

Law, Trade, and Nutrition Labeling:

Reflections and Experiences
from Latin America



Diana Guarnizo Peralta
René Urueña Hernández
Juan Martín Carballo
(Editors)

Colección
Dejusticia

**LAW, TRADE, AND
NUTRITION LABELING:**

REFLECTIONS AND EXPERIENCES FROM LATIN AMERICA

Resumen

La situación de sobrepeso y obesidad es uno de los asuntos más urgentes en la agenda de salud global. América Latina es una de las regiones que reportan un alto consumo de bebidas azucaradas y productos ultraprocesados, lo que hace a su población más vulnerable frente a enfermedades no transmisibles (ENT). Con el fin de promover ambientes alimentarios y hábitos de consumo más saludables, la OMS y la OPS le han recomendado a los Estados que adopten un conjunto de medidas, dentro de las que se encuentra la adopción de un etiquetado nutricional de advertencia basado en la mejor evidencia científica disponible.

Distintos países de la región como Chile, México y Perú han adoptado el modelo de sellos de advertencia octagonal, que ha mostrado, además, su efectividad. Sin embargo, su adopción en estos y otros países de la región no ha sido fácil. La industria de ultraprocesados comestibles se ha opuesto a este modelo con argumentos que pasan por lo económico, lo político y, también, lo jurídico. En particular, frecuentemente se ha argumentado que esta medida vulnera los acuerdos internacionales en materia económica, pese a que la normativa internacional permite excepciones legítimas en favor de la salud pública.

Esta publicación busca aportar al debate sobre la adopción de un etiquetado nutricional desde dos perspectivas. De un lado, desde una perspectiva legal, los autores reflexionan sobre los principales argumentos que se exponen en contra de esta medida de salud pública y aportan argumentos del derecho internacional para contestarlos. De otro lado, desde una perspectiva vivencial, los autores ofrecen un recuento de cómo lograron impulsar esta política de salud pública en sus países y cómo sortearon su oposición. El libro es, entonces, una reflexión desde el Sur Global hacia el mundo sobre el etiquetado frontal de advertencia; una de las políticas de prevención de obesidad más importantes de los últimos años. Es un libro dirigido a académicos, activistas y estudiosos de las interacciones entre salud pública, derecho y comercio internacional.

Palabras clave: etiquetado frontal de alimentos, comercio internacional, Organización Mundial del Comercio, enfermedades no transmisibles, derecho a la alimentación, obesidad, salud.

Summary

Overweight and obesity are two of the most pressing issues on today's public health agenda. Latin America in particular is home to some of the world's highest consumption levels of sugar-sweetened beverages and ultra-processed foods, putting its population at greater risk of noncommunicable diseases. To promote healthier eating environments and habits, the World Health Organization and Pan American Health Organization have called on countries to adopt a variety of measures, including front-of-package warning labels based on the best available scientific evidence.

Several countries in the region, such as Chile, Mexico, and Peru, have adopted the octagonal warning label model, with positive results. However, the adoption of these and similar policies has not been easy. The ultra-processed food industry has put up significant resistance, citing economic, political, and legal concerns. In particular, it has argued that such policies violate international trade agreements, despite the fact that international law allows for exceptions in favor of legitimate objectives such as public health.

This multi-authored volume contributes to the debate on the adoption of front-of-package nutrition labeling from two perspectives. First, from a legal viewpoint, the book's authors examine the main arguments against this public health measure and provide counterarguments based on international law. Second, from a lived experience perspective, the authors recount how they successfully advocated for this public health policy in their respective countries and overcame opposition.

The book offers a perspective from the Global South on front-of-package warning labels, one of the most important obesity prevention policies in recent years. It is aimed at academics, activists, and others interested in the intersections of public health, law, and international trade.

Keywords: front-of-package food labeling, international trade, World Trade Organization, noncommunicable diseases, right to food, obesity, health.

To quote this book:

Guarnizo Peralta, D., Urueña Hernández, R, and Carballo, J., eds. 2024. *Law, Trade, and Nutrition Labeling: Reflections and Experiences from Latin America*. Bogotá: Dejusticia.

Law, Trade, and Nutrition Labeling:

Reflections and Experiences
from Latin America

Diana Guarnizo Peralta
René Urueña Hernández
Juan Martín Carballo
—Editors—

**Colección
Dejusticia**

**Global Health
Advocacy Incubator**



 **Universidad de
los Andes**
Colombia

Facultad
de Derecho

Guarnizo Peralta, Diana

Law, Trade, and Nutrition Labeling: Reflections and Experiences from Latin America / Diana Guarnizo Peralta, René Urueña Hernández, and Juan Martín Carballo. Editors – Bogotá: Editorial Dejusticia, 2024.

425 pages; 15 Tables y 23 Figures; 24 cm. – (Dejusticia Series)

ISBN: 978-628-7517-99-8

1. Front-of-Package Food Labeling 2. International Trade 3. World Trade Organization 4. Noncommunicable Diseases 5. Obesity. I. Title II. Series

ISBN 978-628-7517-99-8 printed version

ISBN 978-628-7764-00-2 digital version

Translation & Copyediting
Morgan Stoffregen

Cover
Alejandro Ospina

Layout
Precolombi EU, David Reyes

First English Edition
Editorial Dejusticia

Bogotá, Colombia, November 2024

This document is available at
<https://www.dejusticia.org>



Creative Commons Attribution-NonCommercial-ShareAlike 4.0

© Dejusticia, 2024
Calle 35 No. 24-31, Bogotá D.C.
Telephone: (+57 1) 608 3605
info@dejusticia.org
<https://www.dejusticia.org>

© Universidad de los Andes, 2024

Vigilada Mineducación. Reconocimiento como universidad: Decreto 1297 del 30 de mayo de 1964. Reconocimiento de personería jurídica: Resolución 28 del 23 de febrero de 1949, Minjusticia. Acreditación institucional de alta calidad, 10 años: Resolución 582 del 9 de enero del 2015, Mineducación.

© Global Health Advocacy Incubator, 2024

Content

Acknowledgments	9
-----------------	---

Introduction: Law, Health, and the Debate on Food Labeling in Latin America	10
<i>Diana Guarnizo Peralta</i>	

Part One ■ Nutrition Labeling and International Economic Law	23
--	----

Building Regulatory Sovereignty: Nutrition Labeling, Technical Barriers to Trade, and Communities of Practice	24
<i>René Uruña Hernández</i> <i>Rafael Tamayo-Álvarez</i>	

Front-of-Package Food Labeling and the Committee on Technical Barriers to Trade: A Legal Perspective on Front Labeling and International Trade	48
<i>Gianella Severini</i> <i>Juan Martín Carballo</i> <i>María Luján Abramo</i>	

Economic Forums as a Setting for Obstructing the Adoption of Front- of-Package Food Labeling Measures: The Case of Mercosur	72
--	----

Gianella Severini
Juan Martín Carballo
María Luján Abramo

The Relevance of NGO Participation in the World Trade Organization	98
---	----

María Paula Barbosa
Adriana Torres

Part Two ■ Legal Perspectives on Nutrition Labeling Policies	125
--	-----

Reflections on Nutrition Labeling and Self-Regulation from the Perspective of Economic Law and Human Rights: Tensions between Private Initiatives and the Protection of the Public Interest	126
---	-----

Paula Angarita Tovar
Julián Gutiérrez-Martínez

Nutrition Labeling in Latin America: An Analysis of International Trade Regulations from a Human Rights Perspective	166
--	-----

Maria Cecilia Cury Chaddad

Consumer Protection: The Right to Healthy Food in the Context of Consumer Relations	194
---	-----

Sergio Procelli
Lucas Landívar

Part Three ■ Nutrition Labeling: Case Studies from Latin America	213
--	------------

Experiences and Lessons Learned from Mexico's Adoption of Front-of- Package Warning Labels	214
---	------------

Ana Munguía

Carlos Cruz-Casarrubias

Javier Zúñiga

Gabriela Guzmán-Pérez

Alejandra Contreras-Manzano

Lizbeth Tolentino-Mayo

Simón Barquera

Ecuador's Traffic Light Labeling System: Its Impact and the Potential Need for Updating	244
--	------------

Daniela Valdivieso Riofrío

Daniel Felipe Dorado Torres

Advertising Warnings versus Front-of- Package Warning Labels: An Analysis of Peruvian Legislation	278
--	------------

Jaime Delgado Zegarra

Human Rights and Food Labeling in Argentina: Social Actors and Economic Interests	308
--	------------

Berenice Cerra

Luciana Castronuovo

Leila Guarnieri

Maria Victoria Tiscornia

Maria Elisabet Pizarro

**The Challenges of Brazil's Adoption
of Front-of-Package Nutrition Labeling** 334

Laís Amaral Mais
Mariana de Araújo Ferraz
Mariana Gondo dos Santos
Patrícia Chaves Gentil
Janine Giuberti Coutinho
Renato Barreto Florentino
Ana Paula Bortoletto Martins

**Civil Society Efforts during Uruguay's
Adoption of Its Front-of-Package Food
Labeling Policy: Health over Economic
Interests?** 376

Lucía Martínez
Diego Rodríguez
Raquel Sánchez

Contributors 414

Editors 424

Acknowledgments

We are grateful to the Global Health Advocacy Incubator, the School of Law at the University of the Andes, and Dejusticia for their financial, research, and editorial support. We are especially grateful to Morgan Stoffregen, Paula Angarita, Johnatan García, Claudia Luque, Andrés Hernández, and Margarita Belandria for their translation work, editorial assistance, and language editing. Their meticulousness and attention to detail were critical for the development of this book. We would also like to thank the participants of the Third Regional Meeting on Adequate Food, a virtual convening that we organized in September 2020 that brought together a diverse group of jurists, litigators, and activists from Argentina, Brazil, Colombia, Chile, Ecuador, Mexico, Peru, and the United States with a shared interest in promoting healthier food environments through legal practice. It is those participants who contributed to this book.

The process of planning, writing, and editing each of the chapters allowed us to reconnect with one another virtually and focus on a common purpose, despite the constraints of the COVID-19 pandemic. This volume is also a tribute to the authors' commitment to improving access to adequate and healthy food for all people in Latin America. Their work on the strategic use of the law has contributed to fundamental changes in public policies on nutrition labeling, as well as obesity prevention in general. Thanks to their efforts, Latin America's legal framework has become more amenable to public health goals. The healthier environments that are being created and the lives that are being extended as a result of these changes are due in large part to this work.

**Introduction: Law, Health,
and the Debate on Food
Labeling in Latin America**

Diana Guarnizo Peralta

The Problem of Overweight and Obesity and the Importance of Labeling

Overweight and obesity are two of the most pressing issues on today's global health agenda. Latin America in particular is home to some of the world's highest consumption levels of sugar-sweetened beverages and ultra-processed foods, putting the population at greater risk of noncommunicable diseases (NCDs) such as heart disease, diabetes, and certain types of cancer. Indeed, NCDs are the current leading cause of death in the world (World Health Organization 2019), and obesity is one of their risk factors. Added to this, the COVID-19 pandemic has exacerbated overweight and obesity rates, creating the "perfect storm" (Katmarzik et al. 2020). Addressing the issue of weight gain has thus become a public health imperative in the region.

In addition, ensuring access to adequate and healthy food is an ethical imperative. Obesity is increasingly affecting low-income populations, who often lack access to fresh and varied foods as well as the time and facilities to engage in physical exercise. In fact, school-age children from low-income families tend to be one of the groups most commonly affected by the recent changes in eating patterns in the region, where the consumption of ultra-processed foods and sugar-sweetened beverages is becoming increasingly commonplace.

It has also become evident that strategies that focus on individual responsibility, such as education and the promotion of exercise, are not sufficient. There is an urgent need for measures that address the obesogenic contexts in which we live and that promote healthier habits. Against this backdrop, the World Health Organization (2013), the Pan American Health

Organization (2020), and the United Nations Special Rapporteur on the Right to Health (2020) have called on states to adopt nutrition warning labeling, based on the best available scientific evidence, to curb overweight and obesity. Clear and simple labeling would make it easier to recognize less healthy products and thus reduce their consumption.

Currently, there are a variety of ways to display the nutritional information of the foods we consume, although not all of them have the same impact. For years, the food and beverage industry has advocated a form of labeling known as guideline daily amounts, which we now know does not help people make informed decisions. In Europe, several countries have adopted the Nutri-Score model, which uses five different colors to classify foods according to their nutritional value; however, this system has been criticized for being misleading and difficult to read. Meanwhile, in Latin America, countries such as Chile, Uruguay, Peru, and Mexico have adopted black octagonal nutrition warning labels, which have shown positive results by discouraging the purchase of these products by consumers (Talati et al. 2017). Other models such as the “traffic light” model, implemented in Ecuador, and the magnifying glass warning labels, implemented in Brazil, have not shown the same results. Nonetheless, these measures, taken together, reveal a trend across the region toward the adoption of warning labels on ultra-processed foods containing excess amounts of nutrients of concern.

Despite the effectiveness of the octagonal warning label model in the countries that have implemented it, its adoption has not been easy. The ultra-processed food industry has opposed this labeling measure on economic, political, and legal grounds. For example, it has argued that such labeling causes job loss and hurts industry. It has also claimed that such labeling stigmatizes the consumption of certain products and is a paternalistic measure that violates individual freedom of choice. And from a legal standpoint, industry has argued that this type of labeling violates international economic agreements and ignores state obligations under the World Trade Organization. In fact, in several countries, the ultra-processed food industry has threatened to initiate international disputes if governments

adopt such labeling policies; and in some countries, it has filed domestic lawsuits. As a result, the legal debate has been assimilated into public policy discussions on obesity prevention. It is thus critical to first analyze the contours of this debate before discussing how this book seeks to contribute to it.

Law and Health: The Role of Law in the Debate on Policies for NCD Prevention

In today's globalized world, achieving the ideal of the highest attainable standard of physical and mental health is impossible without the help of a variety of economic, political, institutional, and legal tools. In this sense, the law—understood broadly as a group of rules aimed at regulating a given situation or social relationship—is increasingly being drawn on as a tool to improve people's health. The adoption of NCD prevention policies is no exception to this trend.

Here, perhaps the most paradigmatic example is the World Health Organization Framework Convention on Tobacco Control, which, to date, is the only binding treaty that seeks to reduce the demand for tobacco, a product whose consumption is linked to numerous NCDs. In the area of obesity and overweight, there is still no binding mechanism with concrete obligations regarding obesity prevention, food, and NCDs, although some scholars have made various proposals, including for a treaty to promote a healthy, equitable, and sustainable food system (Swinburn 2019); for a United Nations instrument to regulate corporate activities on obesity and global health (Patterson et al. 2019); and for an optional protocol to protect children's rights to health and food (Clark et al. 2020).

Several areas of international law stand out in terms of their importance in creating better conditions for global health. International human rights law is perhaps the field that has been most widely drawn on in this regard. Indeed, the objective of achieving “the highest attainable standard of physical and mental health” arises from a human rights treaty (International Covenant on Economic, Social and Cultural Rights, art. 12). Given the relevance and the conceptual and doctrinal development of the right to health in terms of addressing global

health problems, this right has had an especially deep impact on the framing of these debates. For example, with regard to food labeling, the statement made in 2020 by the United Nations Special Rapporteur on the Right to Health (Office of the United Nations High Commissioner for Human Rights 2020) represents a milestone. The statement highlights states' duty to ensure that regulations to prevent harm to people's health stemming from the consumption of unhealthy foods "are driven by human rights and scientific evidence free from conflicts of interest" (ibid.).

Recently, other rights (such as the rights to food, to water, and even to a healthy environment) have reemerged on the international scene, offering new elements for determining state obligations regarding public health issues. Indeed, good health requires access to quality food, potable water, and a clean and healthy environment. These factors are thus considered determinants of health, and, consequently, various international documents have recognized states' duty to guarantee adequate access to them.

In terms of food, for example, important documents include the reports of the Special Rapporteur on the Right to Food, which identify the advertising of ultra-processed foods and the absence of clear labeling as contributors to the global "nutrition transition" and the concomitant increase in overweight and obesity (Elver 2014, 2016). Meanwhile, with regard to the right to water, numerous documents have highlighted the interdependence between this right, food, and life, arguing that situations such as droughts and the contamination of groundwater can threaten the right to food (Ziegler 2003, paras. 36–51). Furthermore, with the recent recognition of the right to a healthy environment, it becomes even clearer that pollution, biodiversity loss, and climate change are having an alarming impact on people's physical and mental health (Human Rights Council 2016).

But of course, this has not been the only contribution of human rights. Human rights principles have also been key in providing ethical underpinnings for the ideal of achieving the highest attainable standard of health. For example, the principle of human dignity has made it possible to place human beings,

as subjects worthy of dignity, at the center of health policies, instead of more utilitarian judgments that prioritize benefits for the majority. Other principles such as equal treatment and nondiscrimination also represent an important step forward, as they provide a basis for which the most disadvantaged groups—including migrants, elderly persons, children, women, and Indigenous communities—can claim access to health.

Human rights have also given content to the notion of health. Indeed, the elements of availability, accessibility, acceptability, and quality, as developed by the United Nations Committee on Economic, Social and Cultural Rights (2000), have offered practical grounding for the debate on the scope of the right to health. Lastly—and this is perhaps their most important contribution—human rights have helped empower individuals and groups in their quest for better health conditions by providing a legal framework that allows these actors to position their demands in terms of state obligations as opposed to merely issues of charity or advantageous public policy.

Meanwhile, other areas of international law—most prominently, international economic law—have recently entered the discussion on global health. Given that the purchase and consumption of certain products (e.g., tobacco, ultra-processed foods, medicines, and so forth) can have a positive or negative impact on a person's health and that the production, distribution, and marketing of these products depends on globalized supply chains, the rules that regulate these commercial processes necessarily play a fundamental role in the protection of global health.

An inherent tension in this legal field in terms of addressing health-related issues is the regulation/deregulation of health markets. Indeed, international economic law tends to favor market liberalization under the idea that greater freedom in the movement of goods and services translates into better consumer access to these things. That said, from a health promotion perspective, the aim is to look beyond the impacts of international trade and promote basic rules to ensure a minimum level of protection for consumers of these products.

When it comes to ultra-processed foods, this tension is clear: while some sectors call for the freest trade possible, the health

movement advocates for the inclusion of clear labels or warnings to alert consumers of the consequences of regularly consuming such products. Although international economic law allows for the possibility of justifying these kinds of measures on the basis of public health—so that there is an adequate balance between these two issues (McGrady 2018, 106–107)—the inherent tension in this legal discipline is reflected in the political and legal debate. A detailed analysis of this field is thus necessary in order to understand how these interests complement each other.

Investment law is another discipline that has become relevant for the implementation of NCD prevention policies. This body of law, consisting of a variety of bilateral and multilateral investment agreements, allows foreign investors to protect their economic interests through dispute settlement clauses and arbitration tribunals. These mechanisms have been criticized for their lack of transparency and for their tendency to favor the economic interests of investors over other public interests of the state, such as the protection of health or the environment.

In terms of food labeling, these dispute settlement mechanisms can be used to hinder the adoption of public health measures or to delay their implementation. In Mexico, for example, after the government approved a regulation in 2020 requiring warning labels on ultra-processed foods high in sugars, fats, or sodium or that contain sweeteners or caffeine, a cereal company (whose identity remains unknown) challenged the government before an arbitration tribunal, invoking the protection of the Free Trade Agreement between the United States, Mexico and Canada (Mardirossian and Johnson 2021). Even if such cases are ultimately unsuccessful, they can serve as effective strategies for the food industry to delay the implementation of public health policies.

This Book's Role in the Debate

This book seeks to contribute to the debate on the adoption of nutrition labeling policies by offering a legal perspective that draws on human rights and international economic law. In this light, the book has two main objectives. First, it seeks to analyze some of the main arguments made against this type of public

health measure, focusing in particular on arguments based on international economic law. It responds to these arguments by drawing both on international economic law and international human rights law. In this regard, the book aims to serve as a guide for activists, civil society organizations, policymakers, and academics interested in promoting public health measures to reduce overweight and obesity. In general, it posits that international economic law, if properly interpreted, does not pose an obstacle to the adoption of public health measures such as food labeling.

Second, the book seeks to document front-of-package food labeling policies that have been adopted in the region, drawing on the experiences of the civil society organizations and activists who have advocated for them. Here, the book has an emancipatory and decolonial aim insofar as it seeks to tell a story from the perspectives of these stakeholders and to offer a reflection from the Global South to the world. This aspect is key, because although there are several publications that address the intersection between global health and the law (Burci et al. 2018; Garde et al. 2020), few—if any—are focused on Latin America.

The book is divided into three parts. The first part, working within the lens of international economic law and human rights, examines some of the most frequent arguments made against nutrition warning labels. Thus, the first few chapters discuss the relevance and justification of front-of-package food labeling vis-à-vis World Trade Organization (WTO) mechanisms. The chapter by René Urueña Hernández and Rafael Tamayo-Álvarez analyzes the Agreement on Technical Barriers to Trade from a socio-legal perspective, arguing that this treaty has forged a “community of practice” aimed at generating “legal meanings, discursive patterns, and cognitive frameworks.” As the authors explain, the interactions among this community of practice end up shaping the scope of government action concerning regulatory measures such as labeling policies. It is therefore important, they argue, for civil society organizations to appropriate the legal knowledge specific to this community in order to help ensure a progressive interpretation. Next, the chapter by Gianella Severini, Juan Martín Carballo, and María Luján Abramo examines why nutrition labeling regulations

should not be considered to contravene the WTO Agreement on Technical Barriers to Trade; rather, such regulations are justified on public health grounds and, when properly interpreted, are perfectly compatible with international economic regulation. The following chapter—written by the same authors—explores the regional trade bloc of Mercosur. It examines how Mercosur has been used by opponents as a delay tactic to thwart the adoption of front-of-package food labeling measures. Concluding this section is the chapter by María Paula Barbosa and Adriana Torres, who undertake a critical analysis of WTO mechanisms for civil society participation. In particular, the authors look at how these mechanisms have hindered broad and genuine contributions by civil society on key issues such as warning labeling.

The second part contributes to the discussion on trade and health from a variety of perspectives. It starts with the chapter by Paula Angarita Tovar and Julián Gutiérrez-Martínez, who explore some of the tensions between industry initiatives to self-regulate and the protection of the public interest, arguing that state regulation is necessary and justified both from a public health standpoint and on the basis of obligations under international economic law. Next, the chapter by Maria Cecília Cury Chaddad analyzes the apparent tension between human rights principles and international economic rules. Arguing that we must strike a harmony between the two regimes, she explores a few cases in which economic law has found the adoption of public health policies to be perfectly admissible. The section ends with a chapter by Sergio Procelli and Lucas Landivar, who offer a defense of the right to food and front-of-package food labeling policies on the basis of consumer law, a little studied branch of public law as it relates to public health measures and the prevention of overweight and obesity.

The third part documents the experiences of several Latin American countries with regard to the adoption of nutrition labeling measures. The chapter by Ana Munguía, Carlos Cruz-Casarrubias, Javier Zúñiga, Gabriela Guzmán-Pérez, Alejandra Contreras-Manzano, Lizbeth Tolentino-Mayo, and Simón Barquera offers some lessons learned based on Mexico's adoption and implementation of front-of-package food labeling. It looks specifically at the legal and technical discussions that

underpinned the debate over why this policy did not constitute a “technical barrier to trade,” a commonly made argument during the policymaking process.

The chapter by Daniela Valdivieso Riofrío and Daniel Felipe Dorado Torres explores the effectiveness of the “traffic light” labeling model adopted by Ecuador, as well as the need for this model to evolve in line with the best available scientific evidence. The authors also examine the national and international standards justifying such an evolution, analyzing the possibility of the country moving toward a model of octagonal labels instead.

The chapter by Jaime Delgado Zegarra explores the Peruvian experience in the adoption of nutrition warnings for the marketing and packaging of processed foods. Specifically, it explains the principles that inspired this legislation, the adoption process, the numerous obstacles it has faced in its implementation, and its impact to date.

The chapter by Berenice Cerra, Luciana Castronuovo, Leila Guarnieri, María Victoria Tiscornia, and María Elisabet Pizarro offers a reflection on the regulatory standards that inspired the food labeling law in Argentina, as well as the civil society actors who participated in its development and the interference tactics employed by the food industry to hinder the regulatory process.

Next, the chapter by Laís Amaral Mais, Mariana de Araújo Ferraz, Mariana Gondo dos Santos, Patrícia Chaves Gentil, Janine Giuberti Coutinho, Renato Barreto Florentino, and Ana Paula Bortoletto Martins tells the story of Brazil’s adoption of front-of-package food labeling rules, as well as the interference by the private sector that ultimately led to the adoption of the magnifying glass model. It also presents some criticisms of the country’s current model and lays out a road map for future reform.

Lastly, the chapter by Lucía Martínez, Diego Rodríguez, and Raquel Sánchez discusses the communications and advocacy strategies used by civil society to promote a front-of-package food labeling law in Uruguay. The authors also reflect on lessons learned during the law’s debate and adoption, as well as some of the challenges it faces going forward.

We are aware that similar regulatory processes aimed at food labeling are underway in other Latin American countries. In Colombia, for example, the legislature approved the Junk Food Law in 2021, requiring the Ministry of Health to adopt a front-of-package food labeling policy based on the best available scientific evidence free from conflicts of interest. Even though the regulation ultimately adopted by the ministry does not appear to adhere to the standards established by the law (Dejusticia 2021), it is nonetheless an important legislative development that sets a precedent for Colombia in terms of the adoption of clear and informative nutrition labeling. It is our hope that this book can offer a valuable contribution to the discussion and serve as an example of how collaboration between academia and civil society—and between research and the use of legal tools—can lead to the adoption of public health policies.

References

- Burci, G. L., and B. Toebes, eds. 2018. *Research Handbook on Global Health Law*. Cheltenham: Edward Elgar Publishing.
- Clark, H., A. Coll-Seck, A. Banerjee, S. Peterson, S. Dalglish, S. Ameratunga, D. Balabanova, et al. 2020. “A Future for the World’s Children? A WHO-UNICEF-Lancet Commission.” *Lancet* 395 (10224): 605–658.
- Committee on Economic, Social and Cultural Rights. 2000. *General Comment No. 14: The Right to the Highest Attainable Standard of Health*. UN Doc. E/C.12/2000/4.
- Dejusticia. 2021. “Tenemos Ley, pero aún no tenemos etiquetado.” November 19. <https://www.dejusticia.org/tenemos-ley-pero-aun-no-tenemos-etiquetado/>
- Elver, H. 2014. *Interim Report of the Special Rapporteur on the Right to Food*. UN Doc. A/69/275.
- . 2016. *Interim Report of the Special Rapporteur on the Right to Food*. UN Doc. A/71/282.
- Garde, A., J. Curtis, and O. De Schutter, eds. 2020. *Ending Childhood Obesity: A Challenge at the Crossroads of International Economic and Human Rights Law*. Cheltenham: Edward Elgar Publishing.

Human Rights Council. 2016. *Analytical Study on the Relationship between Climate Change and the Human Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*. UN Doc. A/HRC/32/23.

Katzmarzyk, P. T., J. M. Salbaum, and S. B. Heymsfield. 2020. "Obesity, Noncommunicable Diseases, and COVID-19: A Perfect Storm." *American Journal of Human Biology* 32(5).

Mardirossian, N., and L. Johnson. 2021, 23 de diciembre). "Children's Cereal Company v. Mexico & the Corporate Use of Investor-State Dispute Settlement to Influence Policymaking." Columbia Center on Sustainable Investment, November 30. <https://ccsi.columbia.edu/news/childrens-cereal-company-v-mexico-corporate-use-investor-state-dispute-settlement-influence>

McGrady, B. 2018. "Health and International Trade Law." In *Research Handbook on Global Health Law*, edited by G. L. Burci and B. Toebes. Cheltenham: Edward Elgar Publishing.

Office of the United Nations High Commissioner for Human Rights. 2020. "Statement by the UN Special Rapporteur on the Right to Health on the Adoption of Front-of-Package Warning Labelling to Tackle NCDs." July 27. <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26130&LangID=E>

Pan American Health Organization. 2020. *Front-of-Package Labeling as a Policy Tool for the Prevention of Noncommunicable Diseases in the Americas*. Washington, DC: Pan American Health Organization.

Patterson, D., K. Buse, R. Magnusson, and B. Toebes. 2019. "Identifying a Human Rights-Based Approach to Obesity for States and Civil Society." *Obesity Reviews* 20(2): 45–56.

Swinburn, B., V. Kraak, S. Allender, V. J. Atkins, P. I. Baker, J. R. Bogard, H. Brinsden, et al. 2019. "The Global Syndemic of Obesity, Undernutrition, and Climate Change: The Lancet Commission Report." *Lancet* 393 (10173): 791–846.

Talati, Z., S. Pettigrew, B. Neal, H. Dixon, C. Hughes, B. Kelly, and C. Miller. 2017. "Consumers' Responses to Health Claims in the Context of Other On-Pack Nutrition Information: A Systematic Review." *Nutrition Reviews* 75(4): 260–273.

World Health Organization. 2013. *Global Action Plan for the Prevention and Control of Noncommunicable Diseases 2013–2020*. Geneva: World Health Organization.

Ziegler, J. 2003. *Report Submitted by the Special Rapporteur on the Right to Food, Jean Ziegler, in Accordance with Commission on Human Rights Resolution 2002/25*. UN Doc. E/CN.4/2003/54.

PART ONE
Nutrition Labeling and
International Economic Law

Building Regulatory Sovereignty: Nutrition Labeling, Technical Barriers to Trade, and Communities of Practice

*René Urueña Hernández*¹

*Rafael Tamayo-Álvarez*²

1 Associate professor at the University of the Andes (Colombia).

2 Professor of international law at the Faculty of Jurisprudence at the University of the Rosary (Colombia).

Introduction

Obesity and other noncommunicable diseases are associated with poor eating habits.³ Consequently, states are increasingly requiring front-of-package warning labels on unhealthy foods. The aim of these regulatory measures is to provide consumers with important and easy-to-understand information about the nutritional value of the food they consume.⁴ Thus, such labeling measures constitute a policy tool for the prevention of chronic diseases that is based on helping people make informed decisions about healthy eating as a form of self-care.

This chapter argues that front-of-package labeling policies are adopted and implemented not in a vacuum but within a specific normative context involving institutions and actors from the field of international economic law. Specifically, we posit that the World Trade Organization's Agreement on Technical Barriers to Trade (TBT Agreement) has forged a true community of practice—that is, a broad network of transnational interactions between diverse social actors who formulate and share legal, political, economic, and scientific arguments about the proper interpretation of free trade rules as they relate to regulatory measures such as front-of-package labeling policies. The various forms of social interaction among members of this community of practice generate legal meanings, discursive patterns, and cognitive frameworks that shape the scope of government action

3 See, for example, Grover (2014).

4 In this regard, see Guarnizo and Narváez (2019).

concerning regulatory measures such as front-of-package labeling policies, with concrete impacts for public health.

Viewing the construction of legal meaning through the lens of communities of practice is important because it allows us to observe a power dynamic in which certain private interests manage to ensure that their vision prevails in discussions about the limits to which state regulatory activity should be subjected. However, to the extent that civil society actors—such as nongovernmental organizations—appropriate the language and legal knowledge specific to this community of practice, these actors become parties to the interactions and, as partners in the conversation, acquire the ability to shape the design and implementation of front-of-package labeling policies.

To illustrate this phenomenon, this chapter is organized as follows. We begin by exploring the concept of communities of practice, which provides us with an analytical framework. We then apply this notion to the web of social relationships that emerge around the TBT Agreement; in particular, we describe the actors that make up this community and the channels through which they interact. At the same time, we analyze the practices of this community, arguing that they reveal a marked internal logic characterized by interpretive disputes over the extent to which free trade rules limit states' regulatory scope in the realm of public health policies. Next, we analyze the way in which these interpretive disputes concerning the TBT Agreement result in the creation of meanings that shape the design and implementation of front-of-package labeling measures. Finally, we end the chapter with some conclusions.

Communities of Practice

The term “community of practice” was coined in the 1990s by anthropologist Jean Lave and computer scientist Étienne Wenger in connection with situated learning—that is, the idea that learning is fundamentally a social process (Lave and Wenger 1991). According to this idea, learning occurs not only from abstract concepts but also through action, which involves different forms of socialization. Later, Wenger imbued the term with organizational meaning, arguing that communities of

practice are groups of people who share a domain of interest and thereby develop shared commitments and a sense of joint enterprise (Wenger 1999, 73–85).

In this way, members of a community of practice participate in a collective learning process based on the joint performance of activities such as debating, sharing experiences, and exchanging information. This allows people in the group to develop a shared repertoire of resources, including discourses, ideas, concepts, tools, and, in general, ways of addressing recurring problems. All of this constitutes a practice that the community develops, shares, and internalizes over time through sustained interaction (Wenger 1999, 83). Thus, iteration is critical for learning, as it would be difficult for learning to emerge from isolated encounters.

The field of international law and international relations has adopted the concept of communities of practice using theoretical approaches inspired by constructivism.⁵ The pioneer in this regard was Emanuel Adler, who argued that

there is no reason ... why we should not be able to identify transnational or even global communities of practice. The closer we get to the level of practices, in fact, the more we can take the international system as a collection of communities of practice; for example, communities of diplomats, of traders, of environmentalists, and of human-rights activists. Communities of practice cut across state boundaries and mediate between states, individuals, and human agency, on one hand, and social structures and systems, on the other. (Adler 2005, 15)

According to Adler, “It is within communities of practice that collective meanings emerge, discourses become established, identities are fixed, learning takes place, new political agendas arise, and the institutions and practices of global governance grow” (Adler 2005, 14). Further, although communities of practice are not international actors in a formal sense, they coexist with these actors to the extent that their work transcends state

5 See, for example, Bicchi (2022).

boundaries and allows individuals to interact with states and other structures or systems of social organization (*ibid.*).

Jutta Brunnée and Stephen Toope (2010) also draw on the notion of communities of practice, in association with the criteria proposed by Lon Fuller on the internal morality of law, in their analysis of the concept of international legal obligation. They argue that international norms are rooted in socially shared understandings or collective meanings that, in turn, are shaped by processes of social interaction (Brunnée and Toope 2010, 56 et seq.). In this way, transnational communities of experts provide the setting for the widening and deepening of shared legal understandings that eventually lead to the creation of criteria of legality, which are key for promoting compliance with international legal obligations (*ibid.*, 85). Indeed, as the authors argue, adhering to the criteria of legality facilitates interaction on the basis of mutual respect and reciprocity, thereby fostering states' and other actors' commitment to their joint enterprise (*ibid.*, 76). Therefore, legal obligation is "best viewed as an internalized commitment and not as an externally imposed duty matched with a sanction for non-performance" (*ibid.*, 27).

In summary, Brunnée and Toope's thesis suggests that the creation of international legal norms be viewed as an interactive process that presupposes the existence of a community of practice whose objective is to construct socially shared legal understandings. In this regard, these understandings are intrinsically interactive since they emerge from social interaction within communities of practice that "cut across state boundaries and mediate between states, individuals, and human agency, on one hand, and social structures and systems, on the other" (Adler 2005, 15).

Before concluding this section, we would like to make two clarifications regarding our decision to use the concept of communities of practice as an analytical framework. First, we are aware that this approach carries the risk of overstating the agency that groups of individuals exercise in the shaping of the legal field and, accordingly, of downplaying the impact of structural factors such as relations of production, gender dynamics, geographic origin, the racialization of subjects, and resource asymmetry. Of course, the contexts in which

legal production takes place—particularly as they concern socioeconomic structures—influence actors’ agency;⁶ however, these structures are not the end of the story. Not all outputs of the legal field are determined by structure. Such an assertion would imply a false contingency, whereby the role of the law would seem to be “simply a matter of chance and will” (Marks 2009, 10). In this regard, we consider that the notion of communities of practice, by straddling the limits of structure and the transformative potential of individual agency, allows for a balance to be achieved.

Second, and as a corollary to the above, we would like to emphasize the fact that communities of practice can enrich our understanding of the relationship between agency and structure. Indeed, constructivist theories have understood that while interactions among agents help define structures, being part of the structure itself can have an impact on the interests and strategies of agents.⁷ Therefore, there is a mutual reciprocity between agents and structures. Seen in this light, the collective meanings that support a social structure in charge of informing the behavior patterns of agents are not fixed but sensitive to the changes stemming from interactions among subjects.⁸

Against this backdrop, the concept of communities of practice offers us a better picture of the role of social interactions—and of the collective learning associated with these interactions—in shaping the normative content of international disciplines as they relate to technical barriers to trade. Our aim is thus to explore the way in which actors such as companies and nongovernmental organizations determine the meaning of a “technical barrier to trade” and how, in so doing, they define the scope of public policies such as front-of-package labeling policies, which incidentally affect trade. Put another way, we seek to show how these actors, as members of a specific community of practice, participate in the production of legal

6 In this regard, see Ureña (2017).

7 In this regard, see Fierke (2016, 191); Hurd (2008, 303).

8 See Wendt (2009).

meaning through the use of the repertoire that the community itself makes available to them.

Building Regulatory Sovereignty

According to the framework described above, we propose that the provisions contained in the TBT Agreement open up spaces of participation for a series of transnational actors with specialized knowledge—and with specific roles and interests—to exchange perspectives about how to interpret the substantive obligations that the agreement lays out for World Trade Organization (WTO) members. Thus, on the basis of debates over legal interpretations that arise in these interactive settings, the regulatory space available to states for adopting public policies aimed at achieving socially valuable objectives, such as health or environmental protection, is collectively constructed. In other words, the interaction around the TBT Agreement allows those who participate in it to collectively produce a socially shared perception of what conditions must be satisfied for a regulatory measure to fall within the scope of what is legally possible for a state, in accordance with its international obligations concerning trade liberalization.⁹

Technical Regulations

First, we must explain why nutrition labeling policies in general, and front-of-package labeling measures in particular, fall within the scope of the TBT Agreement. Here, it is important to note that the category of “technical barriers to trade” includes technical standards, technical regulations, and conformity assessment procedures. Conformity assessment procedures are “any procedure used, directly or indirectly, to determine that relevant requirements in technical regulations or standards are fulfilled” (TBT Agreement, annex 1, no. 3). Meanwhile, technical standards are documents developed by international standardizing bodies that provide—for common and repeated use—rules, guidelines, or characteristics and with which compliance

9 In this regard, see Dorlach and Mertenskötter (2020).

is not mandatory; they may also include, among other things, labeling requirements as they apply to a product, process, or production method (*ibid.*, annex 1, no. 2). Lastly, a technical regulation is defined in the TBT Agreement as

[a] document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method. (TBT Agreement, annex 1, no. 1)

On the basis of these definitions, we can see that the difference between technical standards and technical regulations is that only the latter are mandatory. Moreover, as defined in the TBT Agreement, technical regulations can refer to both technical requirements and labeling requirements.¹⁰ Therefore, a nutrition labeling measure would fall within the second sentence of the above definition.¹¹ This definition has been upheld by the Appellate Body of the WTO's dispute resolution system. According to the Appellate Body, three criteria must be fulfilled in order for a measure to be considered a technical regulation: (i) the measure must apply to an identifiable product or group of products; (ii) it must lay down one or more characteristics of the product; and (iii) compliance with these product characteristics must be mandatory.¹²

Accordingly, a regulatory measure—such as a front-of-package labeling measure—that is applied equally to a group of products that can be determined on the basis of a shared characteristic¹³ (such as nutritional content), that requires these products to include a certain type of label¹⁴ on their packaging displaying information about the nutritional content, and that is

10 In this regard, see Sifonios (2018, 457).

11 In this regard, see Voon *et al.* (2013).

12 See WTO Panel (2018, para. 7.110).

13 See WTO Appellate Body (2001, para. 70).

14 See WTO Panel (2005, para. 7.451).

mandatory (either because it establishes mechanisms to ensure compliance or because it excludes the possibility of using other labeling alternatives)¹⁵ constitutes a technical regulation. Classifying measures such as front-of-package labeling measures in this way means that governments, when designing these measures, must take into account the disciplines that the TBT Agreement imposes on WTO members in terms of the preparation, adoption, and application of technical regulations.

