Regulatory Autonomy and Public Health under the World Trade Organization (WTO)

A Case Study of the Chilean Food-labeling Scheme

Candidate number: 9007
Submission deadline: 15 May 2017
Number of words: 17,885
## Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
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<tbody>
<tr>
<td>AB</td>
<td>Appellate Body</td>
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<tr>
<td>CGNT</td>
<td>Codex Guidelines on Nutrition Labeling</td>
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<td>CGUNHC</td>
<td>Codex Guidelines for Use of Nutrition and Health Claims</td>
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<tr>
<td>DSB</td>
<td>Dispute Settlement Body</td>
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<tr>
<td>DSU</td>
<td>Understanding on Rules and Procedures Governing the Settlement of Disputes</td>
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<td>e.g.</td>
<td>for example (<em>exempli gratia</em>)</td>
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<tr>
<td>EC</td>
<td>European Communities</td>
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<tr>
<td>et al.</td>
<td>and others (<em>et alii</em>)</td>
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<td>EU</td>
<td>European Union</td>
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<td>FAO</td>
<td>Food and Agriculture Organization of the United Nations</td>
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<td>GATT</td>
<td>General Agreement on Tariffs and Trade</td>
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<td>i.e.</td>
<td>that is (<em>id est</em>)</td>
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<td>Ibid.</td>
<td>in the same place (<em>ibidem</em>)</td>
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<td>NCDs</td>
<td>Non-communicable diseases</td>
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<td>p./pp.</td>
<td>page/pages</td>
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<td>Abbreviation</td>
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<tr>
<td>para./paras.</td>
<td>Paragraph/paragraphs</td>
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<tr>
<td>SICJ</td>
<td>Statute of the International Court of Justice</td>
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<td>SPS</td>
<td>Sanitary and Phytosanitary Measures</td>
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<tr>
<td>TBT</td>
<td>Technical Barriers to Trade</td>
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<tr>
<td>TRIPS</td>
<td>Trade Related Aspects of Intellectual Property Rights</td>
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<td>UN</td>
<td>United Nations</td>
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<td>UNICEF</td>
<td>United Nations International Children’s Emergency Fund</td>
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<td>UNSCN</td>
<td>United Nations Standing Committee on Nutrition</td>
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<td>UNTS</td>
<td>United Nations Treaty Series</td>
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<td>US</td>
<td>United States</td>
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<td>WHO</td>
<td>World Health Organization</td>
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<td>WTO</td>
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1 Introduction

The intersection between international trade and public health has been a controversial issue since the establishment of the World Trade Organization (WTO) in 1995. Initially, the conclusion of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) and the General Agreement on Trade in Services raised questions regarding access to medicines and trade in health services, respectively. As regards the TRIPS Agreement and access to medicines, the WTO Members adopted under the 2001 Ministerial Conference the Declaration on the TRIPS Agreement and Public Health, which stated:

‘[T]he TRIPS Agreement does not and should not prevent members from taking measures to protect public health. [...] the Agreement can and should be interpreted and implemented in a manner supportive of WTO members' right to protect public health and, in particular, to promote access to medicines for all.’

Additionally, on 23 January 2017, an amendment to the TRIPS Agreement entered into force securing a legal pathway to ‘ease access to affordable medicines in developing countries that mostly rely on imports for their medicinal needs’, constituting the very first amendment of WTO rules since the establishment of the Organization.

While this progress is the result of efforts taken at the political level of the WTO to address public health concerns, it has unfortunately not been the general rule; in fact, the WTO’s legislative/political arm has been literally paralyzed since the very establishment of the Organization, and sensitive matters related to public health and the protection of the environment have

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3 The WTO’s main decision-making bodies are the Ministerial Conferences, where all WTO Members meet as a general rule every two years, and the WTO General Council, an organ composed by representatives of all Member states who meet in the periods in between the different Ministerial Conferences.
had to be settled by the WTO adjudicating bodies.\(^4\) Many of the specific health issues highlighted in a joint study between the WTO and the World Health Organization (WHO) on international trade and public health, published in 2001 (see figure 1), have already been discussed and settled before panels and the Appellate Body (AB).\(^5\)

**Figure 1.**

<table>
<thead>
<tr>
<th>Specific health issues and most relevant WTO agreements(^1)</th>
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<tr>
<td>WTO Rule or Agreement</td>
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<td><strong>Health Issue</strong></td>
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<td>Infectious Disease</td>
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<td>Control</td>
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<td>Food Safety</td>
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<td>Tobacco Control</td>
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<td>Environment</td>
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<td>Access to Drugs</td>
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<td>Health Services</td>
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<td>Biotechnology</td>
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<td>Information Technology</td>
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\(^1\) Mention is made of only the most relevant agreements to the specific health issues.

\(^4\) The term ‘WTO adjudicating bodies’ refers to the Dispute Settlement Panels and the permanent Appellate Body. For an extensive overview of the way the WTO’s Appellate Body has had to address controversial issues in face of the political paralysis of the WTO see Howse (2016).

\(^5\) Some examples are EC — *Hormones* (DS26, 48) concerning restrictions on meat products treated with certain hormones; EC — *Asbestos* (DS135), concerning a total ban on asbestos; EC — *Approval and Marketing of Biotech Products* (DS291, 292, 293), concerning restrictions on biotech products; US — *Clove Cigarettes* (DS406), concerning tobacco measures adopted by the US; and Australia — *Tobacco Plain Packaging* (DS 434, 435, 441, 458, 467), concerning trademark restrictions and plain packaging requirements on tobacco products and packaging.

However, despite the fact that the WTO adjudicating bodies have already addressed many health issues, recent years have evidenced an expansion of public health policies to new fields. The global epidemic of non-communicable diseases (NCDs)\(^7\) is increasingly being the subject matter of national policy regulations. Despite facing strong opposition from both WTO Members and the industries concerned,\(^8\) several countries have engaged in the design of measures aimed at controlling the main risk-factors associated with NCDs, namely tobacco consumption, alcohol consumption and unhealthy diet. Clear examples of innovative regulations addressing some of the risk-factors associated with NCDs are Australia’s trademark and packaging restrictions on tobacco products – dealing with tobacco consumption – and Chile’s advertising restrictions and labeling requirements on food products – dealing with unhealthy diet.

Australia’s innovative health regulations requiring the plain packaging of tobacco products has set the standard in tobacco regulation worldwide, influencing the policies of many countries.\(^9\) However, they were also challenged before the WTO and, after more than four years of dispute, the panel finally ruled in favor of Australia.\(^10\) Although the panel report has not yet been made public at the time of writing, there is no doubt that it – and eventually an AB decision – will set a precedent in the application of trade rules to NCDs.

At the same time, Chile has also adopted innovative regulations addressing NCDs, but in the area of unhealthy diet. They consist in the implementation of a compulsory labeling scheme

\(^7\) According to the WHO, the four main types of NCDs are cardiovascular diseases (heart attack or stroke), cancer, chronic respiratory diseases (such as chronic obstructed pulmonary disease and asthma) and diabetes. These are considered to be the main causes of death in the world by far. See [www.who.int/features/factfiles/noncommunicable_diseases/en/](http://www.who.int/features/factfiles/noncommunicable_diseases/en/).

\(^8\) This opposition is reflected for instance in the meetings of the TBT Committee. WTO Members hold these meetings to discuss Specific Trade Concerns – i.e. specific laws, regulations or procedures that affect their trade. Some of these concerns have turned into WTO disputes, like for instance *Australia — Tobacco Plain Packaging* (DS 434, 435, 441, 458, 467). There have also been cases of lobbying from the food industry to prevent or delay the entry into force of certain regulations, see for instance Julia and Hercberg (2016) for a recount on the opposition between public health and agro-industry lobbies on the topic of front-of-pack nutrition labeling in France.

\(^9\) See Brocket (2016).

\(^10\) See Baschuk (2017).
for— and restrictions in the advertisement of unhealthy foods.\textsuperscript{11} Like Australia’s case, Chile has faced strong opposition from both WTO Members and the food industry, as can be observed from the minutes of the meetings held by the TBT Committee.\textsuperscript{12} Although the panel decision in Australia – Tobacco Plain Packaging will set an important precedent in the application of trade rules to NCDs in the tobacco field, measures regulating the food industry have their own peculiarities making it difficult to predict how they will be addressed by the adjudicating bodies if challenged before the WTO dispute settlement body (DSB). There are doubts whether an appropriate balance will be upheld between Members’ regulatory autonomy\textsuperscript{13} and the free trade interests underlying the WTO system.

A central element of States’ sovereignty is the right to regulate public health in their territories. In this sense, although WTO Members have compromised their sovereign rights by joining the WTO,\textsuperscript{14} it is difficult to determine exactly to what extent they have restricted or retained their regulatory autonomy. Therefore, a central element in WTO dispute settlement has been how to uphold an appropriate balance between trade and non-trade values – including public health – when applying WTO rules. The question is how to leave sufficient leeway for Member to effectively deal with non-trade matters, but at the same time provide for an effective protection of the trade regime. Ultimately, this is a question underpinning the whole trade regime’s legitimacy.

\textsuperscript{11} Together with Chile, countries like Ecuador, Peru, Indonesia and Thailand have also notified the TBT Committee about proposals regarding food-labeling measures. However, Chile’s regulations are the most stringent to date because of its mandatory nature and strict nutrient thresholds. For a brief overview of the other countries’ proposals see Thow et al. (2017), p. 5.

\textsuperscript{12} Specific Trade Concerns have been raised by many WTO Members, including the US, the EU, Canada, Mexico, Guatemala, Australia, Brazil and Costa Rica. Of these, Mexico is the country which has opposed most fiercely to Chile’s regulation, as reflected in the following statements presented to the TBT Committee: G/TBT/W/361, G/TBT/W/372, G/TBT/W/406 and G/TBT/W/428.

\textsuperscript{13} Regulatory autonomy is taken to mean WTO Members’ entitlement to pursue the fulfillment of the ‘policy objectives it chooses to pursue as well as the means by which it chooses to pursue such policy objectives, so long as they do not constitute protectionism, overt or covert’, in Ming Du (2011), p. 644.

\textsuperscript{14} See AB Report, Japan – Alcoholic Beverages II, p. 15: ‘The WTO Agreement is a treaty- the international equivalent of a contract. It is self-evident that in an exercise of their sovereignty, and in pursuit of their own respective national interests, the Members of the WTO have made a bargain. In exchange for the benefits they expect to derive as Members of the WTO, they have agreed to exercise their sovereignty according to the commitments they have made in the WTO Agreement.’
The WTO adjudicating bodies have elaborated different tests to balance regulatory autonomy with free trade, centered on the measures’ proportionality and necessity.\textsuperscript{15} In addition, the level of intrusion – \textit{i.e.} the standard of review – the adjudicating bodies apply in reviewing domestic regulations, and the level of deference they find appropriate to afford national regulatory autonomy will also be crucial for upholding a balance between regulatory autonomy and free trade.

Examining the proportionality or necessity of measures addressing NCDs is a complex task. The diffuse cause-and-effect relationship between NCDs and their risk factors, such as tobacco, alcohol and unhealthy diet, complicates the measures’ examination of legality. In addition, risk management is normally done within the framework of comprehensive policies comprising a series of different measures, making it difficult to determine the specific contribution of one such measure to the achievement of the overall objective. Put in the context of unhealthy food: ‘there is a longer chain of causation between consumption and the onset of disease, and there are likely to be a greater number of ways in which a WTO Member may address the risks.’\textsuperscript{16}

Against this background, in the following chapters we will concentrate our efforts on examining one specific type of measure: food-labeling schemes addressing NCDs thereby engaging different WTO rules governing product standards. This will be done examining the relevant provisions of the Agreement on Technical Barriers to Trade (TBT Agreement), their interpretation by the WTO adjudicating bodies, and their effects on domestic regulatory autonomy. These rules will be tested taking Chile’s mandatory food-labeling scheme as an example.\textsuperscript{17} We have chosen Chile’s labeling scheme because it is currently being used as an inspiration in the design of similar measures by other countries facing the same public health concerns. Moreover, its novelty and stringent requirements defy WTO rules, and a possible WTO challenge is therefore not a far-

\begin{itemize}
\item \textsuperscript{15} Proportionality and necessity will be used indistinctly in this thesis. However, for a thorough discussion on proportionality, necessity and balancing in WTO law see Andenas and Zlepting (2007).
\item \textsuperscript{16} McGrady (2011), p. 8. State practice shows that risks related to dietary choices are normally dealt with policies related to education, advertisement and consumer information.
\item \textsuperscript{17} Chile’s food-labeling scheme forms part of a comprehensive policy strategy to address obesity and NCDs that includes advertising and selling restrictions of unhealthy foods, as well as education campaigns and promotion of physical activity.
\end{itemize}
fetched scenario.\textsuperscript{18} The findings on the application of the relevant rules in a prospective WTO dispute will shed light on the extent to which regulatory autonomy is upheld in the context of measures addressing NCDs. Ultimately, the outcome of the analysis proposed here also bears relevance for the evaluation of the legitimacy of the WTO system in matters related to public health.

