

## FRONT-OF-PACK NUTRITION LABELLING: ARE HEALTH POLICY DECISIONS RECONCILABLE WITH THE WTO DISCIPLINES?

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### Abstract

Over the past decade, States have increasingly used various forms of front-of-pack nutrition labelling to prevent the proliferation of obesity and related non-communicable chronic diseases. Some forms of front-of-pack nutrition labelling highlight increased amounts of certain nutrients in foods and are mandatory for compliance. The growing popularity of such measures raises serious concerns amongst the Members of the World Trade Organization, since, to date, no position has been formed on the conformity of such labelling with the core disciplines of the WTO. This article attempts to reach that understanding and to suggest how national legislators may adjust their labelling initiatives so as to bring them in line with the WTO Agreement on Technical Barriers to Trade (TBT Agreement). Section 1 of the paper analyses Article 2.1 of the TBT Agreement (principle of non-discrimination) and concludes that the legislator should take into account all dietary options in order to avoid discrimination against certain types of foods. Unpackaged goods should also be covered by regulatory interventions, since by nutritional composition they are similar to pre-packaged foods. Section 2 looks at Article 2.2 of the TBT Agreement (principle of necessity) and summarises that the adopting Member has to be cautious when setting the goals of the labelling measure, since demonstration of its necessity would further require to separately establish what contribution to any of the stated objectives the measure makes. Moreover, the WTO Member must determine how labelling schemes discourage consumption of various nutrients. Otherwise, there may be a problem in demonstrating the expected regulatory results. The anticipated contribution of front-of-pack labelling could be enhanced by creating a supporting environment of regulatory interventions. Section 3 focuses on Arts. 2.4 and 2.5 of the TBT Agreement (harmonisation principle) and concludes that current international standards recognize the relevance and authority of regional studies, including those examining dietary patterns of locals. Nonetheless, this does not exempt the WTO Members from the need to provide a scientific justification for how the measure relates to the consumption of particular foods and nutrients.

### Key words

front-of-pack nutrition labelling, World Trade Organization, TBT Agreement, principle of non-discrimination, harmonisation

### Introduction

It may seem that since the world has been confronted with COVID-19, all other diseases have ceased to exist or lost their significance. However, there is another disease that is apt to bring equally devastating consequences to humankind, slowly conquering generation after generation. According to the World Health Organization (hereinafter — WHO), obesity and overweight have already become an epidemic — the so-called “globesity”.<sup>2</sup> Since 1975, the rates of global obesity have increased nearly threefold.<sup>3</sup> By 2016, already 39 % of adults were overweight, and 13 % were obese.<sup>4</sup> More than that, obesity and overweight bring with them a range of life-shortening non-communicable diseases (hereinafter — NCDs), such as cancer, diabetes and gastrointestinal disorders.<sup>5</sup>

As one of the “best buys” to stop proliferation of NCDs caused by “obesogenic” factors the WHO recommends governments to implement front-of-pack labelling schemes (hereinafter — FOP labelling)<sup>6</sup> to complement conventional back-of-pack nutrient declarations that are made mandatory in many countries throughout the globe. In terms of coverage, it is recommended that FOP labelling should target intake of

<sup>1\*</sup> This article has been prepared strictly in the author’s personal capacity. The views expressed therein should not be attributed to any organisation with which the author is affiliated.

<sup>2</sup> WHO, *Controlling the Global Obesity Epidemic*. URL: <https://www.who.int/activities/> (accessed: 20.04.2023).

<sup>3</sup> WHO, *Fact Sheet: Obesity and Overweight*. 2021. URL: <https://www.who.int/news-room/fact-sheets/> (accessed: 20.04.2023).

<sup>4</sup> *Ibid.*

<sup>5</sup> WHO, *Non-Communicable Diseases Fact Sheet. Key Facts. 13 April 2021*. URL: <https://www.who.int/news-room/> (accessed: 20.04.2023).

<sup>6</sup> WHO, *Tackling NCDs: “Best Buys” and other Recommended Interventions for the Prevention and Control of Noncommunicable Diseases*. World Health Organization. 2017. P. 11. URL: <https://apps.who.int/iris/handle/10665/259232> (accessed: 20.04.2023).

sugars, sodium and fats (including saturated fats), which could be marked as “critical nutrients” for gaining excess weight.<sup>7</sup> FOP labelling represents a form of supplementary nutrition information and is intended to increase consumers’ understanding of the nutritional value of their foods. Such labels are placed on the front of packaged products and can display various numbers, colours, words, symbols or their combination.<sup>8</sup>

There is a vast variety of FOP labelling schemes to date. Compliance with most such initiatives is voluntary, which effectively secures market access opportunities for products that do not bear prescribed FOP labels. On the other side, the share of mandatory FOP labels which serve as a prerequisite to entering the market and the sole means of conveying nutritional properties of the goods to consumers<sup>9</sup> is constantly growing.<sup>10</sup> These measures have a lot in common, since they adopt informative colours (red, black) and/or interpretive wording (“high in” a critical nutrient) to convey that foods with particular amounts of critical nutrients must be consumed responsibly.

As an intervening factor for international trade in goods, mandatory FOP labelling has provoked heated debates at the World Trade Organization’s Committee on Technical Barriers to Trade (hereinafter — WTO, TBT Committee, respectively) since 2013.<sup>11</sup> During this ten-year period some Members that previously challenged such measures have turned to adopting similar initiatives, whereas other Members with mature export-oriented food industries have held their ground. While regulatory interest in mandatory FOP labelling schemes rises, there is still no uniform understanding on how to ensure their compliance with the WTO law. This problem dictates the need for intersectional research that will account both for the relevant WTO jurisprudence and the accomplishments of the natural sciences.

This article contributes to the scarce body of academic research on the matter<sup>12</sup> by assessing mandatory FOP labelling *in abstracto* against the key disciplines of the WTO Agreement on Technical Barriers to Trade (hereinafter — TBT Agreement). Thus, Section I of the paper will review the non-discrimination principle, Section II — the principle of necessity, and Section III — the harmonisation principle. While the General Agreement on Tariffs and Trade (hereinafter — GATT) also covers labelling measures,<sup>13</sup> this paper will rather regard the more specific<sup>14</sup> issues of the TBT Agreement. For the purposes of this article, the notion of FOP labelling is further understood to exclusively mean mandatory measures.

## 1. Non-discrimination

The principle of non-discrimination is embedded in the text of Article 2.1 of the TBT Agreement, which requires that products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country. As observed by the Appellate Body, this provision encompasses both Most-Favoured-Nation and National Treatment principles.<sup>15</sup>

As is evident from the specific trade concerns, the non-discrimination principle was not extensively discussed, as the Members mainly questioned the necessity of FOP labelling and its consistency with the

<sup>7</sup> *Ibid.*

<sup>8</sup> WHO, *Guiding Principles and Framework Manual for Front-of-Pack Labelling for Promoting Healthy Diet*. May 2019. P. 11, 18. URL: <https://www.who.int/publications/m/item/guidingprinciples-labelling-promoting-healthydiet> (accessed: 20.04.2023).

<sup>9</sup> Appellate Body Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, adopted 13 June 2012, DSR 2012:IV, p. 1837 (hereinafter — ABR, US — *Tuna II*), §188.

<sup>10</sup> By the end of 2022 Ecuador, Iran, Sri Lanka, Chile, Mexico, Peru, Uruguay, Argentina, Israel, Colombia and Singapore maintained mandatory FOP labelling schemes.

<sup>11</sup> Thow A. M., Jones A., Hawkes C., Ali I., Labonté R. *Nutrition Labelling is a Trade Policy Issue: Lessons From an Analysis of Specific Trade Concerns at the World Trade Organization* // Health Promotion International. 2017. P. 565. WTO Members attend the TBT Committee to raise specific trade concerns (STCs) in response to practices employed by other Members, that they deem to have a negative impact on trade. Through STCs Members could receive clarifications about the forthcoming legislation and (or) question the WTO-compatibility of the enacted initiatives. According to the infographics on the WTO official website, by the end of 2022 WTO Members had raised 779 STCs at the TBT Committee meetings.

<sup>12</sup> One example is Boza Martinez S., Polanco R., Espinoza M. *Nutritional Regulation and International Trade in APEC Economies: The New Chilean Food Labeling Law* // Asian Journal of WTO & International Health Law and Policy. 2019. Vol. 14. № 1. P. 73–113.

<sup>13</sup> The national treatment obligation of Article III:4 of the GATT would definitely apply. The predominant share of FOP labelling schemes has been introduced as laws, regulations and requirements, which establish product characteristics for obtaining a label. Such requirements may in various ways affect the internal sale of products, for instance, by prohibiting their placement on the market without labels. The most-favoured-nation principle of Article I:1 of the GATT could also apply by virtue of a direct reference to Article III:4 in this provision.

<sup>14</sup> This does not imply that the TBT Agreement is *lex specialis* in relation to the GATT. Since they form part of a “single undertaking” package, they by default apply simultaneously without any hierarchy.