On a substantive level, in order for a technical regulation to be compatible with the TBT Agreement, it must be nondiscriminatory, meaning that it must not imply less favorable treatment among any products that compete in the market in such a way that distorts opportunities for competition in international trade (TBT Agreement, art. 2.1).¹⁶ Furthermore, a technical regulation should not be more trade restrictive than necessary, which means analyzing the degree to which the measure restricts trade, the degree to which it contributes to the fulfilment of a legitimate objective, and the risks of not achieving its intended public policy objective (*ibid.*, art. 2.2; WTO Appellate Body 2012b, para. 374).

Apart from that, there are other obligations stemming from the TBT Agreement that are relevant for our analysis centering on communities of practice. These obligations are those of harmonization and transparency.

Harmonization

The TBT Agreement contains several provisions related to harmonization. For example, when a WTO member needs to adopt a technical regulation and there are international standards on the topic, the state should use these standards, or the relevant portions of them, as a basis for this regulation, except when state authorities consider the international standards in question to be ineffective or inappropriate for achieving the legitimate objective (TBT Agreement, art. 2.4). The TBT Agreement also lists

15 See WTO Panel (2018, paras. 7.145–7.158); WTO Appellate Body (2012a, paras. 186–194).

16 In this regard, see WTO Appellate Body (2012b, para. 267).

these objectives and stipulates that when a technical regulation is aimed at fulfilling any of these legitimate objectives “and is in accordance with relevant international standards, it shall be rebuttably presumed not to create an unnecessary obstacle to international trade” (*ibid.*, art. 2.5).¹⁷

The common thread in these provisions on harmonization is the notion of “relevant international standards,” which has two components.¹⁸ The first concerns the standards’ function and their obligatory nature. In this regard, a standard provides—for common and repeated use—rules, guidelines, or characteristics, including requirements with regard to labeling for products or related processes and production methods (TBT Agreement, annex 1, no. 3). Moreover, even though, as a corollary of the harmonization obligation, states are expected to base their technical regulations on international standards, doing so is not mandatory. The second component relates to the entity from which the standard originates, which should be an international standardizing body (*ibid.*, annex 3, lit. G). These institutions are bodies with recognized activities in standardization and whose membership is open to the standardization authorities of WTO members (WTO Appellate Body 2012a, para. 359).¹⁹

The Appellate Body has held that in order for a standard to be considered “international,” certain procedural conditions must be met, and the standard must originate from an international standardizing body (WTO Appellate Body 2012a, paras. 360–370). The basis for this, as explained by the Appellate Body, can be found in the principles enshrined in a subsequent agreement among WTO members concerning the development of international standards (*ibid.*, paras. 371–372). One of these principles is that of openness, which means that participation in international standardizing bodies must be open, in

17 See also article 2.7, which requires accepting as equivalent the technical regulations of other countries.

18 See generally Barrios Villarreal (2018).

19 Additionally, under article 2.6 of the TBT Agreement, members must participate fully in the development of international standards, with the aim of ensuring that their own technical regulations are harmonized as much as possible with these standards.

a nondiscriminatory manner, to the relevant authorities of all WTO members such that these authorities can participate in the different stages of the international standard-setting process (WTO Committee on Technical Barriers to Trade 2000, 25). Additionally, the principles of impartiality and consensus mean that the opinions of all interested parties should be taken into account during the drafting process and that conflicting positions should be reconciled (*ibid.*). This principle is thus of a procedural nature and aims to ensure that international technical standards reflect the interests not of a mere handful of parties but rather of all participants (Barrios Villarreal 2018). In other words, the principle seeks to bestow legitimacy onto the international standard-setting process.

In this light, we argue that international standardizing bodies play a dual role in the TBT Agreement community of practice: on the one hand, these institutions are relevant actors in their own right within the community of practice, and, on the other, they are settings for interaction among members of the community. One clear example of this is the Codex Alimentarius Commission.²⁰ The Codex Alimentarius is a collection of international technical standards prepared by a joint commission of the World Health Organization and the Food and Agriculture Organization of the United Nations. The commission's members meet to discuss, on the basis of scientific criteria, how to achieve the greatest possible degree of convergence on food standards in order to protect the health of consumers and to ensure fair practices in the food trade. In this regard, Codex standards, which include codes of good practices, guidelines, and other recommendations, are internationally accepted and are thus relied on as a key instrument for the harmonization of technical regulations on food products.

Before proceeding, it is important to clarify that when a WTO member publishes, using the TBT Information Management System, a notification about a proposed technical regulation, other members may submit comments on the proposed measure before the Committee on Technical Barriers to Trade

20 In this regard, see Codex Alimentarius (n.d.).

(TBT Committee) (TBT Agreement, arts. 2.9.2 and 2.10.1).²¹ This procedure, known in the WTO legal framework as the process for discussing “specific trade concerns,” is aimed at preventing states from adopting regulations that run contrary to WTO rules, which run the risk of being litigated in the dispute settlement mechanism.²² Certainly, as we will highlight later, discussions on specific trade concerns brought before the TBT Committee are another key factor in the community of practice under analysis here. For now, the point we wish to emphasize is that the international acceptance enjoyed by Codex standards makes them a favorable tool for members of the community of practice to draw on when arguing that measures such as front-of-package labeling policies cannot be justified on scientific or technical grounds.

Indeed, many of the debates before the TBT Committee over nutrition labeling measures, such as front-of-package labeling policies, revolve around the issue of why states must privilege certain Codex guidelines on nutritional information²³ to achieve the harmonization objectives established by the TBT Agreement.²⁴ For example, it has been argued that front-of-package labeling measures issue a value judgment to the extent that such labels suggest that the consumption of products with a certain nutritional content is harmful to health. However, given that the problem lies in the *excessive* consumption of ingredients of concern, front-of-package labeling measures do not allow consumers to discern the threshold at which the consumption

21 The notification process works as follows: first, the member publishes a notice about their proposed measure, which is sent to the WTO Secretariat via the Notification Submission System and is processed on the basis of relevant notification forms. The Secretariat then notifies other members, who must be given at least sixty days to submit comments. See WTO Committee on Technical Barriers to Trade (2000).

22 A database of specific trade concerns is available at <https://tradeconcerns.wto.org/en>.

23 See especially General Guidelines on Claims (CAC/GL 1-1979); Guidelines for Use of Nutrition and Health Claims (CAC/GL 23-1997); Guidelines on Nutrition Labelling (CAC/GL 2-1985).

24 Among others, see the following meeting minutes from the TBT Committee: G/TBT/M/70, paras. 2.117, 2.118; G/TBT/M/71, para. 2.121.

of those ingredients switches from being harmless to being excessive.

For critics of such labeling policies, this goes against Codex guidelines, which do not allow nutrition claims to generate doubt among consumers about the safety of foods.²⁵ According to these critics, health labels such as front-of-package labels can be misleading because they imply that the mere presence of certain ingredients is harmful to health. In this regard, some have argued before the TBT Committee that while the Codex approach is focused on the declaration of nutrients contained in products,²⁶ front-of-package labeling measures convey a false sense of certainty regarding the point at which the consumption of certain substances becomes harmful to one's health. In this regard, it is argued that front-of-package labeling requirements should be limited to foods that contain ingredients or substances that cause allergies or intolerances, instead of those that are not harmful to human health per se.

In short, the Codex-based criticism of front-of-package labeling policies maintains that Codex offers alternatives to labeling that rely on reference values that allow consumers to identify the nutritional content of food products. However, it should not be forgotten that Codex standards are not mandatory. The point is that the legitimacy enjoyed by these standards, as a result of the scientific and technical environment in which they emerged, allows them to be wielded before the TBT Committee in order to erode the effectiveness of front-of-package labeling measures, under the premise that such measures are trade restrictive and that Codex would therefore strike a better balance between the protection of health and trade facilitation.

But from a community-of-practice perspective, the discussions that take place within the Codex Alimentarius Commission

25 Indeed, paragraphs 3.2. and 3.5. of the General Guidelines on Claims (CAC/GL 1-1979) prohibit claims "implying that a balanced diet or ordinary foods cannot supply adequate amounts of all nutrients" and claims that "could give rise to doubt about the safety of similar food or which could arouse or exploit fear in the consumer," respectively.

26 See especially Guidelines on Nutrition Labelling (CAC/GL 2-1985).

and the TBT Committee are not always the end of the story. Indeed, the community of practice at issue here stands out for the wide range of actors who participate in the collective shaping of the state's regulatory space and for the different forums available for that purpose. It is thus also important to consider how the Appellate Body has interpreted the scope of the TBT Agreement's harmonization obligation. Let us recall that since Codex standards are voluntary, the TBT Agreement allows leeway in their implementation—especially because the obligation for states is that their technical regulations be “based” on relevant international standards (TBT Agreement, art. 2.4). Therefore, of particular importance is the interpretation of what it means for nutrition labeling policies to use Codex standards “as a basis.” In this regard, the Appellate Body's jurisprudence establishes that nutrition labeling measures need not be fully consistent with Codex standards in order for the harmonization obligation to be fulfilled. In general, for regulatory measures involving barriers to trade—such as technical regulations or sanitary and phytosanitary measures—to be understood as having been developed with Codex in mind, it is sufficient that they do not manifestly contradict Codex (WTO Appellate Body 2002, para. 249) and that they have a close relationship with Codex in the sense of using it as a “basis” or “support” (WTO Appellate Body 1998, para. 163).²⁷

As a result, with regard to the community of practice, the TBT Committee offers WTO member delegations a space for social interaction in which to discuss nutrition labeling measures through the formulation of specific trade concerns. At the same time, the dispute settlement system represents another space for such interactions. In this second setting, the interaction emerges from the arguments made before WTO adjudicating bodies by the parties to a dispute and from the way that these bodies, especially the Appellate Body, determine how WTO rules should be interpreted.

On the basis of the discussions that take place in these two spaces for interaction, we can offer a synthesis about the extent

27 See also Van den Bossche and Zdouc (2022, 910).

to which Codex is binding with regard to nutrition labeling. This synthesis is that a state may adopt nutrition labeling measures that diverge from Codex standards by arguing that Codex nonetheless provided the “basis” for the measures’ creation. Further, a state could simply argue that Codex standards are “ineffective” or “inappropriate” for meeting its public health aims (TBT Agreement, art. 2.4). Whatever the case, it is only as participants in the community of practice that governments “learn” about the legal meaning generated on the basis of social interactions in settings such as the TBT Committee and the WTO’s dispute settlement system. It is this learning that allows them to act strategically to justify measures such as front-of-package labeling policies, because they know just how far Codex commitments reach.

Transparency

With regard to technical regulations, the TBT Agreement’s obligation of transparency takes various forms. One is that in cases where there are no relevant international standards to draw on, or when the content of a draft technical regulation is not in accordance with relevant standards, the WTO member in question should publish—at an early appropriate stage in the measure’s implementation—a notification informing other members about the products that will be affected by the draft technical regulation, as well as the regulation’s objective and rationale (TBT Agreement, art. 2.9). This seeks to ensure that other members are promptly informed of the content of the draft technical regulation.

This scenario opens a space for dialogue in the TBT Committee whereby other parties raise their objections to the draft technical regulation, while the party interested in its adoption explains why the measure does not contravene the TBT Agreement. Specifically, the TBT Agreement stipulates that WTO members, upon request, shall provide other members with detailed information about the proposed technical regulation and identify how it diverges from relevant international standards (TBT Agreement, art. 2.9). Further, the agreement states that members shall take into account written comments provided

by other members, as well as those arising in the course of the discussions facilitated by the notification process (*ibid.*). This therefore constitutes a type of “informal challenge” to technical regulations, outside the WTO’s dispute settlement system, that usually results in changes to draft regulations (Barlow and Thow 2021).

But we should not lose sight of the fact that the main consequence of the duty of transparency is the broadening of the social arena in which nutrition labeling measures’ conformity with the TBT Agreement is defined. Admittedly, one could argue that the WTO’s dispute settlement system is the interpretive setting for the TBT Agreement’s normative content. This system has been described as an interpretive community that operates on the basis of the formal adjudication of disputes. It is composed of, among others, members of the Appellate Body; experts on panels; law firms and lawyers specializing in foreign trade who serve as private legal counsel to members; and legal commentators who analyze and comment on jurisprudential developments (Dorlach and Mertenskötter 2020, 575). Here, an interpretive community refers to a community of individuals who discipline and channel the interpretation of law in certain contexts of social interaction (Waibel 2015). Thus, on the basis of the routine social interactions that occur within this setting, it is possible to “predict” how specific legal issues related to a WTO dispute might be resolved (*ibid.*).

Nonetheless, as has been raised in the literature, the procedure for discussing specific trade concerns is another space for interaction that determines whether a draft technical regulation infringes on the TBT Agreement (Barlow and Thow 2021; Dorlach and Mertenskötter 2020; Durkee 2021, 470). Although these interactions tend to take place in quasi-formal spaces outside the dispute settlement system, the interpretive practices that occur therein also produce meaning about the limits that the TBT Agreement places on the adoption of health regulations (Barlow and Thow 2021).

In this regard, it is important to note that the interpretive debates that take place before the TBT Committee involve not only legal arguments but also political and, above all, scientific ones (Barlow and Thow 2021). This is because most of these

discussions, which are cloaked in an aura of scientific criteria and technical efficiency, center on the reasons a particular member had for not basing its proposed regulation on available international standards. Subsequently, there is an expansion in the catalog of actors belonging to the community of practice, who range from public officials to members of the scientific community who participate in international standardizing bodies such as the Codex Alimentarius Commission.

Another example of the TBT Agreement's obligation of transparency is the requirement that WTO members establish enquiry points whereby other members—as well as “interested parties” based in those countries—can formulate reasonable inquiries and request relevant information regarding technical regulations that have been adopted or proposed by a particular member (TBT Agreement, art. 10). The term “interested parties” is open-ended and could be interpreted to include companies in the sector that is being regulated. The TBT Agreement therefore offers these private actors the potential to access a permanent channel for interacting with regulatory authorities, which allows companies to express their views concerning substantive aspects of technical regulations.

Here, the scope of the duty of transparency in the context of preferential trade, regulated on the basis of free trade agreements (FTAs), is worth highlighting. While FTAs reinforce the multilateral commitments that the parties to a treaty have acquired as WTO members, they also contain additional commitments, commonly known as “WTO-plus commitments.” A study by Ana Cristina Molina and Vira Khoroshavina (2015) found that the majority of FTAs with provisions on technical barriers to trade contain commitments that mirror the disciplines of the TBT Agreement while also enshrining WTO-plus commitments, especially in the area of transparency. For example, several of the FTAs signed by Colombia stipulate that Colombia shall allow nationals of the other party to participate in the development of Colombia's standards, regulations, and conformity assessment procedures and to enjoy the same conditions for participation as

nationals from Colombia.²⁸ In practice, these provisions could be interpreted as requiring Colombia, whenever it intends to adopt certain regulations, to notify or consult with companies or representatives of the affected industries in the country with which it signed the FTA.

In any case, what we wish to emphasize is that these participatory settings, referred to in the literature as “regulatory conversations” (Dorlach and Mertenskötter 2020, 573 et seq.), allow companies and other private actors to insert themselves into the process of collectively constructing meaning through interpretive debates on the conformity of technical regulations with international economic law, enabling them to influence policy design on issues such as public health. In this regard, some have argued that the points of contact that states must keep open become spaces where private actors influence government decision-making—by presenting their own interpretation of why a particular regulatory measure could cause a state to violate its commitments under the TBT Agreement (Dorlach and Mertenskötter 2020).

Implications and Distributive Effects

Based on above characterization of the community, we now turn to analyze the key implications of the community’s practice—that is, the process of social interaction among different actors involved in the interpretation of the TBT Agreement.

To start, debates over the content and scope of obligations stemming from the TBT Agreement are a type of social construction of the regulatory space available to states in the design of public policies. This constitutive effect occurs through multiple channels of interaction, from “regulatory conversations” between governments and the private sector, to the adjudication of conflicts in the WTO’s dispute settlement system, to the discussions of specific trade concerns that take

28 See, for example, article 7.6 of the free trade agreement between Colombia and the US, whose third paragraph is about enhancing opportunities for people to provide meaningful comments when participating in discussions on proposed technical regulations.

place in the TBT Committee. These settings produce a specific legal knowledge—albeit one based on non-legal criteria such as science and ideology—that informs our sense of legality with regard to the formal and substantive requirements that should apply to measures such as front-of-package labeling policies.

For example, with regard to nutrition labeling regulations, Barlow and Thow (2021) argue that the process of meaning-generation operates through the definition of certain cognitive frameworks that serve to stabilize the normative expectations of actors interested in this type of technical regulation. The authors base their analysis on the discourse present within TBT Committee meetings concerning nutrition labeling requirements. They conclude that these settings not only challenge the normative legitimacy of such regulatory proposals but also generate patterns of discourse about how to understand the legitimacy of state action aimed at improving people’s dietary habits or about how to strike a balance between food industry interests and public health. The creation of cognitive frameworks such as these allows members of the community of practice to influence the general understanding of how and when it is appropriate for states to implement measures such as front-of-package labeling policies.

Another effect of the practice under analysis is that it redistributes power with respect to the design of nutrition labeling measures. We have already seen that, in order to comply with their obligation of transparency, states must allow the private sector to participate in the development of technical regulations. In this light, authors such as Durkee (2021, 484 et seq.) have discussed the implications of private sector influence on interpretations of international law. Durkee argues that this type of participation allows private actors to behave as “interpretive entrepreneurs”—in other words, to create legal meaning by positioning, within the legal consciousness, certain interpretations of international norms that are aligned with their interests. What is important to remember is that this normative influence of the private sector, as part of the interpretive community, occurs in conjunction with the structural power it frequently wields over governments.

Along these same lines, Dorlach and Mertenskötter (2020) note that in discussions between regulatory authorities and private companies regarding nutrition labeling, the former are often at a disadvantage in terms of financial and human resources, in addition to having less experience vis-à-vis the application of WTO rules. At the same time, the authors argue that the legal knowledge acquired by governments as participants in this kind of interaction gives them tools to defend the compatibility of front-of-package labeling measures with states' international obligations.

In sum, the communities of practice approach allows us to see that, within the multiple distributive effects of international economic law, there is a redistribution of power, understood as the capacity of certain actors to influence the design of public policies. This influence is exercised, among other ways, through participation in the regulatory process, which implies knowing and deploying the language of international economic law in order to express persuasive arguments. Without ignoring the existence of underlying power differentials, we can thus understand regulatory sovereignty as the result of a process of social construction. Although this political space has been exploited mainly by multinational companies, other civil society actors may join the dynamics of the community of practice in an attempt to influence the adoption of public policies aimed at achieving socially valuable ends.

Conclusion

In this chapter, we have described the social relationships present within a broad network of transnational actors whose interactions consist of sharing their perspectives about WTO members' obligations under the TBT Agreement, especially with regard to the design and implementation of front-of-package labeling measures. Seen through the prism of communities of practice, the normative content of the TBT Agreement—and therefore the regulatory space it confers on states to adopt technical regulations—is determined on the basis of interpretive conflicts among members of this community of practice. These interpretive conflicts provide the foundation for the

construction of legal meanings that determine the spectrum of regulatory possibility with regard to nutrition labeling. However, this collective construction of legal knowledge should be viewed not only in terms of legal standards and criteria but also in the sense of establishing cognitive frames for understanding the aim and scope of public policies such as front-of-package labeling regulations.

Therefore, the knowledge that is generated and acquired through the community of practice and its settings allows certain actors to participate in the construction of the normative field to which nutrition labeling policies must conform. Consequently, appropriating the legal knowledge created in these transnational networks of interpretive dialogue becomes a key strategy for progressive sectors of civil society interested in promoting permissive interpretations of international economic law that are compatible with the achievement of public health aims.

References

- Adler, E. 2005. *Communitarian International Relations: The Epistemic Foundations of International Relations*. New York: Routledge.
- Agreement on Technical Barriers to Trade. January 1, 1995.
- Barlow, P., and A. M. Thow. 2021. "Neoliberal Discourse, Actor Power, and the Politics of Nutrition Policy: A Qualitative Analysis of Informal Challenges to Nutrition Labelling Regulations at the World Trade Organization, 2007–2019." *Social Science and Medicine* 273: 113761.
- Barrios Villarreal, A. 2018. *International Standardization and the Agreement on Technical Barriers to Trade*. Cambridge: Cambridge University Press.
- Bicchi, F. 2022. "Communities of Practice and What They Can Do for International Relations." *Review of International Studies* 48(1): 24–43.
- Brunnée, J., and S. J. Toope. 2010. *Legitimacy and Legality in International Law: An Interactional Account*. New York: Cambridge University Press.

Codex Alimentarius. n.d. "About Codex Alimentarius." <https://www.fao.org/fao-who-codexalimentarius/about-codex/en>

Dorlach, T., and P. Mertenskötter. 2020. "Interpreters of International Economic Law: Corporations and Bureaucrats in Contest over Chile's Nutrition Label." *Law and Society Review* 54(3): 571–606.

Durkee, M. J. 2021. "Interpretive Entrepreneurs." *Virginia Law Review* 107(3): 431–493.

Fierke, K. M. 2016. "Constructivism." In *International Relations Theories: Discipline and Diversity*, edited by T. Dunne, M. Kurki, and S. Smith. New York: Oxford University Press.

General Guidelines on Claims. CAC/GL 1-1979.

Grover, A. 2014. *Unhealthy Foods, Non-communicable Diseases and the Right to Health*. UN Doc. A/HRC/26/31.

Guarnizo, D., and A. M. Narváez. 2019. *Etiquetas sin derechos: Etiquetado de productos comestibles; Un análisis desde los derechos humanos*. Bogotá: Dejusticia.

Guidelines for Use of Nutrition and Health Claims. CAC/GL 23-1997.

Guidelines on Nutrition Labelling. CAC/GL 2-1985.

Hurd, I. 2008. Constructivism. In *The Oxford Handbook of International Relations*, edited by C. Reus-Smit and D. Snidal. New York: Oxford University Press.

Lave, J., and E. Wenger. 1991. *Situated Learning: Legitimate Peripheral Participation*. New York: Cambridge University Press.

Marks, S. 2009. "False Contingency." *Current Legal Problems* 62(1): 1–21.

Molina, A. C., and V. Khoroshavina. 2015. *TBT Provisions in Regional Trade Agreements: To What Extent Do They Go Beyond the WTO TBT Agreement?* Working Paper ERSD-2015-09. World Trade Organization, Economic Research and Statistics Division.

Sifonios, D. 2018. *Environmental Process and Production Methods (PPMS) in WTO Law*. Cham: Springer.

Ureña, R. 2017. "International Law as Expert Knowledge: Exploring the Changing Role of International Lawyers in National Contexts." In *International Law as a Profession*,

edited by J. D'Aspremont, T. Gazzini, A. Nollkaemper, and W. Werner. Cambridge: Cambridge University Press.

Van den Bossche, P., and W. Zdouc. 2022. *The Law and Policy of the World Trade Organization*. Cambridge: Cambridge University Press.

Voon, T., A. Mitchell, and C. Gascoigne. 2013. "Consumer Information, Consumer Preferences and Product Labels under the TBT Agreement." In *Research Handbook on the WTO and Technical Barriers to Trade*, edited by T. Epps and M. J. Trebilcock. Cheltenham: Edward Edgar Publishing.

Waibel, M. 2015. "Case 7. Interpretative Communities in International Law." In *Interpretation in International Law*, edited by A. Bianchi, D. Peat, and M. Windsor. Oxford: Oxford University Press.

Wendt, A. E. 2009. "The Agent-Structure Problem in International Relations Theory." *International Organization* 41(3): 335–370.

Wenger, E. 1999. *Communities of Practice: Learning, Meaning, and Identity*. New York: Cambridge University Press.

World Trade Organization (WTO) Appellate Body. 1998. *EC Measures concerning Meat and Meat Products (Hormones)*. WTO Doc. WT/DS26/AB/R.

———. 2001. *European Communities: Measures Affecting Asbestos and Asbestos-Containing Products*. WTO Doc. WT/DS135/AB/R.

———. 2002. *European Communities: Trade Description of Sardines*. WTO Doc. WT/DS231/AB/R.

———. 2012a. *United States: Measures concerning the Importation, Marketing and Sale of Tuna and Tuna Products (US – Tuna II)*. WTO Doc. WT/DS381/AB/R.

———. 2012b. *United States: Certain Country of Origin Labelling (Cool) Requirements*. WTO Docs. WT/DS384/AB/R, WT/DS386/AB/R.

World Trade Organization (WTO) Committee on Technical Barriers to Trade. 2000. *Second Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade*. WTO Doc. G/TBT/9.

———. 2017a. *Minutes of the Meeting of 10–11 November 2016*. WTO Doc. G/TBT/M/70.

———. 2017b. *Minutes of the Meeting of 29–30 March 2017*. WTO Doc. G/TBT/M/71.

World Trade Organization (WTO) Panel. 2005. *European Communities: Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*. WTO Docs. WT/DS290/R (Australia), WT/DS174/R (United States).

———. 2018. *Australia: Tobacco Plain Packaging*. WTO Doc. WT/DS467/23.

Front-of-Package Food Labeling and the Committee on Technical Barriers to Trade: A Legal Perspective on Front Labeling and International Trade

*Gianella Severini*¹

*Juan Martín Carballo*²

*María Luján Abramo*³

1 Lawyer and journalist with an LLM in global health law from Georgetown University (us), with additional certification in international trade and human rights; legal coordinator at the Campaign for Tobacco-Free Kids and the Global Health Advocacy Incubator.

2 Lawyer with an LLM from Georgetown University (us); legal coordinator for food and nutrition policies at the Global Health Advocacy Incubator.

3 Lawyer with an LLM in global health law from Georgetown University (us), with additional certification in human rights; global legal advisor for the food and nutrition program at the Global Health Advocacy Incubator.

Introduction: International Trade and Diet-Related Diseases

Physical inactivity, poor diet, and tobacco and alcohol consumption are the main risk factors for chronic noncommunicable diseases (NCDs). These behaviors can lead to high blood pressure, overweight, obesity, and diabetes, among other issues. NCDs currently represent a leading cause of death worldwide (World Health Organization 2021a), and the SARS-CoV-2 pandemic, which burst onto the global scene in 2020, had a disproportionate impact on people with chronic illnesses (Kluge et al. 2020; Maddaloni and Buzzetti 2020; Nishiga et al. 2020).

Moreover, overweight and obesity represent a serious public health problem in the modern world. In 2016, more than 1.9 billion people over the age of eighteen were overweight, of whom 650 million were obese (NCD Risk Factor Collaboration 2017). And as of 2021, approximately 40 million children under five and 340 million children and adolescents aged five to nineteen were overweight or obese (World Health Organization 2021b). In Latin America alone, as of 2017, 360 million people were overweight and 140 million were obese, equivalent to 58% of the region's population (Pan American Health Organization 2017). This issue affects people of all backgrounds, although there are some variations according to socioeconomic status, ethnicity, and place of residence; in general, people living in a situation of vulnerability are affected to a greater degree. If this trend continues, 30% of Latin America's adult population is projected to be obese by 2030 (Food and Agriculture Organization et al. 2018).

The main factor behind obesity and overweight is a change in dietary patterns. Urbanization, economic growth, and global economic integration, among other things, have fostered a decline in traditional food preparation, sharply increasing the consumption of ultra-processed foods, which are low in nutrients and high in sugars, sodium, fats, and refined carbohydrates (Food and Agriculture Organization and Pan American Health Organization 2017). In the face of this public health emergency, states have begun acknowledging the importance of preventing obesity and protecting the right to adequate food and nutrition.

Measures such as front-of-package nutrition labeling are a critical tool for addressing the problem of overweight and obesity, as they inform consumers about the content of products and help them make informed food purchases quickly and easily, without the need for specific knowledge about nutrition (World Cancer Research Fund International 2019). Indeed, the Food and Agriculture Organization of the United Nations (n.d.) hails food labeling as an effective tool for protecting consumer health in terms of food safety and nutrition. Front-of-package nutrition labeling uses text and/or symbols to provide simplified information about the nutritional content of a given food product, with the aim of allowing consumers to make informed and healthy choices.

At the same time, the adoption of food labeling measures has trade implications at both the local and international level. For example, labeling that differs from country to country could create “barriers” to the free movement of packaged foods. Arguments presented before international bodies thus generally refer to alleged infringements of international trade rules. In such cases, labeling measures have been described as a barrier to trade.

This chapter explores discussions on front-of-package labeling that have taken place within the framework of the Agreement on Technical Barriers to Trade (TBT Agreement). First, we analyze how the Committee on Technical Barriers to Trade (TBT Committee) has addressed the issue of front-of-package labeling and its legitimate objective of protecting public health. Next, we analyze the relevant provisions of the TBT Agreement, which, like other international trade agreements, requires that states

refrain from adopting policies that may hinder free trade. Then we examine the trade concerns raised by different countries with regard to front-of-package food labeling, reflecting in particular on the case of Australia's plain packaging measure for tobacco products that was brought before the World Trade Organization (WTO). Finally, we explore international standards and the Codex Alimentarius as a set of guidelines, standards, and codes of practice relevant to food packaging, and we review the TBT notification system.

Food Labeling as Addressed by the Committee on Technical Barriers to Trade

The legal framework regulating food systems is diverse and complex and can have an impact on food prices, consumer preferences, food access, and food availability. In light of the urgent problem of obesity and overweight, academia and specialized international organizations have outlined a series of recommendations for states to address this epidemic. Among the recommended measures are front-of-package labeling, restrictions on advertising, taxation, and the regulation of school environments (Elver 2016).

Similarly, the Pan American Health Organization (PAHO) recommends front-of-package labeling for processed and ultra-processed food and drink products, with an eye toward informing consumers in a direct, simple, and quick manner. Further, it recommends that such labeling include a nutrient profile that shows when a product contains high levels of nutrients—such as sugars, fats, and sodium—that are associated with health problems when consumed in excess (Pan American Health Organization 2020). These measures should be part of a suite of complementary policies, including public education campaigns aimed at helping consumers make more informed decisions by consulting product labels. Labels with these traits offer better protection of the right to the information needed to make food consumption decisions, while also preventing consumers from being misled and discouraging the purchase of unhealthy products (*ibid.*).

Importantly, measures such as front-of-package labeling, which many countries have adopted to prevent obesity and protect the right to adequate food, can have repercussions in terms of international trade (Arcuri 2013). The regulation of NCD risk factors can lead to tensions in international economic settings. In fact, this intersection of trade and health measures has been a focus of attention in several international bodies. For example, in September 2015, the United Nations General Assembly adopted the 2030 Agenda for Sustainable Development, which includes the goal of eradicating hunger, for which trade is identified as an important means to achieve it. The WTO therefore has a crucial role to play in advancing this agenda, alongside international health agencies.

The WTO is an international body that aims to promote free trade and facilitate the reduction or elimination of technical barriers to trade. In this regard, the TBT Agreement seeks to ensure that WTO members' technical regulations, standards, and conformity assessment procedures are not discriminatory and do not create unnecessary barriers to trade. The agreement governs a wide range of non-tariff barriers, such as safety standards and product labeling.

The TBT Agreement takes into account the legitimate divergences among countries and accords members significant flexibility in the preparation, adoption, and application of their national technical regulations. It also recognizes members' right to adopt measures aimed at achieving legitimate objectives, such as the protection of human health or safety and the protection of the environment. In this regard, the agreement recommends that members base their measures on international standards in order to strengthen the standardization of practices and standards as a means of promoting international trade (TBT Agreement 1995, arts. 2.4, 2.5, 2.9).

The TBT Committee offers WTO members the ability to consult on any matter regarding the TBT Agreement. This committee meets two or three times per year and has a variety of working groups to undertake specific tasks. The committee's work covers two broad areas: (i) strengthening the implementation of the TBT Agreement and (ii) reviewing specific measures. With regard to the first area, members discuss generic themes that

may lead to the adoption of decisions and recommendations to make implementation of the TBT Agreement more effective (WTO Committee on Technical Barriers to Trade 2019b). Concerning the second, the TBT Committee serves as a forum to discuss specific trade concerns that emerge in response to notifications sent by states with regard to laws, regulations, or procedures that could affect international trade.

In the second case, countries share information about measures that have been proposed or adopted in their country, and other members have the opportunity to submit concerns regarding these measures. Trade concerns can be consulted via the TBT information management system (SPS & TBT Platform 2021). As has been the case with other types of measures aimed at preventing chronic NCDs, the TBT Committee has served as a forum for discussing issues regarding food security, as well as those related to tobacco, alcohol, and obesity prevention.

Members have presented specific trade concerns before the TBT Committee with regard to front-of-package labeling initiatives in Thailand, Chile, Indonesia, Peru, Uruguay, Ecuador, and Mexico, among others. These concerns have centered on the potential incompatibility between such initiatives, on the one hand, and the TBT Agreement and the Agreement on Trade-Related Aspects of Intellectual Property Rights, on the other. In particular, they point to a purported lack of justification and scientific backing for such measures. They also highlight an alleged lack of consistency between the labeling measures and international standards. Below, we analyze these concerns and the responses of the countries in question.

Requirements of the TBT Agreement Relevant to Front-of-Package Food Labeling

The main arguments that have been used to challenge front-of-package labeling regulations have revolved around the following: justification of the regulation (art. 2.5); need and proportionality (art. 2.2); international standards on which the regulations are based (art. 2.4); and questions about notifications (art. 2.9). The TBT Agreement entered into force in 1995 with the establishment of the WTO.

The TBT Agreement defines a technical regulation as a regulation that lays down product characteristics or production methods. To meet this definition, a regulation must satisfy three criteria: (i) it must apply to an identifiable product or group of products; (ii) it must lay down product characteristics; and (iii) its compliance must be mandatory. Front-of-package labeling measures thus constitute technical regulations according to this definition. As outlined in the TBT Agreement, technical regulations must (i) be nondiscriminatory; (ii) have a legitimate objective; and (iii) be justified.

Technical Regulations Must Be Nondiscriminatory

Front-of-package labeling measures must not discriminate in the sense of giving imported products less favorable treatment than similar products of national origin (TBT Agreement 1995, art. 2.1⁴). Discrimination can be direct or indirect. For example, a measure that applies to all sugar-sweetened beverages except juices could be contested if most juice drinks are produced domestically while most sodas are imported. In such a case, the measure would have a disproportionate effect on imported products despite the fact that juices and sodas are both high in sugar and can have similar effects on health. As a case in point, Uruguay—in an effort to avoid being challenged on the grounds of possible discrimination—submitted a statement to the TBT Committee in 2019 noting that its food labeling measure applied equally to domestic and imported products (WTO Committee on Technical Barriers to Trade 2019a). Uruguay also allowed products marketed in other countries to use stickers to comply with the regulation, thereby reducing the potential costs borne by importers needing to reprint labels (*ibid.*).

4 “Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favorable than that accorded to like products of national origin and to like products originating in any other country” (TBT Agreement 1995, art. 2.1).

Technical Regulations Must Have a Legitimate Objective

Every country has the sovereign authority to determine its tolerance for risk when it comes to setting health objectives (*EC–Asbestos*⁵), and this risk is used to determine whether a measure is truly necessary to achieve such objectives. According to article 2.2 of the TBT Agreement, the protection of health is a legitimate objective, as is the protection of the environment and the protection of human safety (TBT Agreement 1995). For example, if a country aims to address the public health problem of obesity and chronic NCDs, it should draw on evidence-based arguments to show that front-of-package labeling has a direct impact on obesity rates. It is essential for states to establish clear objectives in relation to how the measure will address the specific health problem. Uruguay, in specifying its legitimate objective, highlighted that the main objectives of its front-of-package labeling measure were to “provide the public with simple information that is easy to find and understand and that will promote informed food choices; and to encourage consumption of foods with favorable nutrient profiles” (WTO Committee on Technical Barriers to Trade 2019a). Meanwhile, Chile explained that its objective for a similar policy was to “inform the consumer, and that it is not considered a technical barrier to trade since its objective is legitimate” (Subsecretaría de Salud Pública 2015).

5 The *EC–Asbestos* dispute was initiated by Canada against the European Communities (EC) in response to a measure imposed by France prohibiting asbestos and asbestos-containing products. Canada argued that the measure resulted in discriminatory treatment between imported products and certain domestic asbestos substitutes, such as cellulose and fiberglass. The Appellate Body found that the French law was not incompatible with EC obligations under WTO agreements. With regard to the earlier findings of the panel, which was the body of first instance in this case, the Appellate Body found that (i) the panel had erred in excluding the health risks of asbestos in its analysis, and (ii) it was true that the measure protected human health and lives, that there was no reasonably available alternative, and that there was no arbitrary discrimination or a disguised restriction on trade. For more information, see https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds135_e.htm.

Technical Regulations Must Be Justified

According to the TBT Agreement, technical regulations must not be more restrictive than necessary to achieve a given policy objective—in this case, the protection of human health⁶ (TBT Agreement 1995). Article 2.2 of the agreement explains the term “unnecessary obstacles to international trade.” As noted in this provision, “technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create.” States must therefore ensure a certain “proportion” between the restriction to trade being carried out and the risk that the technical regulation seeks to address. Thus, the aim of the TBT Agreement is not to eliminate all barriers to trade but rather to eliminate those that are unnecessary.