### 1.1 Research question, aim and delimitations

The research question this thesis seeks to answer is: to what extent would WTO Member’s regulatory autonomy be upheld in WTO disputes arising out of food-labeling schemes implemented to protect public health?

In doing so, section 2.1 will set out a contextual description of the worldwide obesity and NCDs pandemic that have prompted the implementation of – among other measures – food-labeling schemes. Then, section 2.2 will take a closer look into the characteristics of food-labeling schemes and examine whether there are relevant international standards applicable to them. Section 2.3 will then describe the specific measure that we will use as an example to test the WTO rules governing product regulation, namely the Chilean food-labeling scheme, and the legal issues it raises.

Part 3 will provide a conceptual framework of the issue underlying the research question, \textit{i.e.} the relationship between regulatory autonomy and WTO rules, and how it impacts public health. Section 3.1 will start examining how regulatory autonomy is envisaged in the TBT Agreement and how it differs from other WTO Agreements. Section 3.2 will then look deeper into how the WTO adjudicating bodies balance different interests in WTO disputes, focusing on the TBT Agreement and public health.

Part 4 will finally test the Chilean food-labeling scheme under the rules of the TBT Agreement through the lens of regulatory autonomy. Section 4.1 will start explaining why food-labeling schemes fall within the scope of the TBT Agreement and not the Agreement on the Ap-

\textsuperscript{18} There are precedents of WTO disputes involving product-labeling requirements, like \textit{US – Tuna II (Mexico)} (DS381) and \textit{US – COOL} (DS384).
plication of Sanitary and Phytosanitary Measures (SPS Agreement). Following, section 4.2 will focus on the main aspect of this thesis, namely the assessment of the proportionality and necessity test embedded in Article 2.2 of the TBT Agreement and its application to food-labeling schemes. Finally, section 4.3 will test the Chilean food-labeling scheme under the obligation of Article 2.4 of the TBT Agreement to base domestic regulations on international standards.

The aim of this thesis is to further the discussion on the relationship between regulatory autonomy and free trade in the international trading system by bringing into focus underexplored problems between trade and public health. It also seeks to provide a better understanding of WTO rules and the complex exercise of balancing different interests in WTO disputes. On broader terms, it ultimately seeks to contribute to the examination of the international trading system’s legitimacy by bringing up new sensitive issues that defy trade rules.

The scope of this thesis is limited in several ways. Firstly, it only addresses one type of non-tariff barriers to trade; i.e. product regulations dealing with NCDs, and within this category, it only looks into food-labeling schemes dealing with unhealthy diet. Secondly, it only examines into detail the food-labeling scheme implemented by Chile. Although it is true that the characteristics of food-labeling schemes may vary significantly between different countries, we think that an examination of Chile’s example is useful due to its novelty and the influence it has had on the evaluation of other countries’ policy design. Finally, although the Chilean food-labeling scheme is framed within a comprehensive policy strategy undertaken to address obesity and NCDs that includes other potentially trade-restrictive measures – such as restrictions on trademarks – these concerns have been left aside due to space limitations.

1.2 Methodology

Looking into the sources of WTO law, Palmeter and Mavroidis concluded:

The WTO is the product of an international agreement, and that agreement and the agreements annexed to it constitute the basic source of WTO law. The reports of panels and the Appellate Body, however, add a growingly important gloss to those texts.
Most WTO disputes will be resolved primarily, if not solely, with reference to the texts and to prior reports [...].

Therefore, in answering the research question, the main methodological approach used in this thesis involves the examination of the rules contained in the WTO Agreements and how they have been interpreted and applied by the WTO adjudicating bodies. It implies a detailed examination of the judicial reasoning and the transposition of this reasoning into a prospective WTO dispute where food-labeling schemes were challenged.

However, the WTO system is also ‘an important part of the larger system of public international law’; hence the traditional sources of public international law are also applicable. In this sense, we have had recourse to secondary sources such as the teachings of publicists and international legal principles to complement and fill the gaps where the authoritative interpretation of the primary sources is unclear or inexistent.

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20 Ibid.
21 Article 38(1)(d) of the Statute of the International Court of Justice (SICJ).
22 Article 38(1)(c) of the SICJ.
Emerging health policy regulations: food-labeling schemes addressing obesity and non-communicable diseases

The present chapter will first provide an overview of the health context that have prompted the adoption of – among other measures – food-labeling schemes, and the role that trade has played in this context. Secondly, a closer look into the characteristics of food-labeling schemes and the international standards regulating them will be provided. Lastly a description of Chile’s food-labeling scheme, the context in which it was adopted, and the trade concerns it has raised will be explained. This will provide the necessary background for an examination of food-labeling schemes addressing obesity and NCDs under WTO rules.

2.1 Context: the global obesity and NCDs pandemic

Food-labeling is not novel in the realm of food regulation. However, they were not recognized as an effective policy tool to address NCDs before the WHOS’s Global Strategy on Diet, Physical Activity and Health adopted in May 2004. Further documents issued by the Food and Agriculture Organization (FAO) and the WHO consolidated their importance within the context of unhealthy diet, and their implementation is currently being evaluated by several countries seeking to address obesity and NCDs in their territories.

To properly understand food-labeling in the context of unhealthy diet, it is necessary to contextualize the underlying concerns for the increasing consumption of unhealthy foods and its potential implications for human health. In order to explain the current global obesity and NCDs pandemics, nutritionists have coined the term ‘global nutrition transition’. In general, nutrition

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23 WHO, Global Strategy on Diet, Physical Activity and Health, endorsed by the 57th World Health Assembly in Resolution WHA55.23, p. 6.
25 For general literature on the global obesity and NCDs pandemics see Roth et al. (2004); Swinburn (2011); Moodie et al. (2013); Islam et al. (2014); and Allen (2017).
26 The nutrition transition model was first proposed by Barry Popkin in 1993 (Popkin (1993)).
transitions refer to changes in diet and activity patterns of a society. There are normally five nutrition patterns broadly identified: 1) food collection 2) famine 3) receding famine 4) nutrition related non-communicable diseases, and 5) behavioral change. However, the term ‘nutrition transition’ is mainly used by nutritionists to refer to the transition from pattern 3 to 4, and is the focus of much attention as many of the world’s low and moderate-income countries are rapidly undergoing this transition.

Pattern 4 – characterized by a predominance of nutrition-related NCDs – consists of an increased consumption of fat, sugar, processed foods and caloric beverages, normally accompanied by an increasingly sedentary life. As a result, obesity becomes a major problem and brings about a prevalence of NCDs. As clearly summarized by B. Popkin, L.S. Adair and S.W. Ng:

[I]n the 1970s, diets began to shift towards increased reliance upon processed foods, increased away-from-home food intake, and increased use of edible oils and sugar-sweetened beverages. Reductions in physical activity and increases in sedentary behavior began to be seen as well. The negative effects of these changes began to be recognized in the early 1990s, primarily in low- and middle-income populations, but they did not become clearly acknowledged until diabetes, hypertension, and obesity began to dominate the globe. Now, rapid increases in the rates of obesity and overweight are widely documented, from urban and rural areas in the poorest countries of Sub-Saharan Africa and South Asia to populations in countries with higher income levels. Concurrent rapid shifts in diet and activity are well documented as well.

The most recent data reaffirms the negative consequences the nutrition transition has brought about worldwide. According to WHO’s estimates, more than 1.9 billion adults were overweight in 2014, of which over 600 million were obese—meaning that worldwide obesity has more than doubled since 1980. Of special concern is the situation of childhood obesity, since it

28 Ibid.
30 See www.who.int/mediacentre/factsheets/fs311/en/.
doesn’t only deteriorate current health conditions of children – both physically and mentally – but also significantly increases the chances of developing NCDs in their adulthood.\textsuperscript{31} Figures estimated by the WHO together with UNICEF and the World Bank Group indicate that there were 42 million overweight children under 5 years old in the world in 2015, and that increasing figures has taken place most rapidly in low- and middle-income countries.\textsuperscript{32} Although obesity is the result of an imbalance between energy intake and energy expenditure – which means that physical activity is an important factor in overcoming obesity – state practice shows that policies have primarily targeted dietary or energy intake. This is so because increasing energy expenditure through physical activity in low- and middle-income countries is considered to be more difficult than addressing dietary intake.\textsuperscript{33}

Trade liberalization - under the regulatory framework of the WTO and regional trade agreements - has also contributed to the rapid nutrition transition experienced by low- and middle-income countries. Trade has been recognized to have a contradictory impact on global nutrition – and thereby on obesity and NCDs. On the one hand, it has had a positive influence on food security by contributing to the stability of food supply and prices, diversity of supply, lower food prices and increased income.\textsuperscript{34} However, on the other hand, it has had a negative impact by facilitating ‘a trend toward increased consumption of vegetable oils, meats, and highly processed foods, all of which are associated with a nutrition transition’,\textsuperscript{35} increasing the incidence of obesity and related NCDs.\textsuperscript{36} In addition, trade can also have a negative impact on nutrition by restricting WTO Member’s regulatory freedom, turning comprehensive and effective efforts aimed at protecting public health unlawful.\textsuperscript{37}

\textsuperscript{33} Popkin, Adair, and Wen Ng (2012), p. 6.
\textsuperscript{35} McGrady (2011), p. 5.
The potential ‘regulatory chill’ in public health regulation stemming from the WTO and international investment regimes – caused mainly by threats of investment and WTO challenges – may be one of the reasons explaining why countries have been slow in taking action. In completing the analysis quoted above, Popkin, Adair and Wen Ng expressed their concerns about the lack of effective action taken to address the negative impacts of the nutrition transition in the following terms:

An array of large-scale programmatic and policy measures are being explored in a few countries; however, few countries are engaged in serious efforts to prevent the serious dietary challenges being faced.

However, a shift can be observed as several countries have in recent years engaged in ‘serious efforts’ to address the challenges and manage the risks associated with the nutrition transition. By means of different public health policies, affected countries are trying to make the transition from pattern 4 to 5, i.e. a transition from a prevalence of high-caloric and poorly nutrient food consumption and little physical activity – and consequentially high rates of obesity and NCDs – to a positive behavioral change in people’s dietary preferences and physical activity, characterized by diminishing rates of obesity and NCDs.

In this context, international actors like the WHO and the FAO, have played important roles in raising the awareness about the increasing rates of NCDs, calling for prompt and comprehensive action. They have elaborated action plans and guiding principles for policy makers, and have been important in promoting the harmonization of food standards.

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38 On regulatory chill see Tienharaa (2011).
40 Many high-income countries have already made this transition. The problem is therefore most alarming in low- and middle-income countries.
For instance, The WHO adopted in 2000 the *Global Strategy for the Prevention and Control of Noncommunicable Diseases*,\(^{41}\) calling for global action to prevent and control NCDs, and in 2013 it adopted the *Global Action Plan for the Prevention and Control of Non-communicable Diseases 2013-2020*, offering a ‘road map and menu of policy options which, [will contribute to] a 25% relative reduction in premature mortality from NCDs by 2025.’\(^{42}\)

In the context of diet, the WHO adopted in 2004 the Global Strategy Diet,\(^ {43}\) recognizing that ‘the role of government is crucial in achieving lasting change in public health’, and calling for the ‘promotion of national policies, strategies and action plans to improve diet and encourage physical activity’.\(^ {44}\) These national policies contemplate a range of different regulations to improve diet, including measures on education, taxation, food labeling and restrictions on the sale and marketing of sugar-sweetened beverages and unhealthy food products.\(^ {45}\) The objective is to create an ‘enabling environment for sustainable actions at individual, community, national and global levels that, when taken together, will lead to reduced disease and death rates related to unhealthy diet and physical activity.’\(^ {46}\)

Having highlighted the need for policy action to address the obesity and NCDs pandemics in the field of diet, a brief explanation will be provided on the policy measure that conforms the subject matter of this study, namely food-labeling regulations.