<sup>15</sup> Appellate Body Report, *United States — Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, adopted 24 April 2012, DSR 2012:XI. P. 5751 (hereinafter — ABR, US — *Clove Cigarettes*), §87; Appellate Body Reports, *United States — Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/AB/R / WT/DS386/AB/R, adopted 23 July 2012, DSR 2012:V. P. 2449 (hereinafter — ABR, US — *COOL*), §267.

harmonisation principle. The scarce number of concerns raised in respect of discrimination relate to the Chilean warning labelling which was the first mandatory FOP scheme. For instance, the US highlighted that Chile's traditional foods rich in critical nutrients were exempted from the need to bear warning labels.<sup>16</sup> Brazil in turn requested justification for the exclusion of certain types of food, such as fast food, from the measure's coverage.<sup>17</sup> Switzerland added that the measure "discriminates according to the selling method".<sup>18</sup> It appears that the Members were concerned that the Decree promulgating Chile's FOP labelling specifically excluded foods marketed in bulk and those prepared at the request of the public.<sup>19</sup> Currently, mandatory labelling schemes adopted by Mexico and Sri Lanka contain a similar set of exceptions.<sup>20</sup>

Therefore, a FOP labelling scheme that does not regulate important distribution channels of foods rich in critical nutrients would raise concerns, since it could discriminate against imported prepackaged foods to the benefit of the local food production. Two questions would thus form the core of legal analysis under Article 2.1: if the groups of compared products are like and if the treatment accorded to imported goods is less favourable than that of like domestic goods.<sup>21</sup>

### 1.1. Likeness

As a preliminary point, the vagueness of the initial terms forms the main constraint for the analysis of "likeness", since neither of the involved Members specified which goods were subject to discussion. Nonetheless, the importing Members may be assumed to be concerned with the treatment accorded by FOP labelling to ultra-processed foods, which form a considerable share of trade among the Members. Such foods commonly include sugary beverages, sweet and savoury packaged snacks and candy.<sup>22</sup> According to the estimates of the Global Panel on Agriculture and Food Systems for Nutrition, the trade volumes of ultra-processed foods are constantly growing in response to rising demand, especially in emerging markets.<sup>23</sup> The key "high in" suspect amongst bulk products is bakery, since it is by definition rich in critical nutrients. Amongst "foods prepared at the request of the public" fast food is likely to be the subject of concern, as it accounts for the largest chunk of spending and is considerably energy-dense.<sup>24</sup>

Coming to the legal test of Article 2.1, "likeness" is construed as conditions of competition between products in the marketplace. Informed by the understanding of "likeness" in Article III:4 of the GATT, "competitiveness" could be assessed with the use of four non-cumulative, yet interrelated criteria: (1) the properties, nature and quality of the products; (2) the end-uses of the products; (3) consumer tastes and habits; and (4) the tariff classification of the products.<sup>25</sup> The latter, arguably, would not form the crux of legal analysis. For instance, in *Japan — Alcoholic Beverages II* the spirits that shared the same classification heading were considered "like", but that conclusion was predominantly based on three other criteria.<sup>26</sup> Thus, under Article 2.1 the relationship between ultra-processed goods, bakery and fast food in the marketplace should be tested against these guiding criteria.

<sup>16</sup> WTO TBT Committee, *Minutes of the meeting of 30–31 October 2013*. G/TBT/M/61. §2.128. URL: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/G/TBT/M61.pdf&Open=True> (accessed: 20.04.2023).

<sup>17</sup> WTO TBT Committee, *Minutes of the meeting of 19–20 March 2014*. G/TBT/M/62. §2.155. URL: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/G/TBT/M62.pdf&Open=True> (accessed: 20.04.2023).

<sup>18</sup> WTO TBT Committee, *Minutes of the meeting 18–19 June 2014*. G/TBT/M/63. §3.127. URL: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/G/TBT/M63.pdf&Open=True> (accessed: 20.04.2023).

<sup>19</sup> Chile's Ministry of Health, *Decree No 13 amending Supreme Decree No 977 of 1996, Food sanitary regulations*. Library of the National Congress: Chile Law. 26 June 2015. URL: <https://www.bcn.cl/leychile/navegar?idNorma=1078836%26buscar%3D20606> (accessed: 20.04.2023).

<sup>20</sup> Secretariat of Economics, *Amendment to the Official Mexican Standard NOM-051-SCFI/SSA1-2010, General labeling specifications for prepackaged food and non-alcoholic beverages-Commercial and health information, published on April 5, 2010*. Official Gazette. 27 March 2020. URL: [http://dof.gob.mx/2020/SEECO/NOM\\_051.pdf](http://dof.gob.mx/2020/SEECO/NOM_051.pdf) (accessed: 20.04.2023). Minister of Health Nutrition and Indigenous Medicine, *Food (Colour Coding for Sugar, Salt and Fat) Regulations*. The Gazette of the Democratic Socialist Republic of Sri Lanka. 17 April 2019. Schedule I. URL: <https://extranet.who.int/nutrition/ginal/> (accessed: 20.04.2023).

<sup>21</sup> ABR, US — *Tuna II*, §202, confirming relevance of ABR, US — *Clove Cigarettes*, §87.

<sup>22</sup> Cassano O., Horton R. *How to Identify Ultra-Processed Food and What to Eat Instead*. ZOE private health science company. January 2022. URL: <https://joinzoe.com/learn/what-is-ultra-processed-food> (accessed: 20.04.2023).

<sup>23</sup> Global Panel on Agriculture and Food Systems for Nutrition, *Rethinking Trade Policies to Support Healthier Diets*. Policy Brief no. 13. London, UK. 2020. P. 12, 14. URL: <https://www.glopan.org/wp-content/> (accessed: 20.04.2023).

<sup>24</sup> Brindal E., Mohr P. et al. *Obesity and The Effects of Choice at a Fast Food Restaurant II* Obesity Research & Clinical Practice. 2008. Vol. 2. № 2. P. 112–113.

<sup>25</sup> Appellate Body Report, *European Communities — Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII. P. 3243 (hereinafter — ABR, EC — *Asbestos*), paras. 99–101; ABR, US — *Clove Cigarettes*, paras. 119–120.

<sup>26</sup> Appellate Body Report, *Japan — Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, p. 97 (hereinafter — ABR, *Japan — Alcoholic Beverages II*). P. 22–23.

### 1.1.1. Physical properties

Ultra-processed foods embrace a variety of goods from breakfast cereals and potato chips to sugary yoghurts and soda. However, all these foods contain considerably high levels of one or more critical nutrients.<sup>27</sup> This feature predetermines other characteristics of such goods, which are likely to influence their competitive conditions.<sup>28</sup>

First, density in salt, sugars and/or fats ensures a long shelf-life of ultra-processed foods.<sup>29</sup> Second, the nutrient content of these goods makes them “highly palatable” to humans, who soon build an “addiction-like” relationship with them.<sup>30</sup> Third, such goods are “ready-to-eat” or “ready-to-heat” dietary options due to their composition.<sup>31</sup> Fourth, health risks associated with their contents also define the product properties.<sup>32</sup> According to The Food and Agriculture Organization (hereinafter — FAO), ultra-processed foods are one of the major causes of NCDs, such as obesity, cardiovascular diseases or gastrointestinal disorders.<sup>33</sup> Bakery goods and fast food arguably share most of these properties, as they pertain to the nutritional content of products. Bakery has been long subject to discussion, as it is traditionally high in salt<sup>34</sup> and added sugars.<sup>35</sup> Fast food follows suit.<sup>36</sup> Further on, sugar and fats contents ensure high palatability<sup>37</sup> of all discussed products, whereas salt extends their shelf-life.<sup>38</sup> Ultra-processed goods, however, are more durable than the other discussed options, as they undergo more processing stages. Nonetheless, in line with the relevant WTO practice, products do not need to share the same properties to be considered “like”.<sup>39</sup> The fact that some products are more durable is unlikely to affect the analysis if the consumers would perceive products as substitutable for their intended end-uses.

### 1.1.2. End-uses

According to the Appellate Body in *US — Clove Cigarettes*, end-uses are closely related to consumers’ tastes and habits, as the former explains if a product *is apt* to perform certain functions, whereas the latter indicates if consumers *are willing to use* it to perform those functions.<sup>40</sup> End-uses have to be precisely formulated to ensure a meaningful comparison.<sup>41</sup> In respect of nutrition labelling, it means that “to be consumed” would not at all identify end-uses. In respect of foods, their physical properties may heavily inform the determination of end-uses.<sup>42</sup> Ultra-processed foods, as well as bakery goods and fast food due to high density in critical nutrients are not satiating in a long-term,<sup>43</sup> but rather provide an instant and short-term energy boost. Second, their nutritional composition identifies the end-use of creating a pleasurable experience associated with the properties of foods.

<sup>27</sup> Fiolet T., Srour B., Sellem L. et al. *Consumption of Ultra-Processed Foods and Cancer Risk: Results from NutriNet-Santé Prospective Cohort* // *The BMJ*. 14 February 2018, citing a range of studies in the introduction.

<sup>28</sup> ABR, *EC — Asbestos*, §114.

<sup>29</sup> Luiten C. M., Steenhuis I. H. M. et al. *Ultra-Processed Foods Have the Worst Nutrient Profile, Yet They are the Most Available Packaged Products in a Sample of New Zealand Supermarkets* // *Public Health Nutrition*. 2015. Vol. 19. № 3. P. 531.

<sup>30</sup> Almeida L. B., Scagliusi F. B. et al. *Barriers to and Facilitators of Ultra-Processed Food Consumption: Perceptions of Brazilian Adults* // *Public Health Nutrition*. 2017. Vol. 21. № 1. P. 72, 74.

<sup>31</sup> Pongutta S., Chongwatpol P. et al. *Declaration of Nutrition Information on and Nutritional Quality of Thai Ready-To-Eat Packaged Food Products* // *Public Health Nutrition*. 2018. Vol. 21. № 8. P. 1409.

<sup>32</sup> ABR, *EC — Asbestos*, §114.

<sup>33</sup> Monteiro C.A., Cannon G. et al. *Ultra-Processed Foods, Diet Quality, and Health Using the NOVA Classification System*. Rome: FAO, 2019. P. 22–25.