This requires a necessity test, which is usually carried out in two steps. The first step considers whether the measure is necessary according to a variety of factors, such as (i) whether and to what extent the measure helps achieve the legitimate objective; (ii) the risks it takes into account—that is, the possible risks that non-fulfillment would create; and (iii) the degree to which the measure restricts trade. The second step considers alternative measures and compares them with the technical regulation at hand. Is there a less trade-restrictive alternative measure that makes a comparable contribution to the policy objective? A regulation is deemed more restrictive than necessary when the objective it pursues can be achieved via alternative measures that are less trade restrictive. To this end, in the case of front-of-package labeling, states should consider available

6 “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” (TBT Agreement 1995, art 2.2).

scientific and technical information, as well as related processing technology or the intended end-uses of products subject to regulation (World Trade Organization 2020, 30).

In the next section, we explore the argument that front-of-package labeling policies do not comply with this third requirement because they are more restrictive than necessary, they lack sufficient evidence, and there are other less restrictive measures available. We also discuss the responses offered by various countries.

Trade Concerns Raised over Front-of-Package Labeling

The trade concerns raised before the TBT Committee have centered largely on the justification for front-of-package labeling measures, particularly their proportionality. Specifically, members voicing these concerns have argued that (i) such measures are more trade restrictive than necessary; (ii) there is not enough evidence to show that labeling measures are necessary or proportionate in terms of the trade restriction and the objective being pursued; and (iii) there are other less trade-restrictive alternatives available. Below, we analyze each of these claims, taking into consideration other TBT Agreement disputes that have been addressed by WTO dispute settlement panels and which concerned technical regulations related to these same issues. We place special emphasis on the case of Australia's labeling rules for tobacco products, in which the rules were found not only to be appropriate but to contribute significantly to the objective of improving public health by reducing the consumption of and exposure to tobacco products.

It is important to point out that none of these discussions within the TBT Committee resulted in formal complaints filed before the WTO's dispute settlement system. For this reason, the discussions within the committee take on special importance as setting precedent within the WTO in the same way that formal disputes do.

“Front-of-Package Labeling Measures Are More Trade Restrictive Than Necessary”

Like several other countries, Guatemala raised a trade concern before the TBT Committee indicating that a Peruvian labeling measure “might be more trade restrictive than necessary to achieve the stated legitimate objective of reducing obesity in order to fight non-communicable diseases” (WTO Committee on Technical Barriers to Trade 2013). Along the same lines, Canada argued that a Chilean labeling measure “deviated from international standards, was not based on science and was likely to be more trade restrictive than necessary” (WTO Committee on Technical Barriers to Trade 2015).

In analyzing these concerns against Chile’s and Peru’s labeling measures, it is interesting to look at the TBT disputes that have already referred to technical regulations on this issue. In particular, it is worth examining the case regarding Australia’s law requiring plain packaging on tobacco products (WTO Appellate Body 2020). Here, both the dispute settlement panel and the Appellate Body found that the Australian measure did not unnecessarily restrict trade or violate the trademark rights of tobacco companies. In this case, in responding to the claims made under article 2.2 of the TBT Agreement, the panel and the Appellate Body analyzed whether—as has been argued in certain trade concerns regarding front-of-package labeling measures—Australia’s plain packaging of tobacco products was “more trade-restrictive than necessary to fulfill a legitimate objective.” This meant considering first whether—and to what extent—the measure actually restricted trade.

In answering this question, the panel and the Appellate Body found that the only way in which the plain packaging rules would have a limiting effect on trade would be if “by reducing the use of tobacco products, [they] reduce the volume of imported tobacco products” (WTO Appellate Body 2020). The panel cautioned that the objective of the measure was to reduce tobacco use, and it rejected arguments that plain packaging restricted competitive opportunities and would make it more difficult for new brands to enter the market. It also rejected arguments that the compliance costs for companies

were sufficient to constitute a limitation on trade (wto Panel 2018, paras. 7.1255, 7.1178, 7.1244).

The *US–Tuna II (Mexico)* dispute analyzed other labeling provisions, namely the “dolphin-safe” labeling measure that specified the conditions under which tuna products sold in the us can be labeled as dolphin-safe. In this case, the us measure was found to not restrict trade more than necessary to achieve its legitimate objectives: to inform consumers if a product contains tuna caught in a manner that endangers dolphins, and to discourage such harmful fishing practices (World Trade Organization 2020; wto Appellate Body 2018).

With regard to front-of-package labeling, countries have introduced alternatives aimed at reducing trade restrictions, such as by allowing stickers and by establishing a gradual phasing-in of measures (as in the case of Uruguay) (wto Committee on Technical Barriers to Trade 2019a). In light of the precedents set by other labeling initiatives, we can see that the trade restrictiveness (or lack thereof) of a measure is linked to other requirements that have been the subject of deeper development in TBT Committee discussions. In addition, the use of solid scientific evidence to support a measure (as we will see below) serves to demonstrate that front-of-package labeling is a means to achieve a legitimate objective. In turn, if there is an alternative measure for achieving such an objective—but this alternative carries a greater likelihood that the objective will not be met—this option will not be considered valid, even if it would be less trade restrictive (as we will see later).

**“Front-of-Package Labeling Measures Lack
Sufficient Evidence to Show That They
Are Necessary or Strike a Proportional
Balance between the Trade Restriction
and the Intended Objective”**

With regard to the issue of scientific evidence, two main questions have been observed: (i) what is the evidence supporting the establishment of nutrient thresholds on certain food labels? and (ii) what is the evidence showing that front-of-package labeling has positive effects on health? Concerning the first

question, some countries have requested further justification from other members regarding the maximum thresholds established in nutrient profiles on food labels, as well as for the selection of food products or categories. For example, the us noted that it did not have a clear understanding of the criteria that Thailand used in its food labeling measure (wto Committee on Technical Barriers to Trade 2007). Similarly, the European Union questioned Chile's food labeling rules and expressed the following concerns: "(i) the lack of scientific basis for the definition of the maximum levels for the concerned nutrients; (ii) the absence of international guidelines backing up the requirements in the measure; and (iii) doubts as to whether this measure was proportional and effective" (wto Committee on Technical Barriers to Trade 2015). With regard to the second question, Switzerland, for example, asked Mexican authorities to provide the risk assessment and scientific and technical evidence supporting the nutrient profile model underpinning Mexico's food warning labels, as well as evidence showing how the measure contributed toward the stated legitimate objective (Swiss Confederation 2019).

To respond to the first question, countries implementing front-of-package labeling measures have used internationally recognized thresholds that are based on standards issued by relevant specialized bodies, such as the World Health Organization (WHO) and PAHO. These entities compile the best available evidence and issue recommendations to help states ensure that their public policies reflect best practices in public health. While the recommendations issued by international organizations such as WHO or PAHO are not considered international standards from the perspective of the TBT Agreement (as we will see in the next section), it is clear that they are legitimate sources for justifying public health policies.

Regarding the second question—as Chile, Uruguay, and other countries have done—it is important to collect scientific evidence demonstrating the effectiveness of front-of-package labeling and to concretely identify how such a measure will achieve the legitimate objective pursued (wto Committee on Technical Barriers to Trade 2019a; Subsecretaría de Salud Pública 2015; Ministerio de Salud Pública 2018). In particular,

it is important to ensure that clear and measurable objectives are established and defined in relation to how the measure will tackle the specific health problem, always supported by evidence. For example, the objective might be to provide easy-to-understand information that helps consumers make healthier food choices. Here, a country could cite evidence showing that labeling helps consumers make better food choices, which in turn helps reduce the intake of sugar, sodium, and fat—all of which are linked to obesity and chronic NCDs. Evidence should be presented in support of each aspect of the measure, including evidence of harm to health, of the particular nutrient profile being used, and of the reasons why certain thresholds were chosen.

“Other Less Trade-Restrictive Alternatives Are Available”

Some countries have claimed that there are potential and reasonable alternative measures that are less trade restrictive and that would work in service of the same objectives as front-of-package labeling policies. Many of these suggested alternatives are voluntary measures, education campaigns, or less effective mechanisms such as guideline daily amounts. For example, the European Union argued that Ecuador, in adopting its food labeling measure, did not consider “less restrictive alternatives that encouraged the consumer to read the contents of sugar, fat and salt on the products in question and make an informed choice” (WTO Committee on Technical Barriers to Trade 2014). In the case of Mexico’s front-of-package labeling measure—one of the most robust in the region—Switzerland expressed its concern before the TBT Committee regarding the need for Mexico to consider less trade-restrictive measures that contribute equally to the legitimate objective.

With regard to the need to consider alternative measures, it is worth taking another look at the case of Australia’s plain packaging rules for tobacco products. In this case, claimants offered four alternative measures that they argued would be less trade restrictive but equally effective in contributing to Australia’s objective; these alternatives included raising the

minimum legal purchasing age and increasing tobacco taxes. Responding to these proposals, the arbitration panel concluded that “individually, each of the four alternatives proposed by the complainants would not make a contribution to Australia’s objective that is equivalent to the contribution made by the [plain packaging] measures” (wto Panel 2018, para. 7.1721). The panel stressed that the use of tobacco products should involve an integrated approach consisting of various measures; plain packaging is intended not to operate as a stand-alone policy but to operate together with measures such as graphic health warnings and restrictions on advertising. It held that one aspect of a comprehensive strategy could not be substituted for another, as this would leave unaddressed the problem that plain packaging seeks to address, such as the attractiveness of tobacco packaging (wto Panel 2019, paras. 7.1729, 7.1731).

This underlines the importance of documenting which alternatives were considered and explaining why a mandatory front-end labeling regime was chosen (*us–Gasoline*⁷) when establishing a front-of-package food labeling system. For example, in the *us–Clove Cigarettes* dispute, even though the decision was not favorable to the disputed measure, Indonesia did not show that the us could have adopted other less trade-restrictive measures. It is thus important for states to explain why alternative measures that were considered were not adopted, in addition to providing evidence on why these alternatives do not address the problem effectively. Lastly, it is critical to show how other measures, such as education campaigns, are used as complementary measures, not alternatives.

For example, Switzerland’s concern regarding Mexico’s labeling measure mentioned Nutri-Score, a voluntary front-of-package labeling scheme that seeks to provide better

7 In the *us–Gasoline* dispute, Venezuela and Brazil raised complaints before the wto dispute settlement system alleging that a us gasoline measure treated imported gasoline less favorably than domestic gasoline. They argued that the us could not justify such discriminatory treatment under wto rules, which allow exceptions only to protect health and the environment. For more information, see https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds2_e.htm.

information to consumers (Swiss Confederation 2019). It is worth noting that this scheme is strongly backed by the ultra-processed food industry because it allows companies to mask unhealthy ingredients behind healthy ones. In order to assign a score to a given product, Nutri-Score uses an algorithm that offsets harmful ingredients with ones that can be beneficial to health. This can lead to a positive rating for products that are high in ingredients such as sugar and which are highly processed and contain additives, generating confusion among consumers (Justicia Alimentaria 2021). It is thus clear why this alternative was not adopted.

The Role of International Standards in International Trade: The Case of Codex Alimentarius

When there exists a relevant international standard, WTO members must use it as a basis for their technical regulations unless this standard would be ineffective or inappropriate for achieving the stated policy objective (TBT Agreement 1995, art. 2.4⁸). Provided that a technical regulation is designed in accordance with relevant international standards, it is rebuttably presumed not to constitute an “unnecessary obstacle to trade.”

Whenever a member is considering a new regulation that might affect trade, it must notify the WTO if there is no relevant international standard that can be drawn on or if its proposed technical regulation deviates from a relevant international standard, so that other members may raise any concerns before the policy is adopted. In an effort to ensure transparency, the TBT Agreement recommends that the member notify the WTO at least sixty days prior to adopting a regulation in order to give other

8 “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” (TBT Agreement 1995, art. 2.4).

members time to provide comments on the proposed measure. This sixty-day period may be shortened in cases where a country is facing an urgent safety, health, or environmental problem. By way of example, Chile provided an ample consultation period for national and international comments prior to adopting its policy on front-of-package warning labels⁹ (Subsecretaría de Salud Pública 2015).

One argument that is often made with regard to compliance with international standards is that front-of-package labeling policies do not comply with the Codex Alimentarius. The Codex Alimentarius is a collection of food-related standards, guidelines, and codes of practice that are voluntary and nonbinding on states. Codex has a dual role: to protect the health of consumers and to ensure fair practices in the food trade. Codex standards serve as international reference standards that, for example, are meant to be used a guide or basis for agreements signed under the framework of the wto. Codex guidelines are thus mentioned in various trade agreements, such as the Agreement on the Application of Sanitary and Phytosanitary Measures.

The Codex Alimentarius Commission is the relevant decision-making body; it meets once a year and is a subsidiary body of the FAO and WHO (Codex Alimentarius n.d.-a). It also convenes working groups and committees, such as the Committee on Food Labelling, that operate throughout the year. Currently, the commission has 189 members, each of which may include nongovernmental participants in their delegations who serve as observers. According to a peer-reviewed article published in 2020, as of the year prior there were 225 Codex observers, including (i) various intergovernmental organizations (such as WHO), with 72 observers, and (ii) nongovernmental international organizations, including 140 from the private sector and 13 from civil society (Thow et al. 2020). This underscores the significant role that industry representatives play before the

9 “The text in question was available for public consultation for more than 60 days between August 19 and October 23, 2014, and approximately 350 comments were received from citizens, national and international institutions, academics, unions, the national consumer association, and the food industry” (Subsecretaría de Salud Pública, 2015).

Codex Alimentarius Commission compared to representatives working in public health.

Although Codex standards are not binding, they can hinder countries' regulatory efforts. By bestowing a presumption of legality on measures based on Codex Alimentarius, Codex Alimentarius provides a channel for industry to challenge domestic regulatory measures. For example, some countries have argued that front-of-package warning labels arouse fear among consumers, a practice prohibited by Codex. In this regard, Guatemala asked Chile to explain how its front-of-package labeling measure "reflected the norms established in the Codex Alimentarius for food labelling" (WTO Committee on Technical Barriers to Trade 2015).

In general, arguments about how Codex Alimentarius and how these standards should influence countries' policymaking processes have not been consistent, though it is generally accepted that countries should justify any measure that departs from Codex standards. Switzerland, for example, asked the Mexican government to clarify how its front-of-package labeling measure was compatible with Codex guidelines and requested more information about Mexico's rationale for choosing a label with a negative warning—namely, one with the word *exceso* ("excess")—to inform consumers (Swiss Confederation 2019).

Codex standards include guidelines on nutrition labeling that address the compositional requirements of foods so that they are nutritionally safe, nutrient claims on food labels, and how such claims should be displayed, among other things (Codex Alimentarius n.d.-b). In addition, at the end of 2021, after several years of work, the Codex Alimentarius Commission published its first set of guidelines on front-of-package labeling. These guidelines recognize front-of-package nutrition labeling as a form of supplementary information that presents simplified nutrition information on the front of pre-packaged foods. They also emphasize that such labeling is a tool for helping consumers make decisions. Lastly, they outline key principles, such as the following: front-of-package nutrition labeling can include symbols, graphics, text, or a combination thereof; such labeling can be voluntary or mandatory, depending on a country's national legislation; where multiple systems for front-of-package

nutrition labeling coexist, they should be complementary and not contradictory to one another; such labeling should align with evidence-based national or regional dietary guidance; and the process of adopting front-of-package nutrition labeling should be led by the government and with the participation of all interested parties (Codex Alimentarius Commission 2021).

As might be expected, these guidelines from the Codex Alimentarius Commission do not provide detailed information about specific front-end labeling systems but rather outline the general principles to be followed and encourage the adoption of this evidence-based measure. Even if such detailed guidance is provided in the future, compliance will not be mandatory under trade law if there is a sound reason not to comply. In this regard, if the guidelines are not followed, this decision should be clearly justified and backed by scientific evidence. It is also important to keep in mind that food warning labels provide information based on evidence that allows consumers to make healthier choices; they are not intended to arouse fear.

Conclusion

In today's global context, it is clear that front-of-package food labeling regulations can have implications for international trade. At the same time—and in light of what was discussed in the introduction—it is clear that diet-related public health problems require urgent action by states. The track records of countries that have already moved forward with front-of-package labeling policies show that other states have raised concerns within the framework of the TBT Committee. All of these concerns have been adequately addressed by the countries in question, and in no case did they lead to formal complaints brought before the WTO.

Our analysis of TBT Committee discussions on specific front-of-package labeling measures, as well as discussions on this issue generally, shows that health-related obesity and overweight prevention is a legitimate objective. Moreover, it shows that there is scientific evidence to support front-of-package labeling measures; indeed, the evidence continues to grow as countries continue to adopt such policies. Finally, our analysis

allows us to confirm that other less trade-restrictive measures can be used as complementary measures to front-of-package labeling but are highly unlikely on their own to make the same contribution to public health protection as labeling measures.

At the same time, a review of the arguments concerning supposed violations of Codex Alimentarius and concerning the role of international standards shows that the recent guidelines proposed by the Codex Alimentarius Commission contain only provisions of a general nature and do not impede states from pursuing such policies. Keeping in mind that Codex standards are not binding, it is important to highlight the need to draw on technical recommendations from international organizations with expertise in public health, such as WHO and PAHO.

The discussions on front-of-package labeling underway in several countries, as well as initiatives to formally adopt the Codex Alimentarius Commission's proposed recommendations, suggest that this issue will continue to be a relevant item on the TBT Committee's agenda. Moreover, the compilation of scientific evidence in countries that have already implemented front-of-package labeling policies will potentially have an impact on the way that such measures are rolled out by other countries in the future.

As a result, it is critical to continue exploring, documenting, and analyzing events taking place within the TBT Committee related to emerging front-of-package labeling policies in Latin America. In particular, it is important to analyze the discussions and arguments that have surfaced around the nutrition warning label measure approved by Colombia in June 2021, as well as any future discussions that might take place with regard to Argentina's proposed front-of-package labeling policy.

References

Agreement on the Application of Sanitary and Phytosanitary Measures. January 1, 1995.

Agreement on Technical Barriers to Trade. January 1, 1995.

Arcuri, A. 2013. "International Economic Law Meets Lifestyle Risks: What Role for International Standards?" *European Journal of Risk Regulation* 4(4): 542–547.

Codex Alimentarius. n.d.-a. "About Codex Alimentarius." <https://www.fao.org/fao-who-codexalimentarius/about-codex/en>

———. n.d.-b. "Nutrition and Labelling." <https://www.fao.org/fao-who-codexalimentarius/thematic-areas/nutrition-labelling/en/>

Codex Alimentarius Commission. 2021. *Report of the Forty-Sixth Session of the Codex Committee on Food Labelling*. https://www.fao.org/fao-who-codexalimentarius/sh-proxy/en/?lnk=1&url=https%253A%252F%252Fworkspace.fao.org%252Fsites%252Fcodex%252FMeetings%252FCX-714-46%252Freport%252FRP21_FLE.pdf

Elver, H. 2016. *Interim Report of the Special Rapporteur on the Right to Food*. UN Doc. A/71/282.

Food and Agriculture Organization. n.d. "Food Labelling." <https://www.fao.org/food-labelling/en/>

Food and Agriculture Organization and Pan American Health Organization. 2017. *Panorama of Food and Nutritional Security in Latin America and the Caribbean 2016*. Washington, DC: Pan American Health Organization.

Food and Agriculture Organization, Pan American Health Organization, World Food Programme, and UNICEF. 2018. *Latin America and the Caribbean Regional Overview of Food Security and Nutrition 2018: Inequality and Food Systems*. Santiago: Food and Agriculture Organization.

Justicia Alimentaria. 2021. *La gran mentira de Nutri-Score: Una herramienta al servicio de las grandes multinacionales de la alimentación procesada*. Barcelona: Justicia Alimentaria.

Kluge, H. H. P., K. Wickramasinghe, H. L. Rippin, R. Mendes, D. H. Peters, A. Kontsevaya, and J. Breda. 2020. "Prevention and Control of Non-communicable Diseases in the COVID-19 Response." *Lancet* 395(10238): 1678–1680.

Maddaloni, E., and R. Buzzetti. 2020. "COVID-19 and Diabetes Mellitus: Unveiling the Interaction of Two Pandemics." *Diabetes/Metabolism Research and Reviews* 36(7): e33213321.

Ministerio de Salud Pública (Uruguay). 2018. Decreto 272 de 2018: Modificación del Reglamento Bromatológico Nacional. https://medios.presidencia.gub.uy/legal/2018/decretos/08/cons_min_705.pdf

NDC Risk Factor Collaboration. 2017. "Worldwide Trends in Body-Mass Index, Underweight, Overweight, and Obesity from 1975 to 2016: A Pooled Analysis of 2416 Population-Based Measurement Studies in 128.9 Million Children, Adolescents, and Adults." *Lancet* 390(10113): 2627–2642.

Nishiga, M., D. W. Wang, Y. Han, D. B. Lewis, and J. C. Wu. 2020. "COVID-19 and Cardiovascular Disease: From Basic Mechanisms to Clinical Perspectives." *Nature Reviews Cardiology* 17(9): 543–558.

Pan American Health Organization. 2017. "Overweight Affects Almost Half the Population of All Countries in Latin America and the Caribbean Except for Haiti." January 19. https://www3.paho.org/hq/index.php?option=com_content&view=article&id=12911

———. 2020. *Front-of-Package Labeling as a Policy Tool for the Prevention of Noncommunicable Diseases in the Americas*. Washington, DC: Pan American Health Organization.

SFS & TBT Platform. 2021. <https://eping.wto.org>

Subsecretaría de Salud Pública (Chile). 2015. *Consolidado de respuestas a observaciones recibidas durante consulta pública nacional e internacional sobre propuesta de modificación del Decreto Supremo N° 977/96, Reglamento sanitario de los alimentos, del Ministerio de Salud de Chile, para la ejecución de la Ley N° 20.606, sobre composición nutricional de los alimentos y su publicidad*. <https://www.minsal.cl/wp-content/uploads/2015/08/consolidado-de-respuestas-a-observaciones-recibidas-durante-consulta-p%C3%9Ablica.pdf>

Swiss Confederation. 2019. "Mexico – Draft Amendment to Mexican Official Standard NOM-051-SCFI/SSA1-2010: General Specifications for the Labelling of Pre-packed Food and Non-Alcoholic Beverages (ID 608)." <https://tradeconcerns.wto.org/en/stcs/details?imsId=608&domainId=TBT>

Thow, A. M., A. Jones, C. H. Schneider, and R. Labonté. 2019. "Increasing the Public Health Voice in Global Decision-Making on Nutrition Labelling." *Globalization and Health* 16: 268.

World Cancer Research Fund International. 2019. "Building Momentum: Lessons on Implementing a Robust Front-of-Pack Food Label." <http://wcrf.org/buildingmomentum>

World Health Organization. 2021a. "Noncommunicable Diseases." April 13. <https://www.who.int/news-room/fact-sheets/detail/noncommunicable-diseases>

———. 2021b. "Obesity and Overweight." June 9. <https://www.who.int/news-room/fact-sheets/detail/obesity-and-overweight>

World Trade Organization. 2020. *The WTO Agreements Series: Technical Barriers to Trade* (3rd edition). Geneva: World Trade Organization Trade and Environment Division.

World Trade Organization (wto) Appellate Body. 2018. *United States – Measures concerning the Importation, Marketing and Sale of Tuna and Tuna Products*. WTO Doc. WT/DS381/AB/RW2.

———. 2020. *Australia – Certain Measures concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*. WTO Docs. WT/DS435/AB/R, WT/DS441/AB/R.

World Trade Organization (wto) Committee on Technical Barriers to Trade. 2007. *Minutes of the Meeting of 21 March 2007*. WTO Doc. G/TBT/M/41.

———. 2013. *Minutes of the Meeting of 17, 19 and 20 June 2013*. WTO Doc. G/TBT/M/60.

———. 2014. *Minutes of the Meeting of 19–20 March 2014*. WTO Doc. G/TBT/M/62.

———. 2015. *Minutes of the Meeting of 18–19 March 2015*. WTO Doc. OMC G/TBT/M/65.

———. 2019a. *Uruguay – Labelling of Packaged Foods: Statement by Uruguay to the Committee on Technical Barriers to Trade*. WTO Doc. G/TBT/W/614.

———. 2019b. *Decisions and Recommendations Adopted by the WTO Committee on Technical Barriers to Trade since 1 January 1995 (revision)*. WTO Doc. G/TBT/1/Rev.14.

World Trade Organization (wto) Panel. 2018. *Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*. WTO Docs. WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R.

Economic Forums as a Setting for Obstructing the Adoption of Front-of-Package Food Labeling Measures: The Case of Mercosur

*Gianella Severini*¹

*Juan Martín Carballo*²

*María Luján Abramo*³

1 Lawyer and journalist with an LLM in global health law from Georgetown University (us), with additional certification in international trade and human rights; legal coordinator at the Campaign for Tobacco-Free Kids and the Global Health Advocacy Incubator.

2 Lawyer with an LLM from Georgetown University (us); legal coordinator for food and nutrition policies at the Global Health Advocacy Incubator.

3 Lawyer with an LLM in global health law from Georgetown University (us), with additional certification in human rights; global legal advisor for the food and nutrition program at the Global Health Advocacy Incubator.

Introduction

Chronic noncommunicable diseases (NCDs) are responsible for 71% of deaths worldwide, with most of these deaths occurring in low- and middle-income countries (World Health Organization 2021). Modifiable behavioral risk factors for NCDs include, among other things, the consumption of ultra-processed food and drinks, which are high in sugars, fats, and sodium (Pan American Health Organization 2015). These products also contain additives and ingredients that can be harmful to health and, according to recent evidence, might be addictive (Global Food Research Program 2021).

The availability, accessibility, and indiscriminate marketing of these products have fostered obesogenic environments in which the excessive intake of nutrients of concern leads to malnutrition (Pan American Health Organization 2015). In particular, obesity and overweight have made Latin America home to one of the world's highest burdens of malnutrition. According to data published by the Pan American Health Organization, 62.5% of adults in Latin America are overweight or obese, representing the highest prevalence of all the World Health Organization regions (Pan American Health Organization n.d.-b).

The countries of the Southern Common Market (commonly known by its Spanish abbreviation, Mercosur) are no strangers to this problem. According to data from 2016, the prevalence of obesity and overweight among adults in Argentina, Brazil, Paraguay, and Uruguay was 62.75%, 56.5%, 53.5%, and 62.85%, respectively. It is alarming, then, that an overview of just four countries in the region reveals that more than half of the

population is at risk of developing cardiovascular diseases, diabetes, and some types of cancer (Pan American Health Organization 2019).

During the COVID-19 global health crisis, people with comorbidities such as chronic NCDs related to unhealthy dietary patterns were disproportionately affected by the SARS-CoV-2 virus, as demonstrated by higher rates of mortality and hospitalization (Katzmarzyk et al. 2020; Popkin et al. 2020). Against this backdrop, the need for robust regulatory frameworks that are based on the best available evidence for addressing chronic NCDs—and that are generated in settings free from conflicts of interest—has become more urgent than ever. That said, this urgent need for better regulatory frameworks was evident even before the pandemic burst onto the global scene.

In recent years, the Pan American Health Organization (PAHO), World Health Organization (WHO), United Nations Special Rapporteurs, academics, and civil society have been calling on states to adopt public health policies that promote healthy food environments (Office of the United Nations High Commissioner for Human Rights 2020). Among the measures that these actors have recommended are front-of-package warning labeling aimed at informing consumers in a clear and concise manner about the nutritional quality of packaged foods. It is worth mentioning that the effectiveness of such measures depends on a variety of factors, including the design of the warning labels, an adequate nutrient profile model, supporting technical evidence, and complementary policies.

Front-of-package nutrition labeling seeks to inform consumers about products that contain excess amounts of nutrients of concern, specifically by means of a warning label that advises consumers when a product is high in sugars, fats, or salt, among other ingredients. In this regard, PAHO has designed a nutrient profile model that establishes cutoff points for countries to keep in mind in order to adequately protect the right to health, according to their specific contexts, food environments, and level of food processing (Pan American Health Organization 2016).

In Latin America, the front-of-package labeling system has already begun to take root. Chile was a pioneer in adopting a set of measures aimed at addressing obesity and overweight,

including front-of-package labeling (Food and Agriculture Organization and Pan American Health Organization 2017). Peru followed Chile’s model, and Mexico took a step forward by adopting a front-of-package labeling policy that also warns consumers when a product contains caffeine or zero-calorie sweeteners (Alianza por la Salud Alimentaria 2020). However, while Argentina, Brazil, and Uruguay have adopted front-of-package nutrition labeling policies—some of which have yet to begin implementation—Mercosur countries have been hampered in their efforts to develop similar policies because of legal and economic arguments claiming that such measures should be done through a process of harmonization that prevents them from erecting barriers to trade (Decreto 272 de 2018; Ley 27642 de 2021; Resolução da Diretoria Colegiada 429 de 2020).

This chapter explores the legal basis for these claims, positing that Mercosur rules do not actually prevent countries from exercising their sovereignty by adopting domestic regulatory frameworks—such as front-of-package labeling measures—aimed at protecting their populations’ health. We begin by looking at Mercosur resolutions related to the issue of food labeling. Then we briefly explore how the food industry utilizes trade forums to hinder the adoption of domestic public policies and analyze the arguments that have been raised against the adoption of front-of-package labeling policies in Mercosur countries. Lastly, we present cases that illustrate how individual countries are in fact empowered to adopt front-of-package nutrition labeling measures. We conclude by noting that the harmonization arguments put forth in Mercosur settings function more as a corporate delay tactic than a reflection of a genuine regional legal obligation.

The Regulation of Food Labeling in Mercosur

Understanding how Mercosur’s standard-setting process works is critical to understanding the alleged violation of the trade bloc’s rules when a country decides to implement a front-of-package labeling policy. The Treaty Establishing a Common Market between the Argentine Republic, the Federal Republic of Brazil, the Republic of Paraguay and the Eastern Republic of

Uruguay, known as the Treaty of Asunción, created the regional trade bloc of Mercosur. While the treaty was initially signed by these four states, Bolivia is currently in the process of accession (Mercosur 2015). Venezuela also became a member but was suspended indefinitely for failing to uphold democratic norms (Mercosur 2017).

One of Mercosur's main objectives (Mercosur n.d.-a), addressed in article 1 of the Treaty of Asunción, is for state parties to "harmonize their legislation in the relevant areas in order to strengthen the integration process." However, this commitment now functions as a mechanism for obstructing regulatory conversations around front-of-package labeling that are taking place within Mercosur member states.

The Additional Protocol to the Treaty of Asunción on the Institutional Structure of Mercosur, better known as the Ouro Preto Protocol, is the legal instrument that established Mercosur's intergovernmental decision-making bodies. These bodies are (i) the Council of the Common Market, the highest organ and the one responsible for political leadership of the integration process; (ii) the Common Market Group; and (iii) the Mercosur Trade Commission, which assists the Common Market Group with issues related to the operation of the customs union and common trade policies. Moreover, Mercosur has a unicameral parliament that represents the interests of the citizens of member states and seeks to incorporate a parliamentary perspective into the trade bloc. This body, known as *Parlasur*, issues nonbinding administrative acts of an advisory nature. These acts are addressed to national legislatures and may take the form of opinions, bills and draft bills, statements, and reports, among other things (Mercosur n.d.-b).

The Common Market Group is Mercosur's executive organ; its resolutions are binding on member states, and it adopts decisions by consensus among all countries. This group has several working subgroups that deal with specific regulatory issues. Among these is Working Subgroup No. 3, whose aim is to develop technical regulations that facilitate trade and reduce technical barriers in order to foster regional integration among member states. This subgroup has several committees that carry out specialized tasks; one of these committees is the Food

Committee, which focuses on front-of-package food labeling at the regional level (Mercosur SGT No. 3 n.d.).

The Common Market Group has issued a set of minimum standards on food labeling for countries to follow. Minimum standards represent the basic requirements and conditions that member states must abide by in the various matters regulated by the Common Market Group. In this way, they function as a legal floor—not a limit or ceiling—upon which member states can add other regulatory standards. In other words, Mercosur regulations set minimum standards for countries but do not prevent countries from establishing additional regulations that are more specific or are complementary.

In 2003, Mercosur approved the Technical Regulation on the Labeling of Packaged Foods (Resolución GMC 26 de 2003). This regulation outlines minimum mandatory requirements for the labeling of packaged food products, without prohibiting countries from adding other requirements that they consider relevant or necessary to protect their populations. The regulation applies to the labeling of any food that has been packaged in the absence of the consumer, that is ready for offer to the consumer, and that is marketed in Mercosur member states, regardless of its origin. If the particular characteristics of a food require specific regulation, such regulation shall be applied in a manner complementary to the technical regulation. Further, the 2003 regulation establishes technical definitions for certain terms, such as labeling, package, packaged food, consumer, and food additive.

The regulation also contains general principles according to which packaged foods should not be described or presented with labels that use vocabulary or other elements that “could present false, incorrect, or insufficient information or could be misleading, confusing, or deceptive to the consumer” (Resolución GMC 26 de 2003) with regard to the true nature of the product. These principles also establish that packaged foods may not contain labels that make unproven claims regarding a product’s effects or properties, or that highlight supposed therapeutic, medicinal, or health-enhancing properties. In terms of language, the required information must be written in the official language of the country of consumption. This last

point is important, as it is a clear example of how a particular characteristic can vary from one country to another. Compliance with these minimum labeling standards should be done with a consideration of the best interests of consumers and their right to access information.

The regulation has been modified several times via resolutions issued by the Food Committee of Working Subgroup No. 3, the body charged with regulating the issue of food packaging at the regional level (Mercosur SGT No. 3 n.d.). The purpose of these modifications is to keep the 2003 regulation up to date with the trade needs of Mercosur. On various occasions, the modifications have taken into account the protection of consumers' rights to health and to information, in line with the Mercosur resolution establishing basic consumer rights (Resolución GMC 124 de 1996).

In addition to these adjustments to the regulation, Mercosur has issued complementary resolutions to be applied by member states. For example, Resolution 44/2003 makes nutrition labeling mandatory and establishes that products must display, at a minimum, information on energy value, protein, carbohydrates, total fats, dietary fiber, saturated fats, trans fats, and sodium (Resolución GMC 44 de 2003). According to this resolution, these data points inform consumers about the nutritional properties of products so consumers can make informed decisions. Moreover, another resolution on the nutrition labeling of packaged foods includes technical provisions and specific definitions on nutrient declarations, nutrition claims, and requirements for the presentation of nutrient content, among other provisions (Resolución GMC 46 de 2003).

Nonetheless, large ultra-processed food and beverage corporations and their allies have used trade forums to delay, hinder, and even block front-of-package labeling initiatives in the region. Below, we will explore how this process has played out and will then take a look at the case of Mercosur.

The Ultra-Processed Food and Beverage Industry's Use of Economic Forums to Interfere in Public Policymaking

Ultra-processed food and beverage companies involved in the global supply chain—whether directly or indirectly—regularly employ legal threats to object to or delay countries' efforts to introduce healthy food policies such as front-of-package nutrition labeling (Global Health Advocacy Incubator 2021). Their arguments are shaped by private and economic interests, and the regional forums established for facilitating trade have become an ideal setting for such policies to be challenged on the grounds of noncompliance with international trade obligations or with commitments to harmonization and standardization.

Directing regulatory efforts toward the modifiable risk factors for chronic NCDs invariably invites interference in decision-making settings by the companies that manufacture these products. Specifically, Mercosur is a setting that is utilized and led by authorities who, without declaring their conflicts of interest, often place economic interests above the health of the population (Torres Cabreros 2021).

The progress being made in front-of-package warning labeling in the Americas, together with the numerous obstacles being faced by countries along the way, has made discussion of this policy a priority in Mercosur settings. That said, there is irony in the fact that these discussions on evidence-based public health policies are taking place in a trade-related setting.

In this regard, it is important to point out that Mercosur is but one of the political and economic forums being used to delay or weaken countries' front-of-package labeling efforts. For example, within the framework of the World Trade Organization, states have voiced their opposition to such policies. There, the Codex Alimentarius standards—which, like Mercosur, currently do not address the specific issue of front-of-package labeling—have been cited as a supposed legal barrier to countries seeking to protect and promote the health of their inhabitants. It is also worth noting that the development of Codex standards is “based on and informed by the experiences of countries and regions” and seeks to gather “country experiences

in implementing policies to inform the development of relevant Codex texts” (Pan American Health Organization n.d.-a). To deepen our understanding of these arguments, below we explore the challenges that have emerged within Mercosur with regard to countries’ efforts to adopt front-of-package nutrition labeling policies.

Mercosur as a Tool for Thwarting Front-of-Package Nutrition Labeling Policies

Mercosur’s currently regulatory framework on food labeling does not contain any rules on front-of-package labeling. There is no provision preventing member states from moving freely toward the adoption of front-of-package labeling measures. As we will show later, Mercosur establishes minimum requirements on food labeling generally, and each country is free to expand its levels of protection, particularly when the objective is to safeguard health.

The Mercosur Agreement on Good Regulatory Practices and Regulatory Coherence (Mercosur Council of the Common Market 2018) establishes that while states must commit to promoting regulatory practices that facilitate trade, this does not prevent them from adopting regulatory measures aimed at meeting their international commitments, “with a view to achieving legitimate public policy objectives.” Moreover, states reserve the right to modify and broaden their regulatory frameworks “with the objective of making their regulatory regime more effective” (ibid.). Regulatory harmonization for trade purposes, then, does not prohibit countries from adopting public policies that promote legitimate health objectives while also enabling compliance with their international human rights obligations.

A Mercosur member’s adoption of a front-of-package food labeling policy does not violate the principle of harmonization, as this principle is fulfilled by complying with all of the labeling requirements established in current Mercosur regulations, which only set minimum standards for nutritional information on the back of packaging. Legislative harmonization is not affected by measures that do not contradict the resolutions currently in force.

Beyond the fact that there is no common standard in Mercosur that prevents countries from advancing on the domestic policy front, it is worth making some observations with regard to an eventual harmonizing standard. To start, any attempt to move toward a harmonizing standard within Mercosur should be done in a participatory and transparent manner that identifies and mitigates potential conflicts of interest. Front-of-package warning labels are a public health measure, meaning that their main considerations should occur in a public health setting. Mercosur—including its various organs and mechanisms for debate and decision-making—is focused more on trade than on issues of consumer protection, the environment, or health, among other things. For this reason, any discussions on front-of-package labeling should ensure that member states' representatives come from Ministries of Health, even while acknowledging that it is important to consider trade perspectives regarding such measures. Given the current dynamics in Mercosur, there is little likelihood that an eventual harmonization process will ensure the participation of public health authorities and experts or that it will guarantee a transparent discussion or the identification and prevention of conflicts of interest. For this reason, civil society organizations and public health authorities have been pushing strongly for the advancement of such measures at the domestic level.