### 2.2 Labeling schemes and the importance of front-of-pack labels

Food labeling is defined in *The Codex General Standard for the Labeling of Prepackaged Foods*\(^ {47}\) as ‘any written, printed or graphic matter that is present on the label, accompanies the

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\(^{43}\) See footnote 23 above.


\(^{46}\) *Ibid.* p. 3. See also footnote 24.

\(^{47}\) *Codex General Standard for the Labeling of Prepackaged Foods*, CODEX STAN 1-1985 (Rev. 1-1991), prepared by the Codex Alimentarius Commission (Codex), which is an international body, established by the FAO and the WHO to elaborate food standards.
food, or is displayed near the food, including that for the purpose of promoting its sale or disposal.

It provides consumers with general information about the food, such as the name, list of ingredients, country of origin, date marketing, storage instructions, etc. Of these, the most relevant component to public health is the information about the nutritional qualities of the food, referred to as ‘nutrition labeling’.

Nutrition labeling is defined in The *Codex Guidelines on Nutrition Labeling (CGNT)* as a ‘description intended to inform the consumer of nutritional properties of a food’. The utility of nutrition labeling is that it provides consumers with relevant information about the nutritional properties of the food, assisting them in making better-informed and healthier choices.

According to the *CGNT*, nutrition labeling comprises two components: 1) nutrient declaration, and 2) supplementary nutrition information. Nutrient declaration basically consists in a list of the nutritional content of a food product (normally in the form of back-of-pack tables), whereas supplementary nutrition information - commonly referred to as ‘front-of-pack’ labels - provides additional qualitative information ‘intended to increase consumer’s understanding of the nutritional value of the food, assisting in the interpretation of the nutrient declaration’. Thus, front-of-pack labels help consumers to make healthier food choices at the point of purchase. Front-of-pack labels can also have an impact on producers, encouraging them to change their production processes to make healthier foods. They are for these reasons a valuable measure to deal with obesity and NCDs. An example of front-of-pack labeling is the UK voluntary traffic light nutrition-labeling scheme, where colors are given different meanings: red means high, am-

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48 Ibid., standard 2.
50 Ibid., guideline 2.1.
52 *CGNT*, guideline 2.2.
53 Ibid., guideline 2.3
54 Ibid., guideline 5.1.
55 See Vyth (2010).
ber means medium, and green means low in levels of fat, salt, sugar and calories. In UK’s example the nutrient declaration – i.e. the list of the nutritional content of a food product – is provided in a way that facilitates consumers’ interpretation and understanding of the nutritional value of the product.

Moreover, in parallel with nutrient declarations and supplementary nutrition information in nutrition labeling, the Codex also contemplates ‘nutrition and health claims’, which are claims directed at highlighting the ‘healthiness’ of a food, normally also in the form of ‘front-of-pack’ labels.

Standards and guidelines on the nutrient declaration component of nutrition labeling and on ‘nutrition and health claims’ have been largely developed by the Codex; the former by the CGNT and the latter by the Codex Guidelines for Use of Nutrition and Health Claims (CGUNHC). Conversely, regarding the other component of nutrition labeling – i.e. ‘supplementary nutrition information’ or ‘front-of-pack’ labels – although the CGNT contains a heading titled ‘Supplementary Nutrition Information’, the WHO has recognized that ‘this section has not yet been reviewed and updated in the light of various evidence and recommendations that are now becoming available.’ The only standard is found in guideline 5.2 and consists in a recommendation that front-of-pack labels ‘should be optional and should only be given in addition to, and not in place of, the nutrient declaration.’ The WHO is therefore working on developing guidelines and standards for front-of-pack labeling and held for this purpose a technical meeting in December 2015. However, further progress has not been published at the time of writing.


The term ‘front-of-pack’ labels will be used only as a synonym of ‘supplementary nutrition information’, and not as a synonym for health claims. The main difference between ‘front-of-pack’ labels and health claims is that the former provides neutral or negative information on the nutritional quality of a food, while health claims is aimed at highlighting positive nutritional qualities of a food. Examples of health claims found in food packages are: “source of calcium” or “reduced…”, see the CGUNHC and WHO, Nutrition labels and health claims: the global regulatory environment (2004) for more information on nutrition and health claims.

Committee on Technical Barriers to Trade, Statement by the WHO, G/TBT/GEN/185, 19 January 2016.

See WHO’s website for updated information about the outcomes of the technical meeting: www.who.int/nutrition/events/2015_meeting_nutrition_labeling_diet_9to11dec/en/
After this brief account of the characteristics of front-of-pack labels, their importance and the lack of international standards regulating them, we will next take a closer look at the food-labeling scheme implemented by Chile – which we will use to test the WTO rules on product standards – and the compelling reasons it had for its implementation.

2.3 The Chilean food-labeling scheme

The Chilean food-labeling scheme is only one of the measures contemplated in the *Law on the Nutritional Composition on Food and its Advertising* (Law 20.606) – a comprehensive regulation that seeks to reduce the obesity rates and prevalence of NCDs in the country. It was enacted in 2012, but only became operational in 2016. The regulation’s three main regulatory areas include the implementation of a mandatory food-labeling scheme, the introduction of advertising restrictions and the prohibition of sale of unhealthy foods in schools.

The food-labeling scheme goes beyond similar schemes implemented by other countries, as it provides for the mandatory use of ‘front-of-pack’ warning messages - in the shape of a black, octagonal stop signs with the text ‘high in…’ (see Annex 1) – for foods that are either high in sodium, sugar, fat or calories according to the nutrient thresholds established in the regulation implementing the law. The usual approach so far had been to require that only nutrient declarations – i.e. a list of the nutritional content of a food product – be mandatory, leaving the use of other labeling formats to the discretion of the producers themselves.

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60 Law 20.606 (Sobre Composición Nutricional de los Alimentos y su Publicidad), 6 June 2012. Available in Spanish at: www.leychile.cl/Navegar?idNorma=1041570


62 Law 20.60 Articles 5–7.

63 In addition to the United Kingdom’s system mentioned above, there are also the Guiding Stars system in North America (https://guidingstars.com/what-is-guiding-stars/) and the system implemented in the EU Food Information Regulation, among others.
The Chilean mandatory food-labeling scheme – together with the advertising restrictions and the sales ban of unhealthy foods in schools – are also complemented by other efforts to address obesity and NCDs that include education programs and the promotion of physical activity.\(^{64}\) However, with the introduction of these new measures, Chile may well be ‘the first country to reverse obesity and all the diet and obesity-related NCDs’\(^{65}\). Despite this optimistic view, we will see below that aspects of these measures have been highly criticized by other countries and by the food industry - as well as by scholars - and a challenge before the WTO DSB is therefore a possibility. If so, it would be the first claim of this kind brought before the WTO, engaging different treaties, like the TBT and the TRIPS Agreements.

A brief overview of the Chilean regulations’ background and the legal issues it has raised will be provided before engaging in an examination of the food-labeling scheme under WTO law.

2.3.1 Law 20.606 addressing obesity and NCDs

Chile published law No. 20.606 in its Official Gazette (Diaro Oficial) on 6 July 2012.\(^{66}\) Its enactment was justified by public health concerns related to the increasing rates of obesity and related NCDs in the country. According to the parliamentary motion presented in 2007,\(^{67}\) obesity was the most prevalent chronic disease across all sectors of the Chilean population. This statement has proven right, as according to FAO estimates, Chile is the country with highest rates of overweight and obesity in Latin America, with approximately 63% of the population being either overweight or obese,\(^{68}\) and according to the Chilean government there is currently one death eve-

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\(^{64}\) These efforts are framed in the ‘Elige Vivir Sano’ (Choose to Live Healthy) system, introduced with Law 20.670. For more information see [http://eligevivirsano.gob.cl/elige-vivir-sano-en-comunidad/](http://eligevivirsano.gob.cl/elige-vivir-sano-en-comunidad/).

\(^{65}\) See the presentation made by Dr. Barry Popkin under the Seminar arranged by the Chilean Ministry of Health to evaluate the new regulations, held on 4 and 5 January 2017 in Santiago, Chile. Available at: [http://web.minsal.cl/wp-content/uploads/2017/01/10-Evaluación-de-pol%C3%ADticas.pdf](http://web.minsal.cl/wp-content/uploads/2017/01/10-Evaluación-de-pol%C3%ADticas.pdf). Other presentations evaluating the regulations are available at the Ministry’s website: [http://web.minsal.cl/seminario-de-evaluacion-de-la-ley-de-alimentos/](http://web.minsal.cl/seminario-de-evaluacion-de-la-ley-de-alimentos/).

\(^{66}\) See [www.leychile.cl/Navegar?idNorma=1041570](http://www.leychile.cl/Navegar?idNorma=1041570)


ry hour due to obesity. Moreover, Chile also lists the top 10 countries in childhood obesity worldwide, and also ranks number one in Latin America with one out of three children under the age of six being overweight.

Article 5, the most controversial Article of Law 20.606, reads:

‘The Ministry of Health shall determine the foods that, per unit of weight or volume or portion of consumption, contain in their nutritional composition high amounts of calories, fats, sugars, salt, or other ingredients as determined by the regulation. This type of food shall be labeled "high in calories", "high in salt" or with another equivalent name, as the case may be.’

However, the Ministry of Health did not determine the technical specifications of the labels to be used and the thresholds of ‘critical nutrients’ whose surpassing required labeling (which are foreseen to be gradually tightened over time) before June 2015.

After Chile notified the TBT Committee about the draft proposals implementing Law No. 20.606 on 16 January 2013, Specific Trade Concerns were raised during all the following meetings of the TBT Committee. Some were taken into account by Chile, as for instance the recommendation to allow for the use of stickers to facilitate the implementation of the regulation to foreign companies. Moreover, Chile also held public consultations and responded to the comments made by WTO members and other stakeholders via a document made available in the Mi-

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69 See the statements made by Chile in the meetings of the TBT Committee, 15–16 June 2016, G/TBT/M/69, p. 25.
71 See El mostrador (2017).
72 See footnote 69 above.
73 Translated from Spanish by the author. Further, in Article 6, the selling or marketing of foods ‘high in…’ is prohibited in schools, and Article 7 introduces a total ban on advertising targeted at children under 14, without distinction to where it is made.
74 However, Decree 12/15 did not enter into force before 26 June 2016, according to its first transitory provision.
75 G/TBT/N/CHL/219, 16 January 2013.
istry of Health’s website in August 2015. However, this document does not address all the Specific Trade Concerns raised by WTO members during the meetings of the TBT Committee, specifically regarding the measures’ compatibility with the TBT and TRIPS Agreements, limiting itself to state that the measures are not an obstacle to international trade under Article 2.2 of the TBT Agreement because they pursue a legitimate objective, and to list the available scientific evidence that was taken into consideration when designing the measures. Regarding advertising restrictions, it does not address why it would not constitute a violation of the TRIPS Agreement. In any case, WTO members in the TBT Committee meetings expressed these concerns in general terms, so a more specific response was perhaps deemed unnecessary by the Chilean government.

Finally, a brief overview of the Specific Trade Concerns raised by WTO members – and also their food industries – during the meetings of the TBT Committee will be provided.

