ To this end, the *Codex Alimentarius*³⁰ offers recommendations for food labelling and nutritional claims included on labels to ensure this content is accurate, not misleading, and informative for consumers.³¹ However, traditional labelling practices require consumers to have some preexisting knowledge of nutrition and even mathematics to evaluate and compare the product's contents. Even if with that, consumers generally have minimal available cognitive energy and time to dedicate effort to making decisions that consider long-term health impacts or differentiate misleading claims, especially during routine food purchases.³²

Traditional nutritional tables are underused and misunderstood.³³ Since 1989, a new labelling approach has been developed to³⁴ provide consumers with synthesized nutritional information in simple, at-a-glance formats to help them make informed and healthier food choices with ease: FOPNL.³⁵ These labels provide a quick, easy-to-understand summary of a product's nutritional content in lieu of the traditional descriptions. FOP nutritional labels typically focus on key nutrients of concern, such as fat, sugar, and salt.

²⁵ Lei Huang & Ji Lu, *The impact of package color and the nutrition content labels on the perception of food healthiness and purchase intention*, 22 J. OF FOOD PRODS. MKTG. 1-29 (2015).

²⁶ FAO, et al., *supra* note 17, at 79.

²⁷ Codex Alimentarius, *Guidelines on Nutrition Labelling: CXG 2-1985*, at 2, FAO (2021).

²⁸ Codex Alimentarius, Codex General Standard for the Labelling of Prepackaged Foods: CODEX STAN 1-1985, at 2, FAO (1991) (defining “label”).

²⁹ See generally Codex Alimentarius, *supra* note 27.

³⁰ A set of standards, codes of practice, guidelines and recommendations on food approved by the Codex Alimentarius Commission, the leading international organization setting standards and issuing guidance with the aim of protecting the health of consumers and promoting fair practices in the food trade.

³¹ FAO, et al., *supra* note 17, at 82.

³² *Id.*

³³ See generally Mary J. Christoph, Nicole Larson, Melissa N. Laska & Dianne Neumark-Sztainer, *Nutrition Facts Panels: Who Uses Them, What Do They Use, and How Does Use Relate to Dietary Intake?*, 118 J. OF THE ACADEMY OF NUTRITION & DIETETICS 217 (2018).

³⁴ Sweden was the first country to implement voluntary, summary-type front-of-package nutritional labelling, called “Keyhole”, which distinguishes foods that are healthier than others in the same category. Cf. SERGIO BRITOS, AYELÉN BORG, CATALINA GUIRALDES & GRACIELA BRITO, *REVISIÓN SOBRE ETIQUETADO FRONTAL DE ALIMENTOS Y SISTEMAS DE PERFILES NUTRICIONALES EN EL MARCO DEL DISEÑO DE POLÍTICAS PÚBLICAS* 30 (Centro de Estudios sobre Políticas y Economía de la Alimentación ed., 2018).

³⁵ *Id.* at 4.

Latin America is leading the world in FOPNL.³⁶ This innovative strategy endeavors to promote healthier diets based on nutritional profile systems (“NPS”). NPS classify foods based on their nutritional profile to prevent disease and promote health through consumer consciousness. NPS classification is derived from various methodologies, including threshold and scoring systems, and uses different reference units such as quantity, portion size, and energy content.³⁷ These systems serve as the basis for FOPNL.

FOPNL can take different forms:

- i) Informative labels: These distill critical nutritional data from more detailed back-of-package panels.
- ii) Warning labels: These highlight excessive levels of detrimental nutrients, urging consumer caution.
- iii) Summary labels: With a broader educational approach, these labels categorize foods based on nutrients that should be limited and those that are essential or beneficial, thereby promoting more informed dietary choices.³⁸ This labelling strategy not only makes nutritional information more accessible but also educates consumers on making healthier food selections.

Studies have shown that FOPNL can influence consumer behavior and food choices. For example, using FOPNL can improve overall dietary quality, with reduced added sugars and increased consumption of fiber.³⁹ Consumers prioritize prominently displayed nutrition information, making FOPNL more likely to be viewed than back-of-pack labels.⁴⁰ Implementing FOPNL systems has been recognized as a valuable tool for promoting healthier diets and preventing diet-related NCDs.⁴¹ FOPNL provides consumers with clear and accessible information about the nutritional content of food products, which is crucial in promoting healthier food choices and improving public health. FOPNL have been found to simplify nutritional information, enhance consumer understanding, and incentivize product reformulation.⁴²

³⁶ Cecilia Nowell, *Latin America labels ultra-processed foods. Will the US follow?*, THE GUARDIAN (May 21, 2024), <https://www.theguardian.com/environment/article/2024/may/21/latin-america-food-labels-processed-foods> [https://perma.cc/KWJ7-CE82].

³⁷ Gabriela Flores et al, *Ánalisis del Nivel de Concordancia de Sistemas de Perfil de Nutrientes con las Guías Alimentarias para la Población Argentina*, DIRECCIÓN NACIONAL DE ABORDAJE INTEGRAL DE LAS ENFERMEDADES NO TRANSMISIBLES 8 (2020) (Arg.).

³⁸ Ayelén Borg, Catalina Güiraldes, Nuria Chichizola & Sergio Britos, *Perfiles nutricionales y etiquetado frontal de alimentos: Definiciones, estado de situación y discusión del tema en la Argentina*, CENTRO DE ESTUDIOS SOBRE POLÍTICAS Y ECONÓMICA DE LA ALIMENTACIÓN 5 (2017) (Arg.).

³⁹ Helene Normann Rønnow, *The Effect of Front-of-Pack Nutritional Labels and Back-of-Pack Tables on Dietary Quality*, 12 NUTRIENTS 1704, 1716-17 (2020).

⁴⁰ Liyuworuk Mitiku Dana, Kathy Chapman, Zenobia Talati, Bridget Kelly, Helen Dixon, Caroline Miller & Simone Pettigrew, *Consumers' Views on the Importance of Specific Front-of-Pack Nutrition Information: A Latent Profile Analysis*, 11 NUTRIENTS 1158, 1159 (2019).

⁴¹ Alexandra Jones, Bruce Neal, Belinda Reeve, Cliona Ni Mhurchu & Anne Marie Thow, *Front-of-pack nutrition labelling to promote healthier diets: current practice and opportunities to strengthen regulation worldwide*, 4 BMJ GLOBAL HEALTH 1, 1 (2019).

⁴² Daphne L. M. van der Bend & Lauren Lissner, *Differences and Similarities between Front-of-Pack Nutrition Labels in Europe: A Comparison of Functional and Visual Aspects*, 11 NUTRIENTS 626, 631 (2019).

The food industry has significantly challenged the relevance and justification for FOPNL in Latin American countries. Processed food manufacturers oppose explicit indications that a product or ingredient is not recommended as part of a healthy diet.⁴³ Doing so undermines their interest in maintaining sales notwithstanding the rise of obesity and NCDs in the region.

As of 2024, thirty-five Latin American countries have discussed FOPNL, thirty have formally introduced the policy, eleven have adopted it, and nine countries (Argentina, Brazil, Chile, Colombia,⁴⁴ Ecuador, Mexico, Perú, Uruguay, and Venezuela) have implemented FOPNL.⁴⁵ Some of these implemented measures also encompass special requirements for using trademarks—such as words, letters, numbers, figurative elements, and color combinations that misleadingly suggest health benefits in unhealthy products.⁴⁶ These initiatives aim to help consumers quickly and easily identify products containing excessive amounts of ingredients linked to NCDs, which are major contributors to mortality and reduced quality of life in Latin America.⁴⁷

Table 1: FOPNL in Latin America⁴⁸

Country	EIF	FOPNL type
Argentina ⁴⁹	2022	<p>Black octagonal warnings, black rectangular labels for artificial sweeteners and caffeine, and small warning seals for compact packages are also used.</p>  <div style="border: 1px solid black; padding: 10px; text-align: center;"> <p>CONTIENE EDULCORANTES, NO RECOMENDABLE EN NIÑOS/AS. Ministerio de Salud</p> <p>CONTIENE CAFEÍNA. EVITAR EN NIÑOS/AS. Ministerio de Salud</p> </div>

⁴³ See generally Norman Temple & Joy Fraser, *Food labels: A critical assessment*, 30 NUTRITION 257, 259 (2014).

⁴⁴ Resolution No. 2492 of 2022, 13 Dec. 2022, Ministry of Health and Social Protection, at Article 7, numeral 40.3. (Colom.).

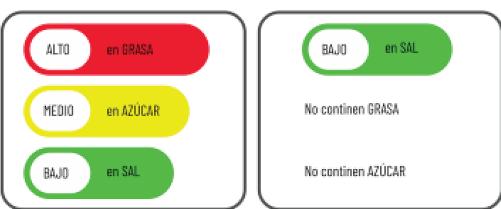
⁴⁵ Eric Crosbie, Fabio S. Gomes, Jasmine Olvera, Sofía Rincón-Gallardo Patiño, Samantha Hooper & Angela Carriero, *A policy study on front-of-pack nutrition labelling in the Americas: Emerging developments and outcomes*, 18 THE LANCET REGIONAL — AMERICAS 1, 3-5 (2022). See also FAO, PAHO & UNICEF, FRONT-OF-PACK NUTRITION LABELLING IN LATIN AMERICA AND THE CARIBBEAN — GUIDANCE NOTE, 7 (2023).

⁴⁶ Chile and Mexico.

⁴⁷ FAO, et al., *supra* note 17, at 82.

⁴⁸ See FAO, PAHO & UNICEF, *supra* note 45, at 8-9.

⁴⁹ Government of Argentina, Law No. 27.642: Promotion of Healthy Eating. Boletín Oficial de la República Argentina [Official Gazette of the Argentine Republic], 13 Oct. 2021.

Country	EIF	FOPNL type
Brazil ⁵⁰	2022	Black rectangles with a magnifying glass. 
Chile ⁵¹	2016	Black octagonal warnings. 
Colombia	2024	Black octagonal warnings. 
Ecuador	2014	Traffic-lights based on the concentration levels of saturated fats, added sugars, and sodium. 
Mexico ⁵²	2020	Black octagonal warnings, black rectangular labels for artificial sweeteners and caffeine, and small warning seals for compact packages are also used. 

⁵⁰ Brazilian Health Regulatory Agency (ANVISA). Board of Directors Resolution (RDC) No. 429/2020: Nutritional Labelling of Packaged Foods. Diário Oficial da União [Official Gazette of the Union], 9 Oct. 2020.

⁵¹ Government of Chile. Food Health Regulations, Supreme Decree No. 977/1996, as amended by Supreme Decree No. 41/2023. Diario Oficial de la República de Chile [Official Gazette of the Republic of Chile], 16 Apr. 2024.

⁵² Ministry of Health and Ministry of Economy. Amendment to Mexican Official Standard NOM-051-SCFI-2010: General Labelling Specifications for Pre-Packaged Non-Alcoholic

Country	EIF	FOPNL type
Perú ⁵³	2019	Black octagonal warnings.
Uruguay ⁵⁴	2020	Black octagonal warnings.
Venezuela ⁵⁵	2021/2024	Black octagonal warnings.

Food and Beverages — Commercial and Health Information. ('NOM 051'). Diario Oficial de la Federación [Official Gazette of the Federation], 27 Mar. 2020.

⁵³ Ley No. 30021, *Ley de Promoción de la Alimentación Saludable para Niños, Niñas y Adolescentes* [Law on the Promotion of Healthy Eating for Children and Adolescents], Decreto Supremo No. 012-2018-SA, *Manual de Advertencias Publicitarias* [Advertising Warnings Manual], *El Peruano*, June 21, 2018 (Peru).

⁵⁴ See Decree 315/944, Reglamento Bromatológico Nacional [National Bromatological Regulation], July 5, 1994, available at <https://www.impo.com.uy/bases/decretos-reglamento/315-1994> [https://perma.cc/DS53-ZW2L]; Decree 272/018, Modificación del Reglamento Bromatológico Nacional, Relativo al Rotulado de Alimentos [Amendment to the National Bromatological Regulation on Food Labelling], Aug. 29, 2018, available at <https://www.impo.com.uy/bases/decretos/272-2018/1> [https://perma.cc/59S8-TMD7]; Decree 246/020, Modificación del Decreto 272/018, el cual Modificó el Reglamento Bromatológico Nacional, Relativo al Rotulado de Alimentos [Amendment of Decree 272/018, which Modified the National Bromatological Regulation, Concerning Food Labelling], Sep. 2, 2020, available at <https://www.impo.com.uy/bases/decretos/246-2020/3> [https://perma.cc/B57E-QQUL]; Decree 34/021, Sustitución del Anexo del Decreto 246/020, Relativo al Rotulado de Alimentos y Creción de Comisión Interministerial, Integración y Funciones [Replacement of the Annex to Decree 246/020 on Food Labelling and Creation of the Inter-Ministerial Commission, its Composition, and Functions], Jan. 26, 2021, available at <https://www.impo.com.uy/bases/decretos/34-2021> [https://perma.cc/8PRE-U4FD].

⁵⁵ See Resolution 011/2020, Resolución mediante la cual se regula el etiquetado y consumo de alimentos manufacturados con alto contenido de sodio [Resolution regulating the labelling and consumption of manufactured foods with high sodium content of manufactured foods with high sodium content], Gaceta Oficial de la República Bolivariana de Venezuela [Official Gazette of the Bolivarian Republic of Venezuela], Jan. 21, 2020, No. 41.804; Resolution 137/2021, Resolución mediante la cual se establece la Regulación del Etiquetado de Alimentos Manufacturados con Alto Contenido de Azúcar, Grasas Saturadas y Grasas Trans.-(Se reimprime por fallas en los originales) [Resolution establishing the Regulation of the Labelling of Manufactured Foods with High Sugar, Saturated Fats and Trans Fats Content (reprinted due to errors in the originals)], Gaceta Oficial de la República Bolivariana de Venezuela [Official Gazette of the Bolivarian Republic of Venezuela], Dec. 7, 2021, No. 42.271.