Despite the absence of a Mercosur regulation on front-of-package labeling—and even knowing that such labeling measures are urgent for the protection of people's rights to health and to food—critics have argued against front-of-package labeling initiatives in Mercosur member states on the grounds that such policies would violate Mercosur rules. Whenever a particular country has communicated its intention to adopt a front-of-package nutrition labeling policy, arguments against such regulations—both at the domestic and the bloc level—have been raised.

These arguments basically claim that Mercosur members are prevented from advancing regulatory schemes at the domestic level in the absence of a Mercosur resolution establishing a common standard. But even if such a resolution did exist, it would only set minimum standards upon which countries

could then build their own protective standards. Opponents have also argued that a country's decision to move forward unilaterally with a measure would end up generating more costs for the industry in that country, since domestic companies would eventually have to change their labeling to comply with a harmonized measure within the trade bloc. Importantly, this argument is not comparable to the argument regarding technical barriers to trade that floats around World Trade Organization settings, although the two do have some points of contact. Fundamentally, in both cases there is a concern about the impact on trade, whether at the global or regional level. However, the argument in the Mercosur case focuses on the idea that harmonization impedes progress at the domestic level while failing to consider the effects of inaction or to look at the domestic measures on a case-by-case basis. Meanwhile, the discussion on possible technical barriers to trade allows for an analysis of each concrete measure, including a look at its effectiveness in meeting a non-trade objective (in this case, the protection of the rights to health and food) and evaluating whether alternative measures that are less trade restrictive could achieve the same aim.

In Uruguay, where a front-of-package labeling policy was recently adopted, the domestic process was severely delayed and weakened by arguments about Uruguay's supposed regional commitments (Ares et al. 2020). In fact, one of the country's decisions to postpone the labeling policy's entry into force specifically mentions the need to evaluate possible impacts on Uruguay's regional commitments. Article 2 of Decree 91/20 calls for the creation of "a multidisciplinary working commission to evaluate food labeling, assessing harmonization within the framework of Mercosur regulations."

In Brazil, the food industry's interference at the domestic level resulted in a front-of-package labeling policy whose nutrient profile model is weak in terms of its ability to help prevent chronic NCDs (Peres 2021). In this case, during meetings of the Working Subgroup No. 3, Argentina and Paraguay voiced their concerns over Brazil's efforts to regulate on this issue, claiming that such a policy could cause problems for eventual Mercosur negotiations on front-of-package nutrition labeling. In 2018 and

2019, the Brazilian Health Regulatory Agency (known as Anvisa) initiated the regulatory and consultative process for front-of-package labeling. In late 2020, it approved a front-of-package labeling measure for products high in nutrients of concern, with cutoff points above those recommended by PAHO's Nutrient Profile Model. It also established a very lax implementation schedule, giving, for example, producers of nonalcoholic drinks in returnable containers fifty months before they needed to comply with the measure (Resolução da Diretoria Colegiada 429 de 2020).

In Paraguay, various front-of-package labeling initiatives have been proposed before Congress without much success, which is perhaps why the Mercosur argument has not been used in that country (Ministerio de Salud Pública y Bienestar Social 2019). In Argentina, on the other hand, the legislature passed a robust front-of-package labeling law in September 2021 outlining a set of measures, based on PAHO guidance, to promote health and healthy eating (Ley 27642 de 2021). Implementing regulations were issued in March 2022, but prior to this legislation there were several front-of-package labeling proposals presented through different channels; the executive branch had presented proposals in Mercosur and the National Food Commission (Fundación InterAmericana del Corazón 2021). As soon as Argentina's Senate approved a healthy eating bill in October 2020, which was then sent to the Chamber of Deputies, lobbying against the measure emerged. "Mercosur harmonization" was among the arguments raised by those who sought to position business interests over the health of millions of people (Cantando 2021; *Letra P* 2021; Torres Cabreros 2021).

Discussions of Front-of-Package Labeling in Mercosur

The issue of front-of-package labeling has been discussed in Mercosur in recent years, without seeing any real progress. In June 2018, at a meeting of health ministers from Mercosur countries held in Paraguay, ministers signed a declaration indicating their agreement on criteria for front-of-package food labeling, the strengthening of national regulatory authorities,

and universal health coverage, among other things (Ministerio de Salud Pública y Bienestar Social 2018). In doing so, they expressed their intention to work on these issues through technical cooperation with PAHO and WHO, demonstrating the standing that these two health organizations hold within Mercosur. PAHO and WHO also provided support to intergovernmental commissions on nutrition (the Intersectoral Food and Nutrition Security Commission) in order to promote the development of agreements on front-of-package labeling measures that warn consumers about high levels of sugars, fats, and salt.

In November of that same year, Working Subgroup No. 3 held a meeting—which included the participation of delegations from Argentina, Brazil, Paraguay, and Uruguay—whose final document identified the need for a Mercosur technical regulation on front-of-package food labeling (Mercosur SGT No. 3 2019). According to this document, the countries highlighted the importance of taking international guidance into account and ensuring that such a regulation is not restricted to a specific labeling model. In subsequent Working Subgroup No. 3 meetings, the national coordinators of the subgroup agreed to begin working on front-of-package nutrition labeling and held discussions on the experiences of Brazil and Uruguay in this regard. Meetings were also held to allow countries to share their experiences and analyze challenges in the implementation of front-of-package labeling in the region, emphasizing the seriousness of the epidemiological problems of obesity, overweight, and related chronic diseases (República de Argentina 2019; Consenso Salud 2019). Conversations around harmonization continued to take place in 2020 and 2021, but with little success. As of April 2022, no real progress had been made with regard to a front-of-package labeling regulation in Mercosur (Mercosur SGT No. 3 2021).

With regard to Parlasur, recent years have witnessed a number of developments (Parlasur 2018, 2019). To start, Argentina and Paraguay used this parliamentary setting to voice concerns about Uruguay's labeling measure. Moreover, Parlasur held a series of meetings in 2019 on front-of-package food labeling, some of which involved the participation of PAHO (Pan American Health Organization n.d.-c). At the end of 2019, a draft bill

proposing harmonized front-of-package nutrition labeling was presented before Parlasur (n.d.). Although draft bills are proposals whose aim is to harmonize member states' legislation, and they are eventually brought before national legislatures for consideration, they open up a space for debate and discussion around how to move toward harmonizing guidelines that are binding on member states (Mercosur n.d.-b).

The guiding principles of this draft bill are human rights, food sovereignty, and access to healthy food and adequate nutrition information. Among the bill's objectives are to protect children and adolescents and to prevent the consumption of food that may be harmful. It includes provisions on food in schools and on food marketing and places a strong emphasis on following the nutrient thresholds recommended by PAHO and WHO. However, as of April 2022, no concrete progress on its adoption had been made.

Mercosur Countries Have Adopted Various Labeling Measures That Are Not Harmonized within the Bloc

Mercosur countries have adopted a range of labeling systems for other food-related matters that are justified on health grounds. Although these systems differ from country to country and are not harmonized within the trade bloc, they have not generated claims of possible violations of countries' legal commitments. Below, we look at three types of such food labeling measures. Our analysis shows that as long as a country complies with the minimum requirements established at the regional level and justifies the need for more protective rules, it can unilaterally implement measures at the domestic level.

In 2015, Brazil approved Resolution 26/15 regulating allergen labeling, as a complementary measure to the Technical Regulation on the Labeling of Packaged Foods, contained in Resolution 259/2002 (Resolução da Diretoria Colegiada 26 de 2015; Resolução da Diretoria Colegiada 259 de 2002). Resolution 26/15 requires the labeling of products that may cause food allergies, in addition to compliance with the general rules on product labeling. The resolution, which was the result of a

deeply collaborative process between Anvisa and civil society (Põe no Rótulo n.d.), seeks to contribute to fulfilling consumers' right to adequate information, since being aware of the potentially adverse health effects of a product is an essential right of the entire Brazilian population enshrined in the Consumer Protection Code (Lei No. 8078 de 1990).

This allergen labeling regulation was the subject of controversy and resistance by the food industry. It was even the target of an unsuccessful lawsuit in which the Brazilian Association of Small and Medium-Sized Dairy Cooperatives and Companies argued that the Anvisa resolution caused confusion among consumers and could affect their health. The association also argued that the regulation was harmful to the Brazilian market and violated Mercosur rules. The presiding judge held that consumers—as a vulnerable group within society—had a right to be informed and that domestic and foreign companies alike are obligated to inform consumers of the potential risks that a product might cause to their health and safety (Cury Chaddad and Mainier Hack 2016).

The Anvisa resolution on allergens is currently in force. While there is no harmonizing standard in Mercosur on this type of labeling, Brazil was able to unilaterally and independently advance a policy on this issue. It did so in a compelling manner, protecting its population from the potential health risks posed by certain food components. To date, this regulation on the labeling of products with allergens has characteristics that have not been replicated in other Mercosur countries.

Gluten labeling is another kind of labeling that has been unilaterally regulated by various Mercosur countries without it being considered a trade barrier that undermines harmonization within the bloc. Brazil adopted Law 10674 in 2003 requiring packaged foods to contain either the phrase “contains gluten” or “does not contain gluten,” whichever the case may be (Lei No. 10674 de 2003). Meanwhile, Argentinean law requires that packaged foods that are free of wheat, oats, barley, and rye include a label indicating as much. This law was introduced through a reform to the Argentine Food Code by way of Joint Resolutions 201/2011 and 649/2011 (Resolución Conjunta 10-E de 2017).

In 2006, Paraguay adopted Law 3109 requiring the use of the international symbol for gluten-free products, which must be printed clearly and legibly on products that do not contain wheat, oats, barley, or rye (Ley 3109 de 2006). Later, the country adopted Law 6072 in order to ensure that consumers have access to clear, simple, and truthful information about the nutritional content of foods; this law states that products without gluten must also include one of the following statements: “without gluten,” “does not contain gluten,” or “without TACC⁴” (Ley 6072 de 2018). Similarly, Uruguay, through Law 16096, has adopted the voluntary use of the international symbol for gluten-free foods (“Edil propone que etiquetado para celíacos sea obligatorio” 2015; Ley 16096 de 1989). This array of regulations at the domestic level clearly illustrates, once again, how individual countries have the power to regulate health-related matters in a variety of ways that go beyond mere compliance with minimum requirements established at the regional level and that take into account the country’s unique realities and needs.

As a final example, Brazil and Uruguay both regulate the labeling of foods that contain genetically modified ingredients, regardless of the fact that regulation on this issue has not been harmonized in Mercosur. Each of these countries requires the use of a logo indicating the presence of transgenics in food products, without this representing a barrier to trade (Lei No. 11105 de 2005; Portaria 2658 de 2003; Resolución 722 de 2018). There are no similar rules in Argentina or Paraguay.

The above examples are meant not as an exhaustive list but rather as an illustration of how various areas of food labeling regulation differ across Mercosur countries. The aim is also to show how, in practice, there is a tolerance for such differences. One of the overall objectives of the Mercosur Agreement on Good Regulatory Practices and Regulatory Coherence is to incentivize state parties to adopt “regulatory coherence measures to promote good regulatory practices” (Mercosur Council of the Common Market 2018). These good practices are defined as guidelines and recommendations that are internationally

4 TACC stands for *trigo* (wheat), *avena* (oats), *cebada* (barley), and *centeno* (rye).

recognized or that are based on the guidance of international standardizing bodies. Regardless, this incentivization does not hinder states' right to adopt measures that they deem appropriate for achieving legitimate public policy objectives. This regulatory heterogeneity across Mercosur members is justified on the basis of the protection of health and consumers' access to information. Moreover, it does not mean that states will fail to comply with Mercosur resolutions; it simply means that states will comply with the resolutions while also reserving the right to adopt better standards on the basis of legitimate reasons and objectives, such as the protection of health and adequate food.

Conclusion

Mercosur's regulatory framework on food labeling represents a set of minimum standards that countries can use as a basis to seek greater protection of the rights of their populations, as guarantors of the right to health enshrined in their constitutions and international human rights treaties. While one of Mercosur's main objectives is to harmonize member states' laws in relevant areas in order to strengthen regional integration, this does not operate as a legal barrier against a country's decision to adopt and implement innovative policies aimed at providing a more robust protective framework for its population. Indeed, a country's progress in terms of adopting such policies works to the benefit of the regional trading bloc because it allows for the possibility of learning from national experiences and using this learning to improve measures at the regional level.

In the case of food labeling, Mercosur's Technical Regulation on the Labeling of Packaged Foods contains the minimum mandatory standards for food labeling. Mercosur does not have specific rules on front-of-package nutrition labeling for food products, despite some efforts in this area, and it does not prevent countries from moving forward on this issue.

Indeed, in recent years, Mercosur countries have begun to make progress in the adoption and implementation of front-of-package food labeling measures at the domestic level as a response to diet-related public health concerns. Uruguay approved a front-of-package warning labeling system in 2018,

with subsequent modifications. Brazil completed its regulatory process with its health regulatory agency in 2020, and the measure is now in the process of implementation. Argentina approved a law in September 2020, and implementing regulations were issued in March 2022, with a calendar for gradual rollout. Lastly, efforts are underway in Paraguay to adopt front-of-package labeling rules.

Harmonization and standardization within Mercosur has served as an argument to inhibit the adoption of these national-level measures. In each country, regional harmonization has been used as a legal barrier to delay the advancement of national regulatory processes. According to this argument, Mercosur members may not move forward at the domestic level until a resolution has been issued by the trading bloc, and taking unilateral action has the effect of generating additional costs for the food industry due to labeling changes. However, in light of the information presented in this chapter, it is clear that Mercosur countries may adopt the measures that they deem appropriate for achieving legitimate public policy objectives, such as the protection of the rights to health and to adequate food.

Other regulatory experiences of Mercosur members show that the adoption of labeling policies does not violate Mercosur's harmonization rules. Brazil's adoption of regulations on allergen labeling and the presence of transgenics is an example of this. By the same token, the different labeling rules for gluten that were adopted by Argentina and Brazil demonstrate that states can comply with the minimum standards while also adopting specific complementary regulations.

Although the standardization of countries' regulations seems a desirable aim, this does not prevent a country from acting within its power to adopt and implement innovative health policies that seek to provide a stronger protective framework to its population. Here it is important to highlight countries' practice as a useful element for interpreting their obligations at the regional level in the manner suggested in this chapter.

Lastly, it is important to pay attention to the food industry's continued efforts to utilize Mercosur-related arguments to thwart the adoption of front-of-package food labeling and other policies that seek to protect the right to adequate food.

It will be critical to keep a close eye on future discussions that take place not only in the context of Mercosur but also in other trade settings, such as the Codex Alimentarius Commission and the World Trade Organization's Committee on Technical Barriers to Trade, as this will help refute the arguments that are presented with the sole aim of preventing the adoption of these measures. In addition, it will be important to analyze what happens regarding the adoption of a regulation on front-of-package food labeling within Mercosur's Working Subgroup No. 3. It will be interesting to analyze how these discussions take shape, with the hope that there will be more space for participation by civil society and the public health sector in a process that is transparent and free from conflicts of interest.

References

Additional Protocol to the Treaty of Asunción on the International Structure of Mercosur (Ouro Preto Protocol). December 17, 1994.

Alianza por la Salud Alimentaria. 2020. *Etiquetado frontal de advertencia en México: Un paso adelante para combatir la epidemia de obesidad y diabetes y fortalecer nuestro sistema inmune*. <https://alianzasalud.org.mx/wp-content/uploads/2020/09/d-2009-etiquetado-frontal-advertencia-hoja-Informativa.pdf>

Ares, G., I. Bove, R. Díaz, X. Moratorio, W. Benia, and F. Gomes. 2020. "Food Industry Arguments against Front-of-Package Nutrition Labels in Uruguay." *Revista Panamericana de Salud Pública* 44.

Cantando, M. 2021. "El Gobierno plancha la ley de etiquetado frontal a la espera de un acuerdo en el Mercosur." *La Política Online*, March 24. <https://www.lapoliticaonline.com.ar/nota/132920-el-gobierno-plancha-la-ley-de-etiquetado-frontal-a-la-espera-de-un-acuerdo-en-el-mercosur/>

Código Alimentario Argentino. Ley 18284 de 1969. Capítulo xv "Productos estimulantes o frutivos." July 28, 1969 (Argentina). http://www.conal.gob.ar/ultimas_modificaciones/Capitulo_xv.pdf

Código de Proteção e Defesa do Consumidor. Lei No. 8078 de 1990. September 11, 1990 (Brazil). https://www.planalto.gov.br/ccivil_03/leis/l8078.htm

Consenso Salud. 2019. “Intercambio de experiencias en la implementación de advertencias al etiquetado frontal de alimentos.” May 6. <http://www.consensosalud.com.ar/intercambio-de-experiencias-en-la-implementacion-de-advertencias-al-etiquetado-frontal-de-alimentos/>

Cury Chaddad, M. C., and F. Mainier Hack. 2016. “Justiça Federal confirma necessidade de urgente vigência da norma de alergênicos (RDC 26/15).” *Migalhas*, July 4. <https://www.migalhas.com.br/depeso/241770/justica-federal-confirma-necessidade-de-urgente-vigencia-da-norma-de-alergenicis-rdc-26-15>

Decreto 91 de 2020 [Consejo de Ministros]. Prórroga del plazo establecido en el art. 11 del Decreto 272/018, referente al rotulado de alimentos y creación de una comisión de trabajo multidisciplinaria. March 11, 2020 (Uruguay).

Decreto 272 de 2018 [Ministerio de Salud Pública]. Modificación del Reglamento Bromatológico Nacional. August 29, 2018 (Uruguay). https://medios.presidencia.gub.uy/legal/2018/decretos/08/cons_min_705.pdf

“Edil propone que etiquetado para celíacos sea obligatorio.” 2015. *El Observador*, August 24. <https://www.elobservador.com.uy/nota/edil-propone-que-etiquetado-para-celiacos-sea-obligatorio-2015824500>

Food and Agriculture Organization and Pan American Health Organization. 2017. *Approval of a New Food Act in Chile: Process Summary*. Santiago: Food and Agriculture Organization and Pan American Health Organization.

Fundación InterAmericana del Corazón. 2021. *Tutorial: Etiquetado frontal en la Argentina—Contexto 2021*. <https://www.ficargentina.org/etiquetado-frontal-en-argentina-contexto-2021/>

Global Food Research Program. 2021. *Ultra-processed Foods: A Global Threat to Public Health*. University of North Carolina at Chapel Hill: Global Food Research Program.

Global Health Advocacy Incubator. 2021. *Behind the Labels: Big Food’s War on Healthy Food Policies*. Washington, DC: Global Health Advocacy Incubator.

Katzmarzyk, P. T., J. M. Salbaum, and S. B. Heymsfield. 2020. "Obesity, Noncommunicable Diseases, and COVID-19: A Perfect Storm." *American Journal of Human Biology* 32(5).

Lei No. 10674 de 2003. Obriga a que os produtos alimentícios comercializados informem sobre a presença de glúten, como medida preventiva e de controle da doença celíaca. May 16, 2003 (Brazil). http://www.planalto.gov.br/ccivil_03/leis/2003/110.674.htm

Lei No. 11105 de 2005. Regulamenta os incisos II, IV e V do § 1º do art. 225 da Constituição Federal, estabelece normas de segurança e mecanismos de fiscalização de atividades que envolvam organismos geneticamente modificados – OGM e seus derivados, cria o Conselho Nacional de Biossegurança – CNBS, reestrutura a Comissão Técnica Nacional de Biossegurança – CTNBio, dispõe sobre a Política Nacional de Biossegurança – PNB, revoga a Lei nº 8.974, de 5 de janeiro de 1995, e a Medida Provisória nº 2.191-9, de 23 de agosto de 2001, e os arts. 5º, 6º, 7º, 8º, 9º, 10 e 16 da Lei nº 10.814, de 15 de dezembro de 2003, e dá outras providências. March 24, 2005 (Brazil). http://www.planalto.gov.br/ccivil_03/_Ato2004-2006/2005/Lei/L11105.htm

Letra P. 2021. "Etiquetado de alimentos: La industria le reza a la Cancillería para pisar la ley." March 12. <https://www.lettrap.com.ar/nota/2021-3-12-13-24-0-etiquetado-de-alimentos-la-industria-le-reza-a-la-cancilleria-para-pisar-la-ley>

Ley 3109 de 2006. Que adopta el símbolo internacional de productos alimenticios "sin gluten", aptos para enfermos celíacos y se arbitran las medidas de control y ejecución de su uso. November 23, 2006 (Paraguay). <https://www.bacn.gov.py/archivos/3896/20150914081400.pdf>

Ley 6072 de 2018. Establece medidas de control de productos sin gluten. August 8, 2018 (Uruguay). <https://www.bacn.gov.py/leyes-paraguayas/8495/ley-n-6072-establece-medidas-de-control-de-productos-sin-gluten>

Ley 16096 de 1989. Declaración de interés nacional: Enfermedad celiaca. October 16, 1989 (Uruguay). <https://legislativo.parlamento.gub.uy/temporales/leytemp1206123.htm>

Ley 27642 de 2021. Promoción de la alimentación saludable. October 26, 2021 (Argentina).

<https://www.boletinoficial.gob.ar/detalleAviso/primera/252728/20211112>

Mercosur. n.d.-a. “Objetivos del Mercosur.” <https://www.mercosur.int/quienes-somos/objetivos-del-mercosur/>

———. n.d.-b. “¿Qué es el Parlamento del Mercosur (Parlasur)?” <https://www.mercosur.int/quienes-somos/parlasur/>

———. 2015. “Bolivia ingresa al Mercosur.” July 17. <https://www.mercosur.int/bolivia-ingresa-al-mercosur/>

———. 2017. “Suspensión de Venezuela en el Mercosur.” August 5. <https://www.mercosur.int/suspension-de-venezuela-en-el-mercosur/>

Mercosur Council of the Common Market. 2018. *Decisión no. 20/18: Acuerdo de buenas prácticas regulatorias y coherencia regulatoria del Mercosur*. December 17.

Mercosur SCR No. 3. n.d. “Comisión de Alimentos: Normativa vinculada.” http://www.puntofocal.gov.ar/mercosur_sgt_alim.htm

———. 2019. *Acta No. 02 de 2019: LXIX reunión ordinaria del subgrupo de trabajo no. 3 “reglamentos técnicos y evaluación de la conformidad” / Comisión de Alimentos*. July 1–4. http://www.puntofocal.gov.ar/doc/lxix_ca_02-19_acta.pdf

———. 2021. *Acta 02 de 2021: LXXVI reunión ordinaria del subgrupo de trabajo no. 3 “reglamentos técnicos y evaluación de la conformidad” / Comisión de Alimentos*. May 26–June 11. http://www.puntofocal.gov.ar/doc/lxxvi_ca_02-21_acta.pdf

Ministerio de Salud Pública y Bienestar Social (Paraguay). 2018. “Ministros de salud del mercosur acordaron garantizar el acceso universal de salud.” June 15. <https://www.mspbs.gov.py/portal/15134/ministros-de-salud-acuerdan-enfocar-el-desarrollo-de-la-cobertura-universal-de-la-salud.html>

———. 2019. “Etiquetado frontal de alimentos busca incidir en la toma de decisiones saludables.” November 12. <https://www.mspbs.gov.py/portal/19911/etiquetado-frontal-de-alimentos-busca-incidir-en-la-toma-de-decisiones-saludables.html>

Office of the United Nations High Commissioner for Human Rights. 2020. “Statement by the UN Special Rapporteur on the Right to Health on the Adoption of

Front-of-Package Warning Labelling to Tackle NCDs.” July 27. <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26130&LangID=E>

Pan American Health Organization. n.d.-a. “Front-of-Package Labeling.” <https://www.paho.org/en/topics/front-package-labeling>

———. n.d.-b. “Obesity Prevention.” <https://www.paho.org/en/topics/obesity-prevention>

———. n.d.-c. “OPS participó en la sesión del PARLASUR sobre etiquetado frontal de alimentos.” https://www.paho.org/uru/index.php?option=com_content&view=article&id=1348:ops-participo-en-la-sesion-del-parlasur-sobre-etiquetado-frontal-de-alimentos&Itemid=451

———. 2015. *Ultra-processed Food and Drink Products in Latin America: Trends, Impact on Obesity, Policy Implications*. Washington, DC: Pan American Health Organization.

———. 2016. *Pan American Health Organization Nutrient Profile Model*. Washington, DC: Pan American Health Organization.

———. 2019. *Core Indicators 2019: Health Trends in the Americas*. Washington, DC: Pan American Health Organization.

Parlasur. n.d. *Ante proyecto de norma: Derecho a la alimentación saludable, acceso a la información fundada y etiquetado de alimentos en el Mercosur*. <https://www.parlamentomercosur.org/innovaportal/file/17360/1/p-a-r-l-a-s-u-r-iniciativa-derecho-alimentacion-saludable.pdf>

———. 2018. “Comisión de Desarrollo y Salud del Parlasur debate la armonización de la normativa de rotulado en alimentos.” November 21. <https://www.parlamentomercosur.org/innovaportal/v/16108/1/secretaria/comision-de-desarrollo-y-salud-del-parlasur-debate-la-armonizacion-de-la-normativa-de-rotulado-en-alimentos.html>

———. 2019. “Comunicado de prensa: Anteproyecto de norma sobre etiquetado de alimentos.” October 17. <https://www.parlamentomercosur.org/innovaportal/v/17360/1/parlasur/comunicado-de-prensa--anteproyecto-de-norma-sobre-etiquetado-de-alimentos.html>

Peres, J. 2021. “How the Ultraprocessed Industry Has Deceived the Brazilian Health Agency.” *O Joio e O Trigo*,

April 5. <https://ojoioeotrigo.com.br/2021/04/how-the-ultraprocessed-industry-has-deceived-anvisa/>

Põe no Rótulo. n.d. “Alergênicos.” <https://www.poenorotulo.com.br/alergenicos>

Popkin, B. M., S. Du, W. D. Green, M. A. Beck, T. Algaith, C. H. Herbst, R. F. Alsukait, M. Alluhidan, N. Alazemi, and M. Shekar. 2020. “Individuals with Obesity and COVID-19: A Global Perspective on the Epidemiology and Biological Relationships.” *Obesity Reviews* 21(11).

Portaria 2658 de 2003 [Ministério da Justiça]. Definir o símbolo de que trata o art. 2º, § 1º, do Decreto 4.680, de 24 de abril de 2003, na forma do anexo à presente portaria. December 26, 2003 (Brazil). <https://www.gov.br/agricultura/pt-br/assuntos/insumos-agropecuarios/insumos-pecuarios/alimentacao-animal/arquivos-alimentacao-animal/legislacao/portaria-no-2-658-de-22-de-dezembro-de-2003.pdf>

República de Argentina. 2019. “Autoridades de salud y ops inauguraron encuentro sobre etiquetado frontal en el marco del Mercosur.” May 2. <https://www.argentina.gob.ar/noticias/autoridades-de-salud-y-ops-inauguraron-encuentro-sobre-etiquetado-frontal-en-el-marco-del>

Resolución Conjunta 10-E [Secretaría De Políticas, Regulación e Institutos y Secretaría de Agregado de Valor]. Modificación al artículo 1383 del Código Alimentario Argentino. September 29, 2017 (Argentina). https://www.argentina.gob.ar/sites/default/files/anmat-capitulo_xvii_dieteticosactualiz_2018-12.pdf

Resolução da Diretoria Colegiada (RDC) 26 de 2015 [Agência Nacional de Vigilância Sanitária]. Dispõe sobre os requisitos para rotulagem obrigatória dos principais alimentos que causam alergias alimentares. July 2, 2015 (Brazil). <https://www.gov.br/agricultura/pt-br/assuntos/inspecao/produtos-vegetal/legislacao-1/biblioteca-de-normas-vinhos-e-bebidas/resolucao-rdc-no-26-de-2-de-julho-de-2015.pdf/@@download/file/resolucao-rdc-no-26-de-2-de-julho-de-2015.pdf>

Resolução da Diretoria Colegiada (RDC) 259 de 2002 [Agência Nacional de Vigilância Sanitária]. Observação: a Resolução – RDC nº 136, de 8 de fevereiro de 2017, se aplica de maneira complementar à esta Resolução. September 23, 2002 (Brazil).

Resolução da Diretoria Colegiada (RDC) 429 de 2020 [Agência Nacional de Vigilância Sanitária]. Dispõe sobre a rotulagem nutricional dos alimentos embalados. October 9, 2020 (Brazil). http://antigo.anvisa.gov.br/documents/10181/3882585/RDC_429_2020_COMP.pdf/2ed9794e-374c-4381-b804-02b1f15d84d2

Resolución 722 de 2018. Se modifica la reglamentación del artículo D.1774.83 del Capítulo xxix.I del Título II del Volumen VI del Digesto Departamental relacionada a los alimentos que contienen organismos genéticamente modificados. February 6, 2018 (Uruguay). <https://montevideo.gub.uy/sites/default/files/biblioteca/722-181.pdf>

Resolución GMC 26 de 2003 [Mercosur]. Reglamento técnico Mercosur para rotulación de alimentos envasado (deroga la Res. GMC N° 21/02). December 10, 2003.

Resolución GMC 44 de 2003 [Mercosur]. Reglamento técnico Mercosur para la rotulación nutricional de alimentos envasados. December 10, 2003.

Resolución GMC 46 de 2003 [Mercosur]. Reglamento técnico Mercosur sobre el rotulado nutricional de alimentos envasados. December 10, 2003.

Resolución GMC 124 de 1996 [Mercosur]. Defensa del consumidor: Derechos básicos. December 13, 1996.

Torres Cabreros, D. 2021. "Etiquetado frontal: La ley para saber qué comemos se empantana entre el lobby y los tiempos legislativos." *elDiarioAR*, May 24. https://www.eldiarioar.com/sociedad/etiquetado-frontal-ley-comemos-empantana-lobby-tiempos-legislativos_1_7963965.html

Treaty Establishing a Common Market (Asunción Treaty) between the Argentine Republic, the Federative Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay. November 29, 1991. https://www.parlamentomercosur.org/innovaportal/file/15511/1/tratado_de_asuncion.pdf

World Health Organization. 2021. "Noncommunicable Diseases." April 13. <https://www.who.int/news-room/fact-sheets/detail/noncommunicable-diseases>

The Relevance of NGO Participation in the World Trade Organization

*María Paula Barbosa*¹

*Adriana Torres*²

Introduction

The participation of civil society organizations—such as non-governmental organizations (NGOs), industry associations, activist organizations, trade unions, and even academic sectors—has had a notable influence on international law. Indeed, their participation has been decisive both in the negotiation of treaties, rules, and standards and in the monitoring of states' compliance with international instruments. But the relevance of civil society interventions in the international legal sphere is routinely questioned from the perspective of traditional legal practice, according to which states are the only legitimate subjects of international law.

1 Law degree from the University of the Andes (Colombia).

2 Law degree from the Andrés Bello Catholic University (Venezuela) and a master's degree in human rights from Friedrich-Alexander-Universität Erlangen-Nürnberg (Germany).

Particularly in the case of the World Trade Organization (WTO), civil society participation has been a recurring topic of discussion that has yet to be settled. Since its inception, the WTO has suffered a legitimacy crisis (Scholte 2011), as demonstrated most clearly in 1999 during the protests against the Ministerial Conference in Seattle.³ But even today, NGOs do not really hold a seat at the WTO discussion table or have clear guidelines for participation. This is especially evident with regard to current debates taking place within the WTO, such as those on the adoption of warning labels for food products high in sodium, fats, and sugars. Despite the fact that such labeling measures are aimed directly at protecting the lives and health of populations, NGOs—key actors from these populations—lack a designated space for contributing to the discussion of such measures.

This chapter seeks to explore the mechanisms through which NGOs are able to present their positions on issues being discussed at the WTO and to show why these mechanisms are insufficient. To this end, we discuss the filing of *amicus curiae* briefs by NGOs in disputes before the WTO Dispute Settlement Body, the participation of NGOs in symposia and academic events, and the possibility of NGOs submitting requests to

3 The Ministerial Conference in Seattle, held in late 1999, was the third meeting of the WTO's highest decision-making body. This conference was marked by major disagreements among member states, who were unable to reach a consensus to launch a new round of multilateral trade negotiations known as the "Millennium Round." These tensions were heightened by massive social protests surrounding the negotiations that decried the WTO's democratic deficit and accused the organization of promoting trade policies that were harmful to the environment and workers' rights.

member states' enquiry points. We also outline a possible mechanism for ensuring NGOs' effective participation in the process of member states' notification of measures. Specifically, we discuss the case of the notification of measures under the framework of the Agreement on Technical Barriers to Trade (TBT Agreement) and the possibilities for discussion between civil society organizations and states within the Committee on Technical Barriers to Trade (TBT Committee).

Before commencing, it is important to explain what we mean by NGO, as the definition of this term has been debated for a long time without reaching a peaceful consensus. In this chapter, we define an NGO as a nonprofit organization that is independent of the state and international governmental organizations. In addition, we consider an NGO to be formally organized and to normally, but not necessarily, have legal status according to applicable national laws (Giorgi 2019).

It is worth pointing out that some industries classify themselves as part of civil society, arguing that if NGOs are given a space to participate, then the economic sector also deserves representation. In our opinion, one of the core purposes of civil society organizations is to ensure the protection of fundamental rights and not the profit of a particular group of people, which is why we consider NGO participation to be different from that of industry participation.

Against this backdrop, the chapter addresses several main themes. First, we analyze the participation of NGOs in international law and in international economic law. Then, we discuss existing mechanisms for NGO participation and why they are insufficient, in order to then present what we consider to be an *ideal space* for discussion between NGOs and states, within the framework of the notification and challenging of measures within the TBT Committee.

A History of (the Absence of) Civil Society Participation in the World Trade Organization

The WTO's creation in January 1995 marked one of the most important reforms to international trade following the Second World War. With its creation, there was finally a third global

economic organization to complement the World Bank and the International Monetary Fund, following the failed attempt to create an International Trade Organization in 1948. The WTO would also be responsible for providing a framework for the regime that had, until that point, governed international trade: the General Agreement on Tariffs and Trade (GATT) of 1947 (Steffek and Ehling 2008).

The GATT dealt only with issues concerning tariffs and quotas, which were decided by a very small group of countries. From 1947 to 1995, the GATT served as an international agreement and a de facto international organization for trade among states. However, given its scope and institutional design, the GATT did not develop specific agreements or protocols for receiving feedback from nonstate organizations. Thus, both the disputes resolved under the GATT and the documents related to them were generally kept out of the public eye (Steffek and Ehling 2008).

By 1995, the public's attention began turning toward the GATT in light of the debate that the *Tuna-Dolphin* case⁴ sparked among environmental organizations (Eckersley 2004), given the public policy consequences of the panel's report (even though the panel report was ultimately not adopted). The case centered on a dispute between Mexico and the US over a US embargo against tuna from Mexico for its failure to comply with the US Marine Mammal Protection Act. According to the panel's report, the GATT did not allow a country to take trade-related measures to enforce its own domestic legislation in another country, not even to protect the health of animals or to preserve the environment.

Thus, since its inception, the WTO has had to grapple with how to involve an increasingly active civil society within its institutional framework, which was created under the pillar of consensus *among states*.⁵ It is also worth pointing out that the

4 See *Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna* (August 16, 1991).

5 Article IX(1) of the Marrakesh Agreement establishes the following with regard to decision-making within the organization: "The WTO shall continue the practice of decision-making by consensus

wto's decision-making process has been routinely criticized for not being democratic enough and for catering to the interests of the most powerful states, a fact that has been highlighted by NGOs from around the world (Van den Bossche 2005).

Today, NGOs enjoy a certain level of status as experts in some of the issues debated in the wto. For example, they are invited to participate in symposia and to write working papers, which can help inform discussions taking place among member states. But their work tends to remain in the academic sphere and rarely has any interpretive value for wto agreements. It could thus be said that the door of the wto is barely ajar for NGOs. Efforts to incorporate mechanisms for NGO participation have been half-hearted and have not shown a genuine willingness on the part of the wto and its members. To start, article V⁶ of the Marrakesh Agreement—the instrument that created the wto—allows the General Council to consult and cooperate with NGOs that work on issues related to those addressed by the wto. While this provision sets the legal basis for upholding the importance of NGO participation, it leaves it to the organization's discretion whether to seek or listen to the opinions of civil society regarding the issues under discussion. As a result, civil society participation is merely ancillary.

Second, in 1996 the wto adopted Guidelines for Arrangements on Relations with Non-governmental Organizations (wto General Council 1996). These guidelines recognize the

followed under GATT 1947(1). Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting. At meetings of the Ministerial Conference and the General Council, each Member of the wto shall have one vote. Where the European Communities exercise their right to vote, they shall have a number of votes equal to the number of their member States(2) which are Members of the wto. Decisions of the Ministerial Conference and the General Council shall be taken by a majority of the votes cast, unless otherwise provided in this Agreement or in the relevant Multilateral Trade Agreement."

6 Article V of the Marrakesh Agreement states: "(1) The General Council shall make appropriate arrangements for effective cooperation with other intergovernmental organizations that have responsibilities related to those of the wto. (2) The General Council may make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the wto."

importance of having a direct channel of communication with NGOs, noting that they are “a valuable resource [that] can contribute to the accuracy and richness of the public debate.” In this regard, the guidelines acknowledge the importance of finding ways to interact with grassroots organizations, with the aim of enriching debate on WTO-related issues.⁷ However, the document is not clear about the methodology that should be used to facilitate such interaction. Further, at the same time, it highlights the “special character” of the WTO by citing its inter-governmental nature that restricts the rights and obligations of its members. This acknowledgment confirms the impossibility of direct participation by NGOs.

Lastly, the WTO made a decision whose impact is not negligible: the publication and circulation of official WTO documents and meeting minutes (WTO General Council 2002). Thanks to this move, civil society organizations now have unrestricted access to the work carried out by the WTO, even if they may not have permission to participate in or observe the debates as they are unfolding. Thus, the WTO has granted civil society organizations, especially NGOs, preferential seating to observe, analyze, and comment on the WTO’s work *after the fact*. But to date, there is no official mechanism within the WTO that establishes parameters for civil society contributions. Below, we present a critical analysis of this situation.

Civil Society Participation in International Law

NGO participation in international law has been marked by controversy over the legitimacy of such participation. This controversy is the result of a restrictive understanding of this

7 “The Secretariat should play a more active role in its direct contacts with NGOs who, as a valuable resource, can contribute to the accuracy and richness of the public debate. This interaction with NGOs should be developed through various means such as inter alia the organization on an ad hoc basis of symposia on specific WTO-related issues, informal arrangements to receive the information NGOs may wish to make available for consultation by interested delegations and the continuation of past practice of responding to requests for general information and briefings about the WTO” (WTO General Council 1996).

area of law, which sees global civil society participation as being in conflict with the traditional notion whereby states are the only legitimate participants in this setting. Therefore, for legal scholars from this traditional line of thought, the presence of global civil society, especially NGOs, does not fit easily into the state-centric structures and processes of international law (Pearson 2004), since the scope of civil society presence and participation is always subject to state control (Henkin et al. 1993). This creates tension between, on the one hand, the aspirations of global civil society to participate autonomously in global governance and, on the other, the formal structures of international law that privilege a state-centric understanding (Charnovitz 2006).