<sup>34</sup> Saavedra-Garcia L., Sosa-Zevallos V. et al. *Reducing Salt in Bread: A Quasi-Experimental Feasibility Study in a Bakery in Lima, Peru* // *Public Health Nutrition*. 2015. Vol. 19. № 6. P. 976–977.

<sup>35</sup> Cediel G., Reyes M., da Costa Louzada M. L. et al. *Ultra-Processed Foods and Added Sugars in the Chilean Diet (2010)* // *Public Health Nutrition*. 2017. Vol. 21. № 1. P. 127.

<sup>36</sup> Lewis N., Huang Q., Merkel P. et al. *Differences in the Sugar Content of Fast-Food Products Across Three Countries* // *Public Health Nutrition*. 2020. Vol. 23. № 16. P. 2858.

<sup>37</sup> Tarragon E., Cases Ceano-Vivas P. et al. *Perceived Intensity and Palatability of Fatty Culinary Preparations is Associated with Individual Fatty Acid Detection Threshold and the Fatty Acid Profile of Oils Used as Ingredients* // *Chemical Senses*. 2021. Vol. 46. P. 5–8.

<sup>38</sup> Tuhumury H. *The Effects of Salt on Bread: Technological Considerations for Reduced Salt Levels* // *Journal of Sustainable Dryland Agriculture (AGRIC)*. 2011. Vol. 4. № 2. P. 135.

<sup>39</sup> Panel Report, *United States — Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/R, adopted 24 April 2012, as modified by Appellate Body Report WT/DS406/AB/R, DSR 2012:XI. P. 5865 (hereinafter — PR, *US — Clove Cigarettes*), §7.187, citing ABR, *EC — Asbestos*, §92.

<sup>40</sup> ABR, *US — Clove Cigarettes*, §125.

<sup>41</sup> *Ibid.*, §129.

<sup>42</sup> PR, *US — Clove Cigarettes*, §7.153.

<sup>43</sup> Drewnowski A. *Energy Density, Palatability, and Satiety: Implications for Weight Control* // *Nutrition Reviews*. 1998. Vol. 56. № 12. P. 347–348.

Ultra-processed foods may be argued to be far more appealing to consumers due to improving agents usually added to them (e.g., flavours, emulsifiers).<sup>44</sup> However, “likeness” at the stage of end-uses is concerned with the *capability* to perform a function. The abovementioned body of scientific knowledge shows that consumers highly appreciate all foods that are dense in critical nutrients. Degrees of consumer appreciation arguably lie outside of capabilities analysis.

### 1.1.3. Consumer tastes and habits

Consumer tastes and habits are highly market-specific. It bears assessing whether *in a given marketplace* consumers are willing to substitute ultra-processed foods with bulk bakery products or foods prepared at request. This paper is not supposed to name and shame any particular measures, but some country-related research may shed light on consumer preferences worldwide.

In general, there are some observations of cross-price elasticity that may be useful, albeit they are not definitive of the product “likeness”.<sup>45</sup> In economics food (especially, staple foods) is generally considered less price-elastic, since an increase of its price does not significantly affect the demand for food.<sup>46</sup> However, cross-price elasticity within some food groups exists, although this matter is still under-researched. Studies of Chile’s market found sugary beverages and sweet snacks and desserts to be highly substitutable.<sup>47</sup> A review of Mexico’s market provided similar results.<sup>48</sup> The analysis of the US market showed that “food prepared away from home” demonstrated a high rate of demand elasticity within the group.<sup>49</sup>

Thus, energy-dense foods could be considered price-elastic. Considering that such products are nevertheless addictive due to palatability, it is possible to conclude that consumers could switch to other energy-dense foods rather than decrease their consumption altogether. Demand for at least one critical nutrient (sugar) is so persistent that it induces substitution of sugary products across product groups. Hence, consumers may prefer sugary pastry sold in bulk or by street vendors to sugar-dense ultra-processed foods for the end-use of creating a pleasurable experience associated with the properties of foods.

Additionally, in some markets ultra-processed foods and fast food are perceived by children as a sort of reward from parents that provides a pleasurable gastronomic experience.<sup>50</sup> As for bakery products, in the markets of Chile and Brazil a good share of adolescents consume considerable amounts of bread (not specified whether packaged or in bulk) as part of their diet and prefer it to snacks or processed foods.<sup>51</sup> Since children are most susceptible to consuming palatable energy-dense foods,<sup>52</sup> their consumer behaviour could heavily inform the analysis of competition. Recalling the Appellate Body’s jurisprudence, even if for some consumers products are highly substitutable, it would determine that the products compete in the marketplace.<sup>53</sup> Further on, there is scientific evidence that snacks and food from street vendors are viewed by Chilean adults and children as instant sources of energy, since cooking full meals is considered time-consuming.<sup>54</sup> This arguably suggests that in some other marketplaces consumers may prefer energy-dense foods for the end-use of an instant and short-term energy boost.

<sup>44</sup> Monteiro C. A., Cannon, G. et al. *The UN Decade of Nutrition, the NOVA Food Classification and the Trouble with Ultra-Processing II* Public Health Nutrition. 2017. Vol. 21. № 1. P. 10.

<sup>45</sup> ABR, *Japan — Alcoholic Beverages II*, para. 25.

<sup>46</sup> Anderson P. L., McLellan R. D., Overton J. P., Wolfram G. L. *Price Elasticity of Demand*. McKinac Center for Public Policy, 1997. P. 58–60.

<sup>47</sup> Guerrero-López C. M., Unar-Munguía M., Colchero M. A. *Price Elasticity of the Demand for Soft Drinks, other Sugar-Sweetened Beverages and Energy Dense Food in Chile II* BMC Public Health. 2017. Vol. 17. P. 5. Table 4.

<sup>48</sup> Colchero M. A., Salgado J. C. et al. *Price Elasticity of the Demand for Sugar Sweetened Beverages and Soft Drinks in Mexico II* Economics & Human Biology. 2015. Vol. 19. P. 132. Table 2a.

<sup>49</sup> Andreyeva T., Long M. W., Brownell K. D. *The Impact of Food Prices on Consumption: A Systematic Review of Research on the Price Elasticity of Demand for Food II* American Journal of Public Health. 2010. Vol. 100. № 2. P. 219. Table 1.

<sup>50</sup> Turnbull B., Gordon, S. F. et al. *Childhood Obesity in Mexico: A Critical Analysis of the Environmental Factors, Behaviours and Discourses Contributing to the Epidemic II* Health Psychology Open. 2019. Vol. 6. № 1. P. 3–5.

<sup>51</sup> Martínez Arroyo A., Corvalán Aguilar C. et al. *Dietary Patterns of Adolescents from the Chilean Growth and Obesity Cohort Study Indicate Poor Dietary Quality II* Nutrients. 2020. Vol. 12. № 7. P. 9–10.

<sup>52</sup> WHO, *Noncommunicable diseases: Childhood overweight and obesity*. Q&A. 19 October 2020. URL: <https://www.who.int/> (accessed: 20.04.2023).

<sup>53</sup> ABR, *US—Clove Cigarettes*, §142, citing Appellate Body Reports, *Philippines — Taxes on Distilled Spirits*, WT/DS396/AB/R / WT/DS403/AB/R, adopted 20 January 2012, DSR 2012:VIII, p. 4163 (hereinafter — ABR, *Philippines—Distilled Spirits*), §220.

<sup>54</sup> Martínez Arroyo A., Corvalán Aguilar C. et al. *Op. cit.* P. 9–10.

## 1.2. Less favourable treatment

In line with the WTO practice, the measure accords less favourable treatment to “like” imports if it *de jure* or *de facto* affects their competitive conditions in the marketplace.<sup>55</sup> FOP labelling does not encompass *de jure* discrimination by excluding certain food distribution venues, as it applies equally to both imported and domestic goods. Nonetheless, the manner in which the measure operates or is designed to operate in the marketplace could be subject to a *de facto* discrimination claim. Objectively speaking, all labelling measures are by design intended to modify competitive conditions in the market. As rightly pointed out by the *US — Tuna II* panel, “it is the measures themselves that control [application of] the label and [direct] consumers to express their preferences.”<sup>56</sup> This is especially the case with FOP labelling designed to discourage consumption of labelled foods.

Thus, a step further has to be made to assess all the relevant features of the market, including the particular characteristics of the industry at issue, the relative market shares in a given industry, consumer preferences and historical trade patterns.<sup>57</sup> What share of the domestic market is occupied by excluded products is one of the core features to consider. For instance, in some Asian, African and Latin American countries eating out and buying from street vendors form a large part of the habitual dietary environment. Moreover, in many developing countries street food trading is occupied predominantly by locals.<sup>58</sup> Thus, if unregulated food distribution channels hold a considerable share in the domestic market of energy-dense foods, the labelling measure could *de facto* discriminate imports to the benefit of a local food industry.

Nonetheless, in *US — Clove Cigarettes* and *US — COOL* the Appellate Body read into Article 2.1 an additional requirement that permits making product distinctions detrimental to competitive opportunities, if such differential treatment “stems exclusively from legitimate regulatory distinctions”.<sup>59</sup> The Appellate Body, however, introduced a new term without explanation. It was suggested to identify the legitimacy of the drawn distinction through another relative notion of “even-handedness”. The best guess to be made from case law is that technical regulation is applied in an even-handed manner if it treats in the same way products that pose the same risks to the legitimate objective pursued by the measure.<sup>60</sup> For instance, the US lost its case under Article 2.1 both in *Clove Cigarettes* and *COOL* proceedings precisely because the challenged measures failed to cover (1) menthol flavoured cigarettes equally attracting young smokers, (2) tuna caught outside the Eastern Tropical Pacific Ocean by fishing methods injurious to dolphins.