Another important element in the broader context of FOPNL's emergence is international legal obligations. Given the liberalization of international trade, ultra-processed foods (and their trademarks) often come from different countries than the locale of consumption.⁵⁶ In response to allegations from the processed food industry, a key question emerges: Does FOPNL in Latin America impose restrictions on international trade and on the use of trademarks which exceed what is necessary to achieve their public health objectives?

III. TECHNICAL REGULATIONS & TRADEMARK REQUIREMENTS IN THE WTO

The WTO is the key international organization governing international trade.⁵⁷ The purpose of the WTO is not trade liberalization *per se* but, rather, the reduction of trade barriers and discrimination in trade to achieve broader welfare objectives, such as:

[R]aising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development...⁵⁸

The WTO is made up of 166 Members, which are all States or 'State-like' entities (e.g., the EU, Hong Kong, and Chinese Taipei).⁵⁹ Many international intergovernmental organizations have observer status (with respect to particular WTO bodies), including the FAO, the WHO, the United Nations World Food Programme, and the WHO/FAO Codex Alimentarius Commission.⁶⁰ While these organizations do not participate in decision-making, their observer status grants them access to certain WTO meetings and documents, allows them to contribute technical expertise, and enables them to influence discussions on trade-related matters within their areas of competence.⁶¹

⁵⁶ TANIA VOON & ANDREW D. MITCHELL, *International Trade Law*, in REGULATING TOBACCO, ALCOHOL AND UNHEALTHY FOODS: THE LEGAL ISSUES 102 (Tania Voon, Andrew Mitchell & Jonathan Liberman eds., 2014).

⁵⁷ MITSUO MATSUSHITA, THOMAS J. SCHOENBAUM, PETROS C. MAVRODIS & MICHAEL HAHN, THE WORLD TRADE ORGANIZATION: LAW, PRACTICE, AND POLICY 13 (3rd ed. 2015).

⁵⁸ Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. Preamble [hereinafter Marrakesh Agreement].

⁵⁹ *Members and Observers*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm [https://perma.cc/VSU3-5Z7P] (last visited May 20, 2025).

⁶⁰ MATSUSHITA ET AL., *supra* note 57, at 16.

⁶¹ Committee on Technical Barriers to Trade, Decisions and Recommendations Adopted by the Committee Since 1 January 1995, Part 2: Rules of Procedure of the Committee, Including the Guidelines for Observer Status for Governments and International Intergovernmental Organizations, WTO Doc. G/TBT/1/Rev.15, at 89-95 (Nov. 15, 2022), <https://web.wtocenter.org.tw/file/PageFile/378062/GTBT1R15.pdf> [perma.cc/Y7QB-4UED].

With few exceptions,⁶² each WTO Member must comply with all WTO agreements. Additionally, Member States may need to comply with additional obligations, as set out in their Accession Protocol.⁶³ Each new Member State signs its own Accession Protocol, which is unique and specifically tailored to the conditions and commitments negotiated during its accession process. If one WTO Member believes another is not complying with its WTO obligations, it may initiate dispute settlement.⁶⁴

This section addresses the most important WTO provisions that might be raised in response to Latin America's FOPNL policies: Article 2.2 of the TBT Agreement and Article 20 of the TRIPS Agreement.

A. *Navigating the WTO Dispute Settlement System*

The liberalization of international trade has given rise to various debates involving its positive and negative effects. NCDs have been no exception. On the one hand, international trade liberalization offers “the potential for considerable welfare benefits at national and global levels, through economic growth, fairer competition among producers, increased access to a wider range of better quality products and services, and the transfer of technology and knowledge.”⁶⁵ On the other hand, such liberalization “has the potential to increase certain unhealthy habits such as smoking and over-consumption of alcohol and unhealthy foods,” which exacerbates the rise and prevalence of NCDs.⁶⁶

Faced with this dilemma, WTO Members have approached the problem of NCDs from different perspectives, leading to the implementation of a wide variety of regulatory measures, including: “product bans; packaging and labelling requirements; import tariffs; sales taxes; subsidies; licensing; restrictions on advertising, promotion or sponsorship; regulation of product content through disclosure or restriction of ingredient; restrictions on ages of sale or purchase; exclusion areas (e.g., no smoking or no alcohol areas); and education.”⁶⁷

A dispute could arise involving a complaint by one or more WTO Members (the complainant/s) that another WTO Member (the respondent) has violated one or more WTO obligations through its FOPNL.⁶⁸ The dispute would be heard first by a three-person Panel.⁶⁹ The WTO Dispute Settlement Body

⁶² For example, the Agreement on Trade in Civil Aircraft and the Agreement on Government Procurement are ‘plurilateral’ agreements that apply only to Members who have ratified them. Two other plurilateral agreements have been terminated (the International Dairy Agreement and the International Bovine Meat Agreement).

⁶³ Jingdong Liu, *Accession Protocols: Legal Status in the WTO Legal System*, 48 J. OF WORLD TRADE 751 (2014).

⁶⁴ *Dispute settlement*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm [https://perma.cc/S28Z-9KP6] (last visited May 20, 2025).

⁶⁵ Voon & Mitchell, *supra* note 56, at 86; see generally Alan O. Sykes, *Comparative Advantage and the Normative Economics of International Trade Policy*, 1 J. INT'L ECON. L. 49, 49 (1998).

⁶⁶ Voon & Mitchell, *supra* note 56, at 86.

⁶⁷ *Id.*

⁶⁸ Alan Yanovich and Tania Voon, *What is the measure at issue?*, in CHALLENGES AND PROSPECTS FOR THE WTO 115 (Andrew D. Mitchell ed., 2005).

⁶⁹ Understanding on the Rules and Procedures Governing the Settlement of Disputes, art. 8.5, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].

automatically adopts reports of Panels and the Appellate Body, giving them legal force.⁷⁰ A non-WTO Member (such as a law firm or food industry representative) could form part of a WTO Member's delegation in a hearing and support a government in a dispute but could not independently be a party.⁷¹

B. Interplay between the TBT and TRIPS Agreement

Obesity prevention involves various types of regulatory policies,⁷² which can take various forms.⁷³ Some may constitute technical barriers to trade;⁷⁴ others may impose special requirements for using trademarks in the course of trade.⁷⁵ Some regulatory measures involve both,⁷⁶ as is the case with FOPNL.⁷⁷

It is undisputed that regulatory measures play a crucial role in addressing social needs.⁷⁸ However, such measures can become extremely restrictive, imposing technical requirements on trade and special requirements on the use of trademarks. This, in turn, may discourage trade and investment, and, in the realm of intellectual property, hinder innovation.⁷⁹

The WTO's legal framework safeguards trade and intellectual property rights through agreements such as the TBT and TRIPS Agreements, both included in Annex 1 of the WTO Agreement as part of its single undertaking.⁸⁰

In this regard, the TBT Agreement and the TRIPS Agreement establish regulatory frameworks aimed at protecting trade and intellectual property, as explicitly stated in their preambles. In the case of the TBT Agreement, international commitment is made "to ensure that technical regulations and standards . . . do not create unnecessary obstacles to international trade,"⁸¹ while recognizing Members' right to regulate.⁸² Meanwhile, the TRIPS Agreement aims to "reduce distortions and impediments to international trade,"

⁷⁰ DSU, *supra* note 69, at arts. 16-4 and 17.14.

⁷¹ Appellate Body Report, EC – Bananas III, ¶ 10, WTO Doc. WT/DS27/AB/RW/USA (Nov. 26, 2008).

⁷² *See id.*

⁷³ PETER VAN DEN BOSSCHE & WERNER ZDOUC, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION 884 (5th ed. 2021).

⁷⁴ *Id.*

⁷⁵ Special requirements refer to binding conditions that are imposed on the use of trademarks, including a condition not to do something, a prohibition on using a trademark. Cf. Panel Report, *Australia—Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Doc. WT/DS435/R, DS441/R, DS458/R, DS467/R (adopted June 28, 2018) [hereinafter Panel Report, *Australia—Tobacco Plain Packaging*].

⁷⁶ See Andrew Mitchell & Theodore Samlidis, *The Implications of the WTO Tobacco Plain Packaging Disputes for Public Health Measures*, 73 INT'L & COMPAR. L.Q.1011, 1022 (2021).

⁷⁷ See discussion *infra* Section 5 for an analysis of the technical regulations for front-of-package nutritional labelling in Latin America, classifying the elements that constitute technical barriers to trade and special requirements for the use of trademarks.

⁷⁸ Van den Bossche & Zdouc, *supra* note 73, at 885.

⁷⁹ *Id.* at 995.

⁸⁰ MATSUSHITA ET AL., *supra* note 57, at 434.

⁸¹ Agreement on Technical Barriers to Trade, Jan 1., 1980, 1186 U.N.T.S. 117 fifth recital of the preamble [hereinafter TBT Agreement].

⁸² TBT Agreement, *supra* note 81, at sixth recital of the preamble.

considering “the need to promote effective and adequate protection of intellectual property rights.”⁸³

Of note, both instruments can be applied simultaneously as they are integral parts of the WTO Agreement. According to the Appellate Body in *Korea – Dairy*, it is necessary to interpret the treaty as a whole, so the applicable provisions are read “in a way that gives meaning to *all* of them, harmoniously.”⁸⁴

In WTO jurisprudence, it is often held that all WTO provisions ought to be applied cumulatively and harmoniously.⁸⁵ For example, *Australia – Tobacco Plain Packaging* examined the cumulative and harmonious application of Article 2.2 of the TBT Agreement and Article 20 of the TRIPS Agreement as it relates to tobacco plain packaging (“TPP”) regulations. In addition to the legal relationship between the TBT Agreement and the TRIPS Agreement, the protection of trade and intellectual property is closely linked.⁸⁶ In this regard, the achievements of trade liberalization can be undermined if intellectual property rights related to goods are not respected in the export market or in the country of origin of the imports.⁸⁷

Of note, there is no obligation to adopt a specific sequence. Both agreements are listed in Annex 1 of the WTO Agreement, and the plain meaning of the text suggests there is no explicit hierarchy between them.⁸⁸ That said, in *Australia – Tobacco Plain Packaging*, the initial determination that the regulatory measures were covered by Article 2.2 of the TBT Agreement allowed for examining the trademark requirements under Article 2.2 of the TBT Agreement.⁸⁹

C. TBT Agreement: Article 2.2

As trade liberalization has made it easier for products to be distributed to international markets, WTO Members have promulgated more rigorous non-tariff regulations. One of these non-tariff regulations is product standardization, which guarantees consumers the safety and reliability of marketed products,⁹⁰ especially when the products “may pose a risk to personal safety

⁸³ Agreement on Trade-Related Aspects of Intellectual Property Rights, first recital of the preamble, Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1869 U.N.T.S. Annex 1C [hereinafter TRIPS Agreement].

⁸⁴ Appellate Body Report, *Korea—Definitive Safeguard Measure on Imports of Certain Dairy Products*, ¶ 81, WTO Doc. WT/DS98/AB/R (adopted Dec. 14, 1999). See also Appellate Body Report, *Argentina—Safeguard Measures on Imports of Footwear*, ¶ 81, WTO Doc. WT/DS121/AB/R (adopted Dec. 14, 1999); Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, n. 12, WTO Doc. WT/DS2/AB/R (adopted Apr. 29, 1996); Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, n. 41, WTO Doc. WT/DS8/AB/R, DS10/AB/R, DS11/AB/R (adopted Jan. 12, 1998); Appellate Body Report, *India—Patents*, n. 21, WTO Doc. WT/DS79/6 (adopted Apr. 16, 1999).

⁸⁵ Appellate Body Report, *Korea – Dairy*, ¶¶ 74, 80, 81, 89.

⁸⁶ Van den Bossche & Zdouc, *supra* note 73, at 995.

⁸⁷ *Id.*

⁸⁸ Panel Report, *Australia—Tobacco Plain Packaging*, *supra* note 75, ¶ 7.2231.

⁸⁹ *Id.* ¶ 7.8.

⁹⁰ MATSUSHITA ET AL., *supra* note 57, at 433.

or harm human health.”⁹¹ However, as warned in the previous section, standardization can complicate market access and even be deliberately abused to create significant trade restrictions.⁹²

WTO Members have the authority to adopt the regulatory measures they deem necessary to ensure the quality of their exports, and to protect human, animal, or plant health or the environment.⁹³ However, application is limited such that a Member may not apply such regulation in a way that amounts to a disguised restriction on international trade (i.e., protectionist measures) or produces effects contrary to the principles of the multilateral trading system.⁹⁴

According to Article 2.2 of the TBT Agreement, the determination of whether a technical regulation is compatible with this provision considers three elements of the substantive obligation therein: (i) technical regulations; (ii) legitimate objectives; and (iii) restricting trade more than necessary.⁹⁵ The following subsections discuss each in turn.

1. Technical Regulations

The TBT Agreement applies to mandatory technical regulations, non-mandatory standards,⁹⁶ and procedures for assessing conformity with technical regulations and standards. A technical regulation essentially provides mandatory product characteristics (e.g., ingredient restrictions or requirements, such as limits on the sodium, salt, or fat content),⁹⁷ related processes

⁹¹ Some examples of technical regulations that protect the health and safety of consumers are the Mexican Official Standards. See Secretaría de Salud, *Normas Oficiales Mexicanas* (2015), <https://www.gob.mx/salud/en/documentos/normas-oficiales-mexicanas-9705> [https://perma.cc/7AXX-8YRT].