It is important to understand the difference between the notions of “subject” and “actor” in public international law: the former category, usually assigned to states, has the capacity to be a rights holder and a duty bearer in a given legal regime, whether domestic or international; meanwhile, the notion of actor is related to power and the capacity to influence and is a concept that allows us to analyze civil society participation in international contexts (Fernández Liesa 2018).

The two approaches move in different worlds, but NGOs have been described as the driving force behind the progressive development of international law, as drivers of international law, so it is problematic that traditional international law does not provide a sufficient basis for understanding the emerging roles and potential of global civil society in the structures and processes of contemporary international law. By privileging states, traditional international law downplays the importance of the presence and participation of “other” relevant actors in the international arena, such as NGOs, international organizations, transnational corporations, and minorities (e.g., Indigenous peoples’ groups).

Thus, in the current debate, the impact of NGOs on the development of international law is undeniable, as they are increasingly relevant actors. The sphere of influence of these organizations can be divided into four types of activities: (i) the raising of public awareness and the placement of issues on the international agenda (in environmental matters, for example,

NGO participation has been key, as these organizations have helped raise awareness of the problem, pushing states to take a position on these issues); (ii) presence in international legislative processes, including the development and codification of international law (the role played by NGOs in the drafting of the Convention on the Rights of the Child, for example, has been documented by several authors as key to the process); (iii) activities concerning the interpretation and application of international law (in various regional and international courts, NGOs have participated by offering their interpretations of the content and scope of the provisions of international treaties); and (iv) technical expertise on specialized matters (Pearson 2004).

In this regard, some international bodies have tried to set parameters for NGO participation. For example, the United Nations has done this through article 71 of its Charter, which allows NGOs to acquire consultative status with the Economic and Social Council (ECOSOC).⁸ The rules require that NGOs be of recognized standing within their field of competence or of a representative character. In addition, they must have an established headquarters, democratic governance processes, mechanisms for accountability and transparent decision-making processes, and funds derived from the contributions of affiliates or from individual members.

This mechanism is designed to allow the ECOSOC to obtain expert advice or information from NGOs that have experience working on the issues covered by the ECOSOC agenda. It also seeks to ensure that NGOs (whether international, regional, subregional, or national), which represent important areas of public opinion on certain issues, can express their opinions on

8 According to article 71 of the United Nations Charter, "The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence. Such arrangements may be made with international organizations and, where appropriate, with national organizations after consultation with the Member of the United Nations concerned." There are currently 2,379 NGOs with consultative status. See <http://www.un.org/esa/coordination/ngo/faq.htm>. A list of these organizations is available at https://www.un.org/partners/civil_society/ngo/n-ecosoc.htm#top.

a particular situation or development (Charnovitz 2006). As Zoe Pearson (2004) notes:

The ECOSOC provisions appear to be arrangements that facilitate the participation of a diverse group of NGOs in international law and the work of UN agencies. These provisions acknowledge the breadth of the expertise of NGOs and their capacity to contribute to international law processes. The provisions also recognise the importance of the participation of NGOs from all regions, and the desirability that all NGOs promote accountability and transparency in their internal processes. Coupled with the strong support by the UN Secretary-General for an increased NGO presence, these provisions appear to facilitate the effective participation of NGOs in international law. (Pearson 2004, 12)

NGO Participation in International Economic Law

International economic law regulates international economic relations between states and other economic actors (such as investors and private companies). This legal system is unique in that it was conceived to support both domestic and international rules, and it is a specialized branch of public international law (Qureshi and Ziegler 2019). It thus involves a process of creating international norms and obligations that is based on the principle of sovereignty, which translates into relationships in which states and certain international organizations are the main actors. That said, we recognize that international economic law has undertaken a series of innovations that disengage it from classical theories of international law. A clear example is the development and widespread acceptance of international investment agreements (IIAs) and the inclusion of investor-state arbitration clauses. Through this mechanism, foreign investors covered by an IIA between their home state and the state receiving the investment can directly initiate a claim, without the need for traditional diplomatic channels between states. It is thus clear that growing international trade relations and direct foreign investment have surfaced the need to rethink the definition of subjects of international law to include, perhaps,

new entities such as investors and private companies (Vadi 2018). The debate even remains open as to whether NGOs could, in certain circumstances, obtain such a status. However, the discussion remains controversial, and the undisputed subjects of international law continue to be states and states alone. Even the IIAs that regulate investor-state disputes are made possible only because of the willingness of states and of the principle of sovereignty that allows them to sign such agreements in the first place.

With this in mind, international economic law can be viewed from various perspectives. One such perspective is based on the relationships that states have within the various organizations that shape the structuring of international economic relations. While every international economic organization has a clear objective that is enshrined in its founding treaty, authors such as Kwakwa argue that these organizations have not always remained within the limits of their functions (Vargas 2012). For example, the World Bank's founding treaty contains no mention of issues such as poverty, equity, or the environment—yet one of the objectives of this organization is to reduce inequality around the world, for which it has established broad mechanisms to encourage civil society participation.⁹

In fact, the World Bank has developed a clear strategy—the World Bank Group Strategy—that contains an action plan to end extreme poverty by 2030 and promote shared prosperity in a sustainable and inclusive manner. This strategy affirms the importance of working alongside civil society organizations, since inclusion and the reduction of inequality requires empowering citizens to participate in and benefit from the process of development and elimination of social and economic barriers (World Bank Group 2014). In this regard, one of the World Bank's "lessons learned" has centered on communication,

9 To take an example, the World Bank has created a specialized team for communicating with civil society organizations that, among other things, convenes a public forum where these organizations can participate. The World Bank also has mechanisms for engaging civil society for purposes such as information sharing, dialogue, consultations, operational collaboration, partnerships, and advocacy.

cooperation, and coordination with civil society—so much so that consultation with affected populations and civil society stakeholders is mandatory in various parts of the World Bank's work (Schlemmer-Schulte 2001).

NGOs in the World Trade Organization

In the specific case of the WTO, it is the Marrakesh Agreement that opens the door for NGO participation. Specifically, article V.2 refers to cooperation with NGOs: "The General Council may make appropriate arrangements for consultation and cooperation with non-governmental organizations *concerned with matters related to those of the WTO*" (emphasis added).

In July 1996, after the adoption of the Marrakesh Agreement, a decision of the General Council resolved to provide an interpretation of article V.2 by adopting the Guidelines for Arrangements on Relations with Nongovernmental Organizations (WTO General Council 1996). However, this document does not establish a clear procedure for such interactions. On the contrary, and paradoxically, it reinforces the state-centric nature of WTO members and ends up suggesting that interactions with NGOs are desirable only at the local level, and not within the WTO.

In this regard, we have identified three scenarios where NGOs are able to play some kind of role within the WTO: (i) litigation before the WTO Dispute Settlement Body, where NGOs may provide technical expertise to decision-makers through the filing of *amicus curiae* briefs; (ii) "enquiry points," a status provided in certain WTO agreements, such as the TBT Agreement and the Agreement on the Application of Sanitary and Phytosanitary Measures; and (iii) the notification of measures within the framework of specialized committees. However, none of these mechanisms offer a guarantee that NGOs will be heard, nor do they give them a seat at the table, as we show below.

Submission of Amicus Briefs to WTO Dispute Resolution Bodies

The submission of *amicus curiae* briefs is an almost self-proclaimed mechanism for NGOs to present their comments in cases pending before the WTO Dispute Settlement Body. We

say “self-proclaimed” because neither the Dispute Settlement Understanding (DSU) nor WTO agreements explicitly state that NGOs can submit *amicus curiae* briefs in cases being heard by the Dispute Settlement Body. Thus, although article 13 of the DSU establishes that panels have the right to seek information from any source that they deem appropriate in relation to a given case, the document is not clear about the possibility of actors other than member states filing briefs in disputes.

For example, in the *us–Shrimp* case heard by a WTO panel, NGOs such as the Earth Island Institute, the Center for International Environmental Law, and the Philippine Ecological Network, among others, submitted technical reports on environmental issues. However, the panel decided not to admit unsolicited submissions, stating that doing so would go against the DSU (WTO Panel 1998). But recognizing the importance of the technical content of these reports, the panel did grant parties the opportunity to incorporate NGO reports into their own submissions to the panel.

This decision was reconsidered by the Appellate Body, which—after conducting an analysis of the spirit of DSU articles 12 and 13, taken together—determined that a panel established by the Dispute Settlement Body should be granted the authority to control the process by which the Appellate Body and panel are informed about relevant facts in a dispute and the legal principles that are applicable to those facts (WTO Appellate Body 1998). It therefore determined that accepting unsolicited *amicus curiae* briefs was permissible. The Dispute Settlement Body deemed such authority indispensable for the panel to comply with its duty under article 11 of the DSU to “make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements.”

Moreover, the Appellate Body held that *amicus* briefs submitted within the framework of a dispute, regardless of their origin, were presumed to be an integral part of the submission of the party they favored. Therefore, on the basis that each party is free to determine what to include in its submission, a party may decide to not include a given *amicus* brief. In this case,

however, the US was clear in stating that the positions adopted in the amicus briefs filed corresponded to those of the state.

Another relevant case concerning the participation of NGOs before the WTO is the *EC–Asbestos* case. In this dispute, the Appellate Body, broadly interpreting article 16 of the Working Procedures for Appellate Review, consulted with the parties and interested third parties to create an additional procedure (applicable only to the appeal in question) to deal with amicus brief submissions (WTO Appellate Body 2001). This procedure included detailed requirements for third parties wishing to submit information. Among the requirements were the following: a description of the organization (including a statement of membership), legal status, general objectives, nature of its activities, and funding sources. But at the same time, the Appellate Body clarified that authorizing an amicus curiae submission did not mean that the body would address the brief's legal arguments in its report. This decision was meant to preserve a certain margin of discretion in the body's decisions.

Although the Appellate Body ultimately decided not to accept any amicus briefs, its meticulous work in having defined requirements and procedures for the submission of such briefs led to an intense debate among member states, which disagreed with the Appellate Body's original decision to create an additional procedure for amicus brief submissions (WTO General Council 2000). According to some authors, member states felt that accepting amicus briefs could alter the intergovernmental nature of the WTO and consequently affect the rights and duties of members (Stern 2005). A brief look at the *US–Shrimp* and *EC–Asbestos* cases suggests that the admissibility of amicus curiae submissions within the framework of WTO disputes continues to be a point of contention and does not appear to have states' backing. However, there are even deeper reasons (aside from states' unwillingness) to assert that amicus briefs are insufficient for ensuring civil society participation in the WTO.

First, the lack of regulation in WTO agreements and the DSU regarding the possibility of NGO submissions in disputes initiated by member states means that there is no guarantee that such organizations' arguments will be heard or taken into account. According to article 13 of the DSU, a panel may seek the

expert opinion of an organization or individual that it deems appropriate; what is not clear, though, is whether an organization may present its expert opinion *ex officio*. In other words, it is up to the Appellate Body or relevant panel to determine whether *amicus curiae* briefs will be admissible and under what conditions. Assuming that the argument put forward by the Appellate Body in the *us–Shrimp* case had been upheld under article 13.2 of the DSU, NGOs would be able to contribute their views through *amicus* briefs, but only if those views are supported by one of the parties to the dispute (WTO Panel 1998). In other words, NGOs would be able to participate only under the “care” of a state, which could have the effect of jeopardizing their independence.

Second, NGO participation in the WTO via *amicus* briefs would be limited to scenarios involving disputes between countries, meaning that they would be able to participate only after the debate and not while it is being carried out. This not only is impractical and inefficient but also goes against the logic of transparency that governs the WTO. Indeed, the WTO and its agreements emphasize the importance of ensuring communication among countries and transparency in the notification of new policies that affect international trade and different WTO committees, in order to avoid resorting to formal disputes (Mavroidis and Wijkström 2013). It would thus go against the WTO’s philosophy if the only setting in which civil society could participate were litigation. Thus, although *amicus* briefs are a relatively available mechanism for civil society to participate in the WTO, the lack of regulation in this regard makes for a precarious situation and allows civil society to participate only within the framework of disputes between states.

Regardless, disputes between member states before the Dispute Settlement Body concerning the labeling of food products should necessarily allow for a consideration of civil society’s views. This is because food labeling policies are a technical barrier to international trade that can be justified on the grounds of protecting human health and lives. But it is precisely those who stand to be affected by such policies who lack a space for voicing their perspectives on the matter during the process.

Meanwhile, states have free rein to debate the economic and trade impacts that such measures might have.

We can thus conclude that the ability to submit amicus briefs—though this should certainly not be the only setting for NGO participation—is an essential mechanism that allows civil society’s opinions to be taken into account in panel or Appellate Body decisions. As mentioned above, amicus briefs by themselves do not guarantee NGO participation in the WTO, but they hold promise in giving NGOs a space where they can be heard during the final stages of disputes.

Enquiry Points

Enquiry points are a mechanism created by some WTO agreements, such as the TBT Agreement (art. 10.1.1), the Agreement on the Application of Sanitary and Phytosanitary Measures (annex B, no. 3), and the Trade Facilitation Agreement (art. 1.3.1). They are defined as follows:

An enquiry point is, in essence, an institution established within each member of the WTO which serves to connect members, the private sector, trade officials, standards officials, regulators and *any other domestic and international stakeholders*, in all matters relating to the implementation of the transparency provisions of the TBT Agreement. (WTO Trade and Environment Division 2018, 12, emphasis added)

According to this definition provided by the WTO Trade and Environment Division, enquiry points would appear to be the channel for communicating not only with civil society but with all groups who stand to be affected by state policies related to international trade. But there are several points to consider in this regard.

The sole function of enquiry points, as their name suggests, is to receive and respond to requests for information; they are not a forum for discussion. Therefore, while they represent a mechanism by which civil society may request information from states about policies or measures concerning international trade, they are not an appropriate setting for initiating a high-level discussion.

Moreover, enquiry points are limited to matters falling within the scope of the agreements that provide for their existence. In other words, they are not empowered to provide information related to any matter but rather just in relation to measures adopted by a state under a given agreement. By way of example, an enquiry point would not be obligated to provide information about measures taken by a state under the TRIPS Agreement. Thus, although enquiry points appear to be a step forward in terms of including nonstate actors, they do not really create a forum for discussion or have the ability to ensure that the issues raised by civil society are taken into account.

Specifically, in the context of debates related to food labeling measures, enquiry points, though not a space for participation (since they are not a discussion forum as such), allow NGOs and other private actors to obtain information regarding the measures that states report to the WTO. In this sense, they are spaces that are designed not to allow actors to present positions on issues under discussion but to obtain the necessary information to be able to participate in the debate within the appropriate setting.

The Notification and Questioning of Measures within the WTO: An Ideal Space for NGO Participation?

As we have demonstrated throughout this chapter, NGOs do not have any guaranteed spaces for participation within the WTO. Nonetheless, this does not preclude existing mechanisms in the WTO from being used to address the concerns and proposals of civil society.

As mentioned earlier, the WTO is an international organization whose membership base has traditionally been limited to states (though article XII of the Marrakesh Agreement also allows the accession of customs territories possessing full autonomy in the conduct of their external commercial relations, such as Hong Kong, Macao, and Chinese Taipei). Therefore, decisions within the organization are made on the basis of consensus among members, who are largely states, and the disputes formally involve only states. On this basis, and given the

wto's importance for ensuring the security and predictability of international trade, this chapter does not intend to suggest that NGOs should be members of the organization or that they should be able to initiate disputes before the Dispute Settlement Body. What we do wish to do is open up the panorama of possibilities so that debates within the WTO are nourished by a more diverse range of positions than those put forth by states and so that they include the positions of civil society, which, in the end, is arguably the one most impacted by the international trade policies discussed in the WTO.

Furthermore, it is important to highlight that within the framework of the WTO, private companies, despite not being members, play an important role in the monitoring and negotiation of international trade policies, as well as in the settlement of disputes before the Dispute Settlement Body. In fact, according to Brutger et al., private companies engage in a unique form of lobbying within the WTO through contributions made during litigation that is initiated by states before the Dispute Settlement Body (Brutger et al. 2017). The authors show how the WTO's dispute settlement rules allow states to receive information and resources from companies, while "preserving their role as legal gatekeepers." These firms are in a position to contribute economic resources to support the litigation of disputes and to offer relevant information that allows states to determine which disputes should be pursued and what their probability of success is (ibid.).

NGOs, meanwhile, do not enjoy the possibility of contributing to WTO discussions to the same extent. On the one hand, NGOs generally lack the same kind of economic resources that private firms have to support states during litigation. And on the other, NGOs are not economic actors that generate wealth for states, so their bargaining power is comparatively lower. Indeed, sometimes they are even critical of the trade policies of their own states, since their role is to advocate for the well-being and human rights of citizens. In other words, the interests of states and NGOs are often at odds. In sum, while the WTO is indeed impacted by the work of nonmember actors, such as private firms, NGOs do not enjoy access to the same mechanisms, even informally, to present their positions.

In this light, we believe that the notification processes established under WTO agreements, as well as their mechanisms for submitting comments, are the ideal space for ensuring a diversity of views regarding matters under debate.

The WTO's process for the notification of measures is a mechanism for ensuring transparency and openness that seeks to maintain continual dialogue among members during the development of potentially trade-restrictive measures by a given state. In essence, "notification" is a document submitted by a state with the purpose of notifying the other members about a potentially trade-restrictive measure that is being pursued domestically by that state (Mavroidis and Wijkström 2013). Several WTO agreements include a notification requirement, as well as other mechanisms—such as enquiry points—for permitting dialogue with third parties.

Broadly speaking, the notification requirement encourages states not only to disclose draft measures but also to communicate with and provide information to WTO trade partners that would potentially be affected by the measures (Van Grassek 2013). Notification is thus the event that triggers the participation of states and interested third parties in the development and adoption of potentially trade-restrictive measures. Hence, notification and mechanisms for submitting comments represent a potentially ideal scenario for discussing trade-related issues not only among states but also with NGOs.

Let us take the example of the notification of food labeling measures, which are usually categorized as technical regulations under the TBT Agreement. They are categorized this way because they are non-tariff measures that affect international trade by laying down product characteristics via labeling rules (World Trade Organization 2021). In this regard, the relevant notification procedure and the possibilities for other states and third parties to submit comments are regulated in the TBT Agreement, particularly in article 2.9.

In the aforementioned agreement, member states may notify their counterparts of any measure they deem relevant in the interest of transparency. However, given that labeling measures tend to represent a gray area with regard to the TBT Agreement, the TBT Committee has determined that members

should notify other states of all labeling requirements that are not based on a relevant international standard and that may have a significant effect on trade (wto Committee on Technical Barriers to Trade 1995). Thus, the original requirement under the TBT Agreement pertaining to draft technical regulations has been expanded to apply to labeling measures, which have proliferated in recent years and have grown to represent 20% of all notifications presented.

In terms of the form of notification, the TBT Committee has provided formats and guidelines for states to transmit their notifications (wto Committee on Technical Barriers to Trade 2019). It has also created an electronic notification system—the Notification Submission System—through which notifications are created and sent to the wto’s Central Registry of Notifications. This is when the other members are informed of the measure and when the period for debate and comments begins (World Trade Organization 2021). Additionally, the notification is published in the TBT Information Management System, which is open to the public.

Here, there is potential for NGOs to react to the measures proposed by states and thereby contribute to debates. States, insofar as they are wto members and members of specialized committees such as the TBT Committee, may rely not only on enquiry points to question the measures notified by their counterparts but also on the mechanism for raising specific trade concerns. This latter mechanism allows a member or group of members to bring a draft measure up for open discussion within the committee, with the participation of representatives from all states. If NGOs were to be granted access to this mechanism at TBT Committee sessions, this could create an effective tool for their participation.

The main function of the TBT Committee is to ensure transparency under the TBT Agreement and review any measures that cause concern to another member or group of members (Mavroidis and Wijkström 2013). This committee therefore represents an ideal mechanism for states to engage with civil society organizations in a purely consultative environment, without a formal dispute having been initiated. Moreover, allowing civil society organizations to raise specific trade concerns and to

attend TBT Committee sessions where these concerns are discussed would allow for real-time debates regarding measures that could potentially lead to problems. This would serve to modify the measure in question or to bring problematic issues to the fore, perhaps even paving the way to a formal dispute.

Lastly, it is worth mentioning that the WTO has made efforts to encourage communication among members and interested stakeholders via digital means. To this end, it has created electronic tools such as the information management systems and electronic notification system described above. However, its most ambitious effort in this regard is ePing—a publicly available platform that allows registered users to receive email alerts any time a member submits a notification concerning a product of interest.

This platform addresses the asymmetry that has affected NGOs, given that they are not direct recipients of notifications by member states. In addition, it is linked with the enquiry points as a channel for discussing any concerns that may arise regarding notified measures. In this way, the platform seeks to close the information gaps between states and interested stakeholders described above. Thus, although it does not resolve the problem of a lack of participatory settings for civil society, it represents a step forward in terms of including nongovernmental actors in WTO discussions.

The Importance of Participation

As demonstrated above, NGO participation in the WTO is both relevant and necessary. The WTO was built on the basis of consensus among all member states, with a recognition that the matters discussed and the rules adopted by the WTO directly affect the global economy. However, agreements such as TBT Agreement, the Agreement on the Application of Sanitary and Phytosanitary Measures, the Agreement on Trade-Related Aspects of Intellectual Property, and even GATT encompass, in our opinion, a focus that goes beyond mere economic issues to include the protection of the civilian population and

the promotion of international trade as a means to achieving countries' development, not as an end in itself.¹⁰

Hence, the issues discussed and the decisions made in the WTO have an impact not just on the economy and on the competitiveness of each country's products in the global market but also on civil society. It is thus critical to highlight why civil society participation in an organization that is more than just an economic organization is important and necessary. This is especially true considering that the WTO recently appears to be embracing a position in which international trade is conceived as a tool for national development and for the closing of social gaps.¹¹

That said, due to the nature of the WTO, NGOs are unable to actively participate in the organization and are not considered members. In particular, NGOs cannot be members of any of the committees established under the organization's various agreements, such as the TBT Committee. Further, civil society organizations of any kind lack the power to initiate debates on critical issues. They also lack access to some of the mechanisms provided within the framework of WTO committees to initiate such debates, such as the mechanism for raising specific trade concerns.

It is of course understandable that the WTO has a purely state-centered design, but the fact that there are no mechanisms for ensuring NGO participation in the committees established under the various agreements reinforces the idea that the WTO has no real intention of including civil society. Under the system's current design, the only possibility that civil society organizations have to be heard within committees—and within

10 For example, article XX of GATT establishes general exceptions to its obligations in cases where a member aims to protect health, life, and the environment, among other things. These exceptions are also contained in the TBT Agreement and the Agreement on the Application of Sanitary and Phytosanitary Measures.

11 The WTO's director-general, Ngozi Okonjo-Iweala, has frequently used a phrase that sums up the WTO's philosophy: "trade is about people, about making their lives better." See, for example, <https://www.youtube.com/watch?v=ph8xHe0lZtw>.

the wto as a whole—is through states. But this is problematic for several reasons.

First, not all NGOs have a national geographic scope; some are international in scope, meaning that they operate in several countries simultaneously, which makes it impossible for one state alone to serve as their torch-bearer. This is problematic because, as mentioned earlier, the only actors with a direct and active presence in the wto are states. Thus, for an NGO that lacks a specific state that can represent it, the chances for contributing to discussions are greatly diminished. Second, many NGOs do not agree with the positions of their host countries, and it is precisely this fact that they wish to bring to the debate. It goes without saying that a state seeking to advance a particular agenda is not going to invite to the discussion an NGO that advocates contrary views. Third, the need to act through a state delegitimizes the discourse of NGOs, which tend to operate independently of governments and whose value is usually based on such independence.

The relevance of NGO participation in the wto lies precisely in the importance of incorporating nonstate—and even anti-state—perspectives into the debate. NGOs enjoy greater independence from political forces than do states. They are therefore more capable of identifying the potential pros and cons of public policies under debate. Their participation arguably helps raise the level of discussion, especially when it concerns topics of public concern.

Legitimacy

For an organization such as the wto that adopts its decisions by consensus, it is of critical importance to address challenges around the legitimacy of its procedures. The wto's legitimacy is generally questioned in two respects. First, questions are often raised with regard to issues concerning the wto's external transparency, openness with the public, and relationship with civil society. Second, questions are raised with regard to the wto's informal forms of discussion, debate, and negotiation, because even though they play a crucial role in the decision-making process, there is no official tool for accessing these

conversations, which have been described as falling within the realm of internal transparency and participation (McDougall 2018).

With regard to external transparency, no human rights organization has managed to acquire WTO observer status, despite the numerous intersections between trade, health, food, and the environment, among other things, that are discussed at the WTO. Even United Nations Special Rapporteurs have had a very limited voice within the WTO. In fact, in 2004, the Special Rapporteur on the Right to Health noted that his mission to the WTO was “one of the first occasions” in which WTO members and observers had discussed the right to health (Lizarazo González 2019).

Four years later, the Special Rapporteur on the Right to Food conducted a mission to the WTO—marking the first (and to date only) such mission, despite the significant impacts that WTO trade agreements have on member states’ guarantee of the right to food. In this context, several scholars have suggested that the aforementioned concerns over the WTO’s legitimacy and transparency could be eliminated, or at least mitigated, by introducing a system for NGO accreditation. This would improve the WTO’s public image and increase its political support by providing additional channels for representation (Zelicovich 2019).

Furthermore, critics of the WTO argue that a small group of countries usually ends up imposing its will on all members, resulting in both the decision-making process and the decisions themselves lacking the necessary legitimacy (Lizarazo González 2019). Therefore, the first step to increasing the WTO’s legitimacy would be to establish rules for the participation of actors that do not necessarily have an economic interest at stake but that have the technical expertise to produce reports about the potential impacts of measures under discussion.

Lastly, the 2004 Sutherland report entitled *The Future of the WTO* (World Trade Organization 2004) addressed the question whether there is truly a need or possibility for greater NGO involvement in the WTO. This report included the first-ever acknowledgment that the responsibility to involve civil society in trade policy issues lies not with the WTO but with its members. To this end, the report urged members to develop a set of clear

objectives for the WTO Secretariat's relations with NGOs, as well as to increase the Secretariat's administrative capacity and financial resources. It also referred to the need to create new relationships between civil society and the WTO but without specifying what types of activities such relationships might encompass. In fact, the report did not suggest any substantial deepening of the WTO's engagement with NGOs but rather called for streamlining and further developing existing forms of civil society participation, with an emphasis on NGOs' relations with the Secretariat (as opposed to WTO members).

Conclusion

There are currently no effective mechanisms for civil society participation in the WTO. The dialogue triggered by the notification of measures seems to be reserved for member states, who enjoy specific settings for discussion, such as the TBT Committee, as well as mechanisms for dialogue, such as the procedure for specific trade concerns and even the enquiry points. While the WTO has recently undertaken efforts to allow interested third parties to participate—namely via its electronic platforms—these tools appear to be aimed at industry and private commercial actors, not civil society. There is thus a clear need to engage in deeper discussion about the importance of civil society participation following the notification of measures under the TBT Agreement.

This is particularly true with regard to food labeling measures, which aim to protect health and encourage better eating habits among consumers. It is astonishing that consumers do not have the ability to participate in decision-making in this regard. We must remember that while international trade might, on its face, appear to be a matter solely for governments and industry, its repercussions essentially fall on the shoulders of civil society, which is made up of the consumers of the products being regulated.

References

- Brutger, R., T. Betz, M. L. Busch, J. S. Gowa, R. Hicks, A. Kennard, H. V. Milner, J. C. Morse, A. Pond, T. Pratt, and K. W. Ramsay. 2017. "Litigation for Sale: Private Firms and WTO Dispute Escalation." https://ipespeakerseries.mit.edu/sites/default/files/images/litigation_for_sale_9-14-17_full_version.pdf
- Charnovitz, S. 2006. "Nongovernmental Organizations and International Law." *American Journal of International Law* 100(2): 348–372.
- Eckersley, R. 2004. "The Big Chill: The WTO and Multilateral Environmental Agreements." *Global Environmental Politics* 4(2): 24–50.
- Fernández Liesa, C. R. 2018. "Sujetos de Derecho y actores no estatales: Cuestiones de Derecho internacional." *Anuario Español de Derecho Internacional* 34: 87–113.
- Giorgi, M. 2019. "The Role of Non-Governmental Organizations in the Process of International Treaty Making." *Anuario Mexicano de Derecho Internacional* 19: 153–177.
- Henkin, L., R. Crawford Pugh, O. Schachter, and H. Smit, eds. 1993. *International Law: Cases and Materials* (3rd edition). St. Paul: West Publishing.
- Lizarazo González, M. C. 2019. "Es necesaria la transformación del sistema multilateral y su institución central, la OMC." *Revista de Derecho Fiscal* 14: 189–202.
- Marrakesh Agreement Establishing the World Trade Organization. April 15, 1994.
- Mavroidis, P. C., and E. N. Wijkström. 2013. "Moving Out of the Shadows: Bringing Transparency to Standards and Regulations in the WTO's TBT Committee." In *Research Handbook on the WTO and Technical Barriers to Trade*, edited by T. Epps and M. Trebilcock. Cheltenham: Edward Elgar Publishing.
- McDougall, R. 2018. "Crisis in the WTO: Restoring the WTO Dispute Settlement Function." Centre for International Governance Innovation, CIGI Paper No. 194. <https://www.cigionline.org/static/documents/documents/Paper%20no.194.pdf>
- Pearson, Z. 2004. "Non-Governmental Organisations and International Law: Mapping New Mechanisms for

Governance." *Australian Year Book of International Law* 23(73).

Qureshi, A., and A. Ziegler. 2019. *International Economic Law*. London: Sweet and Maxwell.

Schlemmer-Schulte, S. 2001. "The Impact of Civil Society on the World Bank, the International Monetary Fund and the World Trade Organization: The Case of the World Bank." *ILSA Journal of International and Comparative Law* 7(2): 399–428.

Scholte, J. A., ed. 2011. *Building Global Democracy? Civil Society and Accountable Global Governance*. Cambridge: Cambridge University Press.

Steffek, J., and U. Ehling. 2008. "Civil Society Participation at the Margins: The Case of the wto." In *Civil Society Participation in European and Global Governance: A Cure for the Democratic Deficit?*, edited by J. Steffek, C. Kissling, and P. Nanz. New York: Palgrave Macmillan.

Stern, B. 2005. "The Intervention of Private Entities and States as 'Friends of the Court' in wto Dispute Settlement Proceedings." In *The World Trade Organization: Legal, Economic and Political Analysis*, edited by P. F. J. Macrory, A. E. Appleton, and M. G. Plummer. Cham: Springer.

Vadi, V. 2018. "International Investment Law as a Field of International Law." In *Proportionality, Reasonableness and Standards of Review in International Investment Law and Arbitration*. Cheltenham: Edward Elgar Publishing.

Van den Bossche, P. 2005. *The Law and Policy of the World Trade Organization: Text, Cases, and Materials*. Cambridge: Cambridge University Press.

Van Grassek, C. 2013. *The History and Future of the World Trade Organization*. Geneva: World Trade Organization.

Vargas, J. E. 2012. "El derecho internacional económico y la gobernabilidad de las organizaciones económicas internacionales: Un análisis jurídico-político." *Iuris Tantum Revista Boliviana de Derecho* 13: 116–135.

World Bank Group. 2014. *World Bank Group Strategy*. Washington, DC: World Bank Group.

World Trade Organization. 2004. *The Future of the WTO: Addressing Institutional Challenges in the New Millennium*. Geneva: World Trade Organization.

———. 2021. *Technical Cooperation Handbook on Notification Requirements*. Geneva: World Trade Organization.

World Trade Organization (WTO) Appellate Body. 1998. *United States: Import Prohibition of Certain Shrimp and Shrimp Products*. WTO Doc. WT/DS58/AB/R.

———. 2001. *European Communities: Measures Affecting Asbestos and Asbestos-Containing Products*. WTO Doc. W/DS135/AB/R.

World Trade Organization (WTO) Committee on Technical Barriers to Trade. 1995. *Updating the Decisions and Recommendations Taken by the Tokyo Round Committee on Technical Barriers to Trade regarding Procedures for Notification and Information Exchange*. WTO Doc. G/TBT/W/2/Rev.1.

———. 2019. *Decisions and Recommendations Adopted by the WTO Committee on Technical Barriers to Trade since January 1995*. WTO Doc. G/TBT/1/Rev. 14.

World Trade Organization (WTO) General Council. 1996. *Guidelines for Arrangements on Relations with Non-governmental Organizations*. WTO Doc. WT/L/162.

———. 2000. *Minutes of the Meeting of 22 November 2000*. WTO Doc. WT/GC/M/60.

———. 2002. *Procedures for the Circulation and Derestriction of WTO Documents*. WTO Doc. WT/L/452.

World Trade Organization (WTO) Trade and Environment Division. 2018. *WTO TBT Enquiry Point Guide: Making Transparency Work*. Geneva: World Trade Organization.

World Trade Organization (WTO) Panel. 1998. *United States: Import Prohibition of Certain Shrimp and Shrimp Products*. WTO Doc. WT/DS58/RW.

Zelicovich, J. 2020. "La Organización Mundial de Comercio: Entre las normas del siglo xx y la política comercial del siglo xxi." *Agenda Internacional* 27(38): 81–104.

PART TWO
Legal Perspectives on Nutrition
Labeling Policies

Reflections on Nutrition Labeling and Self-Regulation from the Perspective of Economic Law and Human Rights: Tensions between Private Initiatives and the Protection of the Public Interest¹

Paula Angarita Tovar²

Julián Gutiérrez-Martínez³

1 We are grateful to Diana Guarnizo Peralta for providing invaluable feedback on earlier drafts of this chapter.

2 Law degree from the Externado University of Colombia and an LLM in public interest law and policy from the University of California, Los Angeles (us).

3 msc in sociology from the University of Oxford (uk), as well as a law degree and a specialization in constitutional law from the National University of Colombia.

Introduction

Overweight and obesity are one of today's biggest global health challenges (Koplan et al. 2009; Lobstein 2006; Ó Cathaoir 2018). According to the Pan American Health Organization (PAHO), 34% of children (aged six to eleven years) and 35% of adolescents (aged twelve to nineteen years) in Latin America are overweight or obese (Pan American Health Organization 2014). PAHO also notes that "overall 20% to 25% of the children under 19 years old are affected by overweight and obesity" (ibid.). This reflects a global trend: the number of obese and overweight children has increased tenfold in the past forty years (NDC Risk Factor Collaboration 2017; Clark et al. 2020), and this population is projected to suffer more from obesity than low weight by 2022 (Rozo Ángel 2017). Indeed, several recent studies have dubbed this rise in obesity the "climate change of public health" (Morris 2013) not only because of its impact on the population but also because of the economic burdens it entails for health systems (Nugent et al. 2020).

One of the main causes of the dizzying rise of these conditions is the nutritional transition toward greater consumption of ultra-processed foods⁴ (Canella et al. 2014; Huang et al. 2014; Malik et al. 2013; Rico-Campà et al. 2019; Te Morenga et al. 2012), including foods and beverages containing high levels of

4 According to PAHO's Nutrient Profile Model, ultra-processed foods are "industrial formulations manufactured with several ingredients," including those that "have no common culinary use ...; substances synthesized from food constituents ...; and additives used to modify the color, flavor, taste, or texture of the final product" (Pan American Health Organization 2016).

sodium, fats, and sweeteners (such as sugar) (Pan American Health Organization 2016). Institutions such as the World Health Organization (WHO), PAHO, and the World Cancer Research Fund cite the consumption of these products as a leading cause of other comorbidities⁵ (Pan American Health Organization 2015; Rozo Ángel 2017; World Health Organization 2016; World Cancer Research Fund International 2015). Thus, the consumption of ultra-processed foods, which leads to overweight and obesity and promotes the development of noncommunicable diseases (NCDs), is considered a threat to global health (Kasper et al. 2013; De Onis and Lobstein 2010).

Against this backdrop, both WHO (2010b) and PAHO (2011, 2020) have urged states to adopt policies to discourage the consumption of products high in nutrients of concern—such as sugars, saturated fats, and sodium—and to promote healthy eating habits among their populations. Front-of-package nutrition labeling is a policy response that warns consumers about the presence of certain nutrients that could be harmful to their health, thereby facilitating informed decision-making and discouraging the consumption of such products (Kanter et al. 2018; Pan American Health Organization 2020; Taillie, Hall, et al. 2020). This type of regulatory measure is thus strongly linked to the guarantee of the fundamental rights to information, food, and health (Guarnizo and Narváez 2019; Office of the United Nations High Commissioner for Human Rights 2020).

Given the need for increased attention in environments that promote NCDs—where consumers' choices are shaped by powerful economic actors—regulations promoting public health are becoming increasingly important tools in the debate on NCD prevention at both the national and international level. In particular, achieving healthy food systems requires regulation throughout the food supply chain.

5 These comorbidities range from breathing difficulties, hypertension, and insulin resistance among children to cardiovascular diseases, diabetes, some types of cancer, and premature death in adulthood, among others (Evensen et al. 2016; Riley et al. 2017; World Health Organization 2016).

One such regulatory measure is nutrition labeling, which straddles the worlds of public health and international trade—the latter being because foods are marketed across borders through their product labels. This interaction may lead states to argue that regulations in this arena constitute “technical barriers” to the free movement of food or violate the provisions of regional and international trade agreements (Gruszczynski 2014; Thow et al. 2017). Such arguments can end up limiting the regulatory space for public health measures that protect consumers.

The result is a tension between two sets of elements. One set involves international trade, investment law, and intellectual property (the use of trademarks),⁶ while the other concerns the public interest and public health.⁷ The debates surrounding the implementation of warning labels on cigarettes and alcoholic beverages have resulted in the endorsement of regulations in which states are pursuing a legitimate objective, and the measure adopted is proportionate to that public policy goal. Nonetheless, many countries have yet to issue regulations on front-of-package labeling for foods that are high in sodium, sugars, or saturated fats, partly as a result of the tensions that may arise in this regulatory space. Here, we refer to the tension generated between the model of industry self-regulation based on voluntary commitments by companies and the model of mandatory labeling rules set by the government (Thow et al. 2017). It is worth clarifying that although this tension is not the

6 In the context of foreign investment, there are a number of cases that illustrate these tensions and that are not the focus of this chapter: (i) Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay; (ii) Philip Morris Asia Limited v. The Commonwealth of Australia; (iii) Eco Oro Minerals Corp. v. Republic of Colombia; and (iv) Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic.