Since most of mandatory FOP labelling explicitly mentions human health protection as one of its goals, excluding products dense in critical nutrients, the excessive consumption of which leads to obesity and other NCDs, is unlikely to be considered a legitimate distinction. Nonetheless, the adopting Member could claim products sold in bulk or prepared at request are excluded due to technical constraints, as these foods are not traded in packages to display FOP labels on. Here it may be useful to refer to the position discussed in literature that “even-handedness” is similar to evaluating a degree of contribution under Article 2.2, since it equally requires a genuine link between the measure’s ends and means.<sup>61</sup> For this purpose, measures may be effective as part of a complex regulatory effort.<sup>62</sup> If the adopting Member could demonstrate that it adopted or is going to adopt supplementary measures suitable for non-packaged foods, FOP labelling may be considered non-discriminatory under Article 2.1. A possible example of a supportive measure could be the requirement to display calorie information on menus and food items, which is gaining popularity nowadays. For instance, in April 2022 the UK government promulgated regulations requiring enterprises with 250 or more employees to display calorie information for non-prepackaged food and drinks that are prepared

<sup>55</sup> ABR, *US—Clove Cigarettes*, paras. 111, 181–182; ABR, *US—COOL*, §269.

<sup>56</sup> PR, *US — Tuna II*, §7.287.

<sup>57</sup> ABR, *US — COOL*, §269.

<sup>58</sup> Recchi S. *Informal Street Vending: A Comparative Literature Review* // International Journal of Sociology and Social Policy. 2020. Vol. 41. № 7/8. P. 805–825.

<sup>59</sup> ABR, *US — Clove Cigarettes*, §175.

<sup>60</sup> ABR, *US — Tuna II*, §297.

<sup>61</sup> Marceau G. *The New TBT Jurisprudence in US — Clove Cigarettes, WTO US — Tuna II, and US — COOL* // Asian Journal of WTO & International Health Law and Policy. 2013. Vol. 8. № 1. P. 28.

<sup>62</sup> Panel Reports, *Australia — Certain Measures concerning Trademarks, Geographical Indications and other Plain Packaging Requirements applicable to Tobacco Products and Packaging*, WT/DS435/R, Add.1 and Suppl.1 (Honduras) / WT/DS441/R, Add.1 and Suppl.1 (Dominican Republic) / WT/DS458/R, Add.1 and Suppl.1 (Cuba) / WT/DS467/R, Add.1 and Suppl.1 (Indonesia), WT/DS458/R and WT/DS467/R adopted 27 August 2018, DSR 2018:VIII, p. 3925, and WT/DS435/R and WT/DS441/R adopted 29 June 2020, as upheld by Appellate Body Reports WT/DS435/AB/R / WT/DS441/AB/R, DSR 2018:VIII, p. 3925 (hereinafter — PR, *Australia — Tobacco Plain Packaging*), §7.1043.

at request.<sup>63</sup> The problem with the lack of packaging was solved through the obligation to display information at the *point of choice* for the customer, such as menus, food delivery platforms and food labels, where possible. Although some scholars have challenged the effectiveness of displaying caloric value instead of nutritional value,<sup>64</sup> such a regulation is an effective reference point for the adopting Members.

To sum up, legislators will have to ensure that their regulatory intervention objectively covers all foods rich in critical nutrients to avoid risks of discriminating towards specific product groups. If FOP labelling leaves some food distribution channels unregulated, it may violate the NT principle of Article 2.1, as such exceptions could mostly favour domestic production. Due to a similar nutritional composition, such foods would be “like” to processed packaged foods disadvantaged by unpleasant labelling. To secure compliance with Article 2.1 the adopting Member will have to demonstrate that exempted foods are accorded similar treatment through other regulations, which are more suitable for the corresponding distribution channels.

## 2. Necessity

Under Article 2.2 of the TBT Agreement, the Members shall ensure that technical regulations are not “more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create”. The Appellate Body in *US — Tuna II* interpreted this provision to prescribe a “holistic exercise” of reviewing the contested measure as to

- (1) the legitimacy of its objective(s),
- (2) degree of contribution that the measure makes to their achievement,
- (3) the risks non-fulfilment of the objective(s) would create and
- (4) trade-restrictiveness of the measure, compared to alternative measures that are:
  - (a) reasonably available,
  - (b) making an equivalent contribution to pursued objective(s);
  - (c) less trade-restrictive, taking into account the risks of non-fulfilment.<sup>65</sup>

The review of specific trade concerns shows that the majority of the Members questioned the capability of FOP labelling to contribute to the stated objectives. For instance, in respect of Chile and Peru’s measures the Members pointed to the allegedly misleading nature of such labelling, as it portrayed the goods as unhealthy rather than highlighted the nutritional value of the foods.<sup>66</sup> Instead, the Members proposed a range of other supposedly less trade restrictive alternatives, including other labelling schemes and consumer education.<sup>67</sup> Therefore, the major issues for the adopting Members to consider in terms of compliance with Article 2.2 are whether the proposed measure is going to contribute to the stated objectives, as well as whether there are less trade-restrictive alternatives reasonably available. Recalling that even if the measure is trade-restrictive, i.e. has some limiting effects on trade, it would not *per se* violate Article 2.2,<sup>68</sup> the rest of the section does not discuss this part of the test.

### 2.1. Legitimate objective

In line with the WTO practice under Article 2.2 of the TBT Agreement, technical regulations may pursue a wide range of objectives, which should be “lawful, justifiable or proper”, i.e. *legitimate*.<sup>69</sup> Designed to combat proliferation of NCDs, mandatory nutrition labelling is likely to pursue the objective of public health protection, which is explicitly mentioned in the text of Article 2.2 as legitimate. The majority of reviewed technical regulations refer to this objective. The measure may pursue an additional goal of providing consumers with information regarding critical nutrients content (e.g. FOP labelling in Uruguay, Chile, Sri Lanka). Importantly,

<sup>63</sup> Department of Health and Social Care. *Calorie Labelling on Menus to be Introduced in Cafes, Restaurants and Takeaways*. GOV.UK. 2021. URL: <https://www.gov.uk/government/> (accessed: 20.04.2023).

In addition, the UK maintains a voluntary FOP labelling scheme, which displays a share (%) that the contained amount of a nutrient occupies in the daily intake.

<sup>64</sup> Yeo G. S. *Is Calorie Labelling on Menus the Solution to Obesity?* // *Nature Reviews Endocrinology*. 2022. Vol. 18. № 8. P. 453–454.

<sup>65</sup> ABR, *US — Tuna II*, paras. 314, 318–322.

<sup>66</sup> WTO TBT Committee, *Minutes of the meeting of 8–9 November 2017*. G/TBT/M/73. §2.2.4.11. URL: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/G/TBT/M73.pdf&Open=True> (accessed: 20.04.2023); WTO TBT Committee, *Minutes of the meeting of 17, 19 and 20 June 2013*. G/TBT/M/60. §3.2.2.23. URL: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/G/TBT/M60.pdf&Open=True> (accessed: 20.04.2023).

<sup>67</sup> WTO TBT Committee, *Minutes of the meeting of 6–7 March 2013*. G/TBT/M/59. §2.2.1.4. URL: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/G/TBT/M59.pdf&Open=True> (accessed: 20.04.2023); WTO TBT Committee, *Minutes of the meeting of 13–14 May 2020*. G/TBT/M/81. §1.3.23. URL: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/G/TBT/M81.pdf&Open=True> (accessed: 20.04.2023).

<sup>68</sup> ABR, *US — Tuna II*, §319, ABR, *US — COOL*, §375.

<sup>69</sup> ABR, *US — Clove Cigarettes*, §115, ABR, *US — Tuna II*, §313.

even if a technical regulation would not explicitly name this goal, in the case of a WTO dispute the panel could reveal the goal from the design and intended operation of the labelling measure, as it is not bound by the parties' characterisation of objectives.<sup>70</sup> The argument for placing emphasis on the informing function of labelling had been rightly expressed by the panel in *US — Tuna II*, when it found that labels by nature *direct* consumers to express their preferences.<sup>71</sup>

The review of specific trade concerns reveals a firm consensus amongst the Members that FOP labelling has a bearing upon both goals, neither of which is being considered illegitimate or unjustified by the Members.<sup>72</sup> However, concerns were frequently raised with regard to the capability of FOP labelling to achieve either of the aims. While this discussion pertains to the assessment of contribution, proper identification of the measure's objectives predetermines the extent to which such a contribution would be assessed under Article 2.2. In other words, if the measure has two distinct objectives, it must demonstrate a degree of contribution to both of them separately, which complicates the task for the adopting Member.

Based on the existing WTO jurisprudence, there could be two viable options for combining the goal of human health protection with the informing function of the label. First, the adopting Member may argue that informing consumers about the critical nutrients content is not the objective itself, since it is employed as a *means* of raising consumer awareness to combat proliferation of NCDs and thus to protect public health. In *Australia — Tobacco Plain Packaging* the responding party maintained a similar view and claimed that the plain packaging measure had a range of specific objectives in order to influence the smoking behaviour of Australia's population. This set of public health objectives had to be achieved through three "proximal steps", including decreasing the ability of the package to mislead consumers about the harmful effects of tobacco.<sup>73</sup>

A possible critique of this approach is rooted in the fact that Australia itself did not plead that prevention of misleading practices was one of the legitimate objectives, but rather presented it as one of the "mechanisms" to achieve them.<sup>74</sup> The corresponding findings of the panel were not appealed by either of the parties. The Appellate Body thus *did not enquire into the matter*. It recollected the facts and stated that "Australia referred to these processes as the TPP mechanisms, as did the Panel".<sup>75</sup>

FOP labelling could be advocated to have two distinct legitimate objectives. Indeed, providing consumer information was viewed as a self-standing objective in *US — COOL* and *US — Tuna II* as a form of protection from deceptive practices expressly mentioned in the text of Article 2.2.<sup>76</sup> This approach, however, has practical limitations. In *US — COOL* providing consumer information was the sole objective of the measure, not interwoven with other policy concerns. In *US — Tuna II* the responding party itself advanced the two-fold objective of dolphin-safe labelling and there was no substantive dispute between the parties regarding that.<sup>77</sup> The panel accepted such reasoning, and the matter was not subsequently raised in appeal.