⁹² MATSUSHITA ET AL., *supra* note 57, at 433.

⁹³ TBT Agreement, *supra* note 81, at sixth recital of the preamble.

⁹⁴ The principles of the multilateral trading system consist of: i) Trade without discrimination (National Treatment and Most Favored Nation); ii) Freer trade (relating to the gradual reduction of non-tariff barriers); iii) Predictability (concerning the consolidation of commitments and transparency in the trading environment); iv) Promotion of fair competition (referring to the discouragement of “unfair” practices such as export subsidies and dumping); and, v) Promotion of development (relating to the flexibility and privileges granted to developing countries to adapt to the agreements of the multilateral trading system.) See *The principles of the trading system*, WTO (undated), https://www.wto.org/spanish/thewto_s/whatis_s/tif_s/fact2_s.htm [https://perma.cc/32JZ-67M2].

⁹⁵ See Panel Report, *United States – Tuna II (Mexico)*, ¶ 7.387; see also Panel Report, *US – Clove Cigarettes*, ¶ 7.331. According to WTO jurisprudence, the compatibility analysis consists of two parts: (1) the measure must aim to achieve a legitimate objective; and (2) it must not be more trade-restrictive than necessary to achieve that objective. For the purposes of this analysis, we introduce an additional preliminary step, which is the characterization of the regulatory measure as a technical regulation for the applicability of Article 2.2 of the TBT Agreement.

⁹⁶ See Panagiotis Delimatsis, “*Relevant International Standards*” and “*Recognised Standardisation Bodies*” under the TBT Agreement, Tilburg Law and Economics Center Discussion Paper No. 2014-031, 104, 117 (2014) (differentiating technical regulations and standards).

⁹⁷ Decreto Supremo que aprueba el Reglamento de la Ley No. 30021, Ley de Promoción de la Alimentación Saludable, EL PERUANO (June 17, 2017); Law No. 18284 Chapter III, Art. 155 (Arg.). (tris with respect to trans fats). <https://busquedas.elperuano.pe/dispositivo/NL/1534348-4> [https://perma.cc/KNY5-8WRB]; Law No. 18284 Chapter III, Art. 155 (Arg.) (tris with respect to trans fats).

and production methods; or mandatory labelling/packaging requirements for a product, process, or production method.⁹⁸

Disputes arise when a party challenges whether a regulatory measure is a technical regulation.⁹⁹ The legal characterization of a regulatory measure as a technical regulation determines whether the TBT Agreement may be properly applied to the challenged measure. To resolve such disputes, the Appellate Body has used the following three criteria:¹⁰⁰

- First, the regulation must apply to an identifiable product or group of products. The product(s) does not need to be explicitly identified in the text itself.
- Second, the regulation must prescribe or impose one or more characteristics for the product(s). These characteristics may be intrinsic or related to the product(s).
- Third, compliance with the product characteristics must be mandatory.

Regarding the first criterion, the challenged measure must be a “document.” This term can encompass a wide range of instruments or apply to various types of measures,¹⁰¹ as long as the measures establish or prescribe something and, thus, have a certain normative content.¹⁰² According to the Appellate Body in *EC – Asbestos*, this criterion requires that the challenged measure be applicable to an identifiable product or group of products.¹⁰³ The Appellate Body noted that it is not necessary for the products or group of products to be expressly named, identified, or specified in the regulation.¹⁰⁴ Furthermore, the Appellate Body observed:

Although the TBT Agreement clearly applies to “products” generally, nothing in the text of that Agreement suggests that those products need to be named or otherwise *expressly* identified in a “technical regulation.” Moreover, there may be perfectly sound administrative reasons for formulating a “technical regulation” in a way that does *not* expressly identify products by name, but simply

⁹⁸ TBT Agreement, *supra* note 81, at Annex 1.

⁹⁹ Van den Bossche & Zdouc, *supra* note 73, at 889.

¹⁰⁰ Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 66–70, WTO Doc. WT/DS135/AB/R (adopted Mar. 12, 2021); Appellate Body Report, *European Communities—Trade Description of Sardines*, ¶176, WTO Doc. WT/DS231/AB/R (adopted Sept. 26, 2002).

¹⁰¹ Appellate Body Report, *United States—Measures Concerning the Importation, Marketing, and Sale of Tuna and Tuna Products II*, ¶ 185, WTO Doc. WT/DS381/AB/R (adopted May 16, 2012).

¹⁰² Appellate Body Report, *European Communities—Measures Prohibiting the importation and Marketing of Seal Products*, ¶ 5.10, WTO Doc. WT/DS40/AB/R, WT/DS401/AB/R (adopted May 22, 2014).

¹⁰³ Appellate Body Report, *European Communities—Asbestos*, *supra* note 100, ¶ 70.

¹⁰⁴ *Id.*

makes them identifiable – for instance, through the “characteristic” that is the subject of regulation.¹⁰⁵

Regarding the second criterion, the challenged measure must set, define, or specify one or more product characteristics, though it need not do so exhaustively.¹⁰⁶ According to the Appellate Body, product characteristics include:

[A]ny objectively definable “features,” “qualities,” “attributes,” or other “distinguishing mark” of a product. Such “characteristics” might relate, *inter alia*, to a product’s composition, size, shape, colour, texture, hardness, tensile strength, flammability, conductivity, density, or viscosity.”¹⁰⁷

Moreover, the Appellate Body noted that the second sentence in the legal definition of the term “technical regulation” provides some elements that may also be included, namely: “terminology, symbols, packaging, marking, or labelling” as they apply to a product, process, or production method.¹⁰⁸

According to the third criterion, the challenged measure must prescribe or impose the product characteristics, either positively or negatively, explicitly or implicitly.¹⁰⁹ In other words, to be considered a technical regulation, the measure must prescribe that the products subject to regulation possess or lack “in a binding or compulsory fashion”¹¹⁰ certain characteristics.

If the regulatory measures meet the criteria necessary to be technical regulations, the TBT Agreement becomes relevant, and Article 2.2 applies.

2. Legitimate Objective

Article 2.2 of the TBT Agreement establishes that “technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, *inter alia*: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment.”¹¹¹ This provision recognizes the right of States to adopt regulatory measures necessary to fulfil a legitimate objective, including the protection of human health.

The use of the words *inter alia* indicates that this list is not exhaustive, allowing for the inclusion of other objectives that may also be considered legitimate under Article 2.2. According to the Appellate Body, the meaning

¹⁰⁵ *Id.*

¹⁰⁶ Van den Bossche & Zdouc, *supra* note 73, at 890.

¹⁰⁷ Appellate Body Report, *European Communities—Asbestos*, *supra* note 100, ¶ 67.

¹⁰⁸ Appellate Body Report, *European Communities—Seal Products*, *supra* note 102, ¶ 5.14.

¹⁰⁹ MATSUSHITA ET AL., *supra* note 57, at 440.

¹¹⁰ Appellate Body Report, *European Communities—Seal Products*, *supra* note 102, ¶ 5.22.

¹¹¹ TBT Agreement, *supra* note 81, art. 2.2.

of the term “legitimate objective,” based on the definitions¹¹² of the words “objective” and “legitimate,” consists of an “aim or target that is lawful, justifiable, or proper.”¹¹³ Additionally, the Appellate Body observed that the explicitly listed objectives provide a reference point regarding what other objectives may be considered legitimate within the meaning of Article 2.2 of the TBT Agreement.¹¹⁴

Another relevant consideration is that the sixth and seventh preamble recitals of the TBT Agreement recognize several objectives which overlap greatly with those listed in Article 2.2.¹¹⁵

Contrary to the exhaustive list of legitimate objectives in Article XX of the GATT 1994,¹¹⁶ the open list of legitimate objectives of Article 2.2 “allows Members, in principle, to pursue legitimate objectives through the use of technical regulations, for example, labelling.”¹¹⁷

Moreover, the substantive obligation of Article 2.2 of the TBT Agreement implies that the objective, in addition to being legitimate, must be achievable by the technical regulation. In *United States – Tuna II (Mexico)*, the Appellate Body emphasized that the question of whether a technical regulation fulfils a legitimate objective concerns “the degree of contribution that the technical regulation makes toward the achievement of the legitimate objective,”¹¹⁸ referencing the sixth preamble recital of the TBT Agreement, which establishes that a member should not be prevented from taking measures necessary to achieve its legitimate objectives “at the levels it considers appropriate.”¹¹⁹

The requirement to “fulfil[...] the legitimate objective” is met as long as some objective capacity or suitability to contribute to that objective is demonstrated; there is no need to actually achieve a minimum level of success or satisfaction.¹²⁰ This interpretation of what it means to “fulfil” the legitimate objective is reinforced by the fact that there is no requirement for a Panel to discern, identify, or establish, in abstract, the level to which the defending member wishes or intends to achieve that legitimate objective,¹²¹ nor must they identify the specific mechanisms of application through which the defending member intends to fulfil that goal.¹²²

¹¹² See Appellate Body Report, *United States – Tuna II*, *supra* note 95, at n. 636-637 (citing definitions in the Shorter Oxford English Dictionary, 6th edition).

¹¹³ *Id.* ¶ 313.

¹¹⁴ *Id.* See also Appellate Body Report, *United States – Certain Country of Origin Labelling (COOL) Requirements*, ¶ 444 WTO Doc. WT/DS384/AB/R (adopted June 29, 2012).

¹¹⁵ *Id.* ¶ 370 (referencing *id.* ¶ 313).

¹¹⁶ Van den Bossche & Zdouc, *supra* note 73, at 914, n. 163.

¹¹⁷ MATSUSHITA ET AL., *supra* note 57, at 452.

¹¹⁸ Appellate Body Report, *United States – Tuna II*, *supra* note 95, ¶ 315; Appellate Body Report, *United States – COOL*, *supra* note 114, ¶ 373.

¹¹⁹ *Id.* ¶ 316.

¹²⁰ MATSUSHITA ET AL., *supra* note 57, at 455.

¹²¹ Panel Report, *Australia – Tobacco Plain Packaging*, *supra* note 75, ¶ 7.196 (referring to Appellate Body Report, *United States – COOL*, *supra* note 114, ¶ 390) (referring to Appellate Body Report, *United States – Measures Tuna II*, *supra* note 101, ¶ 316).

¹²² *Id.* ¶ 7.229.

However, the degree to which the measure actually contributes to the purported objective must be evaluated,¹²³ weighed, and balanced¹²⁴ with respect to other criteria¹²⁵—such as the material contribution¹²⁶ and necessity¹²⁷—and other less trade-restrictive measures that allow achieving the same objective by different means.¹²⁸

3. Restricting Trade More Than Necessary

The Appellate Body in *United States – Tuna II (Mexico)* defined “trade restriction” as “something that has a limiting effect on trade.”¹²⁹ However, it should be noted that not all trade restrictions are inherently incompatible with Article 2.2 of the TBT Agreement. The expression “unnecessary obstacles to international trade”¹³⁰ in the first sentence of Article 2.2 of the TBT Agreement suggests that certain obstacles are permitted insofar they are strictly necessary to fulfil a legitimate objective.¹³¹ Therefore, a technical regulation that is not trade-restrictive cannot be inconsistent with Article 2.2 since it can never be more trade-restrictive than necessary.¹³²

In assessing whether a technical regulation restricts trade more than necessary within the meaning of Article 2.2, the Appellate Body established the following three-pronged “relational analysis” balancing test:¹³³

[A] panel should begin by considering factors that include:

- (i) the degree of contribution made by the measure to the legitimate objective at issue; (ii) the trade-restrictiveness of the measure; and

¹²³ According to the Appellate Body, a Panel must assess the contribution to the legitimate objective actually achieved by the measure at issue, as in other situations such as, for instance, when determining the contribution of a measure to the achievement of a particular objective in the context of Article XX of the GATT 1994. *See* Appellate Body Report, *United States – Tuna II*, *supra* note 95, ¶ 317, (referring to Appellate Body Report, *China – Publications and Audiovisual Products*, ¶ 252, WTO Doc. WT/DS363/AB/R (adopted Jan. 19, 2010)).

¹²⁴ The Appellate Body interprets, by analogy in the context of Article XX of GATT 1994 and Article XIV of GATS, that “necessity” is determined on the basis of a process in which a number of factors are “weighed and balanced.” *See* Appellate Body Report, *United States – Tuna II*, *supra* note 95, n. 643 (referring to Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, ¶ 178, WTO Doc. WT/DS332/AB/R (adopted Dec. 17, 2007)); Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶¶ 306-308, WTO Doc. WT/DS285/AB/R (adopted April 7, 2005).

¹²⁵ MATSUSHITA, ET AL., *supra* note 57, at 455.

¹²⁶ According to the Appellate Body, in the case of Article XX of GATT 1994, a material contribution is required to achieve its objective. *See* Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, ¶ 151, WTO Doc. WT/DS332/AB/R (adopted Dec. 17, 2007).

¹²⁷ *See* Appellate Body Report, *United States – Tuna II*, *supra* note 95, ¶ 341; Appellate Body Report, *United States – COOL*, *supra* note 114, ¶ 461.

¹²⁸ Panel Report, *Australia – Tobacco Plain Packaging*, *supra* note 75, ¶ 7.196 (referring to Appellate Body Report, *United States – COOL*, *supra* note 114, ¶ 387). *See also* Panel Report, *United States – Certain Country of Origin Labelling (COOL) Requirements (Article 21.5 – Canada and Mexico)*, WT/DS384/RW, WT/DS386/RW (Oct. 20, 2014).

¹²⁹ Appellate Body Report, *United States – Tuna II*, *supra* note 95, ¶ 319.

¹³⁰ TBT Agreement, *supra* note 81, art. 2.2 (emphasis added).