7 Despite the tensions mentioned above, this chapter focuses mainly on those cases that relate to international trade and intellectual property (the use of trademarks)—the latter within the framework of the WTO. Our methodological justification for this emphasis is because the WTO framework is where we can study labeling measures in the three industries under study here: cigarettes, alcohol, and food.

only factor that has shaped the regulatory processes for nutrition labeling, it is one of the most important; as such, it is the main focus of this chapter.

Based on the regulatory and public health context presented above, this chapter explores the question of which type of regulation—self-regulation or mandatory public interest labeling—is the most appropriate for ensuring compliance both with international economic law and with public health obligations. We hypothesize that voluntary, self-regulated nutrition labeling is neither (i) the most suitable option in terms of public health nor (ii) preferable to government-mandated labeling when it comes to fulfilling international economic law obligations. States should be able to confidently progress toward the implementation of government-mandated labeling schemes.

To test our hypothesis, we undertake a comparative analysis of different categories of cases that have faced the same regulatory tension—namely, (i) cigarettes, (ii) alcohol, and (iii) ultra-processed foods and beverages. We analyze these cases within the framework of international economic law, particularly in the context of the European Union (EU) and the World Trade Organization (WTO).⁸ We chose these three industries because of their similitude in terms of their impact on human health, NCDs, and the guarantee of other human rights, and because they have been discussed extensively within the framework of states' obligations under international economic law. We consider that states' decision-making on issues such as alcohol and tobacco—which, in general, involves regulations on consumer products that have harmful effects on public health—offers important insights for the issue of nutrition labeling.

Finally, another objective of this chapter is to embark on a comparative analysis of these three types of economic regulation that affect health and human rights in order to extract a set of lessons learned and recommendations for the adoption of nutrition labeling in Latin America. Specifically, we aim to

8 Due to space constraints, we analyze a handful of representative decisions in each of these settings. This is not meant as an exhaustive review of the possible universe of cases but rather as a glimpse of certain trends and similarities.

construct a set of learnings that adhere to international economic law obligations while also allowing for the protection of public health.

The chapter is divided into three parts. First, we summarize the scientific evidence on the efficacy of self-regulatory models for nutrition labeling compared to models based on government regulation, providing specific examples in each case. Our analysis focuses in particular on human rights-related obligations with regard to public health. Second, we explore a handful of decisions in international economic law concerning the packaging of three types of products with a significant impact on public health: cigarettes, alcohol, and food. Last, we offer some conclusions about how self-regulatory labeling schemes fall short when it comes to ensuring compliance with public health and human rights obligations and how state regulation can be an important mechanism for complying with international economic law obligations.

Self-Regulation, Public Health, and Human Rights

The usefulness of nutrition labeling in combating overweight and obesity—and thus helping guarantee human rights—is a highly relevant topic that has been explored by a number of scholars (Guarnizo and Narváez 2019; Tovar Ramírez et al. 2020). In this regard, it is worth taking a brief look at nutrition labeling and its effectiveness. In particular, it is important to consider the dissonance between the trend toward state regulation and the industry’s counterresponse of self-regulation.

Nutrition Labeling as a Measure to Protect Public Health and Human Rights

In addition to WHO (2010b) and PAHO (2011), several United Nations Special Rapporteurs on the Right to Health and the Right to Food—such as Anand Grover (2014), Hilal Elver (2016), and Dainius Pūras (Office of the United Nations High Commissioner for Human Rights 2020)—have sought to shine the international spotlight on the risks that unhealthy food and NCDs pose to the

effective enjoyment of the rights to health and food. Former Special Rapporteur Pūras, for example, noted in a statement on front-of-package warning labeling that states should adopt public policies aimed at providing information that is accurate, available, easy to understand, transparent, and comprehensible in order to aid consumers in making informed choices (*ibid.*).

This promotion of healthy public policies is based on numerous international obligations to respect and guarantee the rights to health and to food, which are enshrined in instruments such as the International Covenant on Economic, Social and Cultural Rights (arts. 11, 12) and the Convention on the Rights of the Child (art. 24)—interpreted by their respective committees (Committee on Economic, Social and Cultural Rights 1999, 2000, 2017; Committee on the Rights of the Child 2003, 2013a, 2013b)—as well as the Protocol of San Salvador (art. 12), the Universal Declaration of Human Rights (art. 25), and the International Covenant on Civil and Political Rights (art. 24). These international standards seek to guarantee adequate nutrition that ensures the possibility of enjoying the highest level of physical, emotional, and intellectual development, which is connected to other rights such as the rights to health and life, especially in the case of children.

According to PAHO (2020), from a public health perspective, the goal of front-of-package nutrition labeling should be to allow consumers “to correctly, quickly, and easily identify products that contain excessive amounts of sugars, total fats, saturated fats, trans fats, and sodium.” In this regard, the main features of front-of-package labeling systems should be considered to include (i) the ability to capture consumers’ attention; (ii) the ease with which consumers can process, understand, evaluate, and utilize the information; and (iii) the impact that such labeling has on consumers’ decisions (Grunert and Wills 2007; Mansfield et al. 2020).

Thus, measures such as nutrition labeling, when applied to foods containing high levels of nutrients associated with health problems, can be seen as allowing consumers to make quick assessments regarding the nutritional value of a given product and to therefore make more informed and healthier choices, with the potential to transform their eating habits

(Kanter et al. 2018; Pan American Health Organization 2020; Taillie, Hall, et al. 2020).

In addition, regulatory processes and policies focused on human rights and public health should be based on the best available scientific evidence that is free from conflicts of interest. According to General Comment 25 of the Committee on Economic, Social and Cultural Rights (2020), concerning science and economic, social, and cultural rights, states should use scientific knowledge in decision-making and policies because they have “a duty to make available and accessible to all persons ... all the best available applications of scientific progress necessary to enjoy the highest attainable standard of health.” Similarly, according to former Special Rapporteur Pūras, “the appropriateness of measures to address diet-related NCDs risk factors, such as front-of-package warning labelling, should arise from the best available evidence in public health ... [and] evolve with changing understandings of science” (Office of the United Nations High Commissioner for Human Rights 2020).

This makes it clear that “the decision on which front-of-package labelling system should be adopted must be linked to its effectiveness to achieve public health goals and be in accordance with scientific evidence free from conflicts of interest available at the time” (Office of the United Nations High Commissioner for Human Rights 2020). This is important given that comparative studies have shown different results between voluntary and mandatory labeling schemes, as we will see below.

The Tension between Government Regulation and Industry Self-Regulation

As mentioned earlier, when faced with the prospect of government-mandated regulations establishing a robust front-of-package warning labeling system, the food and beverage industry has responded by proposing self-regulatory models. In this regard, former Special Rapporteurs Elver and Pūras have highlighted how food corporations, seeking to avoid government regulation (Office of the United Nations High Commissioner for Human Rights 2020), have promoted voluntary commitments on nutrition labeling and advertising (Elver 2016).

However, the robust scientific evidence on the effectiveness of self-regulation in a variety of industries has generally concluded that self-regulatory approaches do not represent a comparative advantage over government regulation. Indeed, the evidence shows that self-regulation can be problematic.

A number of studies have highlighted that the motivations behind self-regulation are a key factor for assessing the level of effectiveness of this type of model. In the tobacco, alcohol, and food industries, self-regulation is pursued (i) in order to prevent negative perceptions from developing among consumers and, above all, (ii) in order to prevent or forestall external regulation, under the idea that government intervention in general is a threat to industry (Ronit and Jensen 2014; Sharma et al. 2010). Some scholars claim that these schemes are even a deliberate political strategy designed to undermine the public policy objectives of regulation (Freudenberg 2014; Moodie et al. 2013; Wiist 2010).

With regard to the effectiveness of self-regulation in guaranteeing human rights and public health, scholars have found multiple parallels between the food, pharmaceutical, alcohol, and tobacco industries (Buse et al. 2017; Dorfman et al. 2012; Shelley et al. 2014). For example, studies by Sharma et al. (2010) and Ronit and Jensen (2014), focusing on the us, have explored how self-regulation in industries such as alcohol and tobacco can shed light on the issue of self-regulation in the food industry.

First, with regard to the alcohol industry, these authors argue that self-regulation is a classic example of industry circumvention of government regulation and oversight. Various reports of the Federal Trade Commission—starting in 1999 and as recently as 2008 (the time of Sharma et al.’s study)—criticize these self-regulatory practices as being too permissive, call for the strengthening of self-regulatory guidelines in light of new market practices (via the internet, digital advertising, sponsorships, product placement, etc.), and stress the need for new and more effective forms of monitoring. Similarly, various civil society organizations monitoring the issue have raised concerns about the high degree of subjectivity in interpreting advertising content regulations and the lack of an independent third party (the state) in oversight and enforcement (Sharma et al. 2010).

Second, the tobacco industry is an example of “toxic self-regulation” dating back to 1954. Several studies have highlighted how the industry’s strategies during the self-regulatory process took care not to contradict the ultimate message of tobacco advertising (Landman et al. 2002); in fact, these strategies were associated with an increased desire to smoke among young people (Wakefield et al. 2006) and sidelined the campaigns of advocacy groups working on tobacco-related issues (Ling et al. 2002). For Sharma and colleagues (2010), the tobacco industry’s voluntary efforts illustrate the core problem of self-regulation: self-regulation allows industry to use approaches that on their face appear credible and as being in the public interest but that actually seek to curb legislative and regulatory efforts to protect public health.

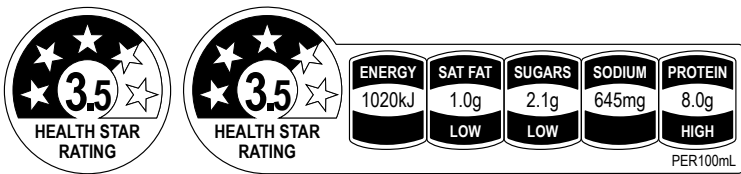
Finally, with regard to the food industry, Ronit and Jensen (2014) reviewed existing studies on industry self-regulation concerning advertising and nutrition labeling up to 2013. Among their most important findings were that (i) self-regulation of the food and beverage industry tends to be voluntary, which is a major shortcoming, because such it tends to manipulate standards; (ii) there is strong industry decision-making power over standards and benchmarks, which creates the risk that these criteria will be too permissive; (iii) stricter regulatory tools, as well as state intervention, are needed to solve this challenge; (iv) self-regulation of this industry is widely viewed as a strategy to prevent the introduction of stricter regulations that lead to higher costs for industry; and (v) the food industry is so heterogeneous that there is no guarantee of joint action to ensure compliance with self-regulation.

The general conclusion among all of these authors is that self-regulation in the aforementioned industries is problematic in light of the private sector’s capacity to impose its own rules of the game, to serve as both judge and jury, and, in general, to avoid providing guarantees for compliance. In this light, by way of example, the following section contrasts two models of front-of-package food labeling—one voluntary and the other mandatory.

The Health Star Rating System vs. Front-of-Package Warning Labeling

The Health Star Rating (HSR) system is a voluntary front-of-package labeling system that has been used in Australia and New Zealand since 2014. It falls under the umbrella of “summary systems,” a type of labeling that provides an overall summary score concerning the healthfulness of a given product; another system in this category is the Nutri-Score system developed in France (Pan American Health Organization 2020). By rating the nutritional profile of packaged foods on a scale of one to five stars, the HSR purports to help consumers make informed decisions. Stars may appear on labels in different ways; some products have general star ratings, while other foods include information on specific nutrients, as shown in figure 1.

FIGURE I
Health Star Rating system



Meanwhile, the “nutrition warning” model—as seen in the octagonal (or “stop sign”) front-of-package labels adopted by countries such as Chile, Uruguay, Peru, and Mexico (Pan American Health Organization 2020)—has been one of the most widely used systems in Latin America over the past decade (Crosbie et al. 2023). This type of label, located on the front of packaging and featuring white lettering against a black octagonal background (see figure 2), aims to help consumers quickly and correctly identify products containing excess amounts of nutrients of concern (Corvalán et al. 2019).

According to PAHO (2020), the HSR system does not meet the public health purpose mentioned at the beginning of this section, as summary systems do not allow consumers to identify products that contain *excessive* amounts of nutrients such as sugars, fats, and sodium. This failure stems from two major problems.

FIGURE 2
Nutrition warning model



First is the inadequate algorithm used to calculate products' star ratings, which has allowed some products high in nutrients of concern to carry a favorable rating (Jones et al. 2019). The algorithm is based on an overall evaluation of nutrient content that individually compares "positive" (e.g., fiber, protein, etc.) and "risk" (e.g., sugars, sodium, fats, etc.) components in order to reach a final product rating. This evaluation process allows products high in nutrients of concern to carry high ratings on account of being rich, for example, in fiber.¹¹ Furthermore, the system does not alert consumers about or allow them to compare products with low nutritional value (Hamlin and Hamlin 2020; Hamlin and McNeill 2018) and is confusing as a tool for comparing products (Colmar Brunton 2018).

The second problem is the HSR system's voluntary status, which has stoked widespread criticism (Jones et al. 2019; Becher et al. 2019). Indeed, HSR's uptake by industry has been limited, with only 28% of eligible products bearing the label in Australia and 20.9% in New Zealand (Jones et al. 2019). More often than not, companies with high ratings are the ones that have opted

9 Decreto 13/2015.

10 Decreto Interno 001-3/13061/2017.

11 In 2016, Nestlé was embroiled in a fierce controversy for rating its Milo product with 4.5 stars despite the product's high sugar content, which was nearly 50%.

to participate in the HSR system, while those with lower ratings tend to avoid it. This has led to skepticism about the system's reliability, authenticity, and effectiveness (Becher et al. 2019). Although a general review was conducted in 2019 to examine the HSR system's performance, this report concluded that the system should remain voluntary (Mpconsulting 2019).

By comparison, nutrition warning labels have been shown to be the most effective method for achieving the public health and human rights objectives discussed above. A recent study by the United Nations Children's Fund and the University of the Republic of Uruguay (2020) analyzed consumers' approval and utilization of Uruguay's front-of-package nutrition labeling system before and after the deadline for full compliance by the food industry. The study concluded that by March 2020, ten days after the deadline for compliance, 87% of participants were aware of the labeling system and 77% had seen it on a product when shopping. This level of awareness is similar to that seen in Chile after the first year of implementation of Chile's nutrition labeling scheme (Ministerio de Salud 2018) and higher than the levels reported in Australia and New Zealand two years after the rollout of the HSR system (Colmar Bruton 2018; National Heart Foundation of Australia 2017). In addition, 58% of the Uruguayan study's participants stated that they modified their purchase decisions after seeing the warning label on a product that they had planned to buy.

In Chile, a survey of 1,067 people conducted by the Ministry of Health showed that one year after implementation of the country's labeling regulation, 43.8% of respondents reported comparing nutritional labels when purchasing food (Ministerio de Salud 2018). This group of respondents was then asked whether these labels influenced their decision-making. The vast majority (91.6%) said that the labels did influence their choices: of these, 67% said that the labels affected their decision-making and that they sought to purchase foods with fewer labels; 9.7% indicated that the labels influenced their decision-making and that they did not purchase foods bearing labels; and 14.1% said that the labels led them to purchase less of a given product than they would have if it did not have warning labels.

The most recent evidence in Chile has shown that after the implementation of the “high sugar” warning label, purchases of sugar-sweetened beverages declined by almost 24% (Taillie, Reyes, et al. 2020). Moreover, a recent cross-sectional study on food reformulation (Reyes et al. 2020) showed that the percentage of “high in” products decreased from 51% to 46% in the first year of the policy’s implementation. Finally, the warning label system has shown to be advantageous compared to other models in terms of (i) highlighting excessive levels of nutrients associated with NCDs (Ares et al. 2018); (ii) ease of interpretation (Ares et al. 2018; Arrúa et al. 2017); and (iii) efficiency in discouraging consumers from choosing foods with excessive amounts of nutrients of concern (Ares et al. 2018; Arrúa et al. 2017; Khandpur et al. 2018; Machín et al. 2018). Voluntary labeling schemes, on the other hand, have been shown to be at a comparative disadvantage in terms of fulfilling public health and human rights objectives. In fact, as noted above, such schemes erect barriers to the achievement of the standards proposed by Special Rapporteurs, treaty monitoring bodies, WHO, and PAHO.

The examples presented above demonstrate that the ability of self-regulatory labeling models to inform and influence consumers’ decisions is questionable, even five years after implementation, as in the case of the HSR system. The capacity of the HSR system is limited on account of its voluntary nature. Indeed, the system has been adopted by only 20%–30% of companies, largely those whose products have better nutrition ratings. By contrast, warning labels have been shown to be faster and more effective in achieving their impact, and they have been quickly accepted and utilized by the food industry, as demonstrated in the cases of Uruguay and Chile. In the next section, we explore how self-regulation influences the fulfillment of states’ international trade obligations.

Trade Agreements and Public Health Regulations

Worldwide, interactions between public health policies and trade agreements have become increasingly common (Janardhan 2021). The inherent tension between economic priorities and

health priorities has heightened as a result of the trend away from multilateralism in favor of bilateral, regional, and mega-regional trade agreements. The scope of trade agreements has thus grown more complex concerning countries' ability to act unilaterally, even within their borders, especially regarding certain public health issues (Kanter et al. 2018).

These intersections occur mainly because WHO's recommendations are nonbinding, unlike obligations under international trade agreements, which also have binding conflict resolution mechanisms. Commitments made under these agreements may therefore limit countries' ability to regulate goods, services, intellectual property, and investments in the name of the public interest, including public health and the environment.

While some of these agreements carve out exceptions for health and other public matters, these clauses are often ambiguous (Moehlecke 2019).¹² This has led to the emergence of serious concerns in recent decades about the restrictive effect of investment protection agreements and the WTO, particularly regarding the development and implementation of policies to enhance sustainable development (Koivusalo 2014). Such have been the discussions that have taken place regarding tobacco packaging, alcoholic beverage labeling, and food nutrition labeling.

Highlighting the different ways, mechanisms, and spaces where there is a link between international trade and health allows us to identify and evaluate the parameters under which states may adopt regulations on public health issues, particularly those aimed at informing consumers of the health risks associated with consuming certain products. To this end, this section

12 The Agreement on Technical Barriers to Trade (TBT Agreement) recognizes WTO members' basic right to protect human health and, in doing so, to choose their own level of protection against health risks. However, from a trade perspective, it is important that the exercise of this right not unnecessarily restrict trade. The Committee on Technical Barriers to Trade provides a forum for WTO members to learn more about the scope and application of member states' regulations in light of their obligations under the TBT Agreement. As for investment agreements, whether bilateral or regional, states are allowed to adopt public health regulations as long as they do not violate the provisions of these agreements.

looks at some of the cases of tobacco packaging and food and alcoholic beverage labeling that have been debated in various international economic forums. Our purpose is to shed light on the parameters developed by the WTO and EU tribunals within the context of bilateral and regional trade commitments. In particular, the rulings of the Court of Justice of the European Union (CJEU) and the Court of the European Free Trade Association (EFTA Court) are noteworthy because they have addressed the precautionary principle in public health and regional trade commitments.¹³

World Trade Organization¹⁴

Alcoholic Beverage Labeling

In 2010, WHO issued a global strategy to reduce the harmful use of alcohol, in light of its serious effect on public health. Alcohol consumption is considered one of the main risk factors for poor health worldwide because it is a significant contributor to the global burden of disease, risk of premature death, and disability¹⁵ (World Health Organization 2010a). Two of the recommendations in WHO's global strategy thus deal with the

13 For methodological reasons, we decided not to study cases before the Andean Community or the Southern Common Market (Mercosur), since these trade bodies do not cover all the countries in their respective regions, unlike the European Union. Moreover, they do not have dispute settlement bodies tasked with addressing measures affecting regional trade.

14 The TBT Agreement, negotiated during the Tokyo Round, seeks to ensure that neither technical regulations and standards nor testing and certification procedures create unnecessary barriers to trade. It also recognizes countries' right to establish the levels that they deem appropriate for the protection of human health and life and the environment. The agreement, which is monitored by the Committee on Technical Barriers to Trade, allows states to raise "specific concerns" about other member states' regulations. Further, the General Council convenes as the Dispute Settlement Body to deal with disputes that may arise between member states with respect to any of the WTO agreements, while the Appellate Body is a standing body of seven people that hears appeals of panel reports issued in disputes brought by WTO members (World Trade Organization n.d.).

15 As noted by WHO, "harmful drinking is a major avoidable risk factor for neuropsychiatric disorders and other noncommunicable

provision of consumer information about alcohol-related harm and the labeling of alcoholic beverages (ibid.).

Worldwide, only thirty countries have issued labeling regulations for alcoholic beverages, and alcohol labeling proposals have been the most recurrent control measure on the agenda of the Committee on Technical Barriers to Trade (TBT Committee). The major alcohol exporters—such as the EU, the US, Chile, Mexico, Australia, and New Zealand—have repeatedly raised questions about other member states' alcohol labeling proposals. Below, we explore three prominent cases raised before the TBT Committee (O'Brien and Mitchell 2018).

Analysis of the discussions on regulations in Colombia (2009), Thailand (2010), and Turkey (2013)

The data and cases presented in this section were drawn from research conducted by Paula O'Brien and Andrew Mitchell in 2018. The objections presented by member states in the cases of Colombia,¹⁶ Thailand,¹⁷ and Turkey¹⁸ centered on six issues:

diseases such as cardiovascular diseases, cirrhosis of the liver and various cancers" (World Health Organization 2010a).

16 In 2009, Colombia drafted a regulation that would require front-of-container labels with health warnings about the risks associated with excessive alcohol consumption, especially among pregnant women. In June of that year, the European Union and the US argued that these warning labels would have a burdensome impact on their exports to Colombia. In 2013, Colombia notified the WTO that it had substantially modified the measure. The final regulation significantly reduced the scope of alcoholic beverages it affected and no longer imposed health warning labeling requirements.

17 In 2010, Thailand proposed graphic and text health warning labels on alcoholic beverages. These labels were intended to take up between 30% and 50% of the container area and would include one of six warnings, which were to be rotated every 1,000 production units (O'Brien 2013; O'Brien and Mitchell 2018). The government ultimately abandoned this proposal as a result of the challenges raised before the TBT Committee.

18 In 2013, Turkey proposed a new labeling law requiring alcoholic beverages to include pictograms related to alcohol consumption and pregnancy, alcohol consumption and driving, and underage drinking, in addition to the message "alcohol is not your friend" (Baumberg and Anderson 2008; O'Brien and Mitchell 2018). These warnings were subject to specific design requirements. This law came into force only after amendments were made to the design

(i) the content of warning messages; (ii) the graphic imagery used in the warning messages; (iii) the mandatory design requirements for labels; (iv) the mandatory rotation requirements for the labels; (v) government refusal to allow stickers or supplementary labels; and (vi) restrictions on industry marketing images and messages on the label space (Baumberg and Anderson 2008; O'Brien 2013; O'Brien and Mitchell 2018).

During the discussions, the TBT Committee determined that states could issue such regulations *provided they had a legitimate objective, such as the protection of public health, under WTO rules*. In theory, if a member frames the objective of its labeling measure in this way and *offers evidence on the prevalence and nature of alcohol-related harm, as well as the rates and patterns of consumption*, other members would likely not dispute the legitimacy of the objective, as it would be in line with international trade law—provided that the measure is demonstrated to not be discriminatory or unnecessarily trade restrictive with regard to either domestic or imported products.

However, the main focus in the discussions on alcohol labeling was on the “degree of contribution” that the labeling measures made to the achievement of the public health objective. In this regard, members repeatedly requested scientific evidence to justify the specific characteristics of the labeling proposals and offered alternative science-based views for consideration.

Furthermore, during TBT Committee meetings, it was argued that while the proposed warning labels had a “limiting effect on trade,” their level of trade restrictiveness was relatively low. A labeling requirement is generally viewed as less trade restrictive than, for example, an import ban, which is often offered as a more restrictive example.

Last, the discussions revealed that members tend to prefer less trade-restrictive alternatives that make an equivalent contribution to the public health objective and that are also reasonably available. The alternatives mentioned in the TBT Committee meeting minutes were industry self-regulatory labeling initiatives and public education or school education

rules concerning font size, style, and presentation, which resulted from the course of several TBT Committee meetings.

to convey information to the population about the health risks. However, these alternatives were noted as being insufficient to achieve the same public health objectives as the labeling regulations.

Cigarette Packaging

According to WHO, tobacco is one of the world's biggest public health threats, as it is responsible for more than eight million deaths a year (World Health Organization 2021). In response to this challenge, WHO adopted the Framework Convention on Tobacco Control in 2003 to decrease tobacco consumption and foster a range of strategies for addressing the problem. One such strategy is the adoption of strong health warnings on cigarette packaging covering at least 30%—and ideally 50%—of the package's principal surfaces.¹⁹ Following the convention's adoption, numerous countries began issuing regulations on cigarette packaging, but some faced a series of obstacles before the WTO. One particularly salient case was Australia's plain packaging law (Gruszczyński 2014), which was analyzed by two WTO bodies.

Australia

Tobacco plain packaging (WTO panel)²⁰

The data presented in this section were extracted mainly from the Tobacco Control Laws database of the nongovernmental organization Campaign for Tobacco-Free Kids (n.d.-b). In 2013, Honduras, Indonesia, Cuba, and the Dominican Republic argued

19 Studies have shown that this measure can convince smokers to protect non-smokers indoors, encourage compliance with legislation on smoke-free environments, and encourage more people to quit using tobacco. Thus, pictorial warnings greatly increase people's awareness of the harms of smoking.

20 In 2012, Australia introduced the tobacco plain packaging law to help reduce smoking rates and improve public health. This regulation restricts the colors, size, and format of cigarette packaging and sets rules regarding the use of logos and brand and variant names on packs. It also increased the size of the health warnings placed on the front of cigarette packages, requiring them to cover 75% of the front surface.

that Australia's plain packaging law violated articles 16.1 and 20 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) by failing to provide protections for trademark rights, thereby constituting an unjustifiable burden on the use of tobacco trademarks. Further, they argued that the law violated article 2.2 of the Agreement on Technical Barriers to Trade (TBT Agreement) by restricting commerce more than necessary to achieve a legitimate objective.

In this dispute, the WTO panel adopted a report rejecting all of the grounds of the complaint, holding that there was ample evidence to show that plain packaging measures contribute to reduced tobacco use (WTO Panel 2018). It concluded that Australia's plain packaging measures aim to enhance public health by reducing the use of and exposure to tobacco. The panel reaffirmed states' right to regulate public health and noted that public policymaking does not interfere with trademark protection under international economic law.

Tobacco plain packaging final ruling (Appellate Body)

The Appellate Body held that Australia's tobacco plain packaging law was fully compatible with WTO regulations and standards. In particular, it confirmed that the tobacco control measures "are apt to, and do in fact, contribute to Australia's objective of reducing the use of, and exposure to, tobacco products" (WTO Appellate Body 2020).

Both WTO bodies affirmed three key concepts regarding the development of public health policies, particularly in the context of tobacco packaging regulations: (i) tobacco plain packaging does not impose more trade restrictions than necessary to achieve its valid public health objective; (ii) TRIPS does not grant trademark owners an affirmative right to use their trademark but rather provides them with the right to prevent others from using their marks; and (iii) tobacco plain packaging represents a justified restriction on the use of trademarks and does not infringe on trademark protections.

The Political Declaration on the Prevention and Control of Non-Communicable Diseases, adopted by the United Nations General Assembly in 2011, recognizes the global burden and threat of NCDs, as discussed in the first section of this chapter. In light of this recognition, many countries have adopted nutrition labeling measures, and most have had to justify these regulations under international economic law.

Regulatory discussions in the TBT Committee²¹ concerning Thailand (2010),²² Chile (2013),²³ and Indonesia (2013)²⁴

Nutrition labeling for public health purposes has been discussed repeatedly in the TBT Committee. These discussions have emerged under the premise that public health regulations requiring nutrition labeling are a legitimate policy objective as

21 The data presented in this section were extracted mainly from Thow et al. (2017).

22 In 2006, Thailand proposed a mandatory front-of-package warning label with the statement “children should take less,” along with a traffic light presentation of nutritional information for five categories of snacks commonly eaten by children. Implementation was postponed in 2008, and in 2013, the government implemented an alternative measure requiring a warning label with the statement “consume in small amounts and exercise for a healthy condition” and guideline daily amounts for certain categories of processed foods. Following this, no further concerns were raised in the TBT Committee (Thow et al. 2017, 565).

23 In 2013, Chile introduced a regulation mandating the inclusion of enhanced nutrition information to combat obesity and NCDs. The regulation, which applied to specific categories of processed foods, required the display of a label in the shape of an octagon covering 20% of the packaging. In 2014, this requirement was updated to a hexagonal label for foods surpassing thresholds for saturated fats, sodium, sugars, or calories. The regulation was developed on the basis of a participatory process and was grounded in health data highlighting the escalating rates of childhood obesity and associated NCDs (Thow et al. 2017, 565).

24 In 2013, Indonesia proposed a labeling measure that would require processed food packaging to display health warnings. The warning labels were designed to detail the salt, sugar, and fat content of products. This measure faced opposition from some WTO members and was rooted in Indonesia’s Balance Nutrition Guidelines and WHO recommendations, along with data from a 2014 nutrition survey (Thow et al. 2017, 565).

long as there is no discrimination between domestic and imported goods. However, such measures have prompted concerns in four areas: (i) their trade restrictiveness; (ii) the existence of scientific evidence on the effectiveness of the measures in achieving the stated public health objective; (iii) compliance with international standards; and (iv) the amount of time given to other members to present comments (Boza Martínez et al. 2019; Lai and Becher 2020; Rimpeekool et al. 2015).

Some members suggested that the proposed measures threatened to restrict trade more than necessary by imposing unnecessary burdens on producers, exporters, and consumers. In particular, their concerns centered on two practical questions: first, the possibility of allowing stickers as a strategy to facilitate compliance and make the measures less trade restrictive; and second, the burden of having to label a wide range of foods, as was the case in Chile. In this regard, the TBT Agreement recognizes members' right to provide the level of public health protection that they deem appropriate when pursuing legitimate objectives. This means that there must be a degree of proportionality between the restrictiveness of a measure and the risk it seeks to mitigate (Boza Martínez et al. 2019; Lai and Becher 2020; Rimpeekool et al. 2015).

Second, concerning the effectiveness of the measures, members requested evidence demonstrating that the regulations were necessary in order to achieve the public policy objective of improving the population's diet and preventing NCDs. In particular, they questioned why Chile's proposed regulation did not apply to meals sold in fast food restaurants or to products such as hot dogs, hamburgers, cheese, and chocolate. They also argued that the use of warning labels, "stop sign" symbols, and phrases such as "high in" could lead to fear among consumers or cause confusion regarding the foods that must carry labels disclosing high levels of nutrients associated with the risk of NCDs (Boza Martínez et al. 2019; Lai and Becher 2020; Rimpeekool et al. 2015). In the case of Chile—after several discussions and objections from members such as the US, Australia, Switzerland, Canada, Argentina, and the EU, among others—the size of the stop sign label was reduced to 4%–7% of the package surface (Barlow et al. 2018).

Third, with regard to compliance with international standards, some members suggested that if there was a less trade-restrictive alternative that could make an equivalent contribution to the policy objective and was reasonably available, this would be preferable from the standpoint of international economic law. Specific alternatives that were offered included the voluntary approaches adopted in Australia and Switzerland. Some members also proposed using the Codex Alimentarius guidelines as a basis for labeling regulations or carrying out educational campaigns as possible alternatives, in order to avoid a clash between regulatory measures and international standards. Based on these points, the TBT Committee concluded that one of the main concerns regarding the restriction of trade was the mandatory nature of the measures (Boza Martínez et al. 2019; Lai and Becher 2020; Rimpeekool et al. 2015). In this regard, to maximize compliance with the TBT Agreement, there must be a clear link between existing scientific evidence, the design of the measure, and the legitimate public health objective being sought (Lai and Becher 2020).

Finally, some members raised concerns regarding the lack of formal notification of the proposed measures, the amount of time that was given to other members to submit comments, and the relatively short deadlines for industry compliance. Even in the cases where the deadlines for implementation were more generous than those stipulated by article 2.9 of the TBT Agreement (Chile, for example, gave a one-year deadline), these members argued that this was insufficient compared to the time given for other labeling interventions, such as the voluntary system adopted in the EU (which included a three-year deadline) (Boza Martínez et al. 2019; Lai and Becher 2020; Rimpeekool et al. 2015).

Regional Economic Law: European Union

In the course of our research for this section, we utilized the Campaign for Tobacco-Free Kids database to identify relevant cases (Campaign for Tobacco-Free Kids n.d.-b). This section delves into a series of cases that occurred within the context of the EU's trade agreements, providing insight into the standards

developed to support public health policies regarding the labeling of food, alcohol, and tobacco. We focus in particular on the application of the principle of proportionality by the CJEU and the precautionary principle by the EFTA Court.

*Court of Justice of the European Union*²⁵

R (on the Application of) Philip Morris Brands SARL et al. v. Secretary of State for Health (UK)

In 2014, the EU issued the Tobacco Products Directive (TPD).²⁶ Philip Morris and British American Tobacco then took legal action against the UK, objecting to the government's planned implementation of TPD requirements in its domestic legislation. The tobacco companies contended that certain parts of the TPD were invalid because they were not in line with EU treaties, lacked proportionality or evidential support, were not adequately harmonizing in nature, and breached the principle of subsidiarity (Campaign for Tobacco-Free Kids n.d.-a).

In response to this challenge, a UK court referred the case to the CJEU. However, the CJEU upheld all aspects of the TPD, including the provisions mandating illustrated warning labels and additional packaging restrictions such as plain packaging. It also asserted that the EU has the authority to prevent barriers to trade in tobacco products while ensuring a high level of public health protection. Consequently, the CJEU determined that the UK's packaging and labeling requirements were proportionate and did not exceed what was necessary, dismissing the objections raised (Campaign for Tobacco-Free Kids n.d.-a).

25 The Court of Justice of the European Union aims to ensure that EU law is interpreted and applied equally in all member countries and to ensure that member countries and European institutions comply with EU law.

26 The TPD sets out rules for the manufacture, presentation, and sale of tobacco and related products. In particular, it requires the tobacco industry to inform EU countries of the ingredients used in tobacco products and to display health warnings on the packaging of tobacco and related products. The combined warnings (including images, text, and information on how to quit smoking) must cover 65% of the front and back of packages (Directive 2014/40/EU).

Pillbox 38 (UK) Ltd. v. Secretary of State for Health (UK)

Pillbox 38 (UK) Ltd., an e-cigarette manufacturer, filed a judicial review against the UK government challenging its intention to implement the TPD in its domestic legislation. In reviewing the claim, the CJEU found the TPD to be valid and upheld all of the requirements regarding e-cigarettes, including health warnings, the prohibition of most e-cigarette advertising, the requirement to notify the government before rolling out a new product, and the requirement to include a leaflet in the product with information such as an ingredients list.

According to the court, it was permissible to regulate e-cigarettes differently from other tobacco products, in part because e-cigarettes were novel products and because there was insufficient information about their health effects. Regardless, the identified and potential risks linked to the use of e-cigarettes meant that the EU could act in accordance with the precautionary principle in public health. Indeed, because of the insufficiency or imprecision of the results of studies conducted, there is uncertainty regarding the existence or extent of the alleged risk of smoking e-cigarettes. However, there remains a likelihood of real harm to public health should the risk materialize. Therefore, the precautionary principle justifies the adoption of restrictive measures.

*Neptune Distribution SNC v. Minister for Economic Affairs and Finance (France)*²⁷

In this case, the French Council of State asked the CJEU whether the country's labeling provisions on mineral waters complied with the rights enshrined in article 11(1) (freedom of expression and information) and article 16 (freedom to conduct business) of the Charter of Fundamental Rights of the European Union, as well as article 10 (freedom of expression) of the European Convention on Human Rights. The court acknowledged that

²⁷ In a resolution issued on February 5, 2009, the government of France ordered Neptune Distribution to remove any statement from its labels or advertising that misled consumers into believing that the company's mineral waters were low or very low in salt or sodium.

France's prohibition constituted an interference with companies' freedom of expression and information, as well as their freedom to conduct business. However, it determined that guaranteeing consumers the most accurate and transparent information possible about product characteristics was closely linked to the protection of human health. Therefore, the general interest justified these restrictions on the freedom of expression and information and the freedom to conduct business.

In this light, the court dismissed the arguments of the mineral water company Neptune Distribution. It also noted that all risks associated with human health should be guided by the precautionary principle, according to which protective and restrictive measures may be adopted as long as there is uncertainty about the existence or extent of risks to human health.

*European Free Trade Association Court*²⁸

Philip Morris Norway AS v. The Norwegian State

Philip Morris Norway, an importer of tobacco products, sued Norway in the Oslo District Court, claiming that the country's ban on tobacco advertising—which included a ban on visual displays in retail outlets—was incompatible with the European Economic Area (EEA) Agreement.²⁹ In this case, the district court requested preliminary rulings from the EFTA Court, which determined that if the prohibition affected tobacco products manufactured in Norway as much as those imported from other EEA states, the ban would be compatible with the EEA Agreement. Furthermore, it noted that the import restrictions were prohibited unless they were justified on public health grounds and were not arbitrary or discriminatory. Therefore, it was up to the national authorities to demonstrate that their rules were necessary to achieve the stated objective and that

28 The EFTA Court was established in 1994 and has been based in Luxembourg since 1996. It monitors compliance with EEA rules and is composed of three judges (one for each member state).

29 The EEA was created in 1994 to extend the EU's provisions on its internal market to members of the European Free Trade Association (EFTA). EFTA member states Norway, Iceland, and Liechtenstein are members of the EEA.

this result could not be attained with less restrictive means or through prohibitions or restrictions with a lesser effect on trade within the EEA. Thus, a visual display ban, whose objective was to reduce tobacco use among the public in general and young people in particular, was suitable and necessary for public health reasons, as provided by article 13 of the EEA Agreement.

*Pedidel AS v. The Norwegian Directorate
for Health and Social Affairs*

The government of Norway consulted the EFTA Court to determine whether the country's general ban on alcohol advertising, as set out in article 9-2 of the Alcohol Act, was covered by article 11 or article 36 of the EEA Agreement. It also sought to find out whether its ban was justified on public health grounds, in conformity with the proportionality principle enshrined in article 13 of the EEA Agreement.