2.3.2 Legal issues raised by Law 20.606

As already stated, after the first notification was made to the TBT Committee on 16 January 2013, several meetings took place where Chile’s regulation were discussed by WTO Members. Although the majority of WTO Members sympathized with the legitimate objectives pursued by the regulations, they expressed serious legal concerns. The main legal concerns can be summarized as follows:

1. The mandatory food-labeling scheme violates Article 2.2 of the TBT Agreement because mandatory ‘High in…’ warning signs are more trade restrictive than necessary to meet the public health objectives of reducing obesity and NCDs. Allegedly, there are more trade-friendly alternatives like: voluntary health claims; expressing the nutritional content of foods as a percentage of the daily intake refer-

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77 G/TBT/N/CHL/219, 16 January 2013.
78 All the minutes of TBT meetings from G/TBT/M/59 to G/TBT/M/70 address Chile’s measures.
79 This concern was raised by almost all Members raising Specific Trade Concerns in the meetings of the TBT Committee.
80 See for instance G/TBT/M/60, p. 33 and G/TBT/M/62, comments by the US.
ence values;\textsuperscript{81} educational campaigns;\textsuperscript{82} and the promotion of physical activity.\textsuperscript{83} Allegedly, there is also no scientific evidence supporting neither the use of front-of-pack warning signals\textsuperscript{84} nor the nutrient threshold\textsuperscript{85} established by the regulation.

2. The food-labeling scheme violates Article 2.4 of the TBT Agreement because neither the “High in…” warning signs nor the nutrient thresholds were based on relevant international standards.\textsuperscript{86} On the contrary, although allegedly appropriate relevant international standards exist – such as standards on voluntary health claims and WHO’s dietary guidelines with suggested daily intake of nutrition\textsuperscript{87} – they were not preferred.

3. Law 20.606 and its implementing regulations are in potential violation of intellectual property rights protected by the TRIPS agreement, as, in principle, they prohibit the use of trademarked characters with marketing effects at children.\textsuperscript{88} Moreover, according to some WTO members, there is no scientific evidence justifying the prohibition on advertising to minors aged 14 or less introduced by Law 20.606.\textsuperscript{89}

Although other specific issues were raised concerning the practical aspects of the measures – especially in the implementation of the food-labeling scheme – the legal concerns stated here would most probably conform the main legal grounds is a prospective WTO dispute. However, as has already made clear above, this thesis will only address the legal concerns underlying the mandatory food-labeling scheme implemented by Chile.

\textsuperscript{81} Ibid.
\textsuperscript{82} See G/TBT/M/61, p. 27, comment by Mexico.
\textsuperscript{83} Ibid.
\textsuperscript{84} See G/TBT/M/64, p. 31, comment by Mexico.
\textsuperscript{85} See for instance G/TBT/M/60, p. 27, comment by the EU.
\textsuperscript{86} See G/TBT/M/60, p. 32 and 33, comments by Brazil and the EU.
\textsuperscript{87} See G/TBT/M/60, p. 33, comment by the United Stated and G/TBT/M/61, p. 27 comment by the EU.
\textsuperscript{88} See G/TBT/M/64, p.31, comment by Canada, G/TBT/M/64, p. 32, comment by the EU, and G/TBT/M/66, p.25, comment by Costa Rica.
\textsuperscript{89} See G/TBT/M/64, p.31, comment by Mexico.
3 Free trade and regulatory autonomy under the TBT Agreement

This chapter will provide a conceptual framework of the TBT Agreement and the rules governing product regulations for a better understanding on how regulatory autonomy could be affected in the context of food-labeling schemes addressing obesity and NCDs. It will first address the relationship between free trade and regulatory autonomy under the TBT Agreement, and secondly, elucidate how a balance between the two is upheld by the WTO adjudicating bodies.

3.1 Regulatory autonomy under the TBT Agreement

The TBT Agreement lays down rules governing the adoption and application of regulatory measures taken to protect legitimate non-trade values. It deals with technical barriers to trade in general, as opposed to the SPS Agreement, which deals specifically with sanitary and phytosanitary measures. However, both the TBT and SPS Agreements form part of the rules that regulate the broader category of ‘non-tariff barriers’, which have been defined as ‘all government imposed and sponsored actions or omissions that act as prohibitions or restrictions on trade, other than ordinary customs duties and other duties and charges on imports and exports’. 90 Because tariff barriers were progressively lowered after the adoption of the General Agreement on Tariffs and Trade (GATT) in 1947; in the late 1960s the focus of trade concerns shifted towards the potential trade restrictiveness of non-tariff barriers. Eventually, these concerns led to the adoption of the Tokyo Round Standards Code in 1979 and later to the TBT Agreement in 1995. 91

The TBT Agreement applies to any measure laying down characteristics on products or their related processes and production methods.\(^92\) When such a measures is mandatory it constitutes a ‘technical regulation’\(^93\) and, conversely, when compliance with the measure is not mandatory it constitutes a ‘standard’.\(^94\) As opposed to the general rules governing non-tariff barriers, the rules contained in the TBT Agreement seek not only to restrict their use or prohibit their discriminatory application; in fact, even if a measure is not \textit{de jure} or \textit{de facto} discriminatory, its reasonableness or necessity can still be put into question. Article 2.2 requires that regulatory measures not be ‘more trade-restrictive than necessary’ to fulfill their legitimate objective, and – in assessing the measure’s necessity or reasonableness\(^95\) – the same Article establishes an implied obligation on members to carry out some sort of risk assessment that takes into account available scientific evidence. The TBT Agreement goes even further; it promotes the harmonization of regulatory measures around international standards, permitting deviation only when these standards are inexistent, ineffective or inappropriate.\(^96\) For these reasons, the TBT Agreement’s obligations are said to ‘move beyond negative integration and begin to stipulate what types of regulations that WTO Members should enact in order to achieve policy objectives.’\(^97\) In this sense, the TBT Agreement represents a ‘paradigm shift’ in relation to the GATT, as it moves towards a more positive system of integration, and is for this reason regarded to pose serious threats to domestic regulatory autonomy.\(^98\)

However – somehow in compensation for this intrusive nature of the TBT Agreement – its preamble establishes that the agreement’s object and purpose is not only to protect free trade, but also to respect the regulatory autonomy of their members; it states that ‘no country should be prevented from taking measures necessary’ to pursue

\(^{92}\) TBT Agreement, Annex 1. The TBT Agreement also applies to conformity assessment procedures, defined also in Annex 1.
\(^{93}\) TBT Agreement, Annex 1(1).
\(^{94}\) TBT Agreement, Annex 1(2).
\(^{95}\) The terms necessity and reasonableness are here used synonymously.
\(^{96}\) TBT Agreement, Article 2.4.
\(^{98}\) \textit{Ibid.}
legitimate policy objectives ‘at the levels it considers appropriate’. The AB has read this to mean that ‘the object and purpose of the TBT Agreement is to strike a balance between, on the one hand, the objective of trade liberalization and, on the other hand, Member’s right to regulate.’ This is relevant in terms of treaty interpretation as, according to Article 31 of the Vienna Convention on the Law of Treaties (VCLT), the object and purpose of the Agreement will inform the interpretation of its terms. Moreover, in line with the acknowledgment of Member’s right to regulate, the non-trade values that Members can legitimately pursue are depicted in a broadly, open-ended manner in Article 2.2 of the TBT Agreement, including among others the prevention of deceptive practices and the protection of human health or the environment. Additionally, it is acknowledged that it is up to States to decide the level of protection they will afford these non-trade values. As will be seen in the next chapter, these embedded flexibilities of the TBT Agreement help balancing regulatory autonomy with free trade in the context of food-labeling schemes.

3.2 Balance between free trade and regulatory autonomy

Upholding a balance between, on the one hand, the objective of trade liberalization and, on the other hand, Member’s right to regulate, will be the WTO adjudicating bodies’ main task. As stated by Herwig and Serdarevic: ‘The extent of regulatory autonomy and sensitivity [shown] to non-trade values are dependent on judicial approaches to the standard of review and to balancing through the proportionality analysis.’ Therefore, a combination of the standard of review and the proportionality analysis conducted by panels and the AB will be relevant elements to bring about a balanced outcome in a dispute un-

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99 Preamble of the TBT Agreement, sixth paragraph.
100 AB report, US – Clove Cigarettes, para. 174.
der the TBT Agreement. A brief explanation of the two concepts – *i.e.* standard of review and proportionality – is therefore necessary.

The standard of review under WTO law can be understood as ‘the level of scrutiny applied by a court in its review’ of national decisions or policies. The general standard of review for WTO covered agreements is found in Article 11 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), which states:

\[A\] panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements.

In clarifying this provision, the AB stated that ‘the applicable standard is neither *de novo* review as such, nor “total deference”, but rather “the objective assessment of the facts”’. However, this ‘objective assessment’ standard has been highly criticized as not giving much, if any, guidance on the applicable standard of review; the range between a *de novo* standard – *i.e.* a standard where the adjudicating bodies’ judgment would completely replace the State’s judgment in the examination of a measures legality – and a total deference standard – *i.e.* a standard where the adjudicating bodies do not scrutinize at all a State’s judgment of a measure’s legality – leaves the question open as to where exactly the ‘objective assessment’ standard is situated within this spectrum.

In sum, there is no clear applicable standard of review under WTO law, and the literature has therefore mainly focused on identifying different criteria that WTO panels and the AB consider when they scrutinize national regulations, and have proposed different approaches to establish an appropriate standard of review. However, a common feature of the different approaches is that there is a tendency towards considering that the

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104 AB Report, *EC – Hormones*, para. 117.
TBT Agreement counsels a less-intrusive standard of review and a more deferential approach to regulatory autonomy.\footnote{Michael Ioannidis argues that the relevant criterion that the adjudicating bodies should take into account when deciding questions of deference is the extent to which domestic authorities respect the due process standard in their measures’ design, and whether foreign arguments were heard during the process that lead to the adoption of the measure (Ioannidis (2014), pp. 106–11).}

In relation to the judicial approach on proportionality; this has mainly been addressed through the elaboration and application of ‘the necessity test’ – contained both in the GATT 1947 and the TBT Agreement (as well as in other WTO Covered Agreements) – which calls for a ‘weighing and balancing’ exercise of different factors in determining the measures’ necessity or reasonableness.

The necessity test was firstly developed under GATT Article XX, which provides for general exceptions covering – among others – measures ‘necessary to protect human, animal or plant life or health’ in subparagraph (b). Under this Article, if a measure is found to be in violation of any provision of the GATT, it could still be saved through any of the general exceptions of Article XX. In Korea – Various Measures on Beef\footnote{WTO, Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef (DS161).} the AB stated that the necessity requirement ‘involves in every case a process of weighing and balancing a series of factors which prominently include [1] the contribution made by the compliance measure to the enforcement of the law or regulation at issue, [2] the importance of the common interests or values protected by that law or regulation, and [3] the risk of bias’.

Andrew Guzman takes a different approach, arguing that the fact that domestic governments and panels have distinct strengths and weaknesses should lie at the heart of the standard of review. He explains it in the following words:

‘while WTO panels have the merit of neutrality when reviewing a case, which normally counsels in favor of allowing them to exercise more stringent review, their weakness is similar to that of most reviewing courts: they are less knowledgeable about the facts of the case.

Therefore, he argues that when ‘there is little risk of bias and a decision requires a great deal of local knowledge [as could be for instance the case of establishing recommended daily intakes of certain nutrients] there should be deference to domestic policymakers’ (Guzman (2009) at p. 42 and 75).

Ross Becroft argues that taking a uniform standard of review is difficult because WTO Agreements deal with different and highly diverse subject matters and proposes his own approach in Becroft (2012).
the accompanying impact of the law or regulation on imports or exports.'  

Additionally in *US – Gambling*, the AB also envisaged an inquiry into reasonably available alternative measures in the light of the importance of the interests at issue.

In the context of the TBT Agreement, the AB has transposed the necessity test as applied under GATT Article XX to Article 2.2 of the TBT Agreement. In *US – Tuna II (Mexico)*, it found that ‘[i]n the context of Article 2.2, the assessment of "necessity" involves a relational analysis [*i.e.* a weighing and balancing exercise] of [1] the trade-restrictiveness of the technical regulation, [2] the degree of contribution that it makes to the achievement of a legitimate objective, and [3] the risks non-fulfilment would create.’  

Additionally, ‘[i]n most cases, a comparison of the challenged measure and possible alternative measures should be undertaken’. As to the level of scrutiny applied by the adjudicating bodies in each of these steps comprising the necessity test, Herwig and Serdarevic note that ‘[i]n practice, the standard of review employed in the WTO has varied for the different parts of the necessity and proportionality analysis, depending on the issues at stake.’