¹³¹ *Id.*

¹³² Van den Bossche & Zdouc, *supra* note 73, at 913.

¹³³ *Id.* at 917.

(iii) the nature of the risks at issue and the gravity of the consequences that would arise from non-fulfilment of the objective(s) pursued by the Member through the measure.¹³⁴

Additionally, the Appellate Body considered that, in most cases,¹³⁵ a comparison between the challenged technical regulation and possible alternative measures¹³⁶ is necessary to exclude the most trade-restrictive measure.¹³⁷ The Appellate Body noted that in such a “comparative analysis,”¹³⁸ the following should be considered: (i) whether the proposed alternative is less trade-restrictive; (ii) whether the proposed alternative would make an equivalent contribution to the relevant legitimate objective, taking account of the risks non-fulfilment would create; and (iii) whether the proposed alternative is reasonably available.¹³⁹ These points are further detailed below (*see* subparagraph b *Comparative Analysis*).

However, before the Appellate Body applies its “relational analysis” test, the complaining member must present¹⁴⁰ sufficient evidence and arguments to make a *prima facie* case that the technical regulation restricts trade more than necessary to fulfill the legitimate objectives, considering the risks that would be created by not achieving them.¹⁴¹ The complaining member must also include in the *prima facie* case a proposed regulatory measure that is less trade-restrictive, makes an equivalent contribution to the objective(s), and is reasonably available.¹⁴²

a) Relational Analysis

(i) The degree of contribution made by a measure to the legitimate objective at issue

As previously explained (*supra* note 133), the first factor in the “relational analysis” test—the degree of contribution made by a measure to the legitimate objective at issue—is not an abstract concept but something that the technical

¹³⁴ Appellate Body Report, *United States—Tuna II*, *supra* note 95, ¶ 322.

¹³⁵ The Appellate Body noted two cases where a comparison between the measure at issue and possible alternative measures may not be necessary: (i) if a measure is not trade restrictive (because it may not be inconsistent with Article 2.2); and, (ii) if the measure is trade restrictive and makes *no* (original emphasis) contribution to the achievement of the legitimate objective (because it may be inconsistent with that provision). *See* Appellate Body Report, *United States—Tuna II*, *supra* note 95, at n. 647.

¹³⁶ Appellate Body Report, *United States—Tuna II*, *supra* note 95, ¶ 322.

¹³⁷ MATSUSHITA, ET AL., *supra* note 57, at 455.

¹³⁸ Van den Bossche & Zdouc, *supra* note 73, at 917.

¹³⁹ Appellate Body Report, *United States—Tuna II*, *supra* note 95, ¶ 322.

¹⁴⁰ The burden of proof to demonstrate that the technical regulation is inconsistent with Article 2.2 of the TBT Agreement rests on the complaining Member, since any technical regulation prepared, adopted or applied to achieve one of the legitimate objectives expressly mentioned in that provision is presumed not to create an unnecessary obstacle to international trade. *See* TBT Agreement, *supra* note 81, art. 2.5.

¹⁴¹ Appellate Body Report, *United States—Tuna II*, *supra* note 95, ¶ 322.

¹⁴² *Id.*

regulation itself reveals.¹⁴³ In the Appellate Body's view, when preparing, adopting, and applying a technical regulation to pursue a legitimate objective, a WTO member implicitly or explicitly articulates the degree to which it seeks to achieve that objective.¹⁴⁴

When weighing and balancing specific evidence, the Panel may evaluate the probative value of scientific evidence, which should not be taken to mean that the Panel has a "function of making scientific determinations."¹⁴⁵ The Panel's role is to "assist the DSB in resolving a dispute."¹⁴⁶ In that context, the Panel is obligated to consider all available evidence and evaluate the probative value of each.¹⁴⁷

Thus, to the extent that members rely on scientific evidence, the Panel may analyze whether such evidence "comes from a qualified and respected source";¹⁴⁸ whether it has the "necessary scientific and methodological rigor to be considered reputable science"¹⁴⁹ or reflects "legitimate science according to the standards of the relevant scientific community";¹⁵⁰ and "whether the reasoning articulated on the basis of the scientific evidence is objective and coherent."¹⁵¹

Another relevant consideration in evaluating the degree of a measure's contribution to its overarching objective(s) is the temporality of the effects of the challenged technical regulation. The Panels in *Australia – Tobacco Plain Packaging* recognized that while an evaluation is carried out in light of the available evidence, the Panels must consider the possibility that the effects of certain technical regulations may manifest themselves over a longer period of time than others.¹⁵² By analogizing the observation of the Appellate Body in *United States – Gasoline* concerning subparagraph (g) of Article XX of the GATT 1994¹⁵³ to the context of the TBT Agreement, the Panels noted that certain measures to protect public health—including those measures based on behavioural responses to expected changes in beliefs and attitudes—may take some time to materialize fully or be perceived in the relevant data.¹⁵⁴

¹⁴³ Appellate Body Report, *United States—COOL*, *supra* note 114, ¶ 373.

¹⁴⁴ Appellate Body Report, *United States—Tuna II*, *supra* note 95, ¶ 316.

¹⁴⁵ *Id.* ¶ 7.514.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* ¶ 7.517 (referring to Appellate Body Report, *Korea—Dairy*, *supra* note 84, ¶ 137).

¹⁴⁸ *Id.* ¶ 7.516 (referring to Appellate Body Report, *United States—Continued Suspension of Obligations in the EC – Hormones Dispute*, ¶¶ 591-592, 598, 601, WTO Doc. WT/DS320/AB/R (adopted Nov. 14, 2008)). In n. 1481, the Panels clarified that these Appellate Body observations were made in the context of an analysis of the "scientific basis" of SPS measures, which were considered relevant, *mutatis mutandis*, to the analysis of the probative value of disputed scientific evidence in other comparable contexts.

¹⁴⁹ Appellate Body Report, *United States—Continued Suspension*, *supra* note 148, ¶ 591.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² Panel Report, *Australia—Tobacco Plain Packaging*, *supra* note 75, ¶ 7.938.

¹⁵³ *Id.* (referring to Appellate Body Report, *United States—Gasoline*, *supra* note 84, ¶ 25). See also Appellate Body Report, *Brazil—Retreaded Tyres*, *supra* note 126 ¶ 153, n. 243.

¹⁵⁴ *Id.* ¶¶ 7.938, 7.940.

(ii) The degree to which the technical regulation restricts trade

Concerning the “relational analysis” test’s second factor—the degree to which the technical regulation restricts trade—it should be recalled that, as noted (*supra* note 131), Article 2.2 of the TBT Agreement explicitly mentions “unnecessary obstacles” and therefore allows for some degree of restriction (i.e., the limiting effect)¹⁵⁵ on trade.¹⁵⁶

(iii) The nature of the risks and the gravity of the consequences that would be created by not achieving the legitimate objective

Regarding the test’s third and final factor, the Appellate Body has found that Article 2.2 does not set out a particular methodology or define how “the nature of the risks and the gravity of the consequences that would be created by not achieving the legitimate objective” should be “taken into account.”¹⁵⁷ Nevertheless, the fourth sentence of Article 2.2 of the TBT Agreement specifies that the examination of the nature of these risks includes considering, *inter alia*: (i) available scientific and technical information; (ii) related processing technology; and (iii) intended end-uses of products.¹⁵⁸

According to the Appellate Body, evaluating this third factor requires considering all available scientific and technical evidence relevant to the evaluation of the challenged technical regulation. However, the Panels have recognized that, in the context of public health measures (which challenged technical regulations may constitute), it is necessary to consider that scientific evidence related to the behavioral responses of individuals to anticipated changes in their beliefs and attitudes may take some time to materialize fully or be perceived in the relevant data.

b) Comparative Analysis

As noted previously (*supra* note 137), the comparative analysis excludes the possibility of the defending member adopting a particular technical regulation when an alternative measure complies with the following conditions: (i) that is less trade-restrictive, (ii) makes an equivalent contribution to the legitimate objective, and (iii) is reasonably available.¹⁵⁹

¹⁵⁵ Appellate Body Report, *United States—Tuna II*, *supra* note 95, ¶ 319 (referring to Appellate Body Report, *China—Measures Related to the Exportation of Various Raw Materials*, ¶ 319, WTO Doc. WT/DS394/AB/R (adopted Jan. 17, 2013)). In the latter report, the Appellate Body addressed the trade-limiting effect in the context of Article XI:2(a) of GATT 1994.

¹⁵⁶ Appellate Body Report, *United States—Tuna II*, *supra* note 95, ¶ 319.

¹⁵⁷ Appellate Body Report, *United States—COOL*, *supra* note 114, ¶ 2.217.

¹⁵⁸ Panel Report, *Australia—Tobacco Plain Packaging*, *supra* note 75, ¶ 7.1260 (referring to Appellate Body Report, *United States—Tuna II*, *supra* note 95, ¶ 321). See also Van den Bossche et al., *supra* note 73, at 919, n. 198.

¹⁵⁹ Appellate Body Report, *United States—Tuna II*, *supra* note 95, ¶ 322.

(i) The alternative measure is less trade-restrictive

When determining whether [an] alternative measure is less trade-restrictive than a challenged technical regulation, it is essential to evaluate the potential impact of the alternative measure on competitive opportunities in the market. This evaluation compares the degree to which the challenged technical regulation restricts trade with that of the proposed alternative measure. Evidence supporting such an evaluation may include empirical data, market analyses, and the practical effects observed in jurisdictions that have implemented similar measures.

(ii) The alternative measure makes an equivalent contribution to the legitimate objective

In assessing whether the proposed alternative measure makes an equivalent contribution to the legitimate objective as the technical regulation at issue, the Panel must apply the same degree of precision and consider the same specific and empirical evidence used to evaluate the contribution of the challenged technical regulation under the “relational analysis” test.¹⁶⁰ This comparative assessment should ensure that the alternative measure achieves the legitimate objective to the same extent—or to a greater extent—than the challenged technical regulation.¹⁶¹

(iii) The alternative measure is reasonably available

Lastly, considering whether the proposed alternative measure is reasonably available involves assessing the feasibility and practicality of implementing the measure within the defending member’s jurisdiction. This consideration analyzes the regulatory, administrative, and financial implications of adopting the alternative measure, as well as any potential legal or logistical barriers hindering its implementation.¹⁶²

In conclusion, the “relational” and “comparative” tests together allow for a comprehensive and balanced evaluation of whether a technical regulation restricts trade more than necessary within the meaning of Article 2.2 of the TBT Agreement. This thorough examination ensures that members can pursue legitimate objectives via technical regulations while minimizing unnecessary trade restrictions and prompting the consideration of less trade-restrictive alternatives.

¹⁶⁰ Appellate Body Report, *United States—COOL*, *supra* note 114, ¶ 2.214 (referring to Appellate Body Report, *United States—COOL*, *supra* note 114, ¶ 461).

¹⁶¹ *Id.* ¶ 2.215.

¹⁶² Appellate Body Report, *United States—Gambling*, *supra* note 124, ¶ 308; Appellate Body Report, *Korea—Dairy*, *supra* note 84, ¶ 181; Appellate Body Report, *European Communities—Seal Products*, *supra* note 102, ¶ 5.277.

D. TRIPS Agreement: Article 20

The TRIPS Agreement imposes minimum standards of protection concerning various forms of intellectual property, such as patents, copyrights, and trademarks. The objectives of this agreement are set out in its preamble:

[R]educe *distortions of and impediments to international trade*, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become *barriers to legitimate trade*.¹⁶³

The trademark provisions of the TRIPS Agreement are most relevant to FOPNL measures. Under the TRIPS Agreement, a trademark is “[a]ny sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings.”¹⁶⁴

The TRIPS Agreement does not include general public policy exceptions. Nonetheless, WTO adjudicators interpreting Article 20 have adopted an approach that acknowledges a fundamental and extensive right to regulate.¹⁶⁵

In pursuing these objectives, WTO members face the challenge of balancing their public policies.¹⁶⁶ On the one hand, policies must provide sufficient protection for intellectual property rights¹⁶⁷ so as not to discourage innovation, investment, and trade.¹⁶⁸ On the other hand, states must impose certain limits on intellectual property rights so as not to impede the flow of goods and services.¹⁶⁹

The rationale for this balance between the protection of intellectual property rights and the protection of the public interest is based on Articles 7 and 8 of the TRIPS Agreement. Both Articles provide relevant context for the interpretation and application of the other provisions of the TRIPS Agreement, as found by the Panels in *Australia – Tobacco Plain Packaging*.¹⁷⁰

In general terms, Article 20 of the TRIPS Agreement provides that members shall not employ special requirements which unjustifiably encumber the use of trademarks in the course of trade. To establish the inconsistency of a regulatory measure with this provision, the following elements¹⁷¹ must be

¹⁶³ TRIPS Agreement, *supra* note 83, at Preamble (emphasis added).

¹⁶⁴ *Id.* at art. 15.1.

¹⁶⁵ Andrew Mitchell, *The Right to Regulate and the Interpretation of the WTO Agreement*, 26 J. INT'L ECON. L. 462, 470 (2023).

¹⁶⁶ Van den Bossche & Zdouc, *supra* note 73, at 996.

¹⁶⁷ Thomas Cottier, *The Agreement on Trade-Related Aspects of Intellectual Property Rights*, in 1 THE WORLD TRADE ORGANIZATION: LEGAL, ECONOMIC AND POLITICAL ANALYSIS 1041, 1054 (Patrick F. J. Macrory ed., 2005).

¹⁶⁸ Van den Bossche & Zdouc, *supra* note 73, at 995.

¹⁶⁹ Cottier, *supra* note 167, at 1054.