Thus, the discussion above boils down to advocacy strategies adopted in the case of a dispute, since there is case law in support of both approaches. Drafting the measure in a certain way would not be a panacea from a challenge of its objective(s) in the context of contribution analysis. Nonetheless, as panels have to regard the design of the measure amongst other factors, a reference to informing consumers as a means to protect public health in the text of a measure could be recommended.

## 2.2. Degree of contribution

Having identified a complex structure of legitimate objectives, it needs to be explained how, if at all, the measure may achieve its aim(s). Notably, Article 2.2 of the TBT Agreement does not imply that FOP labelling must completely achieve its goal(s), it rather has to show a *degree* of contribution.<sup>78</sup> For this purpose, there must be a "genuine relationship of ends and means" between the stated objective(s) and the contested measure.<sup>79</sup> However, in the case of far-reaching preventive measures, such as public health improvement,

<sup>70</sup> ABR, *US — COOL*, §395.

<sup>71</sup> PR, *US — Tuna II*, §7.287.

<sup>72</sup> *G/TBT/M/73*, §2.2.4.11; *G/TBT/M/60*, §3.2.2.23; *G/TBT/M/59*, §2.2.1.4; *G/TBT/M/81*, §1.3.23.

<sup>73</sup> PR, *Australia — Tobacco Plain Packaging*, §7.223.

<sup>74</sup> *Ibid.*, §7.204.

<sup>75</sup> Appellate Body Reports, *Australia — Certain Measures concerning Trademarks, Geographical Indications and other Plain Packaging Requirements applicable to Tobacco Products and Packaging*, WT/DS435/AB/R and Add.1 (Honduras) / WT/DS441/AB/R and Add.1 (Dominican Republic), adopted 29 June 2020 (hereinafter — ABR, *Australia — Tobacco Plain Packaging*), §6.15.

<sup>76</sup> PR, *US — Tuna II*, §7.437; ABR, *US — COOL*, §445.

<sup>77</sup> PR, *US — Tuna II*, §7.430.

<sup>78</sup> ABR, *US — Tuna II*, § 315–316.

<sup>79</sup> ABR, *US — COOL*, § 462, citing Appellate Body Report, *Brazil — Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, adopted 17 December 2007, DSR 2007:IV, p. 1527 (hereinafter — ABR, *Brazil — Retreaded Tyres*), § 145.



the effects of a regulatory intervention could not be immediately observed.<sup>80</sup> The Appellate Body concurred that in such cases one may accord “greater probative weight to the pre-implementation evidence pertaining to *anticipated* effects” of such measures.<sup>81</sup> Such may include, inter alia, the measure’s architecture, intended operation and evidence of application.<sup>82</sup>

To discuss the issue of contribution it is first necessary to ascertain how FOP labelling is designed. To date, the specific trade concerns have been raised in respect of an alleged inability of FOP labelling to contribute to its objective(s). The adopting Members responding to such concerns constantly state that such measures are apt to improve public health by targeting the excessive consumption of critical nutrients.<sup>83</sup>

Minding the abovementioned discussion on the informing function of labelling, at this point the structure of aims and means becomes overly complicated and requires explanation. As is evident from the existing WTO case law, measures aimed at human health protection are likely to adopt a consecutive chain of means to fulfil the stated objective. The panel in *Australia — Tobacco Plain Packaging* observed such a structure of the measure (the “mediational” model with “proximal” steps), where public health improvements were to be achieved through several means.<sup>84</sup>

A similar causal pathway for FOP labelling implies that labelling must be apt to (1) reduce the excessive consumption of critical nutrients (2) in order to combat proliferation of NCDs. The panel in *Australia — Tobacco Plain Packaging* concluded that for such “mediational” measures the degree of contribution must be present at *each stage* of implementation,<sup>85</sup> so that two causal links need to be demonstrated. In respect of complex preventive measures, such causation may not be substantiated by the factual evidence of the measure’s material contribution. On the contrary, in respect of the plain packaging measure, it sufficed that the responding party demonstrated the measure’s *actual effects on the first stage* of implementation and the voluminous body of *scientific proof* that the measure would be effective *at each stage* of its operation.

The scientific evidence of the anticipated contribution could be considered the Achilles’ heel of FOP labelling. It would be less challenging for the adopting Members to corroborate the link between the decrease in excessive consumption of critical nutrients and improvement of public health (the second stage of operation). According to the WHO, the proliferation of NCDs is driven by the increase of obesity rates worldwide. Obesity is defined as abnormal or excessive fat accumulation caused by an energy imbalance between calories consumed and calories expended.<sup>86</sup> Therefore, to tackle obesity, it is necessary to target both. The WHO recommends to reduce the number of calories consumed from critical nutrients and encourage daily physical activity to keep the balance.<sup>87</sup> The adopting Members may rely on these recommendations as a reputable scientific source to demonstrate causation.

Nonetheless, such an argumentation could face criticism, as FOP labelling is not apt to influence a sedentary lifestyle of the population. The adopting Members could effectively counter that with evidence that FOP labelling forms part of a *consolidated strategy* including various means of intervention, such as promotion of physical activity and consumer education programs. For instance, plain packaging was introduced to support other Australia’s tobacco control regulations. The panel in that case was satisfied with the argument that the contested measure in synergy with other initiatives was apt to make a meaningful contribution.<sup>88</sup>

With regard to the evidence of the effectiveness of FOP labels in decreasing the excessive consumption of critical nutrients currently there is a plethora of conflicting scientific evidence, which if brought to the WTO dispute could lead to unexpected conclusions. The recent meta-analysis suggests on the basis of interventions in 11 countries that any nutrition labelling (however designed) insignificantly reduces consumption of fats, but not of other critical nutrients.<sup>89</sup> Another study reveals that mandatory FOP labelling

<sup>80</sup> PR, *Australia — Tobacco Plain Packaging*, § 7.938, citing ABR, *Brazil — Retreaded Tyres*, § 151.

<sup>81</sup> ABR, *Australia — Tobacco Plain Packaging*, § 6.361; ABR, *US — COOL* (Recourse to Article 21.5 of the DSU by Canada and Mexico), §5.209.

<sup>82</sup> ABR, *US — COOL*, § 461.

<sup>83</sup> *G/TBT/M/73*, § 2.2.4.11; *G/TBT/M/60*, § 3.2.2.23; *G/TBT/M/81*, § 1.3.23.

<sup>84</sup> PR, *Australia — Tobacco Plain Packaging*, § 7.491, 7.493.

<sup>85</sup> *Ibid.*, § 7.564, 7.1030.

<sup>86</sup> WHO, *Fact sheet: Obesity and Overweight*. URL: <https://www.who.int/news-room/fact-sheets/detail/obesity-and-overweight> (accessed: 20.04.2023).

<sup>87</sup> WHO, *Obesity. Prevention and Control*. URL: [https://www.who.int/health-topics/obesity#tab=tab\\_3](https://www.who.int/health-topics/obesity#tab=tab_3) (accessed: 20.04.2023).

<sup>88</sup> PR, *Australia — Tobacco Plain Packaging*, § 7.1043.

<sup>89</sup> Shangguan S., Afshin A. et al. *A Meta-Analysis of Food Labeling Effects on Consumer Diet Behaviours and Industry Practices II* American Journal of Preventive Medicine. 2019. Vol. 56. № 2. P. 307.

reduces purchase intentions of “unhealthy” products.<sup>90</sup> In limitations to that paper the authors acknowledged what arguably forms the core of the scientific discussion on the matter. They stated that there is still a *research gap* between discouraging purchasing intentions and actual intake of different nutrients. The third study maintains that consumers do not change their consumption behaviour because of nutrition labelling.<sup>91</sup> As was rightly pointed out by the recent study, “if consumers switch from labelled products, what do they choose as alternatives?”. This would be the key question that the adopting Member would have to answer to secure the measure’s anticipated contribution. The science still has to reveal changes in actual consumption, whereas the current state of research is full of limitations, which lead to contradictory results.

The adopting Members could also refer to the achievements of other Members who already have FOP labelling in place to show prospects of contribution. Nevertheless, the resulting effect of their interventions is still fairly limited. The study on Ecuador’s FOP labelling concludes that the focus group participants recognised the labels, but not all of them changed their consumption practices tied to packaged processed foods.<sup>92</sup> Similarly, recent studies of Chile’s “warning” labelling demonstrate that the majority of consumers understand the labelling, but still buy labelled foods after more than five years since the measure was introduced.<sup>93</sup>

Thus, what is left to the adopting Members is to choose the most reliable and reputable science they could obtain in favour of their measures. It is worth noting that even in the face of a contradictory body of science the Members have a fair chance of showing the necessary degree of contribution on the first stage of the measures’ operation. The panel as a trier of facts does not resolve scientific debates.<sup>94</sup> Thus, it would rather limit itself to the general analysis of the nature and quality of evidence, including the provenance of studies, their methodological rigour and coherence.<sup>95</sup>

The structure of argumentation may vary depending on the place of the abovementioned informing function of FOP labelling in the complex structure of goals and means. Should it be considered a self-standing objective, a degree of contribution would have to be demonstrated *separately* from the “mediational” model of human health protection. However, if the informing function of the measure is viewed as a means of public health improvement, then it would be built in the “mediational” model as another stage of operation. In such circumstances, the adopting Member must be prepared to show how labelling (1) provides accurate consumer information, which (2) influences the excessive consumption of critical nutrients, (3) having a bearing on combating proliferation of NCDs.