In the realm of public health, McGrady has expressed two concerns about the ‘suitability of the necessity test in the context of measures to address noncommunicable diseases’: the first is that ‘[t]he [distal] position of a risk factor in the chain of causation is likely to affect whether a measure addressing that risk is considered necessary to protect human health’; and the second concern is ‘how a test that seeks out the least trade-restrictive means of achieving a given health goal [would apply] in the context of comprehensive regulatory strategies that rely on the use of a number of different measures.’

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111 WTO, *US – Tuna II (Mexico)* (DS381).
With regard to these concerns, the AB in *Brazil — Retreaded Tyres*\(^{116}\) made two important findings. As to the distal causal link between the risk factors (*e.g.* unhealthy diet) and the protection of human health, the AB stated that it is enough that the measure brings about a ‘material contribution’ to the achievement of the objective,\(^{117}\) and found that a ban on importation of retreaded tyres was ‘necessary’ despite its evident causative distance from the protection of human health.\(^{118}\) Additionally, under *US — Tuna II (Mexico)*, the AB body seems to have gone even further, as it ‘made the important finding that […] Article 2.2 does not seem to require a measure to satisfy any specific minimum degree of contribution, nor does it need to completely “fulfil” the objectives pursued.’\(^{119}\)

As to the second concern expressed by McGrady, – *i.e.* how the necessity test would apply to measures that from part of a comprehensive regulatory strategy – the AB clarified that ‘substituting one element of [the] comprehensive policy for another would weaken the policy by reducing the synergies between its components, as well as its total effect.’\(^{120}\) This suggests that an alternative less trade-restrictive measure will not be regarded ‘reasonably available’ when it is more properly considered as part of a set of complementary measures in the framework a comprehensive strategy to achieve a legitimate objective.\(^{121}\)

As to the differences between the necessity test under the GATT 1947 and the TBT Agreement, it is important to stress that under the TBT Agreement the necessity requirement is envisaged as a positive obligation rather than as part of an exception like happens in Article XX of the GATT. Article 2.2 of the TBT Agreement prohibits Members to adopt technical regulations ‘more trade-restrictive than necessary’ – or stated in

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\(^{116}\) *WTO, Brazil — Measures Affecting Imports of Retreaded Tyres (DS332).* 
\(^{117}\) *AB Report, Brazil — Retreaded Tyres,* para. 172. 
\(^{120}\) *AB Report, Brazil — Retreaded Tyres,* para. 172. 
\(^{121}\) See Thow et al. (2017) p. 9.
positive terms – it directly obliges Members to only adopt measures that are ‘necessary’ to fulfill the pursued legitimate objectives. This means that the necessity requirement will always be applied to regulatory measures. This has implications on the burden of proof, as it will be the claimant that will bear the burden of proving that the defendant has breached its obligations, including the claim that the measures chosen are ‘more trade-restrictive than necessary’ under Article 2.2.\(^\text{122}\)

Moreover, it is important to notice that under Article XX of the GATT, if the measure passes the necessity test, it will still have to overcome the opening clause of Article XX – also called the *chapeau* – which seeks to avoid the discriminatory application of the measure or a disguised restriction on international trade. Members that have invoked Article XX(b) in disputes concerning the application of the GATT have primarily failed to justify their measures under *chapeau* of Article XX – *i.e.* in the examination of whether the measures constitutes illegitimate or disguised protectionism – and not on the necessity test, where the adjudicating bodies have afforded much more deference.\(^\text{123}\) However, there is no equivalent to the *chapeau* in the TBT Agreement, and it suffices that the measure passes the necessity test to be compatible with Article 2.2.\(^\text{124}\)

This conceptual background must be kept in mind when assessing to what extent regulatory autonomy can be upheld in the context of interpretive food-labeling measures that form part of comprehensive policy-strategies to combat obesity and NCDs. In the next chapter we will see in detail how the necessity test has been applied under TBT disputes, and transpose the judicial reasoning to the food-labeling scheme implemented by Chile.

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\(^{122}\) AB Report, *US – Tuna II (Mexico)*, para. 323.


\(^{124}\) *Ibid.*
4 Mandatory food-labeling schemes: compatibility with the TBT Agreement

This chapter will first explain why Chile’s mandatory food-labeling scheme falls within the scope of the TBT Agreement and not the SPS Agreement. Secondly, it will examine the measure under the necessity test embedded in Article 2.2 of the TBT Agreement and, finally, it will examine the measure under the obligation to base product regulations on international standards, found in Article 2.4 of the TBT Agreement. The interpretation of the rules of the TBT Agreement that the panels and the AB have adopted in the US – Tuna II (Mexico) and the US – COOL disputes will form the basis of our analysis, as these are the two only disputes where Article 2.2 and 2.4 of the TBT Agreement have been interpreted and applied to a certain extent. The legal analysis will be done through the lens of the level of deference that the WTO adjudicating bodies seem to be ready to afford national regulations addressing public health and, more specifically, obesity and NCDs.

4.1 Food-labeling schemes as technical regulations

Before examining Chile’s mandatory food-labeling scheme under the TBT Agreement, a preliminary issue is whether food-labeling requirements would fall within the scope of the TBT Agreement in the first place.

In one of the few comprehensive studies made on trade and non-communicable diseases, McGardy argues that food-labeling measures would most likely fall within the scope of the SPS Agreement and not the TBT Agreement. The starting point for his conclusion is that Annex A(1)(b) of the SPS Agreement defines Sanitary and Phytosanitary measures as ‘any measure applied […] to protect human or animal life or health

within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs’. The argument is that ingredients such as salt, sugar and fat constitute food additives – or can at least be compared with food additives\(^{126}\) – and therefore, when they are regulated with the objective of protecting public health, ‘the measure would most likely fall within the scope of the SPS Agreement.’\(^{127}\)

However, the SPS Agreement has historically been applied to measures dealing with food safety and the spread of pests or diseases. Moreover, it is uncertain that an interpretation of ‘additives’ in accordance with the customary rules of treaty interpretation – contained in Article 31 of the VCLT – would regard sugar, salt or fat as food additives. The ordinary meaning of the word, read in conjunction with the context and the object and purpose of the SPS Agreements (concerned mainly with phytosanitary situations), would most likely suggest that the term ‘additives’ within the SPS Agreement refers to substances related to the spread of pests or diseases; therefore, sugar, salt or fat would most likely not be regarded as food additives. Additionally, as already pointed out, concerns about food-labeling schemes were raised under the meetings of the TBT Committee and not the SPS Committee, and all legal concerns have been raised under the TBT Agreement. This shows that Members regard food-labeling schemes as falling within the scope of the TBT Agreement and not the SPS Agreement.

Based on the TBT Agreement’s definition of ‘technical regulation’, the AB in EC – Asbestos laid down a three-point test to determine whether a measure is a technical regulation:\(^{128}\) 1) The document must lay down one or more product characteristics (‘high in…’ warning signs on the packaging); 2) The document must apply to an identifiable product (foods that surpass the limits of critical nutrients established by the regulation);

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\(^{126}\) The logic behind is that ‘saturated fats, sugars or salt have many features analogous to classic toxicants, in that repeated exposure of the population to appreciable amounts of these foods would induce the population risk factors to rise (e.g. raised blood cholesterol, weight gain and increases in hypertension)’ (James (2010), p. 184).


\(^{128}\) AB Report, EC – Asbestos, paras. 67–70.
and 3) Compliance with the product characteristics must be mandatory (as in Chile’s case). For this reason, it appears that the food-labeling scheme imposed by Chile constitutes a clear example of a technical regulation as defined by Annex 1(1) of the TBT Agreement.

After having established that food-labeling schemes fall within the TBT Agreement, we will now apply the necessity test as envisaged in the TBT Agreement to Chile’s food-labeling scheme.

4.2 Compatibility with Article 2.2 of the TBT Agreement

Article 2.2 of the TBT Agreement reads:

Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-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. In assessing such risks, relevant elements of consideration are, inter alia: available scientific and technical information, related processing technology or intended end-uses of products.

As already mentioned above, several WTO Members have complained that Chile’s food-labeling requirements would violate Article 2.2 of the TBT Agreement. Particularly, it is said that mandatory ‘High in…’ warning signs create unnecessary obstacles to international trade because they are more trade restrictive than necessary to meet the public health objectives of reducing obesity, and there are other more trade-friendly alternatives (e.g. voluntary health claims, or educational campaigns accompanied by the promotion of physical activity). Allegedly, there is also no available scientific evidence supporting
neither the use of front-of-pack warning signals nor the nutrient thresholds established by the Chilean food-labeling scheme.

The AB in *US – Tuna II (Mexico)* addressed Article 2.2 of the TBT Agreement dividing it’s interpretation into two parts: 1) the meaning of the term ‘legitimate objective’ and ‘fulfilment’; and 2) the meaning of the phrases “not…more trade-restrictive than necessary’ and ‘taking into account of the risks non-fulfilment would create’.129 These interpretations will be discussed in turn.

4.2.1 ‘Legitimate objective’ and ‘fulfilment’: Does Chile’s food-labeling scheme fulfil a legitimate objective?

The elucidation of whether the measure – Chile’s mandatory food-labeling scheme – fulfils a legitimate objective is the first element a panel would have to engage with in an examination of an Article 2.2 claim; if the objective pursued by the measure is not ‘legitimate’ – or if it is, but the measure is not able to ‘fulfil’ it – then there is no need to discuss whether the trade-restrictiveness of the measure is necessary, and the measure would hence be inconsistent with Article 2.2 (the TBT Agreement recognizes Members’ right to adopt trade-restrictive measures that pursue legitimate objectives; hence, *a contrario sensu*, it does not recognize the right to adopt trade-restrictive measures that pursue illegitimate objectives).130 Therefore, this is a threshold issue that must be addressed before entering into the examination of the necessity test.

So, as to the examination of whether the measures pursues a ‘legitimate objective’, In *US – Tuna II (Mexico)* the AB stated that a ‘legitimate objective is an aim or target that is lawful, justifiable, or proper’.131 It further stressed that the list of ‘legitimate

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129 AB Report, *US – Tuna II (Mexico)*, para. 312.
130 Ibid., para. 315.
131 Ibid., para. 313.
objectives’ contained in Article 2.2 is non-exhaustive, an added that the ‘objectives recognized in the provisions of other covered agreements may provide guidance for, or may inform, the analysis of what might be considered to be a legitimate objective under Article 2.2 of the TBT Agreement.’

In *US – COOL*, the objective pursued by the US’ requirements on origin-labeling was found to be ‘to provide consumers with information on the countries in which the livestock from which the meat they purchase is produced were born, raised, and slaughtered’ – an objective not expressly listed in Article 2.2 of the TBT Agreement. The AB rejected Canada’s arguments that this was not a legitimate objective within the terms of Article 2.2 of the TBT Agreement, based on – among other things – that the purpose of providing consumers with information on origin was related to the objective of preventing deceptive practices – which is explicitly contained in the non-exhaustive list of legitimate objectives in Article 2.2 of the TBT Agreement.

This finding is relevant for two reasons. Firstly, it show a high degree of deference in finding that an objective is ‘legitimate’: as long as the objective pursued by the measure can broadly be linked to any of the objectives expressly listed in Article 2.2 of the TBT Agreement, it would most likely be considered to be ‘legitimate’.

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132 Ibid., para. 313. Regarding the burden of proof, the AB noted in *US – COOL* that ‘it is for the complainant raising an Article 2.2 claim to establish that the relevant objective falls outside the scope of the legitimate objectives covered by that provision’ (AB Report, *US – COOL*, para. 442).


134 Ibid... In addition, the AB confirmed the panel’s acknowledgment – and expression of deference – that ‘Members have certain policy space in determining their objectives’ (in paras. 434 ff).