¹⁷⁰ Panel Report, *Australia—Tobacco Plain Packaging*, *supra* note 75, ¶ 7.2402 (referring to Panel Report, *Canada—Pharmaceutical Patents*, ¶ 7.26, WTO Doc. WT/DS114/R (adopted Jan. 25, 2000) [hereinafter Canada Panel Report]).

¹⁷¹ Appellate Body Report, *Australia—Certain Measures Concerning Trademarks, Geographical Indications and other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, ¶ 6.643, WTO Doc. WT/DS435/AB/R and WT/DS441/AB/R

established: (i) special requirements must exist; (ii) such requirements must encumber the use of trademarks in the course of trade; and (iii) they must do so unjustifiably.

1. Existence of Special Requirements

The term “special requirements” refers to those mandatory conditions that have a close connection with or specifically address “the use of a trademark in the course of trade.” These requirements must also be limited in their application. Such conditions may include a requirement not to do something, such as a prohibition on using a trademark.¹⁷²

Article 20 of the TRIPS Agreement presents an illustrative list of special requirements: (i) use with another trademark; (ii) use in a special form; or (iii) use in a manner that undermines the ability of the trademark to distinguish the goods or services of one enterprise from those of other enterprises.¹⁷³ However, this list is not exhaustive; thus, other types of requirements, such as a requirement equivalent to a prohibition of use, may be within the scope of Article 20.¹⁷⁴

Based on the above considerations, the existence of special requirements in a regulatory measure can be determined by considering (i) whether the measure prescribes conditions for the use of trademarks; (ii) whether the conditions relate to trademarks and their functions; (iii) whether the conditions specifically address such use; and (iv) whether the conditions are limited in their application.¹⁷⁵

Before proceeding, it should be noted that the TRIPS Agreement does not define “trademarks,” but rather specifies that they may be constituted by “any sign or combination of signs capable of distinguishing the goods or services of one enterprise from those of other enterprises.”¹⁷⁶ Furthermore, the signs that may be registered as trademarks are enumerated as follows: words; personal names; letters; numbers; figurative elements; combinations of colors; as well as any combination of these signs.¹⁷⁷

2. Encumbering the Use of Trademarks in the Course of Trade

Special requirements may be found inconsistent with Article 20 of the TRIPS Agreement only if they “encumber” the “use of a trademark in the course of trade.”¹⁷⁸

(adopted Jun. 9 2020). See Panel Report, *Australia—Tobacco Plain Packaging*, *supra* note 75, — ¶¶ 7.2220-7.2293.

¹⁷² Panel Report, *Australia—Tobacco Plain Packaging*, *supra* note 75, ¶ 7.2231.

¹⁷³ Appellate Body Report, *Australia—Certain Measures*, *supra* note 171, ¶ 6.640.

¹⁷⁴ Panel Report, *Australia—Tobacco Plain Packaging*, *supra* note 75, ¶ 7.2226.

¹⁷⁵ *Id.* ¶ 7.2231.

¹⁷⁶ TRIPS Agreement, *supra* note 83, at art. 15.1.

¹⁷⁷ *Id.*

¹⁷⁸ Panel Report, *Australia—Tobacco Plain Packaging*, *supra* note 75, ¶ 7.2234.

In analyzing the verb “encumber,” the Panels in *Australia – Tobacco Plain Packaging* determined that the term refers to “restricting or impeding” the use of a trademark.¹⁷⁹ The Panels also noted that special requirements within the meaning of Article 20 may result in various manners, ranging from limited encumbrances, such as those listed in Article 20, to more far-reaching encumbrances, such as prohibiting the use of a trademark in certain situations.¹⁸⁰

Moreover, encumbrances arising from special requirements must arise “in the course of trade.” According to *Australia – Tobacco Plain Packaging*, “course of trade” refers to the process related to commercial activities,¹⁸¹ which may include pre-sale or post-sale situations.¹⁸²

It should be noted that the “use” of trademarks occurs in (and is limited to) commercial transactions. In this sense, such “use” is relevant to the acquisition and maintenance of the “distinctive character”¹⁸³ of a particular product or service, and this understanding is consistent with Article 15 of the TRIPS Agreement. However, the use of trademarks extends to a wide array of commercial, advertising, and promotional activities and, thus, is not limited to that purpose of distinguishing products and services of one company from those of other companies.¹⁸⁴

In summary, a challenged regulatory measure is inconsistent with Article 20 of the TRIPS Agreement where it restricts or hinders the use of trademarks to distinguish, market, advertise, and promote certain goods or services via binding conditions. However, it is also necessary to show that the challenged regulatory measure applies these conditions in an unjustifiable manner.

3. “Unjustifiably”

According to the Appellate Body in *Australia – Tobacco Plain Packaging*, establishing that the use of a trademark in the course of trade is being “unjustifiably” complicated by special requirements requires a showing that the encumbrances resulting from those requirements do not sufficiently serve the objective of the challenged regulatory measure.¹⁸⁵ In determining whether a special requirement is justifiable, the assessment must consider: (i) the nature and extent of the encumbrances resulting from the special requirements, taking into account the legitimate interest of the trademark owner in using its trademark in the course of trade; (ii) the reasons for the imposition of the special demands; and (iii) a demonstration of how these reasons support the resulting encumbrances.¹⁸⁶

¹⁷⁹ *Id.* ¶ 7.2235.

¹⁸⁰ *Id.* ¶ 7.2239.

¹⁸¹ *Id.* ¶ 7.2261.

¹⁸² *Id.* ¶¶ 7.2262-7.2263.

¹⁸³ *Id.* ¶ 7.1886.

¹⁸⁴ *Id.* ¶¶ 7.2285-7.2286.

¹⁸⁵ Appellate Body Report, *Australia—Certain Measures*, *supra* note 171, ¶ 6.659.

¹⁸⁶ *Id.* See also Panel Report, *Australia—Tobacco Plain Packaging*, *supra* note 75, ¶ 7.2430.

a) Balancing Encumbrances and the Legitimate Interests of Trademark Owners

The Panels in *Australia – Plain Packaging of Tobacco* found that encumbrances resulting from special requirements may be limited or far-reaching.¹⁸⁷

It is important to note that the elimination of signs or their combinations undermines the ability of trademarks to signal to consumers the quality, characteristics, and reputation of products and services.¹⁸⁸ In this regard, the Panel in *EC – Trademarks and Geographical Indications (US)* explained that “each trademark owner has a legitimate interest in preserving the distinctive character, or distinguishability, of its trademark.”¹⁸⁹ Such interests include “using its own trademark in connection with the relevant goods and services of its own and licensed businesses,” as well as protecting “the economic value of its trademark derived from the reputation it enjoys and the quality it denotes.”¹⁹⁰

One must also analyze the impact of the contested measure on the right-holder’s ability to use trademarks for the legitimate purposes outlined above.¹⁹¹ However, the impact of the challenged measure may vary depending on the different purposes for which the rightholder wishes to use its trademark.¹⁹²

It should be reiterated that the use of trademarks is not limited to distinguishing the products and services of one company from those of other companies, since, as previously noted (*supra* note 184), Article 20 of the TRIPS Agreement makes no distinction between the different functions that trademarks may perform in the market.¹⁹³ However, where challenged measures prohibit the use of trademarks, they prevent trademark holders from using trademarks to convey messages about products and their characteristics, whether functional or intangible, which inhibits trademark holders’ ability to derive any economic value from their trademarks.¹⁹⁴ Nonetheless, the practical impact of these impediments or prohibitions is partially “mitigated” insofar as the challenged measure allows trademark holders to use other marks (for example, word marks, including the name of the brand and the variant) to distinguish their products from one another.¹⁹⁵

It is important to note that Article 20 of the TRIPS Agreement does not specify how the legitimate interest of trademark owners should be “taken into account.” However, as analyzed by the Panels in *Australia – Tobacco Plain Packaging*, the permission to use other trademarks to (sufficiently) distinguish the products of one company from those of others may be an indication that the challenged measure “takes into account” the legitimate interest

¹⁸⁷ Panel Report, *Australia—Tobacco Plain Packaging*, *supra* note 75, ¶ 7.2239.

¹⁸⁸ *Id.* ¶ 7.2558.

¹⁸⁹ Panel Report, *European Communities—Section 7.664 of the Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, WTO Doc. WT/DS174/R (adopted Mar. 15, 2005) [hereinafter Section 7.664 Panel Report].

¹⁹⁰ *Id.*

¹⁹¹ Panel Report, *Australia—Tobacco Plain Packaging*, *supra* note 75, ¶ 7.2562.

¹⁹² *Id.*

¹⁹³ *Id.* ¶ 7.2563.

¹⁹⁴ *Id.* ¶ 7.2569.

¹⁹⁵ *Id.* ¶ 7.2570.

of trademark owners.¹⁹⁶ Likewise, these interests may be “taken into account” when the member that issued the challenged measure preserves the trademark owner’s ability to protect, register, and maintain its registration via other domestic legal provisions.¹⁹⁷

b) Justifications for Special Trademark Requirements

As regulatory measures may combine technical regulations and special requirements, either may serve as the source of a measure’s legitimate objective for the purposes of an unjustifiability analysis. In *Australia – Tobacco Plain Packaging*, the Panels noted that while trademark requirements may form an integral part of a principal measure, that measure may also standardize other identifiable product elements.¹⁹⁸ Therefore, an Article 2.2 analysis, which considers trademark requirements, is relevant in determining the underlying policy concern for the purposes of Article 20 of the TRIPS Agreement.¹⁹⁹

For example, in *Australia – Tobacco Plain Packaging*, the Panels recalled that the preservation of human life and health is a value that is “both vital and important in the highest degree.”²⁰⁰ The Panels thus reiterated the Appellate Body’s joint interpretation of Article 8.1 of the TRIPS Agreement with paragraph 5 of the Doha Declaration as shedding light on public health, which constitutes a societal interest that can justify measures under the specific terms of Article 20 of the TRIPS Agreement.²⁰¹

c) Justification for the Encumbrance

To examine whether the justifications for a challenged measure sufficiently support the resulting encumbrances, one must assess the concerns of the relevant social interest area underlying the trademark requirements at issue.²⁰² Such an assessment requires contrasting the requirements with their impact on the use of the trademarks in the course of trade, taking into account the nature and extent of the encumbrances at issue.

In *Australia – Plain Packaging of Tobacco*, the Panels found that the elimination of design features on retail packaging for cigarettes and cigars and on the products themselves was an appropriate measure to reduce the attractiveness of tobacco products and increase the effectiveness of comprehensive tobacco control policies in Australia.²⁰³ In this case, therefore, the TPP measures as a whole (and the trademark requirements which served an integral

¹⁹⁶ Appellate Body Report, *Australia—Certain Measures*, *supra* note 171, ¶ 6.659.

¹⁹⁷ Panel Report, *Australia—Tobacco Plain Packaging*, *supra* note 75, ¶ 7.2574.

¹⁹⁸ *Id.* ¶ 7.2586.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* ¶ 7.2587.

²⁰¹ *Id.* ¶ 7.2588.

²⁰² *Id.* ¶ 7.2591.

²⁰³ *Id.* ¶ 7.2593.

purpose to them) sufficiently supported legitimate public health objectives, and the measures were found not to have been applied “unjustifiably.”²⁰⁴

Unlike Article 2.2 of the TBT Agreement, which refers to “unnecessary obstacles to international trade,” Article 20 of the TRIPS Agreement requires that the use of trademarks in the course of trade not be “unjustifiably complicated” by special requirements.²⁰⁵ Article 20’s use of the term “unjustifiably” also confers some regulatory autonomy to members.²⁰⁶ Therefore, it is one that cannot transpose Article 2.2’s examination of proposed alternative measures to the Article 20 analysis to determine whether the reasons “sufficiently support” the resulting encumbrances.²⁰⁷

IV. TESTING LATIN AMERICAN FRONT-OF-PACK NUTRITIONAL LABELLING AGAINST KEY WTO REQUIREMENTS

This section analyses the compatibility of FOPNL implemented in Latin America with key WTO obligations. As aforementioned, the TBT Agreement and the TRIPS Agreement contain the relevant measures for this analysis.

A. *Compatibility with TBT Article 2.2*

As noted previously (*supra* note 95), under the structure of Article 2.2 of the TBT Agreement, the compatibility examination consists of three steps: (i) demonstrating that the regulatory measure in question is a technical regulation within the meaning of Annex 1.1 of the TBT Agreement; (ii) examining the legitimacy of the technical regulation’s objective; and (iii) assessing whether the technical regulation restricts trade more than necessary to achieve its objective, considering the risks that would arise if the objective were not achieved.

1. Technical Regulation

The first step in Article 2.2’s compatibility examination is to determine whether the FOPNL constitute “technical regulations” within the meaning of Annex 1.1 of the TBT Agreement.

The FOPNL measures must be documents individually issued through decrees applicable to a group of identifiable products, namely ultra-processed foods.

The FOPNL also must establish “characteristics,” such as energy, sugar, fat, and sodium content thresholds, according to which the label will highlight the nutritional profile. A nutritional warning system²⁰⁸ label consists of an

²⁰⁴ *Id.*

²⁰⁵ Appellate Body Report, *Australia—Certain Measures*, *supra* note 171, ¶ 6.687.

²⁰⁶ *Id.* ¶ 6.695.

²⁰⁷ *Id.* ¶ 6.697.

²⁰⁸ According to the date of issue, Chile was the first Member to implement the nutritional warning octagons.

octagonal symbol with a black background and a white border, containing the text “HIGH IN”²⁰⁹ or “EXCESS OF,”²¹⁰ followed by: “SATURATED FATS,” “SODIUM,” “SUGARS,” “CALORIES,” “TRANS FATS,” or, if applicable, “CONTAINS TRANS FATS”²¹¹ in one or more independent symbols.