It could be challenging to adduce evidence of providing consumers with accurate information, as some Members have already questioned the thresholds for assigning labels to packaged foods. For instance, the existing thresholds of mandatory FOP labelling are mainly calculated per 100 g (ml) of a product instead of a portion size. The US representative correctly claimed at the TBT Committee meetings that no one consumes 100 g of butter in one serving, but it is labelled as “high in” fat.<sup>96</sup> The same is true for products sold in portions less than 100 g (ml), which are likely to be wrongfully portrayed as overly dense in critical nutrients. Therefore, the adopting Members have to ensure that their labelling initiatives are backed up with the objectively calculated parameters of adducing a particular label to a particular product.

The abovementioned complexity of the causation pathway apparently makes the contribution stage of analysis a litmus test of the measure’s compliance with Article 2.2 of the TBT Agreement. For this purpose, having a strong scientific basis proving the capability of labelling to reduce consumption of critical nutrients is of utter importance for the adopting Members, since it fuels most of the discussion at the TBT Committee. Conversely, if a meaningful contribution would not be properly substantiated, there would be no need for further analysis under Article 2.2 due to the lack of justification for this regulatory intervention.<sup>97</sup>

<sup>90</sup> Song J., Brown M. K. et al. *Impact of Colour-Coded and Warning Nutrition Labelling Schemes: A Systematic Review and Network Meta-Analysis* // PLOS Medicine. 2021. Vol. 18. № 10. P. 16.

<sup>91</sup> Ikonen L., Sotgiu F. et al. *Consumer Effects of Front-of-Package Nutrition Labeling: An Interdisciplinary Meta-Analysis* // Journal of the Academy of Marketing Science. 2019. Vol. 48. № 3. P. 364, 371.

<sup>92</sup> Freire W. B., Waters W. F. et al. *A Qualitative Study of Consumer Perceptions and Use of Traffic Light Food Labelling in Ecuador* // Public Health Nutrition. 2016. Vol. 20. № 5. P. 805.

<sup>93</sup> Silva C. P., Bento, A. C. et al. *The Impact of Front-of-the-Packaging Nutrition Labelling Warnings on Consumer Habits: A Scoping Review Exploring the Case of the Chilean Food Law* // BFJ. 2022. Vol. 124. № 13. P. 74–77.

<sup>94</sup> PR, Australia — Tobacco Plain Packaging, § 7.514.

<sup>95</sup> *Ibid.*, § 7.516.

<sup>96</sup> WTO TBT Committee, *Minutes of the meeting of 5–6 November 2014*. G/TBT/M/64/Rev.1. §2.136. URL: [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S009-DP.aspx?language=E&CatalogueIdList=130728](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=130728) (accessed: 20.04.2023).

<sup>97</sup> ABR, US — Tuna II, § 322, fn. 647.

## 2.3. Comparative analysis

When existing FOP labelling had been discussed at the TBT Committee, the Members concerned with the lack of contribution proposed a range of measures, which compared to mandatory labelling were deemed to be (1) less trade-restrictive (2) reasonably available alternatives, which (3) make an equivalent contribution to the legitimate objective(s), taking risks of its/their non-fulfilment into account.<sup>98</sup> Suggested regulatory interventions include less stringent forms of labelling prescribed by the Codex Alimentarius, either self-standing or in combination with consumer education initiatives, as well as physical activity programs. In addition, various taxation mechanisms previously employed by some Members to combat obesity and NCDs could be examined as a possible alternative to FOP labelling.

### 2.3.1. Other labelling schemes

At the TBT Committee meetings the concerned Members suggested that mandatory labelling be substituted with the “low,” “free” and “no added” labels contained in the Codex Alimentarius *Guidelines for Use of Nutrition and Health Claims*.<sup>99</sup> Another proposal was to adopt the “Nutrient Reference Values” (hereinafter — NRVs) labelling scheme displaying a percentage of the nutrient contained in the product from its estimated daily need.<sup>100</sup>

The adopting Member could advance two arguments against the nutrient claims prescribed by the Codex. First, it may argue that such a “positive” signposting, even if effective, is not adequate to the risks of NCDs proliferation, taking into account the epidemiological and sociocultural situation in the adopting Member. As the Appellate Body stated in *US — Tuna II*, the nature and gravity of the risks of non-fulfilment of the measure’s objective(s) should be considered.<sup>101</sup> As regards human health protection, the WTO jurisprudence recognises that it is one of the *vital* values, and the risks of not protecting it are particularly grave.<sup>102</sup> It is safe to assume that the Member adopting a measure targeting human disease identifies the sought level of protection as *prevention to the maximum extent possible*.<sup>103</sup> This could be a persuasive point for the low- and lower-middle income countries, since their populations are disproportionately susceptible to cheap low-quality food<sup>104</sup> and have a poor level of consumer awareness.<sup>105</sup>

Second, the adopting Member could maintain that the measure does not achieve an equivalent degree of contribution, which according to the WTO practice does not require the alternative to make the same contribution as the contested measure.<sup>106</sup> Nonetheless, numerous studies suggest that positive perceptions of a product created by labelling induce overconsumption of such foods.<sup>107</sup> Therefore, consumption of critical nutrients in one sitting may even increase as a result of the measure, which by no means could demonstrate the equivalence of contribution. Taking into consideration grave risks of failure to improve public health through the measure, the prospects of success for NRVs labelling as an alternative measure are fairly limited.

Coming to the NRVs, they are not recommended by the WHO as a form of effective regulatory intervention to combat NCDs due to their non-interpretive nature, i.e., purely numerical contents without understandable symbols, colour or text.<sup>108</sup> Scientific research to date reveals consensus amongst scholars that the NRVs lack effectiveness as a self-standing measure to address consumption of critical nutrients due to the lack of salience and the inability of consumers to understand the label.<sup>109</sup> The adopting Member could refer to some studies to prove that the suggested alternative is not going to make an equivalent contribution.

<sup>98</sup> *Ibid.*, §319, 322.

<sup>99</sup> *G/TBT/M/59*, § 2.2.1.4.

<sup>100</sup> *G/TBT/M/64/Rev.1.*, § 2.136.

<sup>101</sup> *ABR, US — Tuna II*, § 321.

<sup>102</sup> *ABR, EC — Asbestos*, § 172; *ABR, Brazil — Retreaded Tyres*, § 144; *PR, Australia — Tobacco Plain Packaging*, § 1310.

<sup>103</sup> *ABR, Brazil — Retreaded Tyres*, § 56; *ABR, US — Tuna*, § 316.

<sup>104</sup> WHO, *Fact sheet: Obesity and Overweight*. URL: <https://www.who.int/news-room/fact-sheets/detail/obesity-and-overweight> (accessed: 20.04.2023).

<sup>105</sup> Flora S. *Health Claims in a Developing Country Context: ‘Food Labels are not a Silver Bullet to Solve the NCD Challenge’* // Food Navigator. 3 August 2021. URL: <https://www.foodnavigator.com/Article/2021/08/03/Health-claims-in-a-developing-country-context-Food-labels-are-not-a-silver-bullet-to-solve-the-NCD-challenge> (accessed: 20.04.2023).

<sup>106</sup> *ABR, US — COOL* (Article 21.5 — Canada and Mexico), § 5.215, 5.254.

<sup>107</sup> Talati Z., Pettigrew S. et al. *Consumers’ Responses to Front-of-Pack Labels That Vary by Interpretive Content* // *Appetite*. 2016. Vol. 101. P. 206.

<sup>108</sup> WHO, *Guiding Principles and Framework Manual for Front-of-Pack Labelling for Promoting Healthy Diet. Box 3, Principle 7*. URL: <https://www.who.int/publications/m/item/guidingprinciples-labelling-promoting-healthydiet> (accessed: 20.04.2023).

<sup>109</sup> Jones A., Neal B. et al. *Front-of-Pack Nutrition Labelling to Promote Healthier Diets: Current Practice and Opportunities to Strengthen Regulation Worldwide* // *BMJ Global Health*. 2019. Vol. 4. № 6. P. 5, citing a range of studies.

However, the concerned Members claim that more complex labelling schemes, such as the NRVs, could be supported by consumer education programs.<sup>110</sup> The WTO jurisprudence recognises a possibility for comprehensive regulatory interventions to act as a single alternative. The Appellate Body in *US — COOL* (para. 21.5) concurred that various methods could jointly achieve a legitimate objective. In such cases, the panels are to assess the synergetic contribution produced by the initiatives.<sup>111</sup> While in a long term this could increase consumers' understanding of the NRVs, the success of such practices would heavily depend on the socioeconomic status, age and cultural experiences of the participants.<sup>112</sup>

Moreover, since it takes little time for consumers to choose particular foods at the point of sale, studies show that they tend to reduce the effort to calculate the overall nutritional benefit of a product, which could neutralise the effect of consumer awareness programs.<sup>113</sup> Finally, the adopting Member could appeal to the lack of time to observe the effects of such intervention due to the harsh epidemiological situation in the region (e.g., progressing morbidity rates, current health expenditure in % of GDP, healthcare system load).