135 Another example of deference shown to the legitimacy of the objective pursued by domestic regulations is the panel’s rejection in *US – TUNA II (Mexico)* of Mexico’s claim that the US Measures’ objective was illegitimate because they only sought to protect dolphins, neglecting other marine species or the environment. The panel stated: ‘Article 2.2 refers to [the protection of ] “animal life or health” in general terms, and does not require that such protection be tied to a broader conservation objective. We therefore read these terms as allowing Members to pursue policies that aim at also protecting individual animals or species whose sustainability as a group is not threatened’ (Panel Report, *US – Tuna II (Mexico)*, para. 7.437).
And secondly, this in turn opens up the possibility for the strategic framing of the policy objective. As Thow et al. correctly point out:

*[when defending a food-labeling measure] the ‘legitimate objective’ of protecting human health should be invoked, [however] it is essential that the objective of the measure is defined in relation to how the measure will address the specific problem, because the policy objective defines the evidence required to establish necessity.*

Therefore, Chile could frame the food-labeling requirement’s objective as narrow as possible— as for instance to ‘provide more understandable information to consumers about the nutritional content of foods’ or to ‘help consumers to make better informed choices’, or a combination of both. Furthermore, since the measure would be framed as being part of a comprehensive policy response to address an urgent public health problem – *i.e.* the prevalence of obesity and NCDs in the country – it would be easily linked to the protection of human health (expressly listed as a legitimate objective in Article 2.2 of the TBT Agreement) and therefore considered to be legitimate. Moreover, as a consequence, the evidence that Chile would have to put forward to justify the mandatory food-labeling requirement would focus on the ‘best available current advice on healthy consumption levels (either a country’s own daily recommended levels, or some internationally accepted advice), clarity and accuracy of messaging […], and understanding by consumers with limited literacy,* rather than evidence about how the measure protects human health or prevents obesity and NCDs. Additionally, by narrowing the policy objective pursued, it would be more difficult for the claimant to suggest that there are other less trade restric-

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137 Although in the notification of the measures to the TBT Committee (G/TBT/N/CHL/219, 16 January 2013) Chile described the measures’ objective quite broadly as the ‘[p]rotection of human, in particular children’s, health’, this objective relates to the regulation implementing Law 20.606 as a whole, and not to the specific food-labeling requirements.
139 This facilitates the concern expressed above regarding the effect that the distal causal link between unhealthy diet and public health could have on the necessity test.
tive alternatives that would equally fulfil this aim (which, as will be seen below, is a determining part of the necessity test).

However, ultimately, it is the panel that will determine ‘what a Member seeks to achieve by means of a technical regulation’, and in doing so, ‘it may take into account the texts of the statues, legislative history, and other evidence regarding the structure and operation of the measure.’\textsuperscript{140} Despite this, the panel in \textit{US – COOL} set a high threshold for the complainants when they tried to prove that the real objective of the US measures was trade protectionism, and the AB seemed to endorse this view by rejecting Canada’s and Mexico’s claims that the AB had erred in its identification of the objective pursued.\textsuperscript{141} Furthermore, the AB confirmed the high discretion that panels have under Article 11 of the DSU to make an ‘objective assessment’ of the evidence before it—including that related to the objective pursued by the measure.\textsuperscript{142} Therefore, if the the food-labeling scheme implemented by Chile were challenged, the claimants would have to put forward strongly convincing evidence to argue that the measure’s objective is different from that stated by Chile.

If the objective pursued by the food-labeling scheme is considered to be legitimate, the question will turn into whether the measure ‘fulfils’ that objective; if the measure does not ‘fulfil’ the legitimate objective, the examination under Article 2.2 would never pass over to the necessity test, and the measure would be considered to be inconsistent with Article 2.2.\textsuperscript{143} The AB considered that, since the word ‘fulfil’ refers to an ‘objective’ – which is something that is pursued and achieved to a greater or lesser degree – ‘the question of whether a technical regulation "fulfils" an objective is concerned with

\textsuperscript{140} AB Report, \textit{US – Tuna II (Mexico)}, para. 314.

\textsuperscript{141} AB Report, \textit{US – COOL}, paras. 382 ff. In \textit{US – Tuna II (Mexico)}, the panel also seemed to be ready to afford a high degree of deference to the States’ stated objective; see Panel Report, \textit{US – Tuna II (Mexico)}, paras. 7.400 ff. These two examples show a high deferential approach in the standard of review when assessing the claimants’ stated objective pursued by its measures.


\textsuperscript{143} Obviously, if a measure is not capable of fulfilling the proposed objective it cannot be considered to be ‘necessary’ in any degree.
the degree of contribution that the technical regulation makes toward the achievement of the legitimate objective’. At this stage of the analysis of an Article 2.2 claim, a measure would ‘fulfil’ a legitimate objective if it contributes to the objective’s fulfillment to a certain degree, or is at least capable of doing so. However, the specific assessment of the degree of contribution it make towards the objective will be a relevant question under the necessity test— as will be seen below – and not to the question whether the measure ‘fulfils a legitimate objective’ in the first place. In other words, as long as the measure makes a certain contribution – or is in principle capable of doing so – it may be said that the measure ‘fulfils’ a legitimate objective.

Thus, it would be very difficult at this stage to find that the Chilean food-labeling scheme does not ‘fulfill’ the objective pursued – i.e. to ‘provide more understandable information to consumers about the nutritional content of foods’ or to ‘help consumers to make better informed choices’, or a combination of both – especially when the objective has been narrowed down as much as possible.

4.2.2 “not…more trade-restrictive than necessary’, ‘taking into account of the risks non-fulfilment would create’: Is the Chilean food-labeling scheme necessary?

The AB started its analysis of the necessity test indicating that the terms ‘not…more trade restrictive than necessary’ qualifies the general requirement in the first sentence of Article 2.2 that measures shall not create ‘unnecessary obstacles to international trade’. It stated that both the first and second sentence of Article 2.2 refer to the notion of ‘necessi-

\begin{itemize}
\item \textsuperscript{144} AB Report, \textit{US – Tuna II (Mexico)}, para. 315.
\item \textsuperscript{145} \textit{Ibid.}, paras. 340–2.
\item \textsuperscript{146} This is a relevant finding because it halts the possibility for a panel to avoid examining a measures’ necessity simply because it does not ‘fulfill’ the objective in the first place, which is what Mexico tried to argue in its appeal in \textit{US – Tuna II (Mexico)} (see para. 340 of the AB Report).
\end{itemize}
ty" and that "[w]hat has to be assessed for "necessity" is the trade-restrictiveness of the measure at issue."  

In laying down elements that comprise the ‘necessity test’ under Article 2.2 it stated that a panel must engage in a ‘relational analysis’ – i.e. a ‘weighing and balancing’ exercise – of the following factors: (i) the degree of contribution made by the measure to the legitimate objective at issue; (ii) the trade-restrictiveness of the measure; and (iii) the nature of the risks at issue and the gravity of consequences that would arise from non-fulfilment of the objective(s) pursued by the Member through the measure. In addition, (iv) ‘a comparison of the challenged measure and possible alternative measures should be undertaken’

The AB read the terms ‘taking into account of the risks non-fulfilment would create’ as suggesting: 1) that it should be one of the factors to take into account in the weighing and balancing exercise; and 2) that a ‘comparison of the challenged measure with a possible alternative measure should be made in light of the nature of the risks at issue and the gravity of the consequences that would arise from non-fulfilment of the legitimate objective.’

The different factors established for the necessity test by the AB will be addressed in turn, examining how it would apply to Chile’s mandatory food-labeling scheme.

148 Ibid., para. 319. Note the difference with GATT Article XX – specifically under subparagraph (b) – where the AB stated that what must be ‘necessary’ is not the trade-restrictiveness, but the ‘treatment giving rise to the finding of a GATT-inconsistency [i.e. the less favorable treatment]’ (AB Report, Thailand – Cigarettes (Philippines), para. 177). See Marceau (2013), p. 18.
149 Ibid., para. 322.
150 Ibid.
151 Before the AB reports in US – Tuna II (Mexico) and US – COOL, there was some uncertainty as to how the terms ‘taking into account of the risks non-fulfilment would create’ would be interpreted. For instance McGrady suggested that one possibility was that ‘the risks that nonfulfillment of a regulatory objective entail should be used to guide [the] determination of whether an objective is legitimate where it does not fall within one of the enumerated categories’ of Article 2.2 TBT (McGrady ‘(2011) pp. 207–8). However as stated above, the AB showed a high degree of deference in accepting objectives others than those listed in Article 2.2 TBT as being ‘legitimate’.
4.2.2.1 Degree of contribution of the food-labeling scheme

As to the first factor of the necessity test – *i.e.* the degree of contribution made by the measure to the legitimate objective at issue – this element of the test requires a panel to go beyond the examination of whether the measure ‘fulfils’ a legitimate objective (as explained above) and requires the panel to ascertain to what *degree* the measure fulfills that objective.\(^{152}\) This ‘may be discerned from the design, structure, and operation of the technical regulation, as well as from evidence relating to the application of the measure.’\(^{153}\) Here, the objective pursued by the measure will serve as ‘the benchmark against which a panel must assess the degree of contribution made by a challenged technical regulation.’\(^{154}\)

As stated above, for strategic reasons, the policy objective pursued by Chile’s food-labeling requirements should be framed as narrow as possible, as for instance to ‘provide more understandable information to consumers about the nutritional content of foods’ or to ‘help consumers to make better informed choices’, or a combination of both. Therefore, the evidence that Chile would have to put forward to justify the mandatory food-labeling requirement would focus on the degree of contribution the measures make toward these objectives rather than evidence about how the measure protects human health or prevents obesity or NCDs.\(^{155}\)

In the evaluation seminar of Chile’s food regulations, hosted by the Ministry of Health on 4 and 5 January 2017 in Santiago,\(^{156}\) Chile presented an external and independ-

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\(^{152}\) AB Report, *US – Tuna II (Mexico)*, para. 317.


\(^{155}\) It would be more burdensome for Chile to put forward evidence on the measure’s contribution to public health or obesity/NCDs, because of the way diet affects health.

\(^{156}\) This seminar was held in compliance with the fourth transitory provision of Decree 13/15 (the decree implementing Law 20.606) which requires the Ministry of Health – before 18 months counted from the decrees’ publication – to perform a study assessing the implementation of the measures, the adaptation of technological processes and the impact on consumer perceptions and attitudes.
ent study carried out by the University of Chile,\textsuperscript{157} which found that 68.9\% of the people surveyed understood that the labels warned about high contents of certain nutrients in foods, while only 6.3 \% did not understand the information provided by the labels.\textsuperscript{158} These numbers suggest that the degree of contribution to the objectives pursued\textsuperscript{159} is considerable.\textsuperscript{160} Moreover, the report concluded that, in general, the policies have been well received and are highly appreciated by the Chilean population, and that it has influenced people’s purchasing decisions.\textsuperscript{161} However it also recognizes that it is still not possible to see a deeper impact on people’s consumption habits.\textsuperscript{162}

Based on the sixth recital of the preamble of the TBT Agreement – which states that no country shall be prevented from taking measures to protect legitimate policy objectives ‘at the levels it considers appropriate’ – the AB found that it is not required that the measure ‘satisfies some minimum level of fulfilment to be consistent with Article 2.2’.\textsuperscript{163} This important finding seems to depart from the AB’s requirement under GATT Article XX(b) that the measure should make some ‘material contribution’ to the achievement of the objective.\textsuperscript{164} However, despite there not being any requirement on the minimum level of fulfilment, the degree of contribution will be important when determin-

\textsuperscript{157} Available in Spanish at: http://web.minsal.cl/wp-content/uploads/2017/01/Informe-Percepci%C3%B3n-Consumidores-ICEI.pdf
\textsuperscript{158} As to the remaining: 14.9\% of the people surveyed stated that the labels allow them to know more about the nutritional composition of the food, and 9.9\% stated that the labels gives irrelevant information to their purchase decisions.
\textsuperscript{159} Note that the objectives pursued refer to providing consumer information as explained in section 4.2.1 above, and not to protecting public health, which will be important in the examination of the risks that non-fulfilment of the food-labeling scheme’s objectives would create, discussed in section 4.2.2.3 below.
\textsuperscript{160} Many WTO Members claimed under the meetings of the TBT Committee that mandatory warning signs could confuse consumers, making them to think that any consumption of a product ‘High in…’ – no matter the size of the portion –is bad for health. However, in discrediting this claim, the study published by the University of Chile concluded that only people belonging to the lowest socioeconomic status, together with people above 61, positioned themselves more firmly around the idea of totally cutting these foods from their diet. The general rule is that the labels encourage consumers to eat smaller portions or to decrease the frequency of purchase.
\textsuperscript{161} 78.5\% of the people surveyed stated that the labels have some effect on their purchasing decisions. See pp. 19 and 31–2 of the report.
\textsuperscript{162} \textit{Ibid.}
ing the existence of alternative less trade-restrictive measures; if the alternative measures proposed by the claimants are less-trade restrictive and contributes to the same degree or more to the achievement of the objective, the food-labeling scheme would not be considered necessary.