Figure 1: Nutritional Descriptors (Chile).



Precautionary legends may support those nutritional warnings. For example, products containing sweeteners and/or caffeine must include the following precautionary legends: “CONTAINS SWEETENERS, NOT RECOMMENDED FOR CHILDREN” and “CONTAINS CAFFEINE, AVOID IN CHILDREN.”²¹²

Figure 2: Precautionary Legends (Mexico).



As for the traffic light labels, they are based on a graphical system with horizontal bars of red, yellow, and green colors, according to the concentration of the components. The red bar is assigned to high-content components and should have the phrase “HIGH IN...”²¹³ the yellow bar is assigned to medium-content components and should have the phrase “MEDIUM IN...”²¹⁴

²⁰⁹ Reglamento Sanitario de los Alimentos, [hereinafter R. Sanitario] art. 120 (Chile); Law 20.606, art. 5 (Chile).

²¹⁰ Fabiola Cortez, Front of Pack Labelling Manual, Appendix A (2021) (Mex.); Reglamento Bromatológico Nacional Decreto 272/018, Annex IV (2018) (Uru.).

²¹¹ Law 20.606, *supra* note 209.

²¹² Cortez, *supra* note 210, at sections 7.1.3, 7.1.4.

²¹³ Reglamento Técnico Ecuatoriano RTE INEN 022 (2R) “Rotulado de Productos Alimenticios Procesados, Envasados y Empaquetados” [Labeling of Processed, Packaged, and Packed Food Products], Resolución No. 14511, Registro Oficial No. 499, July 26, 2011 (Ecuador) (“RTE INEN 022”) s 5.5.4, ¶ a.

²¹⁴ RTE INEN 022, s 5.5.4, ¶ b.

and the green bar is assigned to low-content components and should include the phrase “LOW IN...”²¹⁵

Figure 3: Graphical System (Ecuador).



Likewise, the FOPNL must prescribe that the nutritional warnings should be placed on the principal display panel of the products as the sizes of nutritional warnings according to the area of the main face of the label.²¹⁶ Some of them indicate that the nutritional warnings should be positioned in the upper right corner of the principal display panel.²¹⁷

Figure 4: Location of Warnings According to Package Type (Chile).



Continuing with the assessment of Annex 1.1 of the TBT Agreement, compliance with the FOPNL must be mandatory. Sanctions may include warnings, fines, and closure of establishments, premises, buildings, houses, or workplaces where the violation occurred;²¹⁸ cancellation of the authorization to operate or of permits granted;²¹⁹ suspension of work or tasks;²²⁰ suspension of the distribution and use of the products in question;²²¹ and withdrawal, seizure, destruction, or denaturation of the same.²²²

²¹⁵ RTE INEN 022, *supra* note 213, ¶ c.

²¹⁶ R. Sanitario, *supra* note 209, ¶ 1; RTE INEN 022, *supra* note 213, at section 5.5.5.1; Cortez, *supra* note 210, at sections 3.47, 3.49; Law 20.606, *supra* note 209, at section 4.1; Decreto 272/018, *supra* note 210, ¶ 3.

²¹⁷ R. Sanitario, *supra* note 209, ¶ 1; Decreto 272/018, *supra* note 210, at section A, Number 8 (examples of inclusion of seals on the label); Cortez, *supra* note 210, at Appendix A.

²¹⁸ Arts. 174, third paragraph, 175 and 178, 10th Book of the Sanitary Code.

²¹⁹ Arts. 174 and 178, 10th Book of the Sanitary Code.

²²⁰ *Id.*

²²¹ Art. 174, 10th Book of the Sanitary Code.

²²² Arts. 174 and 178, 10th Book of the Sanitary Code.

Before concluding this assessment concerning Annex 1.1 of the TBT Agreement, it is important to highlight that the FOPNL contains exceptions to the labelling obligations that do not interfere with the mandatory nature of the labelling measures. However, these exceptions, along with other prescriptions and prohibitions, are components of an *integrated whole*, constituting a single regulatory measure.²²³

The Latin American FOPNL are clearly technical regulations, stipulating mandatory packaging, marking, or label requirements for a group of products (food and beverages).

2. Legitimate Objective

The second step of the compatibility examination with Article 2.2 of the TBT Agreement consists of assessing the legitimacy of the objectives of the FOPNL. We recall that text of legal instruments, legislative history, and other evidence related to the structure and application of the FOPNL²²⁴ can be considered, including the provisions of the agreements covered by the WTO Agreement.²²⁵

Although the wording of the objectives of each FOPNL is varied, they fall within the scope of the legitimate objectives of “preventing practices that may mislead consumers” and “protecting human health” contained in both the text of Article 2.2 of the TBT Agreement and the sixth preamble of the TBT Agreement, and even in subparagraphs (b) and (d) of Article XX of the GATT 1994.

Consequently, the FOPNL pursue legitimate objectives for the TBT Agreement.

3. Restricting Trade “More Than Necessary”

The third and final step of the compatibility assessment with Article 2.2 of the TBT Agreement is whether the FOPNL restrict trade more than necessary to achieve their legitimate objectives. Whether a technical regulation is “more trade-restrictive than necessary” involves a “relational analysis,” or a weighing and balancing of the following factors:²²⁶

- the degree of contribution made by the measure to the legitimate objective;
- the trade-restrictiveness of the measure;

²²³ See Appellate Body Report, *European Communities—Asbestos*, *supra* note 100, ¶ 64.

²²⁴ *Id.* ¶ 314.

²²⁵ Appellate Body Report, *United States—COOL*, *supra* note 114, ¶ 372.

²²⁶ Appellate Body Report, *Australia—Certain Measures*, *supra* note 171, ¶ 7.31 (referring to Appellate Body Report, *United States—COOL*, *supra* note 114, ¶ 374 and Appellate Body Report, *United States—Tuna II*, *supra* note 95, ¶ 318).

- the nature of the risks and the gravity of consequences that would arise from non-fulfilment of the objective pursued through the measure; and
- the existence of reasonably available, less trade-restrictive, alternative measures.

a) Contribution of FOPNL to Public Health Goals

It is important to remember that the degree of contribution to achieving a legitimate objective is not an abstract concept but something the technical regulation itself demonstrates.²²⁷ However, if the degree of contribution is not explicitly articulated, it can be “ascertained” through objectively evaluating the technical regulation in question.²²⁸ For this purpose, (i) specific evidence (i.e., the design, the structure, and the functioning of the technical regulation); as well as (ii) evidence related to its application²²⁹ (e.g., empirical evidence related to its implementation since its entry into force) should be analyzed.²³⁰

(i) Specific evidence

Considering the “specific evidence,” *the design of the FOPNL* comprises general guidelines for the production, importation, elaboration, packaging, storage, distribution, and sale of ultra-processed foods, which are in line with recommendations such as the *WHO Global Strategy on Diet, Physical Activity, and Health*;²³¹ *PAHO Nutrient Profile Model*;²³² *WHO Set of Recommendations on the Promotion of Foods and Non-Alcoholic Beverages Directed to Children*; and the *Ottawa Charter*.²³³

Besides those guidelines, the design of the FOPNL may include complementary measures, namely: nutritional composition standardization;²³⁴ education;²³⁵ promotion of physical activities;²³⁶ promotion of breastfeeding;²³⁷ nutritional monitoring system;²³⁸ and promotion of nutritious and quality food.²³⁹

²²⁷ Appellate Body Report, *United States—COOL*, *supra* note 114, ¶ 373.

²²⁸ Appellate Body Report, *United States—Tuna II*, *supra* note 95, ¶ 317.

²²⁹ Panel Report, *Australia—Tobacco Plain Packaging*, *supra* note 75, ¶ 7.484 (referring to Appellate Body Report, *United States—COOL*, *supra* note 114, ¶ 461).

²³⁰ *See id.* ¶ 7.932–7.933.

²³¹ *See generally* WORLD HEALTH ORGANIZATION, GLOBAL STRATEGY ON DIET, PHYSICAL ACTIVITY AND HEALTH 52 (2004).

²³² *See generally* WHO/FAO, DIET, NUTRITION AND THE PREVENTION OF CHRONIC DISEASES: REPORT OF A JOINT WHO/FAO EXPERT CONSULTATION 13 (2002).

²³³ RTE INEN 022-2R, *supra* note 213, sixth recital of the preamble.

²³⁴ *See* Law No. 20.606, *supra* note 209, arts. 3, 5.

²³⁵ *See* Law No. 20.606, *supra* note 209, art. 4; Law No. 30021, arts. 4, 5, 6 (Peru).

²³⁶ *See* Law No. 20.606, *supra* note 209, art. 4; Law No. 30021, *supra* note 235, arts. 4, 5, 6, 7, 10; Ley General de Salud [hereinafter GS], art. 66 (Mex.).

²³⁷ *See* Law No. 20.606, *supra* note 209, art. 6; GS, *supra* note 236, art. 64.

²³⁸ *See* Law No. 20.606, *supra* note 209, art. 6; Law No. 30021, *supra* note 235, arts. 5, 11, 12.

²³⁹ *See* GS, *supra* note 236, art. 66; Law No. 30021, *supra* note 235, arts. 5, 6, 7, 8, 9.

Regarding the *structure of the FOPNL*, it is noted that some of them refer to other instruments or technical regulations to specify the form, size, colors, proportion, and other characteristics of the nutritional labelling of ultra-processed foods,²⁴⁰ or to specify the requirements for nutritional labelling,²⁴¹ nutritional claims and health claims.²⁴² In the case of non-compliance, FOPNL refer to other legal provisions to determine applicable sanctions and corrective measures.²⁴³

Regarding the *functioning of the FOPNL*, it is observed that in the case of nutritional warning²⁴⁴ system consumers can correctly, quickly, and easily identify products that contain excessive amounts of critical nutrients,²⁴⁵ while complementary measures help reduce risk factors for NCDs.

It is worth noting that the nutritional warning system is characterized by focusing on the negative aspects of ultra-processed foods, which has been a source of criticism.²⁴⁶ It has been argued that nutritional warnings tend to classify foods as “good” or “bad” without considering that they may contain other nutrients besides those in excessive amounts.²⁴⁷ However, it has been observed that a front-of-pack labelling system that presents information about negative attributes is an appropriate means to help the population —including children, the vulnerable population, and those with low educational levels—²⁴⁸ identify products that contain excessive amounts of critical nutrients.²⁴⁹ Moreover, emphasizing excessive amounts of critical nutrients can cause “consumers to increase their *intake of positive nutrients* while avoiding consuming excessive amounts of sugars, fats. . . and sodium *as they improve their purchase decisions* based on the nutritional warnings on the label.”²⁵⁰ Furthermore, it is estimated that combining or adding information about positive nutrients or

²⁴⁰ See RSSAP 5103, art. 12.

²⁴¹ See NTE INEN 1334-1, Rotulado de Productos Alimenticios para Consumo Humano. Parte 1. Requisitos, (Ecuador); NTE INEN 1334-2, Rotulado de Productos Alimenticios para Consumo Humano. Parte 2. Rotulado Nutricional. Requisitos (Ecuador); RTE INEN 022-2R, *supra* note 213, sections 3.1, 4.3, 5.1, 5.2, 5.5.2, 5.5.6, 5.5.14.1, ¶, 7.1, 7.2.

²⁴² See NTE INEN 1334-3, Rotulado de Productos Alimenticios para Consumo Humano. Parte 3. Requisitos para Declaraciones Nutricionales y Declaraciones Saludables. (Ecuador); RTE INEN 022-2R, *supra* note 213, sections 3.1, 5.5.13, 7.3.

²⁴³ Law No. 20.606, *supra* note 209, art. 10; Law No. 977/96, art. 542 (Chile); RTE INEN 022-2R, *supra* note 213 sections 10.1, 11.1, 12.1; Ley Federal de Protección al Consumidor [hereinafter LPC], arts. 25 BIS, 96, 97, 98 BIS, 98 TER, 125, 128 TER, 129, 132, 133 (Mex.); Law on the Repression of Unfair Competition, art. 52.1 (Peru); Decreto 272/018, *supra* note 210, arts. 6, 7.

²⁴⁴ See PAN AM. HEALTH ORG. [hereinafter PAHO], FRONT-OF-PACKAGE LABELLING AS A POLICE TOOL FOR THE PREVENTION OF NONCOMMUNICABLE DISEASES IN THE AMERICAS 9 (2020).

²⁴⁵ See *id.* at 10.

²⁴⁶ See *id.* at 15.

²⁴⁷ *Id.*

²⁴⁸ Alianza Por La Salud Alimentaria, *Etiquetado frontal de advertencia en México: un paso adelante para compartir la epidemia de obesidad y diabetes y fortalecer nuestro sistema immune* [Alliance for Food Health, Front-of-package warning labelling in Mexico: A step forward to combat the obesity and diabetes and strengthen our immune system] (2009).

²⁴⁹ See Organización Panamericana de la Salud, *supra* note 22, at 16.