Other less stringent labelling strategies adopted by some Members, including the "Health Star Rating", the "Healthier Choice Symbol" or the "Nutri-Score" labelling, could also be viewed by the concerned party as a viable alternative to mandatory "high in" labelling. Nonetheless, it would be equally challenging to adduce evidence of the effectiveness of other labelling systems in changing consumption patterns to reduce intake of critical nutrients. Scientific information regarding these measures is still conflicting. Several studies point to the misleading nature of endorsement logos and rating systems, due to the false perceptions of healthiness they may create.<sup>114</sup>

### 2.3.2. Promoting physical activity

As noted above, the WHO suggests targeting obesity and associated NCDs through regulating calories consumption and expenditure. Taking into account the objective of human health protection, the Member in line with the WTO practice could decide to achieve it through different means,<sup>115</sup> including promotion of physical activity. Nonetheless, the WHO recognizes that some Members would struggle to succeed in increasing physical activity of the population, as some countries are far more susceptible to sedentary lifestyles than others.<sup>116</sup> Moreover, as a suggested paradigm shift in society, such policies by definition take a considerable amount of time to achieve a decent result, which could not be available to some Members due to a grave situation with the NCDs in the region. Consequently, the adopting Member could argue that promotion of physical activity as a self-standing alternative would not be adequate to the risks on the NCDs proliferation in the Member.

### 2.3.3. Taxation

The idea to introduce a new tax to improve public health is not new to the WTO. For instance, in *Australia — Tobacco Plain Packaging* the complainants suggested increases in excise tax on tobacco products instead of maintaining plain packaging measures. Care should be taken when drawing comparisons between tobacco which intake is unhealthy in any form and foods that an ordinary person needs on a daily basis to live. Nonetheless, there are examples of taxation initiatives (so-called "fat taxes"), which either target a critical nutrient (saturated fat tax in Denmark, abandoned in 2013), or a product containing it (soft drinks taxes in Hungary, France, Norway, Chile, Mexico, etc.). The concerned Members could thus suggest implementing a taxation strategy to target critical nutrients without placing unappealing labels on the front-of-pack. A specific indirect tax (per unit) could arguably achieve the legitimate objective in a more objective and precise way than *ad valorem* indirect tax (per value), which could open opportunities for tax avoidance.

<sup>110</sup> *G/TBT/M/64/Rev.1.*, § 2.136.

<sup>111</sup> *ABR, US — COOL* (para. 21.5 — Canada and Mexico), § 5.216.

<sup>112</sup> *WHO Regional Office for Europe, Manual to Develop and Implement Front-of-Pack Nutrition Labelling: Guidance for Countries on the Selection and Testing of Evidence-Informed Front-of-Pack Nutrition Labelling Systems in the WHO European Region.* P. 36–38. URL: <https://apps.who.int/iris/handle/10665/336988> (accessed 20.04.2023).

<sup>113</sup> Talati Z., Pettigrew S. et al. *Op. cit.* P. 211.

<sup>114</sup> Folkvord F., Bergmans N., Pabian S. *The Effect of the Nutri-Score Label on Consumer's Attitudes, Taste Perception and Purchase Intention: An Experimental Pilot Study // Food Quality and Preference.* 2021. Vol. 94. P. 5–6; Dickie S., Woods J. L., Lawrence, M. *Analysing The Use of the Australian Health Star Rating System by Level of Food Processing // International Journal of Behavioural Nutrition and Physical Activity.* 2018. Vol 15. № 1. P. 4.

<sup>115</sup> *ABR, US — COOL* (Article 21.5 — Canada and Mexico), § 5.215.

<sup>116</sup> *WHO, Global Action Plan on Physical Activity 2018–2030: More Active People for a Healthier World.* P. 15. URL: <https://apps.who.int/iris/bitstream/handle/10665/272722/9789241514187-eng.pdf> (accessed: 20.04.2023).

The adopting Members may respond with two arguments. First, if the informing function of FOP labelling is considered to be a separate legitimate objective, taxation measures would not demonstrate an equivalent contribution, since they do not educate consumers to make dietary choices. Second, taxation measures are unlikely to be less trade-restrictive than mandatory FOP labelling. The economic theory of indirect taxation suggests that the financial burden of a new tax is at least partially shifted on consumers.<sup>117</sup> The same results were proven by the research of various fat taxes in Europe.<sup>118</sup> Other studies confirm that “fat taxes” as a form of indirect taxation could increase the price of foods to the extent that it could discourage purchasing intentions. For instance, over a year after the introduction of an excise tax on sugary beverages in Mexico, the average price of the product increased by 11 %, whereas its consumption decreased by 6 %.<sup>119</sup> As acknowledged in *Australia — Tobacco Plain Packaging*, a tax-induced decrease of goods consumption is likely to affect the volumes of trade in the targeted commodities.<sup>120</sup> In such circumstances, it would be challenging for the concerned Members to demonstrate that the measure is not equally or more trade-restrictive than FOP labelling. In *Australia — Tobacco Plain Packaging* the complainants failed to persuade the panel.

Summarising the discussion of the FOP measures’ compliance with Article 2.2, it would heavily depend on the outcomes of scientific debates over the meaningful contribution. The more objective and methodologically rigorous studies the Member could refer to, the more realistic are its prospects of success. To justify a one-sided approach to target consumption of critical nutrients, the Member would have to demonstrate a synergetic regulatory effort, which covers both calorie expenditure and calorie consumption, supported by consumer awareness programs. If FOP labelling withstands the contribution analysis, there arguably would be no viable alternative to it, as other measures are unlikely to demonstrate equivalent and urgent results in terms of public health improvement.

### 3. Harmonisation

Pursuant to Article 2.4 of the TBT Agreement, the Members shall use the relevant international standards, or the relevant parts of them, as a basis for their technical regulations except when such standards would be an ineffective or inappropriate means for the fulfilment of the pursued legitimate objectives. Thus, the measure would be consistent with Article 2.4, if (1) a relevant international standard exists or its completion is imminent, and (2) it is used as a basis for the technical regulation. To create incentives for the Members to harmonise their measures on as large a scale as possible, Article 2.5 of the TBT Agreement establishes a rebuttable presumption of the measures’ compliance with Article 2.2, if they are prepared, adopted or applied for one of the legitimate objectives mentioned in the latter, and are in accordance with the relevant international standards.

At the TBT Committee, the Members frequently voiced concerns regarding compliance of mandatory FOP labelling with the relevant international standards, for instance, the Codex Guidelines for Use of Nutrition and Health Claims (CAC/GL 23-1997) and the Codex Guidelines on Nutrition Labelling (CAC/GL2-1985).<sup>121</sup> It is unlikely that the status of these Guidelines as relevant international standards could be challenged by the Members. As the Appellate Body stated in *US — Tuna II*, the international standard exists when there is a standard as defined in Annex 1.2 to the TBT Agreement and an international standardizing body in terms of Annex 1.4.<sup>122</sup> These are undoubtedly documents, containing product-related guidelines for common and repeated use, which fits the TBT definition of a standard. Moreover, the Joint FAO/WHO Codex Alimentarius Commission administering the Codex had been acknowledged as an authoritative international standardizing body in the previous WTO practice and in the SPS Agreement.<sup>123</sup>

It is unclear whether these Guidelines could be used as a basis for mandatory FOP labelling. The Appellate Body clarified in *EC — Sardines* that the standard is used “as a basis” if it is a principal constituent

<sup>117</sup> *Economics Online, Indirect Taxes*. URL: [https://www.economicsonline.co.uk/competitive\\_markets/indirect\\_taxes\\_and\\_subsidies.html](https://www.economicsonline.co.uk/competitive_markets/indirect_taxes_and_subsidies.html) (accessed: 20.04.2023).

<sup>118</sup> Thiele S., Roosen J. *Obesity, Fat Taxes and Their Effects on Consumers. Regulating and Managing Food Safety in the EU II* H. Bremmers, K. Purnhagen (eds.) / *Regulating and Managing Food Safety in the EU: A Legal-Economic Perspective*. Cham : Springer, 2018. P. 22.

<sup>119</sup> Fernandez M. A., Raine K. D. *Insights on the Influence of Sugar Taxes on Obesity Prevention Efforts II Current Nutrition Reports*. 2019. Vol. 8. № 4. P. 337, citing a range of studies.

<sup>120</sup> PR, *Australia — Tobacco Plain Packaging*, § 7.1491.

<sup>121</sup> G/TBT/M/59, § 2.2.1.4; G/TBT/M/61, § 2.2.2.23.

<sup>122</sup> ABR, *US — Tuna II*, § 350–352, 356.

<sup>123</sup> Panel Report, *European Communities — Trade Description of Sardines*, WT/DS231/R and Corr.1, adopted 23 Oct. 2002, modified by Appellate Body Report WT/DS231/AB/R, DSR 2002:VIII, p. 3451 (hereinafter — PR, *EC — Sardines*), § 7.66.

or a fundamental principle of the measure.<sup>124</sup> For this purpose, “cherry-picking” from the standard is prohibited, as the measure must incorporate all relevant parts of the standard. The “accordance” with the standard under Article 2.5 is more challenging, since it requires that the measure embodies the international standard completely.<sup>125</sup> At the TBT Committee the Members claimed that the “high in” FOP labelling is not provided for by the Codex Guidelines either in terms of mandatory compliance, or in respect of a defined threshold to consider foods as rich in critical nutrients. Indeed, there are no upper limits of critical nutrients’ content approved by the Codex to date. Moreover, Sec. 5 of the Guidelines on Nutrition Labelling maintains that the use of supplementary nutrition information on food labels should be *optional*. Up until 2021, the adopting Members could have responded that the Guidelines were *inappropriate or ineffective means* to protect human health by discouraging intake of critical nutrients. The standard is ineffective or inappropriate if it does not have “the function or capacity” to achieve the measure’s objectives.<sup>126</sup>

Since the Codex Guidelines were silent on the possibility of a mandatory FOP labelling that would target predetermined amounts of critical nutrients in foods, the Member could claim that they are largely irrelevant and inadequate to the set objective(s). However, the amendments of late 2021 broke the silence by adding a new annex to the Codex Guidelines on Nutrition Labelling. Resulting from an effort of the Codex Committee on Food Labelling (CCFL), Annex 2 sets Guidelines for FOP labelling. It is explicitly acknowledged in para. 3.2 of this Annex that FOP labelling could be mandatory. Notably, in the course of the 46<sup>th</sup> Session of the CCFL the Russian Federation opposed this proposition with a reference to the abovementioned Sec. 5 of the Guidelines.<sup>127</sup> The Codex Secretariat equivocally replied that since the FOP is merely one of the forms that supplementary nutritional information could take, its mandatory nature does not contradict Sec. 5. Objectively speaking, Sec. 5 is to the highest extent unambiguous in stating that *any* supplementary information in the form of labelling should be optional.