According to the court, Norway had to demonstrate that the measures adopted were appropriate for achieving the stated objective and that less trade-restrictive alternatives would not be as effective in meeting that objective. The court held that Norway's policy on alcohol and its ban on alcohol advertising were motivated by social and health considerations. In this regard, the ban did not constitute a means of arbitrary discrimination or a disguised restriction on trade between EEA member states. It also held that the precautionary principle did not apply in this case, since the effects of excessive alcohol consumption on human health are not uncertain.

Finally, the court recalled that the health and life of humans are the most important factors among the property and interests protected by article 13 of the EEA Agreement. Thus, the court held, the contracting parties could determine the degree of protection they wished to afford to public health and the way in which they wished to achieve that protection. That said, they may do so only within the limits set by the EEA Agreement, particularly as it relates to the principle of proportionality.

Parameters under International Economic Law That Apply to the Adoption of Front-of-Package Warning Labels

As trade agreements have grown, greater attention has begun to be paid to two major issues: first, the scope of trade and investment liberalization agreements and their influence on domestic regulatory and policy frameworks, and second, trade in commodities that are harmful to health, particularly tobacco, alcohol, and ultra-processed foods and the ingredients used to make them.

The analysis in this chapter highlights the ongoing concern regarding the potential challenges faced by governments wishing to adopt or implement various regulatory and public policy measures related to tobacco, alcohol, and ultra-processed foods within the framework of international trade law. At the same time, the degree of “regulatory autonomy” retained by governments vis-à-vis the global trade regime has been the subject of debate in the past decade. According to a study by Barlow et al. (2018), between 1995 and 2016, ninety-three food, beverage, and tobacco regulations were challenged at the WTO; of these, 41.9% centered on labeling rules. Further, 16.4% of the challenges related to “unnecessary” barriers to trade, and just 1.1% were not resolved and escalated to a trade dispute (ibid.).

These issues, as demonstrated above, are not inconsequential, as states must protect public health and fulfill their human rights obligations, in addition to addressing the potential impact on international trade that domestic regulations might have. Thus, when deciding whether to apply regulatory measures aimed at preventing NCDs, states must consider, among other factors, compliance with trade-related obligations and their progressive development.

One method for approaching this decision whether to pursue a regulation is to analyze similar cases, as we propose in this chapter. This can shed light on the premises under international trade law that apply with regard a domestic regulation that seeks to address a public health problem. In this regard, we propose six parameters that we believe can help reconcile the tensions that have been highlighted throughout this chapter:

1. Within the framework of their WTO commitments, countries can adopt measures that restrict international trade, provided that the measures are necessary to achieve a legitimate objective or public interest. Among these measures are those that promote public health.
2. States are free to determine the degree of protection that they wish to offer to their citizens, without this necessarily constituting a violation of international trade rules.
3. Measures must be based on the best available scientific evidence, and it is necessary to ensure that trade-restrictive regulations are proportionate to the stated public policy objective. If a state does not have scientific evidence, it should seek another measure that is proportionate to the public health objective pursued and does not impose unnecessary burdens on importers and exporters. Among the measures that have been raised during the discussions analyzed in this chapter are education and self-regulation. Nonetheless, it is important to emphasize that these measures are less than ideal for complying with public health objectives, as the best available scientific evidence, mentioned at the beginning of this chapter, shows disparate impacts between the two types of models.

Under the EU's regional trade agreements, when the best scientific evidence on the effects of consuming a certain product is unavailable, states may apply the precautionary principle when adopting regulatory measures. According to this principle, in cases where the insufficiency or imprecision of study results makes it impossible to determine with certainty the existence or extent of a risk—but where there remains a likelihood of real harm to public health should the risk materialize—the adoption of trade-restrictive measures concerning that product is justified.

4. These measures must be applied equally to domestic and imported goods, as there is no room for differentiation between products.³⁰

30 Cargill, Incorporated v. United Mexican States; Corn Products International, Inc. v. United Mexican States; Archer Daniels

5. Trademark holders do not enjoy an absolute right of use, free from regulation. Rather, they have an exclusive right, understood as the capacity to prevent third parties from using the trademark. Regardless, this right is subject to the regulatory power of the state³¹ and public interests.
6. It is important for states, within the framework of their international trade obligations, to adhere to the principle of transparency and to notify other states as soon as possible of any new regulations on product labeling, so that these states can prepare comments and so that any concerns can be addressed.

Conclusion

Measures to combat obesity, overweight, and chronic NCDs are increasingly at the center of tensions between trade agreements and public health. Consistency between trade policies and health policies at the national level is critical for effective regulation. To this end, countries must adopt strategies that address the harmful effects of consuming foods high in fats, sodium, or sugars. At the same time, they must address arguments that arise from the occasional conflicts between the protection of public health, on the one hand, and trade and investment agreements, on the other.

Self-regulation, as explored in the first section of this chapter, is a form of circumscribing the regulatory space enjoyed by states—a way for the industry to impose its own rules of the game and to sidestep guarantees of compliance. Indeed, analyses of the two models of front-of-package labeling—voluntary and mandatory—show that self-regulation is not the most suitable mechanism for achieving public health objectives as they relate to NCDs. Both scientific evidence and international standards demonstrate that state-mandated labeling models ensure higher levels of industry compliance and clearer standards.

Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States.

31 Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay.

In the same vein, mandatory labeling schemes do not compromise states' commitments under international trade law, since these models are permitted as long as they seek to achieve a legitimate objective, such as public health. We believe that states have significant policy space to ensure a high level of public health protection in the development and implementation of their domestic policies and to thus comply with their obligations regarding the right to health and related rights, provided that they comply with key principles of international economic law.

Finally, it is vital to protect states' regulatory space, which has been clarified and shaped by various decisions made in international economic settings, some of which we have analyzed in this chapter. In order to preserve this regulatory space, states should make an effort to adhere to the six parameters outlined in this chapter so that there is no question about the legitimacy of public health measures that are proportionate in their trade restrictiveness, as in the case of nutrition labeling.

References

- Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador). November 17, 1988.
- Ares, G., F. Varela, L. Machin, L. Antúnez, A. Giménez, M. R. Curutchet, and J. Aschemann-Witzel. 2018. "Comparative Performance of Three Interpretative Front-of-Pack Nutrition Labelling Schemes: Insights for Policy Making." *Food Quality and Preference* 68: 215–225.
- Arrúa, A., L. Machín, M. R. Curutchet, J. Martínez, L. Antúnez, F. Alcaire, A. Giménez, and G. Ares. 2017. "Warnings as a Directive Front-of-Pack Nutrition Labelling Scheme: Comparison with the Guideline Daily Amount and Traffic-Light Systems." *Public Health Nutrition* 20(13): 2308–2317.
- Barlow, P., R. Labonte, M. McKee, and D. Stuckler. 2018. "Trade Challenges at the World Trade Organization to National Noncommunicable Disease Prevention Policies: A Thematic Document Analysis of Trade and Health Policy Space." *PLOS Medicine* 15(6).

Baumberg, B. and P. Anderson. 2008. "Trade and Health: How World Trade Organization (WTO) Law Affects Alcohol and Public Health." *Addiction* 103(12): 1952–1958.

Becher, S., H. Gao, A. Harrison, and J. C. Lai. 2019. "Hungry for Change: The Law and Policy of Food Health Labeling." *Wake Forest Law Review* 54: 1305–1360.

Boza Martínez, S., R. Polanco Lazo, and M. Espinoza. 2019. "Nutritional Regulation and International Trade in APEC Economies: The New Chilean Food Labeling Law." *Asian Journal of WTO and International Health Law and Policy* 14(1): 73–113.

Buse, K., S. Tanaka, and S. Hawkes. 2017. "Healthy People and Healthy Profits? Elaborating a Conceptual Framework for Governing the Commercial Determinants of Non-Communicable Diseases and Identifying Options for Reducing Risk Exposure." *Globalization and Health* 13(1).

Campaign for Tobacco-Free Kids. n.d.-a. "R (on the Application of) Philip Morris Brands SARL et al. v. Secretary of State for Health." <https://www.tobaccocontrollaws.org/litigation/decisions/r-on-the-application-of-philip-morris-brands-sarl-et-al-v-secretary-of-state-for-health>

———. n.d.-b. "Tobacco Control Laws." <https://www.tobaccocontrollaws.org>

Canella, D. S., R. B. Levy, A. P. B. Martins, R. M. Claro, J.-C. Moubarac, L. G. Baraldi, G. Cannon, and C. A. Monteiro. 2014. "Ultra-Processed Food Products and Obesity in Brazilian Households (2008–2009)." *PLOS One* 9(3).

Clark, H., A. Coll-Seck, A. Banerjee, S. Peterson, S. DalGLISH, S. Ameratunga, D. Balabanova, et al. 2020. "A Future for the World's Children? A WHO-UNICEF-Lancet Commission." *Lancet* 395(10224): 605–58.

Colmar Brunton. 2018. *2018 Health Star Rating Monitoring and Evaluation Year 2 Follow-Up Research Report*. Wellington: Health Promotion Agency.

Committee on Economic, Social and Cultural Rights. 1999. *General Comment No. 12: The Right to Adequate Food*. UN Doc. E/C.12/1999/5.

———. 2000. *General Comment No. 14: The Right to the Highest Attainable Standard of Health*. UN Doc. E/C.12/2000/4.

———. 2017. *General Comment No. 24: State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities*. UN Doc. E/C.12/GC/24.

———. 2020. *General Comment No. 25: Science and Economic, Social and Cultural Rights*. UN Doc. E/C.12/GC/25.

Committee on the Rights of the Child. 2003. *General Comment No. 5: General Measures of Implementation of the Convention on the Rights of the Child*. UN Doc. CRC/GC/2003/5.

———. 2013a. *General Comment No. 15: The Right of the Child to the Enjoyment of the Highest Attainable Standard of Health*. UN Doc. CRC/C/GC/15.

———. 2013b. *General Comment No. 16: State Obligations regarding the Impact of the Business Sector on Children's Rights*. UN Doc. CRC/C/GC/16.

Convention on the Rights of the Child. November 20, 1989.

Corvalán, C., M. Reyes, M. L. Garmendia, and R. Uauy. 2019. "Structural Responses to the Obesity and Non-Communicable Diseases Epidemic: Update on the Chilean Law of Food Labelling and Advertising." *Obesity Reviews* 20(3): 367–374.

Crosbie, E., F. S. Gomes, J. Olvera, S. R. G. Patiño, S. Hoeper, and A. Carriedo. 2023. "A Policy Study on Front-of-Pack Nutrition Labeling in the Americas: Emerging Developments and Outcomes." *Lancet Regional Health—Americas* 18.

Decreto 13/2015 [Ministerio de Salud]. Modifica el Decreto Supremo 977/1996. Reglamento Sanitario de los Alimentos. April 16, 2015 (Chile). <http://www.wipo.int/edocs/lexdocs/laws/es/cl/cl074es.pdf>

Decreto Interno 001-3/13061/2017 [Ministerio de Salud Pública]. Rotulado frontal de alimentos envasados. August 29, 2018 (Uruguay). https://medios.presidencia.gub.uy/legal/2018/decretos/08/cons_min_705.pdf

De Onis, M., and T. Lobstein. 2010. "Determining Obesity Risk Status in the General Childhood Population: Using Standard Recommendations." *International Journal of Pediatric Obesity* 5(6): 458–460.

Directive 2014/40/EU [European Parliament and Council]. Approximation of the Laws, Regulations

and Administrative Provisions of the Member States concerning the Manufacture, Presentation and Sale of Tobacco and Related Products and Repealing Directive 2001/37/EC (Text with EEA Relevance). April 29, 2014.

Dorfman, L., A. Cheyne, L. C. Friedman, A. Wadud, and M. Gottlieb. 2012. "Soda and Tobacco Industry Corporate Social Responsibility Campaigns: How Do They Compare?" *PLOS Medicine* 9(6).

Elver, H. 2016. *Interim Report of the Special Rapporteur on the Right to Food*. UN Doc. A/71/282.

Evensen, E., T. Wilsgaard, A. S. Furberg, and G. Skeie. 2016. "Tracking of Overweight and Obesity from Early Childhood to Adolescence in a Population-Based Cohort: The Tromsø Study, Fit Futures." *BMC Pediatrics* 16(1): 1–11.

Freudenberg, N. 2014. *Lethal but Legal: Corporations, Consumption, and Protecting Public Health*. New York: Oxford University Press.

Grover, A. 2014. *Unhealthy Foods, Non-communicable Diseases and the Right to Health*. UN Doc. A/HRC/26/31.

Grunert, K. G., and J. M. Wills. 2007. "A Review of European Research on Consumer Response to Nutrition Information on Food Labels." *Journal of Public Health* 15(5): 385–399.

Gruszczynski, L. 2014. "Australian Plain Packaging Law, International Litigations and Regulatory Chilling Effect." *European Journal of Risk Regulation* 5(2): 242–247.

Guarnizo, D., and A. M. Narváez. 2019. *Etiquetas sin derechos: Etiquetado de productos comestibles; Un análisis desde los derechos humanos*. Bogotá: Dejusticia.

Hamlin, R., and B. Hamlin. 2020. "An Experimental Comparison of the Impact of 'Warning' and 'Health Star Rating' FoP Labels on Adolescents' Choice of Breakfast Cereals in New Zealand." *Nutrients* 12(6).

Hamlin, R., and L. McNeill. 2018. "The Impact of the Australasian 'Health Star Rating', Front-of-Pack Nutritional Label, on Consumer Choice: A Longitudinal Study." *Nutrients* 10(7).

Huang, C., J. Huang, Y. Tian, X. Yang, and D. Gu. 2014. "Sugar Sweetened Beverages Consumption and Risk of Coronary Heart Disease: A Meta-Analysis of Prospective Studies." *Atherosclerosis* 234(1): 11–16.

- International Covenant on Civil and Political Rights. December 16, 1966.
- International Covenant on Economic, Social and Cultural Rights. December 16, 1966.
- Janardhan, S. 2021. "Harnessing Trade and Investment Agreements to Promote Public Health." *Drug and Alcohol Review* 40(1): 41–49.
- Jones, A., A. M. Thow, C. Ni Mhurchu, G. Sacks, and B. Neal. 2019. "The Performance and Potential of the Australasian Health Star Rating System: A Four-Year Review Using the RE-AIM Framework." *Australian and New Zealand Journal of Public Health* 43(4): 355–365.
- Kanter, R., L. Vanderlee, and S. Vandevijvere. 2018. "Front-of-Package Nutrition Labelling Policy: Global Progress and Future Directions." *Public Health Nutrition* 21(8): 1399–1408.
- Kasper, N. M., O. F. Herrán, and E. Villamor. 2013. "Obesity Prevalence in Colombian Adults Is Increasing Fastest in Lower Socio-Economic Status Groups and Urban Residents: Results from Two Nationally Representative Surveys." *Public Health Nutrition* 17(11): 2398–2406.
- Khandpur, N., B. Swinburn, and C. A. Monteiro. 2018. "Nutrient-Based Warning Labels May Help in the Pursuit of Healthy Diets." *Obesity* 26(11): 1670–1671.
- Koivusalo, M. 2014. "Policy Space for Health and Trade and Investment Agreements." *Health Promotion International* 29(suppl 1): i29–i47.
- Koplan, J. P., T. C. Bond, M. H. Merson, K. S. Reddy, M. H. Rodriguez, N. K. Sewankambo, and J. N. Wasserheit. 2009. "Towards a Common Definition of Global Health." *Lancet* 373(9679): 1993–1995.
- Lai, J. C., and S. I. Becher. 2020. "Front-of-Pack Labelling and International Trade Law: Revisiting the Health Star Rating System." *Melbourne Journal of International Law* 21(2).
- Landman, A., P. M. Ling, and S. A. Glantz. 2002. "Tobacco Industry Youth Smoking Prevention Programs: Protecting the Industry and Hurting Tobacco Control." *American Journal of Public Health* 92(6): 917–930.
- Ling, P. M., A. Landman, and S. A. Glantz. 2002. "It Is Time to Abandon Youth Access Tobacco Programmes." *Tobacco Control* 11(1): 3–6.

Lobstein, T. 2006. "Commentary: Obesity—Public Health Crisis, Moral Panic or a Human Rights Issue?" *International Journal of Epidemiology* 35(1): 74–76.

Machín, L., J. Aschemann-Witzel, M. R. Curutchet, A. Giménez, and G. Ares. 2018. "Does Front-of-Pack Nutrition Information Improve Consumer Ability to Make Healthful Choices? Performance of Warnings and the Traffic Light System in a Simulated Shopping Experiment." *Appetite* 121: 55–62.

Malik, V. S., A. Pan, W. C. Willett, and F. B. Hu. 2013. "Sugar-Sweetened Beverages and Weight Gain in Children and Adults: A Systematic Review and Meta-Analysis." *American Journal of Clinical Nutrition* 98(4): 1084–1102.

Mansfield, E., R. Wahba, and E. De Grandpré. 2020. "Integrating a Health Literacy Lens into Nutrition Labelling Policy in Canada." *International Journal of Environmental Research and Public Health* 17(11).

Ministerio de Salud (Chile). 2018. *Informe de evaluación de la implementación de la Ley sobre Composición Nutricional de los Alimentos y su Publicidad*. <https://www.minsal.cl/wp-content/uploads/2018/05/Informe-Implementaci%C3%B3n-Ley-20606-febrero-18-1.pdf>

Moehlecke, C. 2019. "The Chilling Effect of International Investment Disputes: Limited Challenges to State Sovereignty." *International Studies Quarterly* 64(1): 1–12.

Moodie, R., D. Stuckler, C. Monteiro, N. Sheron, B. Neal, T. Thamarangsi, P. Lincoln, and S. Casswell. 2013. "Profits and Pandemics: Prevention of Harmful Effects of Tobacco, Alcohol, and Ultra-Processed Food and Drink Industries." *Lancet* 381(9867): 670–679.

Mpconsulting. 2019. *Health Star Rating System: Five Year Review Report*. [http://www.healthstarrating.gov.au/internet/healthstarrating/publishing.nsf/Content/D1562AA78A574853CA2581BD00828751/\\$File/Health-Star-Rating-System-Five-Year-Review-Report.pdf](http://www.healthstarrating.gov.au/internet/healthstarrating/publishing.nsf/Content/D1562AA78A574853CA2581BD00828751/$File/Health-Star-Rating-System-Five-Year-Review-Report.pdf)

National Heart Foundation of Australia. 2017. *Report on the Monitoring of the Implementation of the Health Star Rating System in the First Four Years of Implementation: June 2014 to June 2018*. Melbourne: National Heart Foundation of Australia.

NDC Risk Factor Collaboration. 2017. "Worldwide Trends in Body-Mass Index, Underweight, Overweight, and Obesity from 1975 to 2016: A Pooled Analysis of 2416 Population-Based Measurement Studies in 128.9 Million Children, Adolescents, and Adults." *Lancet* 390(10113): 2627–2642.

Neptune Distribution SNC v. Minister for Economic Affairs and Finance. Case C-157/14. Court of Justice of the European Union. December 17, 2015.

Nugent, R., C. Levin, J. Hale, and B. Hutchinson. 2020. "Economic Effects of the Double Burden of Malnutrition." *Lancet* 395(10218).

O'Brien, P. 2013. "Australia's Double Standard on Thailand's Alcohol Warning Labels." *Drug and Alcohol Review* 32(1): 5–10.

O'Brien, P., and A. D. Mitchell. 2018. "On the Bottle: Health Information, Alcohol Labelling and the WTO Technical Barriers to Trade Agreement." *QUT Law Review* 18(1): 124–155.

Ó Cathaoir, K. E. 2018. "Children's Right to Freedom from Obesity: Responsibilities of the Food Industry." *Nordic Journal of Human Rights* 36(2): 109–131.

Office of the United Nations High Commissioner for Human Rights. 2020. "Statement by the UN Special Rapporteur on the Right to Health on the Adoption of Front-of-Package Warning Labelling to Tackle NCDs." July 27. <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26130&LangID=E>

Pan American Health Organization. 2011. *Recommendations from a Pan American Health Organization Expert Consultation on the Marketing of Food and Non-Alcoholic Beverages to Children in the Americas*. Washington, DC: Pan American Health Organization.

———. 2014. *Plan of Action for the Prevention of Obesity in Children and Adolescents*. Washington, DC: Pan American Health Organization.

———. 2015. *Ultra-processed Food and Drink Products in Latin America: Trends, Impact on Obesity, Policy Implications*. Washington, DC: Pan American Health Organization.

———. 2016. *Pan American Health Organization Nutrient Profile Model*. Washington, DC: Pan American Health Organization.

———. 2020. *Front-of-Package Labeling as a Policy Tool for the Prevention of Noncommunicable Diseases in the Americas*. Washington, DC: Pan American Health Organization.

Pedicel AS v. The Norwegian Directorate for Health and Social Affairs. Case E-4/04. European Free Trade Association Court. April 4, 2013.

Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay. Case ARB/10/7. International Centre for Settlement of Investment Disputes. July 2, 2013.

Philip Morris Norway AS v. The Norwegian State. Case E-16/10. European Free Trade Association Court. September 12, 2011.

Pillbox 38 (UK) Ltd. v. Secretary of State for Health. Case C-477/14. European Court of Justice. May 4, 2016.

R (on the application of) Philip Morris Brands SARL et al. v. Secretary of State for Health. Case C-547/14. High Court of Justice of England and Wales. May 4, 2016.

Reyes, M., L. Smith Taillie, B. Popkin, R. Kanter, S. Vandevijvere, and C. Corvalán. 2020. "Changes in the Amount of Nutrient of Packaged Foods and Beverages after the Initial Implementation of the Chilean Law of Food Labelling and Advertising: A Nonexperimental Prospective Study." *PLOS Medicine* 17(7).

Rico-Campà, A., M. A. Martínez-González, I. Alvarez-Alvarez, R. De Deus Mendonça, C. De La Fuente-Arrillaga, C. Gómez-Donoso, and M. Bes-Rastrollo. 2019. "Association between Consumption of Ultra-processed Foods and All Cause Mortality: SUN Prospective Cohort Study." *BMJ* 365(1949).

Riley, L., H. Gouda, and M. Cowan. 2017. *Noncommunicable Diseases Progress Monitor 2017*. Geneva: World Health Organization.

Rimpeekool, W., S. Seubsman, C. Banwell, M. Kirk, V. Yiengprugsawan, and A. Sleight. 2015. "Food and Nutrition Labelling in Thailand: A Long March from Subsistence Producers to International Traders." *Food Policy* 56.

Ronit, K., and J. D. Jensen, J. D. 2014. "Obesity and Industry Self-Regulation of Food and Beverage Marketing: A Literature Review." *European Journal of Clinical Nutrition* 68(7): 753–759.

Rozo Ángel, V. 2017. *Sobrepesos y contrapesos: La autorregulación de la industria no es suficiente para proteger a los menores de edad*. Bogotá: Dejusticia.

Sharma, L. L., S. P. Teret, and K. D. Brownell. 2010. "The Food Industry and Self-Regulation: Standards to Promote Success and to Avoid Public Health Failures." *American Journal of Public Health* 100(2): 240–246.

Shelley, D., G. Ogedegbe, and B. Elbel. 2014. "Same Strategy Different Industry: Corporate Influence on Public Policy." *American Journal of Public Health* 104(4): e9–e11.

Taillie, L. S., M. G. Hall, B. M. Popkin, S. W. Ng, and N. Murukutla. 2020. "Experimental Studies of Front-of-Package Nutrient Warning Labels on Sugar-Sweetened Beverages and Ultra-Processed Foods: A Scoping Review." *Nutrients* 12(2).

Taillie, L. S., M. Reyes, M. A. Colchero, B. Popkin, and C. Corvalán. 2020. "An Evaluation of Chile's Law of Food Labeling and Advertising on Sugar-Sweetened Beverage Purchases from 2015 to 2017: A Before-and-After Study." *PLOS Medicine* 17(2).

Te Morenga, L., S. Mallard, and J. Mann. 2012. "Dietary Sugars and Body Weight: Systematic Review and Meta-analyses of Randomised Controlled Trials and Cohort Studies." *BMJ* 346: e7492–e7492.

Thow, A. M., A. Jones, C. Hawkes, I. Ali, and R. Labonté. 2017. "Nutrition Labelling Is a Trade Policy Issue: Lessons from an Analysis of Specific Trade Concerns at the World Trade Organization." *Health Promotion International* 33(4): 561–571.

Tovar Ramírez, A., B. Ríos, I. Barbosa, M. Medina Arellano, R. Gutiérrez Rivas, S. Serrano Guzmán, and O. Cabrera. 2020. *Etiquetado frontal de advertencia en productos comestibles: Materialización de obligaciones de los estados en derechos humanos*. Global Center for Legal Innovation on Food Environments, O'Neill Institute for National and Global Health Law, Georgetown University e Instituto de Investigaciones Jurídicas, Universidad Nacional Autónoma de México.

United Nations Children's Fund and Universidad de la República de Uruguay. 2020. *Efectos inmediatos de la implementación del rotulado nutricional frontal en Uruguay*. Montevideo: UNICEF Uruguay.

Universal Declaration of Human Rights. December 10, 1948.

Wakefield, M., Y. Terry-McElrath, S. Emery, H. Saffer, F. J. Chaloupka, G. Szczypka, B. Flay, P. M. O'Malley, and L. D. Johnston. 2006. "Effect of Televised, Tobacco Company-Funded Smoking Prevention Advertising on Youth Smoking-Related Beliefs, Intentions, and Behavior." *American Journal of Public Health* 96(12): 2154–2160.

Wiist, W. H. 2010. *The Bottom Line or Public Health: Tactics Corporations Use to Influence Health and Health Policy, and What We Can Do to Counter Them*. New York: Oxford University Press.

World Cancer Research Fund International. 2015. *Curbing Global Sugar Consumption: Effective Food Policy Actions to Help Promote Healthy Diets and Tackle Obesity*. London: World Cancer Research Fund International.

World Health Organization. 2010a. *Global Strategy to Reduce the Harmful Use of Alcohol*. Geneva: World Health Organization.

———. 2010b. *Set of Recommendations on the Marketing of Foods and Non-alcoholic Beverages to Children*. Geneva: World Health Organization.

———. 2016. *Obesity and Overweight: Fact Sheet*. WHO Media Centre.

———. 2021. "Tobacco." <https://www.who.int/news-room/fact-sheets/detail/tobacco>

World Trade Organization. n.d. "Dispute Settlement Body." https://www.wto.org/english/tratop_e/dispu_e/dispu_body_e.htm

World Trade Organization (WTO) Appellate Body. 2020. *Australia – Certain Measures concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*. WTO Docs. WT/DS435/AB/R, WT/DS441/AB/R.

World Trade Organization (WTO) Panel. 2018. *Australia – Certain Measures concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*. WTO Docs. WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R.

Nutrition Labeling in Latin America: An Analysis of International Trade Regulations from a Human Rights Perspective

*Maria Cecília Cury Chaddad*¹

1 Master's degree and a PhD in constitutional law from the Pontifical Catholic University of São Paulo (Brazil); consultant in public law and regulation and founder of Põe no Rótulo, a civil society movement that seeks to ensure that food labeling fulfills its function of clearly informing consumers of food products' composition and health risks so that they can make conscious and informed decisions.

Introduction

In a food environment that has not been conducive to nutritionally adequate food (Swinburn 2019), the population worldwide has suffered weight gain—even among children and adolescents—and high levels of chronic noncommunicable diseases (World Health Organization 2004). Beyond its negative impacts on people's health and the environment, poor nutrition also has direct and indirect costs for society (Müller and Sukhdev 2018; Garde and Zrilič 2020), which should be taken into account when formulating and implementing public policies.

It is well known that weight gain and chronic noncommunicable diseases are the product of a range of causes, but it is equally well known that one of their determinants is low-quality diet (Pan American Health Organization 2014). In this context, strengthening nutrition labeling requirements is a much-needed measure (Pan American Health Organization 2020).

Over the past decade, the debate on food labeling requirements has come to the fore, especially in Latin America, where regulations have been updated to improve consumers' ability to understand the information contained on the labels of packaged foods. Changes in food labeling have already been seen in Chile, Mexico, Uruguay, and Peru. And in Brazil, a new standard has granted a generous deadline for compliance by industry, so the changes will not be noticeable until after October 2022. Meanwhile, new standards in Colombia and Argentina are awaiting regulation.

Although each of these measures is unique, they all require the disclosure of high levels of nutrients of concern (as determined by the thresholds in each country's legislation) and

establish certain claims for packaged foods. Chile, Peru, and Mexico have also established restrictions on advertising aimed at children, and Argentina has similarly approved a law and accompanying regulations on the promotion of healthy eating.

Despite the importance of these food labeling measures, questions are still being raised about their legality, specifically whether they violate international trade agreements such as those of the World Trade Organization's (wto) Agreement on Technical Barriers to Trade (TBT Agreement). Many critics also claim that food labeling is already addressed by the Codex Alimentarius standards, an argument that was raised in the cases in Chile (Mialon et al. 2020) and Brazil (Mialon et al. 2021). In practice, free trade agreements have been used—wrongly, as this chapter shows—as a kind of shield against attempts to regulate policies aimed at promoting public health (Tangcharoensathien et al. 2019; Dorlach and Mertenskötter 2020).

Against this backdrop, there is a need to analyze the role of the international trade system, as well as its limits and potential, in protecting the fundamental rights of consumers, particularly their rights to health and to adequate food. This is because the fulfillment of these rights requires access to clear and accurate information on product labels so that consumers are not misled or deceived.

While it is true that the diversity of domestic food labeling standards has an impact on international trade, it is also true that health policies must take into account the specific context of each country, including the population's consumption patterns and educational levels. Therefore, a single global regulation will not always be suitable for dealing with a given health demand, nor will it suffice for every country's reality. This understanding, which supports the use of unilateral measures to address urgent issues regarding people's health and lives, is based on the state's duty to protect and promote human rights, a duty that is acknowledged in the wto framework.

In light of questions concerning the legitimacy of food labeling policies adopted in Latin America—specifically regarding their compatibility with international trade rules—it is of critical importance to evaluate the rules that are applicable to this situation. To this end, it is important to consider not only

the standards under international economic law but also those related to states' duty to promote and protect human rights. This is the objective of this chapter.

The International Framework for Interstate Cooperation

To understand the ostensible conflict between international trade rules and human rights duties, we must begin by noting the fact that many of the norms concerning interstate cooperation date back to the 1940s. During this period, in response to the atrocities of the Second World War, a number of international agreements were reached in order to prevent the recurrence of similar grave human rights violations. Agreements were thus signed to promote better cooperation among countries with regard to trade and financial relations, as well as agreements aimed at defining minimum standards of protection for individuals.

With respect to international trade, in 1947 countries signed the General Agreement on Tariffs and Trade (GATT), which, decades later, was absorbed by the Marrakesh Agreement of 1994 (the WTO Agreement) establishing the WTO.

Meanwhile, on October 24, 1945, via ratification of the United Nations Charter, states created the United Nations (UN), a body that would be tasked with improving cooperation among countries by establishing common values around human rights. This movement toward the humanization of international law and the internationalization of human rights was marked by the "expansive force of the principle of human dignity" (Piovesan 2018).

It was in this context that the UN General Assembly, via Resolution 217 A (III) of December 10, 1948, adopted the Universal Declaration of Human Rights. This declaration inaugurated the modern-day conception of human rights, bringing an "axiological foundation and evaluative unity" (Piovesan 2001) to the field of international human rights law. The declaration recognized all persons as subjects of international law, reinforcing the notion of the universality of human rights, which were seen as indivisible, interdependent, and interrelated. It also

enshrined both civil and political rights and economic, social, and cultural rights, giving them equal status and making them equally enforceable (Henkin 1990).

With regard to the rights of individuals, two important international covenants were adopted in 1966 that, together with the Universal Declaration of Human Rights, formed the International Bill of Human Rights; these covenants were the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. At the regional level, the inter-American human rights system—inaugurated by the American Convention on Human Rights of 1969—enshrined the rights to health and to nutritionally adequate food in the Protocol of San Salvador of 1988.

For the purpose of this chapter, it is worth noting that all of the aforementioned instruments, albeit with variations in wording, provide for the rights to health and to food. As a result, states have a duty to promote and protect these rights, including in international trade matters, as will be shown below. It is also important to note that the fragmentation of these treaties and the diversity of their theoretical foundations—the moral value intrinsic to human rights versus the utilitarianism typical of trade matters—present challenges when it comes to implementation, especially when there is a need to reconcile the two systems.

It is therefore unsurprising that there is a movement to enhance the coexistence of the two systems and promote coherence between them. This is the aim of two reports—one by the UN High Commissioner for Human Rights, entitled *Liberalization of Trade in Services and Human Rights* (High Commissioner for Human Rights 2002), and another by the Inter-American Commission on Human Rights' Office of the Special Rapporteur on Economic, Social, Cultural and Environmental Rights (REDESCA), entitled *Business and Human Rights: Inter-American Standards*, which was approved by the Inter-American Commission on Human Rights on November 1, 2019 (Special Rapporteurship on Economic, Social, Cultural and Environmental Rights 2019). These reports will be examined in more detail below.

This more recent movement seeking convergence between the two systems opens a window of opportunity for

compatibility and coherence between international trade rules and human rights standards. This is an issue that continues to be addressed in current WTO legislation and is the focus of the following section.

Legitimate Objectives: A Gateway to Reconciliation between International Trade and Human Rights

Although the WTO Agreement deals specifically with trade issues, it includes avenues for reconciling the international trade agenda with duties regarding the protection and promotion of human rights. The preamble to the WTO Agreement stipulates that relations in the field of trade and economics “should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand.” Further, such relations should focus on “expanding the production of and trade in goods and services, while allowing for the optimal use of the world’s resources.” This should be done “in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.”

According to article 5.1 of the agreement, the General Council “shall make appropriate arrangements for effective cooperation with other intergovernmental organizations that have responsibilities related to those of the WTO.” This rule will be one of the main themes explored here. In addition, of the entire WTO system, which consists of various agreements, the three instruments that require the most attention are the GATT, the TBT Agreement, and the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), due to their direct correlation with food trade.

The objective of the TBT Agreement is to ensure that—as a general rule—the standards, technical regulations, and conformity assessment procedures developed by WTO member states do not accord less favorable treatment for imported products than that accorded to like products of national origin and to like

products originating in any other country. Thus, the underlying premise is that technical regulations should not be drafted, adopted, or implemented with the purpose (willful intent) or effect (unintended consequence) of creating technical barriers to international trade. In this light, the use of nontransparent standards or technical regulations, those not based on international standards, or even those involving nontransparent or excessively costly conformity assessment procedures, as well as excessively rigorous inspections, is prohibited. This premise is key for correctly understanding the exceptions to the general rule when a state is faced with the need to achieve a legitimate objective.

Meanwhile, the objective of the *sps* Agreement is to protect human, animal, and plant life and health through standards, procedures, and controls for international trade in agricultural products. This agreement, following the logic of the *wto* regulatory framework, recommends the observance of international standards and prohibits the imposition of arbitrary measures that lack reasonableness and proportionality.

The *sps* Agreement also expressly mentions the application of the standards of the Codex Alimentarius Commission, a forum created in 1963 by the Food and Agriculture Organization of the United Nations and the World Health Organization. One of the aims of the Codex Alimentarius standards is to protect consumer health and ensure fair practices. In this regard, the development of definitions and requirements aimed at facilitating international food trade must be guided by the mission of protecting human health and ensuring fair practices. Although the Codex Alimentarius standards are not binding, they represent a compilation of norms agreed on by member countries and thus have great influence on regional and domestic regulatory debates.

In light of the above, we can conclude that the *wto* system has the protection of life and health (human, animal, and plant) among its objectives. Beyond seeking to define minimum parameters for enabling the international flow of goods, *wto* rules also aim to support limitations created by states to protect health and life, as well as measures designed to prevent consumers from being misled and to prevent diseases.

This is the scenario that underpins the possibility of the WTO system being open to the imposition of rules other than those established internationally, particularly when a country identifies the need to address an exceptional domestic concern, a circumstance that the GATT refers to as a “legitimate objective.” Article XX of the GATT, as well as article 2.2 of the TBT Agreement, guarantees the possibility of states adopting unilateral measures to meet legitimate objectives. These measures, as identified in the text of the provision, include the prevention of deceptive practices and the protection of human health or safety, animal or plant life or health, and the environment. Therein lies the window for the WTO system to accommodate human rights claims.

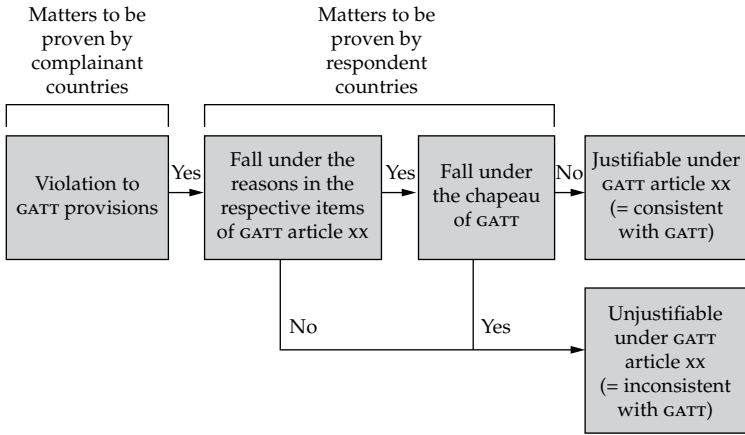
In practice, determining the existence of a legitimate objective—for the purpose of confirming a measure’s compatibility with the provisions of article XX, requires casuistry, or case-based reasoning. While there is openness to the possibility of identifying legitimate objectives, doing so cannot be random or generic; the justification of a measure that has not been agreed on by member states must be concretely demonstrated by the country in question.

Determining whether a specific measure qualifies as an exception requires conducting a two-tiered test, as outlined in the diagram prepared by Japan’s Ministry of Economy, Trade and Industry featured in figure 1.

A measure’s justification is dependent on the state’s ability to prove (i) that there is a link between the measure being adopted and the stated policy objective; (ii) that the measure is technically and scientifically sound; and (iii) that the measure is proportional—in other words, that it is neither more rigorous nor milder than necessary to achieve the objective being sought (Prazeres 2003; Chaddad 2014).

Moreover, analysis of the criterion of proportionality requires checking three elements: (i) how much the measure contributes to the stated policy objective; (ii) the relevance of the common interests or values to be protected; and (iii) what impact the regulation will have on imports or exports (Tamiotti 2007).

FIGURE I
Two-tiered test (theoretical frame for interpreting GATT article XX)



Source: Ministry of Economy, Trade and Industry (2016)

Lastly, the test requires checking whether (i) there is arbitrary and unjustifiable discrimination between countries or (ii) there is a disguised restriction on international trade. If the answer to either of these questions is affirmative, the measure is deemed invalid according to the *chapeau* of article xx of the GATT.