²⁵⁰ *Id.* (emphasis added).

attributes would divert the nutritional warning system from its purpose, dilute its effect, and create more confusion for the consumer.²⁵¹

Concerning the traffic light labelling system, it works through text and color coding for specific nutrients;²⁵² that is, it uses multiple textual information associated with color codes and bars of different sizes to indicate the level of concentration of sugars, fats, or sodium in the product as high, medium, or low.²⁵³ Thus, products with green traffic lights are presented as a “healthier” option *vis-à-vis* those with yellow and red traffic lights, as they contain lower levels of fats, sugar, and/or salt.²⁵⁴

Although it has been shown that this traffic light system is easier for consumers to understand compared to other front-of-pack nutritional labelling systems (such as *Guideline Daily Amounts*, “GDA”),²⁵⁵ it should be noted that the traffic light system can also provide contradictory information because a product can be simultaneously red/high and green/low in certain nutrients.²⁵⁶ Additionally, it is considered that the use of bars and text for the red/high, yellow/medium, and green/low categories distracts from the purpose and confuses the consumer by presenting unnecessary information.²⁵⁷ Furthermore, it has been mentioned that red-green colorblindness is the most common form of color vision deficiency, which may mean that the nutritional information does not reach a portion of the population.²⁵⁸

(ii) Evidence related to the application of the FOPNL

It is important to mention that the implementation of these measures has been gradual by different stages at the end of the last decade and the beginning of the present. However, COVID-19 pandemic influenced the behavior of the ultra-processed food market. Movement restrictions, increased transportation costs, and labor shortages, among other issues, affected the physical and economic access to quality foods. Due to these circumstances, it is impossible to conclusively measure or determine the empirical evidence related to implementing FOPNL since its entry into force to date.

After considering some of the potential specific evidence and the evidence related to the application of the technical regulations in question, it can be said that all of them can achieve a relevant degree of contribution to their legitimate objectives using clear and truthful warnings about the content of critical nutrients and ingredients that pose health risks in excessive consumption. Additionally, it is possible to estimate that the technical regulations in question

²⁵¹ *See id.*

²⁵² *See id.* at 9.

²⁵³ *See id.*

²⁵⁴ Víctor Peñaherrera, Carlos Carpio, Luis Sandoval, Marcos Sánchez, Tania Cabrera, Patricia Guerrero & Ivan Borja, *Efecto del etiquetado de semáforo en el contenido nutricional y el consumo de bebidas gaseosas en Ecuador* [Effect of traffic light labelling on the nutritional content and consumption of soft drinks in Ecuador], 42 PAN AM. J. PUB. HEALTH 1, 2 (2018).

²⁵⁵ *See id.* at 10. *See also* Díaz, *et al.*, *Etiquetado de alimentos en Ecuador: implementación, resultados y acciones pendientes*, en Revista Panamericana de Salud Pública, 2017, 41 (e54), at 3.

²⁵⁶ *See id.*

²⁵⁷ *See id.*

²⁵⁸ *See id.* at 18.

can achieve their respective degree of contribution “over a longer period of time and into the future,”²⁵⁹ considering that “some public health protection measures—[particularly those] based on behavioral responses to anticipated changes in beliefs and attitudes—may take some time to fully materialize or be perceived in relevant data.”²⁶⁰ However, there is already significant evidence that FOPNL nutritional warnings are highly effective in influencing consumers’ purchasing decisions towards healthier options.²⁶¹ These warnings reduce the intent to purchase foods labelled with such notices,²⁶² as they swiftly capture consumers’ attention and deliver straightforward information regarding the excessive content of critical nutrients detrimental to health.²⁶³

b) Extent of Trade Restrictions imposed by FOPNL

In this regard, it must be assessed whether the FOPNL restrict the trade of foods or food products with added sodium, sugars, fats (saturated and trans), or sweeteners. Adherence to FOPNL is a prerequisite for the marketing and selling of ultra-processed foods across these territories, irrespective of whether these products are domestically produced or imported.²⁶⁴ Moreover, some FOPNL state that these ultra-processed foods may not be sold in or near schools.²⁶⁵

Given that the scope of the expression “restricting trade” is broad and can include “any limiting effect”²⁶⁶ on trade, it can be considered that FOPNL are “trade-restrictive.” The FOPNL are not discriminatory, and further evidence of “actual trade effects” may be required to demonstrate the measure’s trade-restrictiveness,²⁶⁷ but given a decrease in the demand for unhealthy processed food would reduce the total volume of imported unhealthy processed food, we will assume that they are trade-restrictive.²⁶⁸ However, the holistic process²⁶⁹ of *weighing and balancing*²⁷⁰ involves assessing whether the FOPNL restrict trade to a greater extent than necessary to achieve their respective legitimate objectives.

Although the goal of policies like the FOPNL is to transform food environments to make them healthier and influence people’s behavior, it should be

²⁵⁹ Panel Report, *Australia—Tobacco Plain Packaging*, *supra* note 75, ¶ 7.938.

²⁶⁰ *Id.* ¶¶ 7.938–7.940.

²⁶¹ Helen Croker, J. Packer, Simon J. Russell, C. Stansfield & R. M. Viner, *Front of pack nutritional labelling schemes: a systematic review and meta-analysis of recent evidence relating to objectively measured consumption and purchasing*, 33 J. OF HUMAN NUTRITION & DIETETICS 518-37 (2020); R. An, Y. Shi, J. Shen, T. Bullard, G. Liu, Q. Yang, N. Chen & L. Cao, *Effect of Front of Package nutrition labelling on food purchases*, 191 PUBLIC HEALTH 59-67 (2021).

²⁶² PAHO, *supra* note 244, at 9.

²⁶³ *Id.*

²⁶⁴ See Cortez, *supra* note 210, at section 1; RTE INEN 022-2R, *supra* note 213, section 8.1.

²⁶⁵ See Law No. 20.606, *supra* note 209, at art. 6; Ley General de Educación, [LGE] art. 75 (2015) (Mex.).

²⁶⁶ Appellate Body Report, *United States—Tuna II*, *supra* note 95, ¶ 319.

²⁶⁷ Appellate Body Report, *Australia—Certain Measures*, *supra* note 171, ¶ 6.385.

²⁶⁸ Panel Report, *Australia—Tobacco Plain Packaging*, *supra* note 75, ¶¶ 7.1200, 7.1204, 7.1207.

²⁶⁹ Appellate Body Report, *United States—COOL*, *supra* note 114, ¶ 21.5.

²⁷⁰ Appellate Body Report, *United States—Tuna II*, *supra* note 95, ¶ 643 (referring to Appellate Body Report, *Brazil—Retreaded Tyres*, *supra* note 126, ¶ 17 and Appellate Body Report, *United States—Gambling*, *supra* note 124, ¶ 306-308).

highlighted that this involves disincentivizing the purchase and consumption of ultra-processed foods.²⁷¹

On the other hand, it is likely that these effects have been paused or diluted due to the COVID-19 pandemic. It was identified that the decrease in household incomes during the pandemic favored the purchase and consumption of ultra-processed products.²⁷² This situation prevents isolating the effect of the FOPNL from the effect of the pandemic on the trade of ultra-processed foods. However, it could later be considered the decrease in purchases of ultra-processed foods with high critical nutrient content²⁷³ was offset by an increase in purchases of ultra-processed foods with “not high” critical nutrient content.

c) Evaluating the Risks and Consequences of Non-Compliance

Although Article 2.2 of the TBT Agreement does not establish a particular method for “taking into account” these risks,²⁷⁴ it is possible to evaluate them based on available scientific and technical information.²⁷⁵

In this regard, there is ample scientific and technical evidence about the relationship between excessive consumption of sugars, sodium, and saturated fats with adult and childhood obesity and its global prevalence, as well as with the increase in morbidity and mortality from NCDs derived from obesity. In 2018, it was recorded in Latin America that 4 million children under the age of 5 were overweight; while in 2016, 262 million adults with overweight and obesity were recorded at the regional level.²⁷⁶ It should be remembered that the main cause of this prevalence in Latin America is estimated to be the change in the population’s diet, mainly based on cereals, sugar, and fats.²⁷⁷

Estimates for numerous Latin American countries indicate that the annual costs related to healthcare, out-of-pocket expenses, absenteeism, and premature death due to obesity and overweight are substantial. The costs are as follows: Chile (USD 493 million), Ecuador (USD 1,746 million), El Salvador (USD 855 million), Guatemala (USD 3,813 million), Honduras (USD 336 million), and Mexico (USD 7,314 million).²⁷⁸ Most of these costs stem from healthcare expenses related to hypertension and diabetes in the obese and overweight population.

Therefore, the risk that the FOPNL does not meet its objectives is that, essentially, the predominant health risk factors, particularly NCDs derived

²⁷¹ Corvalán, *et al.*, *Impacto de la ley chilena de etiquetado en el sector productivo alimentario*, Santiago de Chile, FAO e INTA, p. 2.

²⁷² Elvira Sandoval, *Influencia de la pandemia por COVID-19 en la alimentación*, BOLETÍN SOBRE COVID-19, Feb. 2, 2021, at 3-5.

²⁷³ Taillie, Lindsey *et al.*, *op. cit.*, p. 529.

²⁷⁴ Appellate Body Report, *United States—COOL*, *supra* note 114, ¶ 2.218.

²⁷⁵ Panel Report, *Australia—Tobacco Plain Packaging*, *supra* note 75, ¶ 7.1260 (referring to Appellate Body Report, *United States—Tuna II*, *supra* note 95, ¶ 321).

²⁷⁶ Corvalán, *et al.*, *supra* note 271, at 2.

²⁷⁷ *Id.* at 45.

²⁷⁸ WFP, *El Costo de la Doble Carga de la Malnutrición. Impacto Social y Económico en el Salvador*. (2019). WFP, *El Costo de la Doble Carga de la Malnutrición. Impacto Social y Económico en Guatemala* (2020); WFP, *El Costo de la Doble Carga de la Malnutrición. Impacto Social y Económico en Honduras*, (2020); FAO, *Front of Pack Nutrition Labelling in Latin America and the Caribbean* (2023).

from obesity, would not be significantly reduced because consumer behavior would not be guided by clear warnings and information about the quality and quantity of critical nutrients they are consuming.

Regarding the severity of the consequences, taking as a reference the Panels in *Australia—Tobacco Plain Packaging*, it can be said that it is “widely recognized and undisputed that the public health consequences of [excessive consumption of sugars, sodium, and saturated fats] are particularly severe and are “especially severe for [children].”²⁷⁹

4. Comparative Analysis

If any WTO Member presents a *prima facie* case about any of the FOPNL, within that presumption, they can propose other alternative measures they consider to be “less trade-restrictive.” These measures must make an equivalent contribution to the legitimate objectives, considering the risks of not achieving them.²⁸⁰ Moreover, these alternative measures must be reasonably available to the respondent Member. It is important to highlight that the alternative measures proposed in the *prima facie* case must be distinct from the complementary measures outlined in the technical regulation in question since it would be challenged as a technical regulation, and therefore, as an “integrated whole.”

Summarizing the compatibility assessment with TBT Agreement Article 2.2, it is important to recognize that FOPNL restrict trade only to the extent necessary to achieve their legitimate objectives. This occurs when ultra-processed foods exceed the critical nutrient content thresholds specified in their respective nutritional profiles. If these thresholds are not exceeded, the trade restrictions stipulated by each measure do not apply.

B. Compatibility with TRIPS Article 20

As can be seen in the legal texts of the FOPNL as measures, only a few establish special requirements for trademarks for the marketing and advertising of food products whose critical nutrient content exceeds the mandatory nutritional profiles. Therefore, our examination of their compatibility with TRIPS Agreement Article 20 focuses on the following elements: (a) the existence of special requirements; (b) whether these requirements complicate the use of trademarks in the course of trade; and (c) whether they do so unjustifiably.²⁸¹

²⁷⁹ Panel Report, *Australia—Tobacco Plain Packaging*, *supra* note 75, ¶¶ 7.1310, 7.1316.

²⁸⁰ Appellate Body Report, *United States—Tuna II*, *supra* note 95, ¶ 322.

²⁸¹ Appellate Body Report, *Australia—Certain Measures*, *supra* note 171, ¶ 6.613. See also Panel Report, *Australia—Tobacco Plain Packaging*, *supra* note 75, ¶¶ 7.2220, 7.2293.

1. Existence of Special Requirements

According to the Appellate Body in *Australia – Tobacco Plain Packaging*, Article 20 of the TRIPS Agreement contains an illustrative list of what can be considered a “special requirement,”²⁸² which allows for its extension to prohibitions on the use of trademarks in the course of trade.²⁸³

Furthermore, it is important to emphasize that special requirements are those conditions that have an exclusive or limited relation to the use of trademarks and their application in the course of trade,²⁸⁴ that is, commercial, advertising, and promotional activities.²⁸⁵

Considering this definition of special requirements, it is noted that the labelling and advertising of ultra-processed foods in Chile “must not” contain “words, illustrations, and/or other graphic representations that could mislead, deceive or create a false impression regarding the nature, composition, or quality of the product.”²⁸⁶ However, it is important to highlight an exception that allows the use of words in another language or fantasy words associated “unequivocally with nutritional characteristics, such as *light*, *diet*, *high*, *lite*, *low*, *delgadíssimo*, *flakin* and *soft*, among others”²⁸⁷ to emphasize the qualities of “any type of food or food product.”²⁸⁸ This is highly relevant, considering that trademarks can contain such words to distinguish different versions of the same product category, especially if all those versions exceed the maximum critical nutrient content parameters.

In Mexico, products exceeding one or more critical nutrient content thresholds cannot use recommendations, recognition, seals, or legends from professional organizations or associations.²⁸⁹ Furthermore, prepackaged products bearing one or more warning seals or the precautionary legend of sweeteners “must not” include on the label: “children’s characters, animations, cartoons, celebrities, athletes or mascots, interactive elements, such as visual-spatial games or digital downloads, that, being directed at children, incite, promote or encourage the consumption, purchase, or choice of products with excess critical nutrients or sweeteners.”²⁹⁰

As can be observed, the provisions of both measures constitute special requirements for the purposes of Article 20 of the TRIPS Agreement, as they prescribe conditions that “bear an exclusive relation” to the use of trademarks in the course of trade.²⁹¹ Nonetheless, the mere existence of special requirements is not sufficient to demonstrate the incompatibility with Article 20 of

²⁸² Appellate Body Report, *Australia—Certain Measures*, *supra* note 171, ¶ 6.640.