4.2.2.2 *Are food-labeling schemes trade restrictive?*

The second factor included in the weighing and balancing exercise of the necessity test refers to the trade-restrictiveness of the measure. In this sense, the AB in *US – Tuna II (Mexico)* recalled its finding on *China – Raw Materials*\(^{165}\) that that ‘the word "restriction" refers generally to something that has a limiting effect’, and stated that ‘[a]s used in Article 2.2 in conjunction with the word "trade", the term means something having a limiting effect on trade’.\(^{166}\) However, neither on *US – Tuna II (Mexico)* nor *US – COOL* did the AB provide an interpretation of the scope of trade-restrictiveness under Article 2.2. In *US – COOL*, the AB neither confirmed nor contradicted the Panel’s interpretation that the US’ measure was trade-restrictive because it affected the competitive conditions of imported livestock. As Gabrielle Marceau points out, this creates uncertainty, because accepting this approach would imply defining ‘trade-restrictiveness in similar terms as the obligation not to provide "less favourable treatment" under Article 2.1 and prior GATT jurisprudence.’\(^{167}\)

In the same vein, since the Chilean measure does not formally discriminate between imported and domestic products, the interpretation that the AB adopts of ‘trade-restrictiveness’ could be decisive. If indeed it identifies ‘trade-restrictiveness with ‘less-favorable treatment’ the measure would most probably not be considered trade-restrictive at all (and automatically considered ‘necessary’ within the words of Article 2.2 of the

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\(^{165}\) WTO, *China – Raw Materials* (DS394).

\(^{166}\) Ab Report, *US – Tuna II (Mexico)*, para. 319.

TBT Agreement). Conversely, if it adopts another interpretation, the ‘trade-restrictiveness’ would have to be examined under that interpretation. In this sense, as McGrady points out, one possible interpretation of ‘trade-restrictiveness’ could be that ‘every technical regulation is “trade restrictive” in nature’.\(^{168}\) Moreover, WTO Members’ concerns about the trade-restrictiveness of the food-labeling scheme – as expressed during the meetings of the TBT Committee – were not related to issues of discriminatory or less-favorable treatment,\(^ {169}\) but on issues related to: their mandatory nature; the large number of products affected;\(^ {170}\) the significant investments it would imply for manufacturers;\(^ {171}\) the use of ‘high in’ warning signs in the form of STOP symbols;\(^ {172}\) and the lack of international standards on both the warning signs and the nutrient thresholds.\(^ {173}\)

This suggests that WTO Members consider that the measure’s trade-restrictiveness derives from its ‘excessiveness’\(^ {174}\) and from the lack of conformity with existent international standards. If the AB accepts this approach, it would still have to clarify specifically what factors should be taken into account when examining the measures’ trade-restrictiveness. This could also open up the possibility to consider other aspects of the Chilean regulation that arguably makes the measure less trade-restrictive (as for instance the graduated implementation timeframes and the permission to use stickers). Conversely, if the AB confirms the panels’ finding in US – COOL – i.e. equating ‘trade-restrictiveness’ with ‘less-favorable treatment’ – the claimants would have to

\(^{168}\) McGrady (2011), pp. 203–5. Note that during the Tokyo Round negotiations of Article 2.1 of the GATT Standards Code – i.e. the predecessor of Article 2.1 and 2.2 of the TBT Agreement – ‘[i]t was pointed out that in many cases, regulations introduced in order to protect human, animal or plant health are by their very nature barriers to trade.’ (MTN/AG/W/21, 26 May 1977).

\(^{169}\) There were no allegations of less-favorable treatment under Article 2.1 (which deals with ‘less-favorable treatment’) in the meetings of the TBT Committee. However the representative of the EU raised concerns that ‘Chile’s approach would have a discriminatory effect on foreign manufacturers, which would need to adapt their packaging for the Chilean market only’ (G/TBT/M/59, p. 7), however, a national regulation would hardly be considered to be discriminatory simply because imported products have to comply with it, especially when domestic products also fall within the scope of the regulation.

\(^{170}\) G/TBT/M/59, p. 6, comment by the US.

\(^{171}\) Ibid., p. 7, comment by the EU.

\(^{172}\) Ibid.

\(^{173}\) Ibid.

\(^{174}\) See G/TBT/M/60, p. 34, comment by Argentina.
put forward evidence that the measure provides discriminatory or less-favorable treatment to imported products. It remains to be seen which approach the AB will take.

4.2.2.3 What risks would non-fulfilment of the objectives pursued by the Chilean food-labeling scheme create?

In relation to the third factor to take into account in the necessity test – i.e. the risks non-fulfilment would create – the AB in *US – Tuna II (Mexico)* considered this requirement to involve an examination of ‘the nature of the risks at issue and the gravity of consequences that would arise from non-fulfilment of the objective(s) pursued by the Member through the measure’. Moreover, ‘in assessing such risks, relevant elements of consideration are “inter alia: available scientific and technical information, related processing technology or intended end-uses of products”’. Although the panel did not make any finding on this requirement in *US – COOL*, the AB stated that the fact ‘[t]hat most US consumers are not prepared to pay to receive information on origin as defined in the COOL measure with respect to the meat products they purchase suggests that obtaining such information is not a high priority for such consumers’, and added that ‘this in turn seems to indicate that the consequences that may arise from non-fulfilment of the objective would not be particularly grave’.

In this sense, what Chile would have to show is that the nature of the risks involved suggests that the consequences of non-fulfilment of the objectives pursued by its food-labeling requirements (consumer information) would be particularly grave. Chile would have to highlight that the food-labeling scheme is part of a comprehensive policy response to a public health emergency and seeks to enhance the ‘synergies between its components, as well as its total effects.’ In this way, the consequences of non-

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175 AB Report, *US – Tuna II (Mexico)*, para. 322.
176 Ibid.
178 Ibid.
fulfilment would not only be consumers’ inability to make better informed choices, but also an undermining of public health– a value which has been categorized by the AB as ‘both vital and important in the highest degree’.180

Hence, at this step of the necessity test, the scientific evidence would need to show firstly, that certain nutrients pose serious risks to public health, and secondly, that failing to inform consumers about foods containing high amounts of these nutrients could have grave consequences for public health.

Firstly, regarding the risks to public health posed by certain nutrients, a highly recurring issue during the meetings of the TBT Committee was the allegation that there was ‘no scientific evidence suggesting an identifiable threshold of nutrients above which a risk existed.181 In response, Chile has held that the limits established by its regulation were compared with values proposed by different international health organizations, and those established in various regulations and/or voluntary strategies in Chile and other countries.182 In any case, the panel would have to assess whether the casual link between high intake of certain nutrients and obesity/NCDs is strong enough to assert that there are risks to public health. In this sense, Howse, Trebilcock and Eliason note that the AB – in interpreting Article 5.1 of the SPS Agreement requiring Members to base SPS measures on a risk assessment – has stated that ‘a risk assessment need not establish a minimum quantitative threshold or level of risk, provided that it goes beyond asserting merely theoretical uncertainty, and entails an actual empirical inquiry into the existence of risk’.183 This suggests a deferential approach in examining the evidence about the existence of

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180 AB Report, EC – Asbestos, para. 150.
181 See G/TBT/M/60, p. 33, where the EU expressed this concern in the following words: ‘Although, there was evidence of a positive association between the intake of certain positive association between the intake of certain nutrients and the risk of developing a disease or disorder, there was no evidence suggesting an identifiable threshold above which the risk existed.’
Moreover, in defense of the established nutrient threshold of the food-labeling scheme, Chile should also rely on the precautionary principle, endorsed by the AB in EC – Hormones, where it recalled that Members have the right to establish their own appropriate level of protection, and that it ‘may be higher (i.e., more cautious) than that implied in existing international standards, guidelines and recommendations.

Secondly, scientific evidence should also aim towards showing that the labels have the capacity to provide clearer information to consumers, and that this in turn helps shifting consumption habits towards healthier choices. In this way, the consequences non-fulfilment would create would help outweighing the measures’ trade-restrictiveness (depending on the interpretation of ‘trade-restrictiveness’ adopted). Moreover, since Chile’s food-labeling scheme is a novel and innovative policy measure, there is not much in situ evidence for their effects. For these reasons, although – as shown above – an independent study of Chile’s measure shows that the labels are effective in providing more easily understandable information, it is crucial that further studies are carried out assessing the measures’ effectiveness in encouraging healthier consumption habits. Again, as long as more empirical data are not available on the measures’ effectiveness in this regard, the principle of precaution should be invoked, insisting that ‘representative governments commonly act from perspectives of prudence and precaution where risks of irreversible, e.g. life-terminating, damage to human life are concerned.’

So, in the examination of the risks that non-fulfilment of the objective would create, it seems at first sight that the AB is prepared to afford a high degree of deference in considering that there are risks to public health if nutritional information is not provided to consumers by food-labeling schemes. This is also reaffirmed by the AB’s recognition of the precautionary principle.

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184 Additionally, the TBT Agreement stipulates the obligation to take into account relevant scientific evidence in much looser terms than in the SPS Agreement.

185 The precautionary implies that governments should not wait for full scientific evidence to adopt appropriate protective measures, especially when the risks involved are life-threatening.


187 Ibid.
4.2.2.4 Are there less trade-restrictive alternatives to Chile’s food-labeling schemes?

Finally, after having weighed and balanced the above factors, ‘in most cases, a comparison of the challenged measure and possible alternative measure should be undertaken.’\footnote{AB Report, \textit{US – Tuna II (Mexico)}, para. 322.} This would involve ‘a comparison of the trade-restrictiveness and the degree of achievement of the objective by the measure at issue with that of possible alternative measures that may be reasonably available and less trade restrictive than the challenged measure, taking account of the risks non-fulfilment would create.’\footnote{\textit{Ibid.}, para. 320 (emphasis in original).} Moreover, the AB stressed that the alternative measure should ‘make an equivalent contribution to the relevant legitimate objective’.\footnote{\textit{Ibid.}, para. 321. In \textit{US – Tuna II (Mexico)}, the AB ended up overturning the Panel’s finding that the US’ measure had violated Article 2.2, because it found that the alternative measure proposed by Mexico did not contribute to the same extent to the legitimate objectives pursued by the US.}

Alternative measures proposed in the meetings of the TBT Committee included: voluntary approaches like the ones adopted in Australia, EU and Switzerland;\footnote{There is however evidence that industries self-regulation has limited compliance for less healthy foods, see Carter et al. (2012).} using voluntary ‘low’, ‘free’ and ‘no added’ claims in conjunction with mandatory nutrition labeling;\footnote{There is however evidence that multiple formats are confusing for consumers, see Draper (2011).} and education campaigns accompanied by the promotion of physical activity.\footnote{In Chile’s case, education campaigns are part of the comprehensive policy aimed at reducing obesity and NCDs, therefore it would hardly be regarded as a less trade-restrictive alternative. In words of the AB: ‘these measures already figure as elements of a comprehensive strategy […]. Substituting one element of this comprehensive policy for another would weaken the policy by reducing the synergies between its components, as well as its total effect’ (AB Report, \textit{Brazil – Retreaded Tyres}, para.172).} Of these, voluntary approaches were repeated the most, reflecting that one of the main concerns is the mandatory nature of the Chilean food-labeling scheme. In this sense,
although voluntary approaches could be regarded a less-trade restrictive and reasonable available alternative, Thow et al. have stated:

\[\text{Strong rationales for mandatory approaches remain. For example, voluntary approaches may have limited long term effectiveness, due to disincentives to participate resulting from costs accruing to only compliant companies (in the form of implementation costs and perhaps market share).}\] \(^{194}\)

Therefore, voluntary approaches would hardly be considered to contribute to the same degree as mandatory warning signs in the fulfillment of the legitimate objectives pursued (provide consumers with information about nutritional content in foods). In addition, the risks that non-fulfillment would create would also call for greater deference towards the measures chosen by Chile, as (already explained) they are concerned with risks to public health. \(^{195}\)

In conclusion, in the application of the necessity test, Chile’s food-labeling scheme would most probably be considered lawful under Article 2.2 of the TBT Agreement. The flexibilities that the AB has read into the interpretation of the terms of the TBT Agreement facilitate upholding a balance between free trade and regulatory autonomy, benefiting the protection of public health. Next section will address another legal concern raised by WTO Members in relation to the Chilean food-labeling scheme; its alleged violation of Article 2.4 of the TBT Agreement.