Annex 2 further allows the adopting Members to base their measures on the national or regional dietary guidance. In practice this could justify the Members’ use of locally calculated thresholds for assigning particular labels<sup>128</sup> or differing amounts of the total energy intake. For instance, the WHO considers 2,000 kcal a necessary calorie intake for an average human, whereas in Mexico it amounts to 2,200 kcal for the purposes of calculating the critical nutrients’ thresholds.<sup>129</sup>

Finally, Annex 2 maintains that FOP labelling should help consumers to make appropriate comparisons between foods, as well as that consideration should be given to the nutrients and/or food groups which are discouraged and/or encouraged by FOP labelling. This is arguably where the catch of the new Guidelines lies. To rely on this international standard the Member would still have to demonstrate that the measure is drafted to influence consumers’ purchasing decisions in a manner that decreases not the consumption of goods *per se*, but the consumption of critical nutrients. It could appear to be less challenging, minding that the regional and local studies are encouraged by the Guidelines. However, the research still has to maintain the methodological rigour and scientific precision discussed in this paper with respect to Article 2.2 of the TBT Agreement.

Apparently, this provision was the best that the negotiators managed to arrive at. The Report of the 46<sup>th</sup> Session shows that there was no consensus at all on the inclusion of the non-discrimination principle in the Guidelines. The initial proposal was to recommend that FOP labelling must not exploit fear in consumers or hinder trade. Notably, the Representative of the WHO went as far as to state that the concept of non-discrimination is contrary to the aims of FOP labelling.

Hence, compliance with Article 2.4 and the prospects of presuming the measure’s necessity under Article 2.5 would heavily depend on the Member’s ability to show the effects of the measure on the consumption of critical nutrients, as is the case under Article 2.2. This is one of the major parts of the new Guidelines, which could not be omitted or circumvented by the Member to alleviate the burden of compliance. The task is

<sup>124</sup> Appellate Body Report, *European Communities — Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002, DSR 2002:VIII, p. 3359 (hereinafter — *ABR, EC — Sardines*), § 243.

<sup>125</sup> PR, *Australia — Tobacco Plain Packaging*, § 7.274, fn. 959.

<sup>126</sup> *ABR, EC — Sardines*, § 288.

<sup>127</sup> *Codex Alimentarius Commission, Report of the Forty-Sixth Session of the Codex Committee on Food Labelling (Virtual)*. REP21/FL. June 2021. § 71. URL:

<https://www.federalregister.gov/documents/1999/07/29/99-19422/codex-alimentarius-commission-forty-sixth-session-of-the-executive-committee-of-the-codex> (accessed: 20.04.2023).

<sup>128</sup> See, for instance, *Pan American Health Organization Nutrient Profile Model*. URL: <https://iris.paho.org/handle/10665.2/18621> (accessed: 20.04.2023).

<sup>129</sup> Contreras-Manzano A., Cruz-Casarrubias C. et al. *Evaluation of the Mexican Warning Label Nutrient Profile on Food Products Marketed in Mexico in 2016 and 2017: A Cross-Sectional Analysis* // PLOS Medicine. 2022. Vol. 19. № 4. P. 5.

nonetheless simplified by the fact that the Guidelines now recognize the relevance and authority of regional studies, including those examining dietary patterns of locals.

## Conclusion

It is possible to adopt a FOP labelling scheme that would be effective in combating obesity-associated NCDs and comply with the key WTO norms and principles. However, as much as a Member may strive to respond promptly to the proliferation of the NCDs, the WTO disciplines would work as a deterrent to strike the balance between the right to regulate and the right to unimpeded trade. Therefore, both effectiveness and WTO-compliance come at a cost.

This article has provided several insights into how to mitigate the risks of FOP labelling schemes' non-compliance with the principles of non-discrimination, necessity and harmonisation established in the TBT Agreement. First, the adopting Members must work toward regulating all products rich in critical nutrients. The similar nutritional composition of these goods increases the chances of them being considered "like" for the purposes of non-discrimination analysis of Article 2.1 of the TBT Agreement. If FOP labelling omits, for instance, unpackaged energy-dense foods, the legislator has to ensure that the excluded products are covered by other regulatory interventions. The UK presents one such example: it administers both a FOP labelling scheme for pre-packaged goods and a requirement to display calorie information on menus and food delivery platforms for unpackaged foods.

Second, the adopting Member has to be cautious when setting the goals of the FOP labelling measure, since demonstration of its necessity would further require to separately establish the measure's contribution to the stated objectives. The more objectives are declared, the more challenging this would be. Further on, the Member has to determine how FOP labelling schemes discourage intake of different nutrients. Otherwise, it could be problematic to demonstrate the anticipated outcomes of the regulation. The expected contribution of the FOP measure could be boosted by framing a supporting environment of regulatory interventions that would address different aspects of the problem — from promoting calorie expenditure to increasing consumers' understanding of nutritional information. Against the backdrop of such a synergy of measures other alternatives would likely fail to equivalently combat obesity-related NCDs.

Finally, the Member could concentrate on the scientific analysis of the critical nutrients' intake of its local population. Existing international standards in the field now explicitly allow the adopting Members to base their conclusions of the measure's contribution on regional studies. This, for instance, could help justify different daily caloric intake thresholds employed by some existing measures. Nevertheless, the impact of international standards should not be overestimated, since presently they do not relieve the Members from the need to appropriately differentiate between goods.

Ultimately, the current state of the WTO jurisprudence is not flexible enough to respond to complex health improvement policies. Since such initiatives are aimed at changing subjective perceptions that humans attach to the objects and processes surrounding them, the effects of such measures are extremely difficult to forecast and even more so to achieve. The rulemaking suggestions offered in this paper may assist the Members in balancing obligations they owe to their populations with their commitments under the WTO.

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## МАРКИРОВКА ПРОДУКТОВ ПИТАНИЯ НА ЛИЦЕВОЙ СТОРОНЕ УПАКОВКИ: СОВМЕСТИМЫ ЛИ ИНИЦИАТИВЫ В СФЕРЕ ЗДРАВООХРАНЕНИЯ С НОРМАМИ И ПРАВИЛАМИ ВТО?

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### Аннотация

За последнее десятилетие государства стали все чаще использовать различные формы маркировки продуктов питания на лицевой стороне упаковки в целях предотвращения распространения ожирения и связанных с ним неинфекционных хронических заболеваний. Некоторые формы такой маркировки направлены на информирование потребителя о повышенном содержании критически значимых пищевых веществ и являются обязательными для соблюдения. Растущая популярность таких мер вызывает серьезную озабоченность у членов Всемирной торговой организации (ВТО), поскольку к настоящему времени единая позиция относительно соответствия данной маркировки нормам и правилам ВТО не сформировалась. В настоящей статье предпринята попытка достичь понимания по данному вопросу и предложить варианты того, как национальные законодатели могли бы скорректировать свои инициативы по маркировке, чтобы привести их в соответствие с Соглашением ВТО по техническим барьерам в торговле (Соглашение ТБТ). В первой части статьи на основании положений статьи 2.1 Соглашения ТБТ (принцип недискриминации) автор заключает, что в рамках разрабатываемых инициатив законодателю следует регулировать потребление всех видов продуктов питания. Товары, не прошедшие предварительную упаковку и отпускаемые потребителям в местах продажи, также должны стать объектом регулирующего воздействия, поскольку по своему химическому составу они схожи с продуктами питания промышленного производства. Во второй части настоящей статьи на основании статьи 2.2 Соглашения ТБТ (принцип необходимости) автор отмечает, что членам ВТО следует уделить особое внимание определению целей вводимой маркировки, поскольку, чтобы соответствовать принципу необходимости, такая мера должна продемонстрировать вклад в достижение каждой из заявленных целей. Более того, законодатель должен будет определить, как маркировка повлияет на снижение потребления именно критически значимых пищевых веществ, а не отдельных продуктов питания в целом. В связи с этим ожидаемый вклад маркировки в достижение заявленных целей может быть усилен с помощью принятия дополнительных мер, также снижающих потребление критически значимых пищевых веществ. В третьей части статьи автор рассматривает положения статей 2.4 и 2.5 Соглашения ТБТ (принцип гармонизации) и приходит к выводу о том, что в настоящее время международные стандарты признают значимость региональных исследований, в том числе анализирующих специфику и пищевые привычки местного населения. Тем не менее действующая редакция соответствующих международных стандартов не освобождает членов ВТО от необходимости применять научно обоснованные меры, способные позитивно влиять на потребление критически значимых пищевых веществ.

### Ключевые слова

маркировка продуктов питания, Всемирная торговая организация, Соглашение по техническим барьерам в торговле, принцип недискриминации, гармонизация

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<sup>130\*</sup> Мнения, представленные в данной статье, выражают исключительно позицию автора и никоим образом не отражают позицию любого другого лица или организации.



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