²⁸³ *Id.*

²⁸⁴ *Id.* ¶ 7.2231.

²⁸⁵ *Id.* ¶ 7.2285.

²⁸⁶ R. Sanitario, *supra* note 209, art. 110.

²⁸⁷ *Id.* art. 120.

²⁸⁸ *Id.*

²⁸⁹ *Supra* note 53, ¶ 4.1.4.

²⁹⁰ *Id.*

²⁹¹ Panel Report, *Australia—Tobacco Plain Packaging*, *supra* note 75, ¶ 7.2231.

the TRIPS Agreement. It is necessary to evaluate whether these special requirements “complicate” the “use of a trademark in the course of trade.”²⁹²

2. Encumbrances in the Use of Trademarks in the Course of Trade

According to the Panels in *Australia – Tobacco Plain Packaging*, the encumbrances resulting from special requirements refer to the “restrictions or obstacles”²⁹³ to the use of trademarks to distinguish,²⁹⁴ market, advertise, and promote certain products or services.²⁹⁵

In the case of Chile, those encumbrances consist of restrictions and prohibitions on the use of trademarks in the marketing, advertising, and promotion of ultra-processed foods that exceed the critical nutrient thresholds. For instance, the prohibition of advertising directed at children under fourteen years of age for foods or food products with high critical nutrient content. For this purpose, Article 110 bis of the RSA lists the indicators that constitute advertising “directed at children under 14 years of age,” which can be categorized as follows: (i) by type of message; (ii) by type of channel; and (iii) by type of place.

Regarding the type of message, advertising will be considered “directed at children under 14 years of age” when it uses: elements; children’s characters and figures; animations; cartoons; toys; children’s music; the presence of persons or animals that attract the interest of children under fourteen years; fantastic statements or arguments about the product or its effects; children’s voices; language or expressions typical of children; or situations representing their daily life, such as school, recess, or children’s games.²⁹⁶

Regarding the type of channel, it refers to the mass media where such foods or food products are advertised, namely: programs and websites directed at children under fourteen years or that have an audience of that age group exceeding twenty percent;²⁹⁷ interactive applications, games, contests or other similar elements directed at children under fourteen years;²⁹⁸ cinema and television broadcasts between 6:00 a.m. and 10:00 p.m.,²⁹⁹ except for the transmission of sports, cultural, artistic, or social charity events or shows,³⁰⁰ provided only the name of the product or its brand is shown;³⁰¹ that the advertisement is not intended, directed, directly or indirectly at children under fourteen years;³⁰² that the event or show is not organized or financed exclusively by the company interested in advertising the product, its affiliates, or

²⁹² *Id.* ¶ 7.2234.

²⁹³ *Id.*

²⁹⁴ *Id.* ¶¶ 7.2285, 7.2286.

²⁹⁵ *Id.* ¶ 7.2285.

²⁹⁶ R. Sanitario, *supra* note 209, art. 110.

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² *Id.*

related entities;³⁰³ and that it does not show consumption situations that induce the product or promoted product, such as people or characters consuming the product or situations that state or imply its consumption.³⁰⁴

Regarding the type of place, advertising will be considered directed at children under fourteen years and should not be conducted within early childhood, elementary, or secondary education establishments³⁰⁵ or “wherever it takes place.”³⁰⁶

In the case of Mexico, encumbrances comprise the use of figurative elements, names of people, and combinations of distinctive signs that constitute trademarks,³⁰⁷ namely: seals of professional organizations or associations,³⁰⁸ children’s characters, animations, cartoons, celebrities, athletes, mascots, and interactive elements (i.e., visual-spatial games or digital downloads).³⁰⁹

Additionally, references should not be made to elements unrelated to the prepackaged product for the purposes of inciting, promoting, or encouraging the consumption, purchase, or choice of ultra-processed foods that exceed the maximum critical nutrient contents.³¹⁰ This is particularly relevant considering that there are trademarks for ultra-processed foods based on nutritional and health claims, which must not be made when the prepackaged product includes any of the nutritional warnings or any of the precautionary legends.³¹¹ This poses a risk for trademarks based on adjectives in other languages - mainly in English - alluding to healthiness, lightness, among other nutritional characteristics (e.g., *light*, *lite*, *diet*, *low*), as their use could be complicated, requiring the removal of such trademarks from the product labels in question.

3. “Unjustifiably”

The third aspect to evaluate in the compatibility with Article 20 of the TRIPS Agreement involves establishing that the special requirements unjustifiably complicate the use of trademarks in the course of trade.³¹² However, it must first be demonstrated that the objectives of both measures do not sufficiently support the resulting encumbrances of these requirements.³¹³ This demonstration should include the following aspects: (i) the nature and magnitude of the encumbrances resulting from the special requirements, considering the legitimate interest of the trademark owner in using their trademark in the course of trade; (ii) the reasons for the imposition of special requirements;

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ R. Sanitario, *supra* note 209, art. 110(6).

³⁰⁶ *Id.*

³⁰⁷ TRIPS Agreement, *supra* note 83, Annex 1C.

³⁰⁸ *Supra* note 53.

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² Appellate Body Report, *Australia – Certain Measures*, *supra* note 171, section 6.659.

³¹³ *Id.*

and (iii) a demonstration of how the reasons for the imposition of special requirements support the resulting encumbrances.³¹⁴

a) Evaluating the Impact on Trademark Owners' Interests

Restrictions and prohibitions on the use of trademarks in the marketing and advertising of ultra-processed foods containing sweeteners or exceeding the critical nutrient content thresholds, may be considered “far-reaching.”³¹⁵

By complicating the use of trademarks, owners are prevented from using them to convey any messages about ultra-processed foods with excessive critical nutrient content and their characteristics, whether functional or intangible and therefore prevented from obtaining any economic value from their use.”³¹⁶ However, the repercussions of the restrictions and prohibitions on the use of trademarks for ultra-processed foods in marketing and advertising directed at children can be considered partially “mitigated,”³¹⁷ since Chile and Mexico allow trademark owners to use them in the advertising and promotion of their products.

In the case of Chile, these trademarks can be advertised in cinema and television broadcasts between 10:00 p.m. and 6:00 a.m.,³¹⁸ as well as in events and shows, where the name of the product or brand can be displayed.³¹⁹ For its part, Mexico allows trademark owners to use them in the advertising and promotion of their products, regardless of the media, cinemas, events, or shows. Furthermore, the use of trademarks for ultra-processed foods has been observed in the advertising of other non-food product categories.³²⁰

Therefore, these allowances for the use of trademarks of ultra-processed foods with high critical nutrient content³²¹ indicate that the legitimate interest of trademark owners of the products in question is “taken into account.”

b) Underlying Reasons for Special Requirements

It should be reiterated that the analysis of Article 2.2 of the TBT Agreement, which includes prescriptions related to trademarks, is relevant context for determining the “underlying policy concern” for the purposes of Article 20 of the TRIPS Agreement.³²²

³¹⁴ *Id.* See also Appellate Body Report, *Australia – Certain Measures*, *supra* note 171, ¶ 7.2430.

³¹⁵ Appellate Body Report, *Australia – Certain Measures*, *supra* note 171, ¶ 6.675.

³¹⁶ Panel Report, *Australia—Tobacco Plain Packaging*, *supra* note 75, ¶ 7.2569.

³¹⁷ *Id.* ¶ 7.2570.

³¹⁸ R. Sanitario, *supra* note 209, art. 110(1).

³¹⁹ *Id.*

³²⁰ Stephanie Cuevas, *El ‘Osito Bimbo’ sigue vivo: ‘Poppy’ le hace un espacio en las servilletas Pétalo*, EL FINANCIERO, (Feb. 10, 2021), <https://www.elfinanciero.com.mx/empresas/el-osito-bimbo-sigue-vivo-poppy-le-hace-un-espacio-en-las-servilletas-petalo/> [<https://perma.cc/QFE6-WVE4>].

³²¹ The Appellate Body addresses this permissibility as “the ability of trademark owners to derive economic value from their trademarks.” See Appellate Body Report, *Australia – Certain Measures*, *supra* note 171, ¶ 6.675.

³²² Panel Report, *Australia—Tobacco Plain Packaging*, *supra* note 75, ¶ 7.2586.

In this regard, the preservation of human life and health has been recognized as a value that is “both vital and important in the highest degree.”³²³ Similarly, Article 8.1 of the TRIPS Agreement and paragraph 5 of the Doha Declaration establish that public health and the prevention of deceptive practices³²⁴ constitute social interests that justify measures by the terms of Article 20 of the TRIPS Agreement.³²⁵

Regarding the above, it is estimated that the reasons why Chile implemented the prescriptions on trademarks are to “guide consumer behaviour through clear signals and information about the quality and quantity of what they are consuming”³²⁶ and “contribute significantly to the reduction of the current predominant health risk factors.”³²⁷ On the other hand, it could be said that the reasons why Mexico implemented restrictions on the use of trademarks are to “establish the commercial and health information that must be contained on the labelling of prepackaged products intended for the final consumer”³²⁸ and “establish a front labelling system [that warns] clearly and truthfully about the *content* of critical nutrients and ingredients that pose health risks when consumed *excessively*.”³²⁹

c) Justification of Resulting Encumbrance

To determine if the reasons provide sufficient support for the resulting encumbrances, it is necessary to evaluate the underlying public health and prevention of deceptive practices concerns in the prescriptions related to trademarks.³³⁰ This evaluation is conducted by confronting the prescriptions with the repercussions on the use of trademarks in the course of trade, taking into account the nature and magnitude of the encumbrances in question.³³¹

In both cases, the encumbrances in the use of trademarks for ultra-processed foods with high critical nutrient content can be considered adequate for “reducing the attractiveness” of such food products to children. Furthermore, these encumbrances can increase the effectiveness of other comprehensive measures implemented by Chile and Mexico to control obesity and NCDs in their respective populations. Consequently, it could be considered that the reasons for establishing special requirements sufficiently support

³²³ *Id.* ¶ 7.2587 (referring to the Appellate Body Report, *European Communities – Asbestos*, *supra* note 100, ¶ 172).

³²⁴ TBT Agreement, *supra* note 81, art. 2.

³²⁵ Panel Report, *Australia—Tobacco Plain Packaging*, *supra* note 75, ¶ 7.2588.

³²⁶ Fifteenth recital of the preamble to the Bill on the Regulation of Unhealthy Foods. This instrument, introduced in 2007, laid the foundation for the current Law 20.606 on the Nutritional Composition of Food and Its Advertising, enacted in 2012. See Motion by Sergio Mariano Ruiz Esquide Jara et al., *Bill on the Regulation of Unhealthy Foods*, Parliamentary Motion in Session 5, Legislature 355 (Mar. 21, 2007), <https://www.bcn.cl/historiadaley/historia-de-la-ley/vista-expandida/4468/> [<https://perma.cc/PJ6N-Z6CD>].

³²⁷ *Id.*

³²⁸ *Supra* note 53.

³²⁹ *Id.* (emphasis added).

³³⁰ Panel Report, *Australia—Tobacco Plain Packaging*, *supra* note 75, ¶ 7.2591.

³³¹ *Id.*

these encumbrances in the use of trademarks for the products in question, and therefore, these have not been applied “unjustifiably”³³² in Chile and Mexico.

This concludes the examination of compatibility with Article 20 of the TRIPS Agreement, through which it was observed that, although special requirements complicate “far-reaching” the use of trademarks in the marketing and advertising directed at children, they do so “justifiably” based on the reasons behind these special requirements.

V. CONCLUSION

In many ways, the objectives of international trade are complementary to promoting public health and well-being. For example, one of the objectives of the WTO is to raise living standards, increase real incomes, and expand the production and trade of goods and services. These economic benefits should provide greater access to healthcare and education and promote public health and well-being. International trade should favor access to a broader range of better and cheaper health products and services (including medicines and medical devices). However, despite this abstract complementarity of purposes, the relationship between public health and international trade is often framed as a conflict. The increase in trade and investment tends to intensify the production, consumption, and marketing of unhealthy products, such as ultra-processed foods, tobacco, and alcohol.

Our analysis confirms that Latin American front-of-package nutritional labels align with WTO obligations, particularly under the TBT and TRIPS Agreements, by protecting health and preventing misleading practices. These labels effectively simplify critical health information, empowering consumers to make healthier choices and potentially reducing obesity-related non-communicable diseases (NCDs).

While traditional informative nutritional labels on the back of products provide important information, “in the real world where people live, work, and die,”³³³ they are too complex for consumers who commonly do not understand or use them. In contrast, the clear and simple information provided by the front-of-package nutritional labels raises consumer awareness about the excessive content of sugars, fats, and sodium content in ultra-processed foods. Consequently, consumers can make better purchasing decisions among substitutable or interchangeable food products. By doing so, the negative impact of an unbalanced diet on people’s health, which is one of the main risk factors for obesity, is reduced. However, we consider it important that warning labels are only used when products exceed set nutrient thresholds, aligning with standards set by authoritative health organizations.

Despite resistance from the food industry and claims of increased costs, the potential long-term health benefits and associated cost savings on obesity

³³² *Id.* ¶ 7.2593.

³³³ Appellate Body Report, *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute*, ¶ 187, WTO Doc. WT/DS321/AB/R (adopted Nov. 21, 2008).

justify these measures. It has also led to the industry reformulating many of its products to reduce the content of highlighted critical nutrients.

Ultimately, given the escalating crisis of obesity and related NCDs, WTO Members must enact and enforce measures that prioritize public health, aligned with the WTO's foundational goal of enhancing global well-being. This calls for a reflection on the urgency and responsibility of implementing health-protective regulations, framing them not as trade barriers but as vital public health safeguards.