\(^{194}\) Thow et al. (2017), p. 9.

\(^{195}\) In examining the AB Reports of EC – Sardines, Korea – Beef and EC – Asbestos, Ming Du concludes that ‘the extent of the margin of appreciation left to WTO Members under the TBT Agreement largely depends on the value that the technical regulation purports to protect. The more important the value is, the more likely that the panel will show deference to the domestic regulation.’ (Ming Du (2007), p. 306).
4.3 **Compatibility with Article 2.4 of the TBT Agreement**

Article 2.4 of the TBT Agreement states:

> Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.

Although the term ‘international standards’ is not defined in the TBT Agreement, Annex 1 incorporates the definitions provided in the *ISO/IEC Guide 2: 1991- General Terms and Their Definitions Concerning Standardization and Related Activities*, which in turn defines an international standard in the following words: ‘Standard that is adopted by an international standardizing/standards organization and made available to the public.’

Furthermore, the term ‘standard’ is defined in Annex 1(2) of the TBT Agreement as a:

> Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to a product, process or production method.

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Read together, these definitions suggest that the ‘international’ character of the standard will derive primarily from the characteristics of the entity approving the standard.\textsuperscript{197} Further, Annex 1(4) defines ‘international body or system’ as a ‘[b]ody or system whose membership is open to the relevant bodies of at least all Members.’ Additionally, the AB has also stated that other ‘procedural conditions [may] have to be met for a standard to be considered “international” for the purposes of the \textit{TBT Agreement}\textsuperscript{198} – like for instance whether it was based on consensus or has been made available to the public.

As already mentioned in chapter one, the FAO and the WHO have elaborated standards and guidelines on food- and nutrition labeling through the Codex Alimentarius Commision. Although there are concerns about the Codex’s legitimacy – reflected in criticisms that it ‘is a forum dominated by a handful of developed countries and associated corporate interests, in which civil society and some developing countries find participation difficult’,\textsuperscript{199} – it is highly probable that the Codex standards will be considered ‘relevant international standards’ in terms of the TBT Agreement.\textsuperscript{200} Therefore, as will be explained below, the question under Article 2.4 would most probably be whether the standards are ‘effective’ or ‘appropriate’.

The relevant standards pertaining to food- and nutrition labeling are those set in the \textit{General Standard for the Labeling of Prepackaged Foods} and the \textit{CGNT}. The former establishes general guidelines on labeling, and the latter contemplates specific guidelines addressing front-of-pack labeling.

\textsuperscript{197} \textit{Ibid.}
\textsuperscript{198} AB Report, \textit{US – Tuna II (Mexico)}, para. 353.
\textsuperscript{199} McGrady (2011), p. 44.
\textsuperscript{200} In \textit{EC – Sardines}, the defendant part did ‘not contest that the Codex [Alimentarius] Commission is an international standardization body, and that it is a “recognized body” for purposes of the definition of a “standard” in Annex 1.2’ (AB Report, \textit{EC – Sardines}, para. 221). Additionally, the Codex is expressly recognized in Article 3(4) of the SPS Agreement. Moreover, the \textit{CGNT} would also most probably be considered ‘relevant’, because this term has simply been interpreted as implying that the standard bears upon, relates to or is pertinent to the same subject matter (Panel Report, \textit{EC – Sardines}, para. 7.68)
Under the heading ‘Principles for Nutrition Labeling’, the CGNT states:

*The content of supplementary nutrition information will vary from one country to another and within any country from one target population group to another according to the educational policy of the country and the needs of the target groups.*

Moreover, in guideline 5.2 it states:

*The use of supplementary nutrition information on food labels should be optional and should only be given in addition to, and not in place of, the nutrient declaration, except for target populations who have a high illiteracy rate and/or comparatively little knowledge of nutrition. For these, food group symbols or other pictorial or colour presentations may be used without the nutrient declaration.* (emphasis added)

Hence, on the one hand, the guidelines recognize that front-of-pack labels will vary from one country to another in accordance with the general understanding that there is need for flexibility in adopting domestic regulations, mainly due to differences in the nutritional profiles and dietary behaviors among the populations of different countries. However, on the other hand, the Codex also establishes that the use of front-of-pack labels should be optional and not mandatory.

Therefore, Chile’s food-labeling scheme would be in apparent contradiction with the relevant international standard’s recommendation that front-of-pack labels should be optional. As stated by the AB in *EC – Sardines*: ‘under Article 2.4, if the technical regulation and the international standard contradict each other, it cannot properly be conclud-
ed that the international standard has been used "as a basis for" the technical regulation—as required by Article 2.4.201

However, Article 2.4 also states that Members are not obliged to base their measures on international standards if these standards ‘are ineffective or inappropriate means for the fulfillment of the legitimate objectives pursued’. Therefore, if the relevant international standards were found to be ‘ineffective’ or ‘inappropriate’ to provide consumers with nutritional information in a clear understandable format, Chile ‘would not have to use the international standard as a basis for its technical regulation’.202 Regarding the difference between the terms ‘ineffective’ and ‘inappropriate’, the AB has clarified that ‘[t]he question of effectiveness bears upon the results of the means employed, whereas the question of appropriateness relates more to the nature of the means employed’.203 Moreover, ‘[a]n inappropriate means will not necessarily be an ineffective means and vice versa.’204

As to the question of who bears the burden of proof, the AB found in EC – Sardines that it is the claimant that has to prove that the relevant international standards are an effective and appropriate means of fulfilling the legitimate objectives at stake.205 Since there is wide consensus that food-labeling by their nature are an appropriate mean of providing consumers with nutritional information, the question would most probably revolve around the Codex recommendation’s ‘effectiveness’. The claimant would have put forward evidence that voluntary food-labeling schemes result in more understanding among consumers and helps them in greater degree than voluntary approaches to make healthier dietary choices. However, studies have shown that voluntary approaches to food-labeling are not very effective in providing clear and easily understandable infor-

203 Ibid., para. 7.116 (emphasis in original).
204 Ibid.
mation to consumers.\textsuperscript{206} If the Codex standard’s effectiveness cannot be proved, Chile would not be obliged to use the international standard as a basis for its technical regulation, even if the international standards were considered to be ‘appropriate’.

It is also worth mentioning that the WHO has stated that ‘unfortunately [the section in the CGNT relating to front-of-pack labels] has not yet been reviewed and updated in the light of various evidence and recommendations that are now becoming available’,\textsuperscript{207} suggesting that standards on front-of-pack labels are outdated and need revision. Additionally, as Thow et al. point out:

\textit{Codex establishes ‘minimum standards’ for food safety–providing a ‘floor’ for governments to draw on in ensuring food safety, while allowing for differing levels of protection and innovation to meet emerging challenges […]}. \textit{Disputes have arisen […] where specific evidence suggests that a measure stronger than existing international standards is advisable to protect human health based on the precautionary principle}

In sum, the insufficient development of international standards on food-labeling, together with compelling public health reasons for adopting stronger measures, would most likely yield Chile’s food-labeling scheme lawful under Article 2.4 of the TBT Agreement.

\textsuperscript{206} See Smithers (2009).
\textsuperscript{207} G/TBT/GEN/185, 19 January 2016.
5 Conclusions

The research question that this thesis sought to answer is to what extent regulatory autonomy will be upheld in a WTO dispute where food-labeling schemes implemented to protect public health were challenged. In doing so, we have provided a factual background on the current public health concerns related to the prevalence of obesity and NCDs worldwide, and provided a description of the measures that are being adopted to confront the risk factors associated with these diseases– focusing on unhealthy diet. Against this background, different food-labeling schemes in the form of front-of-pack labels have emerged as an option which – together with other measures such as advertising restrictions and education campaigns – help tackling obesity and NCDs. The advantage with front-of-pack labels is that they help consumers to make healthier food choices at the point of purchase, and – when acting in synergy with other measures – have the potential to change consumer habits towards healthier food consumption.

As we have seen, the question of food-labeling schemes’ compatibility with WTO rules will be conditioned on the WTO adjudicating bodies’ interpretation and application of the necessity test envisaged in Article 2.2 of the TBT Agreement, and the availability of international standards offering effective and appropriate guidance on the implementation of food-labeling schemes. When applying the necessity standard, the WTO adjudicating bodies enjoy wide discretion in deciding the level of deference they will afford regulatory autonomy. However, upholding a proper balance between free-trade and regulatory autonomy is fundamental for WTO’s legitimacy, and will be the WTO adjudicating bodies main task in a dispute concerning sensitive values such as public health or environmental protection.

WTO Members have raised different trade concerns regarding food-labeling schemes in the meetings of the TBT Committee. We have chosen to take a closer look at the legal concerns raised in relation to Chile’s mandatory food-labeling scheme – implemented in June 2016 – because they are the most stringent so far and because it is being used as an inspiration in the evaluation of other countries’ policy design. Among other
things, Chile’s food-labeling scheme is said to violate Article 2.2 and 2.4 of the TBT Agreement, because it is more trade-restrictive than necessary and is not based on international standards. The latest TBT disputes have shed light on the interpretation of these two Articles, facilitating the elucidation of how they would apply to Chile’s food-labeling scheme. In turn, the better understanding of the necessity test in the context of the TBT Agreement helps clarifying to what extent regulatory autonomy will be upheld when concerned with measures protecting public health.

In transposing the interpretations made by the WTO adjudicating bodies in *US – Tuna II (Mexico)* and *US – COOL* on Article 2.2 and 2.4 of the TBT agreement to Chile’s food-labeling scheme, we have made several findings. First, panels and the AB have shown a high degree of deference in accepting that a pursued objective is legitimate despite not being expressly mentioned in the list of legitimate objectives of Article 2.2. In the context of food-labeling schemes and NCDs, this would permit the strategic framing of the objective pursued, making it more difficult to find less trade-restrictive alternatives.

Second, Chile’s food-labeling scheme would most probably pass the necessity test. The evidence put forward about the food-labeling schemes’ degree of contribution to the objective of providing consumer information will be relevant in considering that its trade-restrictiveness is necessary. In this sense, studies on Chile’s food-labeling scheme conducted so far show that they are quite effective. Furthermore, even though the interpretation of ‘trade-restrictiveness’ in the context of the TBT Agreement has not yet been clarified by the AB, there are opportunities to prevent the finding of trade-restrictiveness of food-labeling-schemes and Chile has made use of them by for instance allowing for the use of stickers. In relation to the considerations of the risks that non-fulfilment would create, Chile would have to highlight that the food-labeling scheme is part of a comprehensive policy strategy dealing with a public health emergency. Additionally, the precautionary principle should also be invoked, as its recognition by the AB facilitates the assessment of the risks non-fulfillment would create, allowing for a more deferential approach to WTO Member’s policy choices. Finally in the examination of less trade-
restrictive alternatives, voluntary approaches would hardly be considered to contribute to the same degree as the Chilean mandatory food-labeling scheme in the fulfillment of the legitimate objectives of providing consumers with nutritional information on the food they purchase and helping them in making healthier choices. However, due to the lack of evidence, the precautionary principle could also be invoked.

Thirdly, the Codex standards on food-labeling would most probably be considered ‘relevant international standards’ under Article 2.4 of the TBT Agreement. However, their insufficient development and need for update – together with compelling public health reasons for adopting stronger measures – would most likely yield Chile’s food-labeling scheme lawful under Article 2.4 of the TBT Agreement.

From these findings it can be concluded that food-labeling schemes can withstand an examination under WTO rules. Of course this will depend on the measure at issue, and can only be determined on a case-by-case basis. However, an examination of Chile’s measure under the rules of the TBT Agreement show that the WTO adjudicating bodies have showed deference in examining domestic regulations, opening up the possibility for broader margin of appreciation in the adoption of measures designed to protect public health in the context of nutrition and diet.
Annex 1
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