Having reviewed these theoretical considerations for evaluating a unilateral measure’s compatibility with the general exceptions outlined in the GATT, it is now important to look at specific cases disputed in the WTO. In particular, I will look at cases involving countries’ adoption of policies seeking to promote legitimate objectives, such as the protection of public health.

Disputes in the WTO

This section focuses on cases related to article xx(b) of the GATT. In particular, it looks at discussions involving state claims that a particular regulation is intended to meet the need to promote people’s health and lives. My research is based largely on the consolidated case law of the WTO Appellate Body—namely, an analytical index available on the WTO’s website (World Trade Organization 2021b) and the WTO publication *WTO Dispute Settlement: One-Page Case Summaries 1995–2020* (World Trade

Organization 2021a). The first of these resources highlights the emblematic cases that have shaped the wto's understanding of the scope and limits of article xx—for example, *US–Gasoline* (ds2), *US–Shrimp* (ds58), *EC–Asbestos* (DE 135), and *Brazil–Retreaded Tires* (ds332).

The first two cases illustrate the nature and purpose of the *chapeau* of article xx. *US–Gasoline* (ds2) involves the identification of disguised—and thus unjustified—protectionism. In 1995, Brazil and Venezuela questioned the us policy of restricting gasoline imports under the pretext of protecting the environment. In its evaluation of this case, the wto Appellate Body found that although the measure was justified in its aim of conserving exhaustible natural resources, the parameters adopted were arbitrary because they included different requirements for domestic and imported products; the measure was thus a case of unjustified discrimination. Similarly, in *US–Shrimp* (ds58), India, Malaysia, Pakistan, and Thailand filed a challenge in 1997 to the us's certification requirement for imported shrimp. While the Appellate Body recognized the us's intention to protect exhaustible resources, it determined that the justification failed to meet the requirements of the *chapeau* of article xx of the GATT. These two cases illustrate an important procedural approach embraced by the wto in evaluating whether measures fall within the exceptions allowed by wto rules.

This approach involves two stages: first, an assessment of whether the measure falls under one of the legitimate objectives outlined in article xx, and second, an evaluation of whether the measure falls under the *chapeau* of article xx. One good example of this sequence is *Brazil–Retreaded Tires* (ds332) from 2005, in which the European Union questioned Brazil's import ban on retreaded tires. In its defense, Brazil argued that (i) the ban would prevent risks to health, life, and the environment; (ii) the measure was appropriate with regard to the public policy being pursued; (iii) the measure was necessary to achieve that objective in the absence of reasonably available alternatives; and (iv) it did not constitute arbitrary discrimination or a disguised restriction on international trade. The wto Appellate Body held, in 2006, that the measure was necessary and that there were no reasonably available alternatives to the ban (art. xx(b)). At the

same time, the Appellate Body found that the importation of tires from other Southern Common Market (Mercosur) countries and from countries with court injunctions in their favor constituted arbitrary and unjustifiable trade discrimination, prohibited by the *chapeau* of article xx.² This case, as noted by the Appellate Body, illustrated the tensions that can exist between international trade, on the one hand, and public health and environmental concerns, on the other.

An opposite finding was issued in *EC–Asbestos* (DS135), which centered on a complaint filed by Canada in 1998 challenging France’s ban on the use of chrysotile asbestos. In this dispute, the Appellate Body upheld France’s interest in protecting the health of workers (subject to prolonged exposure to asbestos) and of the population in general (subject to occasional exposure to asbestos). It also found that the measure complied with the conditions set out in the preamble to article xx, as it did not constitute arbitrary or unjustifiable discrimination or a disguised restriction on international trade. It is interesting to note that the Appellate Body assessed the reasonableness of the ban and confirmed that no other measure was available.

Meanwhile, the second WTO resource consulted in my analysis served as a basis for evaluating specific cases in which there was a discussion about whether measures were justified under article xx(b) of the GATT. Here, I found the aforementioned cases of *EC–Asbestos* (DS135) and *Brazil–Retreaded Tires* (DS332), in addition to *China–Raw Material* (DS394, 395, 398), *Indonesia–Chicken* (DS484), and *EC–Seal Products* (DS400, 401). Since the discussion in *EC–Seal Products* (DS400, 401) related to animal protection, not human health, I excluded it from my analysis.

The dispute over Brazil’s ban on retreaded tires (DS332) resulted in an important jurisprudential development concerning the scope of the concept of necessity provided for in paragraph (b) (“necessary to protect human, animal or plant life or health”). As noted above, determining whether a measure is justified

2 Brazil’s executive branch presented this decision before the Supreme Court (ADPF 101) in an effort to secure a ruling declaring unconstitutional the importation of used and retreaded tires from any country, including Mercosur members.

requires examining (i) whether the measure is designed to achieve the desired objective; (ii) whether the measure is necessary to achieve this objective; and (iii) whether the measure unnecessarily restricts international trade. In this case, the Appellate Body noted that this requirement does not mean that a trade-restrictive measure whose contribution is not immediately evident cannot be justified; indeed, certain complex environmental or public health problems can be addressed only through a comprehensive policy that includes a variety of interacting measures. Thus, in such cases, in the short term it may be difficult to isolate a measure's contribution to public health or environmental objectives.

Meanwhile, the dispute over France's ban on the use of asbestos (ds135) highlighted the importance of demonstrating that a measure is based on science and on an evaluation of risk. In this case, the Appellate Body also explicitly acknowledged WTO members' right to determine the level of health protection that is appropriate in a given situation.

In *China–Raw Materials* (ds394, 395, 398), the European Union, Mexico, and the US raised questions in 2009 about China's policy establishing export restraints on certain materials, such as bauxite, magnesium, and zinc. China's measure was based on an interest in reducing the health risks associated with pollution by encouraging the use of recycled materials over raw materials, thereby limiting pollution. In this case, the Appellate Body found that the measure did not fulfill the stated objective.

Indonesia–Chicken (ds484) stemmed from a challenge raised by Brazil in 2014 regarding Indonesian import restrictions on chicken products from Brazil. According to the Appellate Body, Indonesia did not demonstrate that there were justifications for the exceptional treatment against Brazil, and it held that the measure would result in unjustified less favorable treatment of Brazilian products, in violation of article XX(b) and the *chapeau* of article XX.

Lastly, in light of their relevance to the current debate on measures aimed at protecting health, I looked at the disputes concerning Australia's standardization of tobacco packaging, known as *Australia–Tobacco Plain Packaging* (ds434, 435, 441,

458, 467).³ These disputes centered on a 2011 Australian policy requiring tobacco products to have plain packages free from any design elements or logos, and to contain a graphic health warning. Five countries challenged this measure before the WTO, arguing that it violated international trade agreements and intellectual property rights. These countries were Ukraine (DS434), Honduras (DS435), the Dominican Republic (DS441), Cuba (DS458), and Indonesia (DS467).

Despite the measure's clear impact on trade in tobacco products, the WTO Dispute Settlement Body found that there was a legitimate objective and considered the Australian measure to be proportional. It arrived at this finding after Australia demonstrated the causal link between the measure and the objective of reducing the public's use of and exposure to tobacco products.

In light of the above, we can conclude that as long as the conditions described here are met, there is room for domestic policies aimed at protecting people's health and life to receive the WTO's blessing, even if they cause an impact on international trade. This is because states' actions must be guided by human rights principles—in other words, states must adopt a human rights-based approach—in order to contribute to the promotion and protection of human rights and to prevent human rights violations.

International Trade Law from a Human Rights Perspective

International trade policies should be guided by the promotion of and respect for human rights (Constantin et al. 2021). This imperative is all the more urgent when it concerns serious health impacts on children and adolescents (Garde et al. 2020). Thus, governments and other relevant parties must assume their responsibility toward the most vulnerable by reducing the risk of obesity for children and adolescents. Such a scenario calls

3 *Australia—Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging.*

specifically for the adoption of more effective nutrition labeling measures (World Health Organization 2017).

It is worth noting that the traditional practice of separating trade-related discussions from rights-related ones runs counter to the prevailing consensus within the UN system and reduces the system's impact. The correct thing to do would be to adopt what is known as a "common policy framework" (Fachin 2015) applicable to the entire UN system and other international organizations in order to achieve convergence across all relevant policies.

There is an apparent fragmentation of international law as a result of the horizontality of treaties. In order to avoid conflicts between treaties, when interpreting them it is important to consider how they operate on the ground in a particular context, as well as the normative environment in general. Such an interpretation, which seeks mutual accommodation among treaties, is part of the principle of harmonization, according to which norms must be interpreted in order to ensure greater compatibility between them, even though some treaties deal with fundamental norms—such as in the case of the UN Charter, as explained below.

Human rights treaties impose duties on states with regard to the protection, promotion, and fulfillment of human rights. Examples of such duties include (i) the adoption of legislation establishing rules that are compatible with human rights standards and that set limits on third parties regarding these rights; (ii) the promotion of public policies encouraging behavioral change in order to guarantee the exercise of human rights; (iii) the adoption of economic measures, such as tax incentives or differentiated taxation of certain products or activities; and (iv) the application of sanctions in the event of third parties' noncompliance with the regulations in force.

State action must therefore always be guided by the obligations contained in human rights instruments, even in cases where a state faces a trade-related issue (whether national or international). States must always promote and protect human rights, as well as prevent them from being violated by third parties; if action is not taken to prevent such violations, the state may be held accountable (Barbosa et al. 2021).

The duty to act with a human rights focus stems from article 103 of the UN Charter, read in conjunction with article 1. According to article 103, “in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter”—which include respect for human rights—“shall prevail.”

Recognizing the cross-cutting scope of human rights promotes effective cooperation among intergovernmental bodies. This idea is enshrined in article 5(1) of the WTO Agreement, which states that “the General Council shall make appropriate arrangements for effective cooperation with other intergovernmental organizations that have responsibilities related to those of the WTO,” which include the UN and organizations related to it.

In addition, the WTO and UN have signed a commitment to collaboration entitled “Arrangements for Effective Cooperation with other Intergovernmental Organizations: Relations between the WTO and the United Nations,” which seeks to strengthen the cooperative ties between the two systems. The agreement also notes that cooperation between the WTO and UN, including appropriate reciprocal participation in each other’s meetings, could “assist in the smooth and efficient functioning of both organizations in areas where interaction could be of benefit” (World Trade Organization 1995).

In connection with these agreements, the UN High Commissioner for Human Rights stipulated in 2002 that interpretations of WTO agreements must be consistent with human rights law. According to the High Commissioner, increased dialogue on human rights and trade will contribute to greater coherence between the organizations’ policies and rules (Commission on Human Rights 2002). Similarly, specifically in relation to the interaction between international trade and health, in 2006 the World Health Organization called on member states to promote multi-stakeholder dialogue at the national level to explore the interplay between international trade and health. The idea was to foster constructive and interactive relationships across the public and private sectors in order to ensure coherence in countries’ trade and health policies (World Health Organization 2006). The relationship between trade and health was also the

subject of a report by the Commission on Ending Childhood Obesity calling for the health and equity impacts of national and international economic agreements and policies to be made a priority (World Health Organization 2016).

Thus, there is no shortage of calls for the international trade agenda to align with human rights standards. Moreover, in the Americas, states that have ratified the American Convention on Human Rights cannot avoid complying with their obligations under this treaty by arguing that they are implementing a trade agreement. Indeed, a ruling by the Inter-American Court of Human Rights—the 2016 case of the *Sawhoyamaxa Indigenous Community v. Paraguay*—set an important precedent. In this case, which centered on Paraguay’s failure to demarcate the traditional lands of the Sawhoyamaxa community, the Inter-American Court rejected the state’s argument that the third-party owner of the land in question was protected by a bilateral investment agreement between Paraguay and Germany.⁴

Here it is important to note that, in addition to the fact that a trade agreement cannot be used to justify noncompliance with obligations under human rights treaties, states are also prohibited from erecting barriers that make it difficult for another state to comply with its human rights obligations. Countries must therefore cooperate so that human rights are promoted to their fullest potential, particularly in light of the provisions of article 28 of the Universal Declaration of Human Rights and article 2(1) of the International Covenant on Economic, Social

4 “Lastly, with regard to the third argument put forth by the State, the Court has not been furnished with the aforementioned treaty between Germany and Paraguay, but, according to the State, said convention allows for capital investments made by a contracting party to be condemned or nationalized for a ‘public purpose or interest’, which could justify land restitution to indigenous people. Moreover, the Court considers that the enforcement of bilateral commercial treaties negates vindication of non-compliance with state obligations under the American Convention; on the contrary, their enforcement should always be compatible with the American Convention, which is a multilateral treaty on human rights that stands in a class of its own and that generates rights for individual human beings and does not depend entirely on reciprocity among States” (Inter-American Court of Human Rights, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, March 29, 2006, Series C No. 146, para. 140).

and Cultural Rights. In this light, countries should not yield to market pressure when it comes to public policies that seek to promote legitimate objectives.

These are some of the foundations of the REDESCA report, which notes that states “must refrain from signing agreements that may undermine their international human rights obligations, make continuous revisions of these regimes to make the necessary corrections and ensure compatible interpretations of investment rules with human rights” (Special Rapporteurship on Economic, Social, Cultural and Environmental Rights 2019). States must therefore comply with their human rights obligations “in the context of negotiation, conclusion, implementation, dispute resolution and, where appropriate, review of trade agreements or investment treaties” (*ibid.*).

Furthermore, the REDESCA report recommends that international trade documents expressly include clauses outlining the duty to respect and protect human rights, as well as exception clauses aimed at safeguarding compliance with human rights norms and standards. Nonetheless, the existence of such clauses is not a precondition for recognizing the binding force that human rights already have in the current normative framework. But the express provision of such a clause could fulfill an important valuational (and mnemonic) role.

It thus follows that the interpretation of any legal instrument—whether domestic or international—should be conducted from a perspective that recognizes the centrality of human rights and their vertical and horizontal impact on all other existing norms. This applies to rules concerning the production, supply, and trade of food, which is also supported by article 53 of the Vienna Convention on the Law of Treaties.

Therefore, although international trade law requires the observance of internationally agreed standards—which is also the subject of paragraphs 8 and 43 of Resolution 39/248 adopted by the UN General Assembly (1985)—the WTO’s regulatory system allows for the possibility that rules other than those established internationally may be imposed in order to achieve a legitimate objective. In doing so, it acknowledges the importance of human rights and their impact on the obligations of signatories to human rights treaties.

That said, the point is not to downplay the importance of concerted guidelines that aim to facilitate the flow of goods and services. Rather, it is to highlight the fact that the current model of human rights protection places great value on human dignity, and this is the perspective from which all other national and international instruments should be understood.

The Centrality of Human Rights in the Debate on Food Labeling

The previous sections showed that one of the main goals of international trade regulations is the improvement of living standards. They also showed that the GATT allows for the possibility of countries adopting unilateral measures in order to achieve legitimate objectives, such as policies aimed at protecting human health and life or the environment, as well as policies aimed at preventing deceptive practices. There is thus a bona fide space to promote compatibility between international trade rules and public health policies, including those policies aimed at promoting the rights to food and to health.

In order to evaluate the policies adopted in Latin America to promote adequate nutrition, it is important to consider the legal foundations of the right to food. The document that best describes the content of the right to adequate food is General Comment 12 of the UN Committee on Economic, Social and Cultural Rights, issued in 1999. This general comment notes that the right to adequate food encompasses more than a minimum package of calories, proteins, and other nutrients—it is essential to consider not just the quantity of food but also the quality needed to satisfy the dietary needs of the population (Committee on Economic, Social and Cultural Rights 1999).

This important contribution of the committee came at a time when the issue of hunger was the most pressing concern. In today's context, in addition to the serious lack of access to food, countries are faced with the increasing consumption of unhealthy foods among their populations. This phenomenon has contributed to global weight gain and a high incidence of chronic noncommunicable diseases.

Human rights—including economic, social, and cultural rights—are not mere ideals devoid of binding force; on the contrary, they are legal obligations that should guide the actions of states and companies. The state exists to serve the human beings who are part of it—not the other way around (Trindade 2007). Thus, when there is evidence that poor nutrition is one of the causes of weight gain and high rates of chronic noncommunicable diseases among the population, it can be said that a violation of the right to adequate food is at play.

In this regard, *OHCHR Fact Sheet No. 34* states that the right to adequate food includes health-related aspects and that guaranteeing the right to information requires free consumer choice. Accordingly, it defends the possibility of states placing restrictions on the advertising and promotion of unhealthy foods (Office of the United Nations High Commissioner for Human Rights 2010).

It is worth noting that the need to review food labeling rules to ensure that labels are better understood by consumers was already recognized by the Food and Agriculture Organization in 2004, when it approved voluntary guidelines to support the progressive realization of the right to adequate food. These guidelines encourage states to adopt measures aimed at protecting consumers “from deception and misrepresentation in the packaging, labelling, advertising and sale of food and facilitate consumers’ choice by ensuring appropriate information on marketed food” (Food and Agriculture Organization 2004).

General Comment 24 of the Committee on Economic, Social and Cultural Rights, which deals with state obligations under the International Covenant on Economic, Social and Cultural Rights, particularly in the context of business activities, is another important document. This general comment notes that the obligation to protect economic, social, and cultural rights may require measures that restrict the “marketing and advertising of certain goods and services in order to protect public health” (Committee on Economic, Social and Cultural Rights 2017). It thus follows that state actions—as well as business activities—are conditioned by the observance of economic, social, and cultural rights, which places limits on national and international trade. Such limits must be adhered to both when

discussing or negotiating agreements and when interpreting or applying existing regulations.

In this regard, the UN Special Rapporteur on the Right to Food notes in her report *Critical Perspective on Food Systems, Food Crises and the Future of the Right to Food* that “effectively implementing the right to food requires adopting a human rights-based approach to governance” (Elver 2020, para. 64). This approach reinforces the notion that human rights are interdependent, interrelated, and indivisible and must be interpreted holistically.

In her report, the Special Rapporteur notes that the various international organizations that are committed to the right to food—including the Food and Agriculture Organization, the World Health Organization, the United Nations Children’s Fund, the Office of the UN High Commissioner for Human Rights, and the World Food Program—need to act in a more coordinated and connected manner. They must also strengthen their efforts to ensure that human rights are mainstreamed into the food policy agendas of all organizations, whether these organizations are based in Rome, Geneva, or New York. She notes that “such influential, expert-rich organizations can much better address the root causes and consequences of food insecurity if they adopt a human rights-based approach to assessing food insecurity” (Elver 2020, para. 72).

Therefore, discussions on food labeling, and especially front-of-package labeling, should consider not only those aspects related to trade but also—and especially—the content of provisions regarding fundamental human rights. These provisions should be the basis for the interpretation of any other international treaty or document. This should be the line of reasoning and perspective embraced by countries and other interested parties when evaluating WTO rules, including the rule allowing for exceptions to trade obligations in order to pursue legitimate objectives. This perspective also makes it possible to understand to scope and limits of the Codex Alimentarius standards, which have been erroneously cited as an impediment to unilateral measures on food labeling.

In terms of changes to nutrition labeling requirements in Latin America, we can see that the adoption of Chile’s law in

2016 resulted in the raising of specific trade concerns at the WTO. Even prior to this, in March 2013, WTO member states began working on guidelines for policies on front-of-package labeling in an effort to support initiatives that aim to curb the rise in chronic diseases, as well as the obesity and overweight epidemic (World Trade Organization 2013).

Thus, the blanket questioning of the legitimacy of public policies on nutrition labeling vis-à-vis WTO standards is unsubstantiated and rhetorical, as well as irrelevant to the debate on the adoption of domestic nutrition labeling policies. Such a criticism would be valid if it could demonstrate that such measures lack a strong connection with the objective of protecting public health, lack technical or scientific robustness, are disproportionate, or are discriminatory or a disguised restriction on trade. But none of the criticisms to date have been able to demonstrate any of these characteristics.

Having disproven the idea that the WTO Agreement prevents the adoption of any non-harmonized measure, and aware that the WTO recognizes the need for public policies on food labeling, it is important to look at how the Codex Alimentarius has understood changes in domestic food labeling rules. First, it is worth noting that the guidelines on nutrition labeling approved by the Codex Alimentarius Commission already permit the use of supplementary nutrition information. These offer a framework for domestic measures requiring companies to include information on nutrients of concern on the front of food packages (Codex Alimentarius Commission 2021a).

But in light of the growing debate on this issue, and in an effort to improve food labeling requirements, the Codex Committee on Food Labelling began discussing strategies for updating these standards shortly after they were issued.⁵ In 2019, the committee noted the importance of public policies in addressing high rates of chronic noncommunicable diseases

5 Codex Alimentarius standards are updated whenever countries identify any new scientific or other relevant information (Codex Alimentarius n.d.). In terms of nutrition labeling, the guidelines were adopted in 1985; since then, they have undergone two revisions and nine amendments.

and weight gain in countries' populations (Codex Alimentarius Commission 2019). Then, in October 2021, it approved its Guidelines on Front of Pack Nutrition Labelling, which would become an annex to the Guidelines on Nutrition Labelling (Codex Alimentarius Commission 2021b).

It is worth pointing out that Codex documents do not restrict domestic policies. Indeed, the purpose of these guidelines is to provide general orientation to countries in the development of front-of-package nutrition labeling as a form of supplementary nutrition information that increases consumers' understanding of the nutritional value of foods and aids their decision-making, in line with relevant national dietary guidance or health and nutrition policy. The reformulation of products by the food industry, in order to avoid the need to include front-of-package labels, would be a secondary objective and should, importantly, be in line with the key premise of promoting nutrition and health among the population so that new public health problems are not created.

As in the context of the WTO, members of the Codex Alimentarius Commission are aware of the need to implement public policies promoting a food environment that facilitates the population's access to adequate food, which makes it possible for people to lead healthier and more balanced lives. Such a perspective recognizes the vital status of human rights in society and the responsibility of states in this regard.

Final Considerations

Increasing weight gain among their populations and high rates of chronic noncommunicable diseases caused by poor nutrition—including in children and adolescents—have prompted countries to look for ways to ensure that the food environment provides consumers with tools that offer them more certainty about the composition and risks of processed foods so that they can make healthier dietary decisions. While the revision of food labeling requirements is not the only strategy for promoting a healthier and more balanced food environment, it is an indispensable one for promoting necessary changes in people's diets.

Against this backdrop, several Latin American countries have recently decided to adopt regulatory measures to improve nutrition labeling requirements. Through these measures, they seek to make it mandatory for industry to disclose the presence of high levels of nutrients of concern, with an eye toward reducing their inclusion in food products. Yet these measures have been questioned by other states—both during the policymaking phase and after their rollout—on the grounds that they violate WTO rules and the Codex Alimentarius.

Although there is a *de facto* intention to harmonize international trade rules to facilitate operations between countries (and between companies), current international regulations accord human rights a highly relevant status, calling on countries—and, it is worth adding, companies—to implement measures that promote people's rights.

In this sense, by expressly recognizing the importance of fundamental rights, especially the rights to health and life, the international trade system foresees the need for cooperation with other international organizations, in addition to the possibility of states adopting unilateral measures in order to guarantee the protection of human rights. This allows for greater coherence between international trade rules and activities concerning the promotion and protection of human rights. The WTO Appellate Body may endorse this approach as long as countries can show that the measure in question is justified under GATT article XX.

Such a validation process consists of a two-tier analysis. The first step looks at whether the measure falls under one of the legitimate objectives outlined in article XX. The second step evaluates whether the measure satisfies the requirements of the *chapeau* of article XX, which prohibits arbitrary discrimination and disguised restrictions on trade. Thus, in the face of any challenge to an alleged violation of WTO rules posed by a nutrition labeling measure, the state in question must demonstrate the existence of the legitimate objective of promoting and protecting human health and lives, in accordance with article XX(b) of the GATT. To do so, the state must first show a connection between the measure adopted and the legitimate objective, demonstrate the measure's technical and scientific basis, and

show its proportionality vis-à-vis the stated purpose. In other words, it must show that the measure contributes to the objective to be achieved (even if not in the short term), which must be important for the community and must not be more restrictive than necessary. Second, the state must demonstrate that the measure will be applied to all products marketed within its borders, meaning that the measure must not constitute arbitrary or unjustifiable discrimination between countries or a disguised restriction on international trade—that is, it must satisfy the conditions of the *chapeau* of GATT article XX.

Considering the scientific evidence on the subject and the need to implement measures promoting a food environment that is more conducive to good health, the adoption of food labeling policies aimed at promoting healthier lives has the legal support it needs. This is because such policies start from the accurate premise that human rights should guide the actions of countries—as well as companies (United Nations 2011) — even when facing issues related to international trade. In sum, international trade cannot exist in a silo, devoid of meaning; it should be facilitated as long as it is in line with providing health, well-being, and a dignified life for all people. It is for this reason that discussions on the subject must be guided by the perspective of the centrality of human rights.

References

- Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador). November 17, 1988.
- Agreement on Technical Barriers to Trade. January 1, 1995.
- Agreement on the Application of Sanitary and Phytosanitary Measures. January 1, 1995.
- American Convention on Human Rights (Pact of San José, Costa Rica). November 22, 1969.
- Barbosa, I., B. Ríos, and A. Tovar. 2021. “Obligaciones estatales en el contexto de dietas no saludables: Allorando el camino dentro del Sistema Interamericano de Derechos Humanos.” *Revista Internacional de Derechos Humanos* 11(1): 143–176.

Chaddad, M. C. C. 2014. *Rotulagem de alimentos: O direito à informação, à proteção da saúde e à alimentação adequada da população com alergia alimentar*. Curitiba: Juruá Editora.

Codex Alimentarius. n.d. "About Codex Alimentarius." <https://www.fao.org/fao-who-codexalimentarius/about-codex/en>

Codex Alimentarius Commission. 2019. *Proposed Draft Guidelines on Front-of-Pack Nutrition Labelling*. Food and Agriculture Organization and World Health Organization.

———. 2021a. *Guidelines on Nutrition Labelling*. Food and Agriculture Organization and World Health Organization.

———. 2021b. *Report of the Forty-Sixth Session of the Codex Committee on Food Labelling*. Food and Agriculture Organization and World Health Organization.

Commission on Human Rights. 2002. *Liberalization of Trade in Services and Human Rights*. UN Doc. E/CN.4/Sub.2/2002/9.

Committee on Economic, Social and Cultural Rights. 1999. *General Comment No. 12: The Right to Adequate Food*. UN Doc. E/C.12/1999/5.

———. 2017. *General Comment No. 24: State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities*. UN Doc. E/C.12/GC/24.

Constantin, A., O. A. Cabrera, B. Ríos, I. Barbosa, A. Tovar Ramírez, M. M. Cinà, and S. Serrano Guzmán. 2021. "A Human Rights-Based Approach to Non-communicable Diseases: Mandating Front-of-Package Warning Labels." *Globalization and Health* 17(1).

Dorlach, T., and P. Mertenskötter. 2020. "Interpreters of International Economic Law: Corporations and Bureaucrats in Contest over Chile's Nutrition Label." *Law and Society Review* 54(3): 571–606.

Elver, H. 2020. *Critical Perspective on Food Systems, Food Crises and the Future of the Right to Food*. UN Doc. A/HRC/43/44.

Fachin, M. G. 2015. *Direitos Humanos e Desenvolvimento*. Rio de Janeiro: Renovar Editora.

Food and Agriculture Organization. 2004. *Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security*. Rome: Food and Agriculture Organization.

Garde, A., J. Curtis, and O. De Schutter, eds. 2020. *Ending Childhood Obesity: A Challenge at the Crossroads of International Economic and Human Rights Law*. Cheltenham: Edward Elgar Publishing.

Garde, A., and J. Zrilič. 2020. "International Investment Law and Non-Communicable Diseases Prevention." *Journal of World Investment and Trade* 21(5): 649–673.

General Agreement on Tariffs and Trade. April 15, 1994. https://www.wto.org/spanish/docs_s/legal_s/06-gatt.doc

Henkin, L. 1990. *The Age of Rights*. New York: Columbia University Press.

Marrakesh Agreement Establishing the World Trade Organization. April 15, 1994.

Mialon, M., C. Corvalan, G. Cediel, F. Baeza Scagliusi, and M. Reyes. 2020. "Food Industry Political Practices in Chile: 'The Economy Has Always Been the Main Concern.'" *Globalization and Health* 16.

Mialon, M., N. Khandpur, L. Amaral Mais, and A. Bortoletto Martins. 2021. "Arguments Used by Trade Associations during the Early Development of a New Front-of-Pack Nutrition Labelling System in Brazil." *Public Health Nutrition* 24(4): 766–774.

Ministry of Economy, Trade and Industry (Japan). 2016. "Chapter 4: Justifiable Reasons." In *Report on Compliance by Major Trading Partners with Trade Agreements: WTO, EPA/FTA and IIA*. https://www.meti.go.jp/english/report/data/2016wto/pdf/02_06.pdf

Müller, A., and P. Sukhdev. 2018. *Measuring What Matters in Agriculture and Food Systems: A Synthesis of the Results and Recommendations of TEEB for Agriculture and Food's Scientific and Economic Foundations Report*. Geneva: UN Environment.

Office of the United Nations High Commissioner for Human Rights. 2010. *The Right to Adequate Food*. Fact Sheet No. 34. <https://www.ohchr.org/sites/default/files/Documents/Publications/FactSheet34en.pdf>

Pan American Health Organization. 2014. *Plan of Action for the Prevention of Obesity in Children and Adolescents*. Washington, DC: Pan American Health Organization.

———. 2020. *Front-of-Package Labeling as a Policy Tool for the Prevention of Noncommunicable Diseases in the Americas*. Washington, DC: Pan American Health Organization.

Piovesan, F. 2001. Proteção dos direitos sociais: desafios do ius commune sul americano. *Revista de Estudos Constitucionais, Hermenêutica e Teoria do Direito* 3(2): 206–226.

———. 2018. *Direitos humanos e o direito constitucional internacional* (18th edition). São Paulo: Saraiva.

Prazeres, T. L. 2003. *Comércio internacional e protecionismo: As barreiras técnicas na OMC*. São Paulo: Aduaneiras.

Special Rapporteurship on Economic, Social, Cultural and Environmental Rights. 2019. *Business and Human Rights: Inter-American Standards*. Washington, DC: Inter-American Commission on Human Rights.

Swinburn, B., V. Kraak, S. Allender, V. J. Atkins, P. I. Baker, J. R. Bogard, H. Brinsden, et al. 2019. “The Global Syndemic of Obesity, Undernutrition, and Climate Change: The Lancet Commission Report.” *Lancet* 393(10173): 791–846.

Tamiotti, L. 2007. “Article 2 TBT.” *WTO: Technical Barriers and SPS Measures*, edited by R. Wolfrum, P. T. Stoll, and A. Seibert-Fohr. Leiden: Martinus Nijhoff Publishers.

Tangcharoensathien, V., O. Chandrasiri, W. Kunpeuk, K. Markchang, and N. Pangkariya. 2019. “Addressing NCDs: Challenges from Industry Market Promotion and Interferences.” *International Journal of Health, Policy and Management* 8(5): 256–260.

Trindade, A. A. C. 2007. “Desafios e conquistas do direito internacional dos direitos humanos no início do século XXI.” In *Desafios do direito internacional contemporâneo*, organized by A. P. Cachapuz de Medeiros. Brasília: Fundação Alexandre Gusmão.

United Nations. 2011. *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*. New York: United Nations.

United Nations Charter. June 26, 1945.

United Nations General Assembly. 1985. *Consumer Protection*. UN Doc. A/RES/39/248.

Universal Declaration of Human Rights. December 10, 1948.

Vienna Convention on the Law of Treaties. May 23, 1963.

World Health Organization. 2004. *Global Strategy on Diet, Physical Activity and Health*. WHA57.17.

———. 2006. *World Health Assembly Resolution: International Trade and Health*. WHA59.26.

———. 2016. *Report of the Commission on Ending Childhood Obesity*. Geneva: World Health Organization.

———. 2017. *Report of the Commission on Ending Childhood Obesity: Implementation Plan; Executive Summary*. Geneva: World Health Organization.

World Trade Organization. 1995. *Arrangements for Effective Cooperation with Other Intergovernmental Organizations*. WTO Doc. WT/GC/W/10.

———. 2013. "Members Discuss Guidelines for Trade-Friendly Regulation and STOP Sign for 'Junk Food.'" March 13. https://www.wto.org/english/news_e/news13_e/tbt_13mar13_e.htm

———. 2021a. *WTO Dispute Settlement: One-Page Case Summaries 1995–2020*. https://www.wto.org/english/res_e/booksp_e/dispu_settl_1995_2020_e.pdf

———. 2021b. *WTO Analytical Index*. https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art20_jur.pdf

Consumer Protection: The Right to Healthy Food in the Context of Consumer Relations

*Sergio Procelli*¹

*Lucas Landivar*²

1 Lawyer; president of the consumer association Consumidores Argentinos; member of Consumers International and the Organización de Consumidores de América Latina y el Caribe.

2 Lawyer; member of Consumidores Argentinos, Generaciones Futuras, Renama, and Bios; professor at the National University of Mar del Plata (Argentina); legal representative of citizen assemblies in Argentina.

Introduction

195

The transition from the welfare state to the neoliberal state, and the consequent focus on market policies as the arbiter of social relations, changed the civil rights panorama for citizens, who, through their relationship with goods and services, were transformed into consumers. Today, goods and services are no longer viewed solely as a means for a community to meet its collective and individual needs. The relationship between citizens and these goods and services—by virtue of being mediated by market relations—is now governed by the contractual conditions of the economy and regulated only in the context of linkages between consumers and suppliers, not just citizens' rights.

It was in this context that principles and rules began to emerge to clarify the relationship between producers and suppliers of goods and services, on the one hand, and consumers, on the other, based on the premise that there is an inherent inequality and asymmetry between the parties. The idea of consumer rights naturalized this inequality, focusing solely on equalizing those aspects related to commercial transactions and according to the capacities of each party; this inequality continued to grow as technification gradually placed people farther away from corporations.

Legislative advances in this field were focused on developing regulations aimed at establishing a protective regime to ensure safe and predictable interactions between suppliers and consumers. Consumer associations played a central role in this regard, advocating for the defense and enforcement of consumer rights. Countries thus drafted laws and provisions aimed at regulating contracts so that they would be clear and

fair. They also created mechanisms for consumers to file complaints and request refunds. These developments encouraged good business practices, guaranteeing the quality and safety of products and services and providing a framework for dispute resolution. In this regard, alongside increasing globalization there was also progress in the development of regulations aimed at resolving disputes arising from international transactions and the growth of e-commerce.

Consumer rights gradually entered all areas of social relations, ultimately permeating the entire social fabric. Thereafter, they began to take hold in various international treaties. In 1994, they even acquired constitutional status in Argentina, when the country's constitutional reform incorporated several human rights treaties into the Constitution, enshrining not only the rights to life, to health, and to food but also consumer rights.

We can thus see how in today's market economy, all relations are mediated by consumer relations, and the link between citizens and their access to goods and services acquires constitutional rank. This has the effect of positioning consumers above citizens. Within this context, the actions of consumer associations emerge as an expression of the collective, demanding laws and regulations that guarantee essential human rights and reinforce the link between state, rights, and community and counterbalance the individualism of the market.

This chapter considers this perspective in exploring Argentina's Law on the Promotion of Healthy Eating, specifically its front-of-package food labeling requirements. This law brings together rights traditionally associated with consumers, such as the right to information, with basic human rights, such as the rights to health and to food.

The United Nations Guidelines for Consumer Protection

The consumer as a key social actor is accompanied by the regulation of the relationship between consumers and businesses. In this regard, in 1985 the United Nations General Assembly issued Resolution 39/249 approving the first version of the Guidelines for Consumer Protection. In 1999, these guidelines

were expanded via Resolution 1999/7 of the Economic and Social Council, and in 2015 they were updated via General Assembly Resolution 70/186.

The Guidelines for Consumer Protection are designed to apply to all types of goods and services produced or offered in member states, and to be included in any regional or domestic regulations or procedures on consumer protection. They cover the following thematic areas: national policies for consumer protection; physical safety; the promotion and protection of the economic interests of consumers; standards for the safety and quality of consumer goods and services; distribution facilities for essential consumer goods and services; dispute resolution and redress; education and information programs; the promotion of sustainable consumption; e-commerce; financial services; and measures relating to specific areas. With regard to the right to food in general—and front-of-package food labeling in particular—the issues of quality and distribution of essential consumer goods, education and information, and the promotion of sustainable consumption are of particular importance.

The guidelines state that “Member States should develop, strengthen or maintain a strong consumer protection policy, taking into account the guidelines set out below and relevant international agreements” (United Nations Conference on Trade and Development 2016, para. 4). In this regard, they connect with and complement other treaties within the United Nations system. Giving greater participation and power to consumers facilitates the existence of a regulatory framework for consumer rights. This, in turn, contributes to the fulfillment of various goals and plans approved by the United Nations, such as the Sustainable Development Goals. Key among these goals are ending poverty and hunger; reducing inequalities; promoting economic growth; ensuring healthy lives; and guaranteeing access to clean water, hygiene, and sustainable energy.

These Guidelines for Consumer Protection identify the rights that states must take into account, such as consumer access to essential goods and services; consumer protection against risks to their health and safety; adequate information that allows consumers to make informed choices based on their wants and needs; and consumer education, including education

on the environmental, social, and economic consequences of their choices. These rights, linked to individual and collective needs, become even more relevant when a country seeks to strengthen its legislation on healthy eating, specifically through front-of-package food labeling measures.

In this regard, other principles contained in the Guidelines for Consumer Protection set parameters for the development of good business practices, especially regarding consumers' right to information. One of the principles is that "businesses should provide complete, accurate and not misleading information regarding [their] goods and services" (United Nations Conference on Trade and Development 2016, para. 11(c)) and that marketing should be based on the fair treatment of consumers. This requires "the provision of the information necessary to enable consumers to take informed and independent decisions, as well as measures to ensure that the information provided is accurate" (*ibid.*, para. 27). Moreover, this principle calls for consumer associations to "monitor adverse practices, such as the adulteration of foods, false or misleading claims in marketing and service frauds" (*ibid.*, para. 21).

Lastly, the guidelines call attention to the main issues that should be addressed by consumer education and information programs. Key among these issues, as far as this chapter is concerned, are (i) health, nutrition, prevention of food-borne diseases, and food adulteration; (ii) product hazards; and (iii) product labeling. The guidelines also mention specific areas that directly affect consumers' health, such as food, water, and energy, and they urge member states to consider the need for food security among all consumers, including "safety criteria, food standards and dietary requirements and effective monitoring, inspection and evaluation mechanisms" (*ibid.*, para. 70).

Consumer Protection within Mercosur

While the notion of the consumer—including the defense and protection of consumer rights—is generally a key concern in the creation of economic blocs, this has not really been the case for the Southern Common Market (commonly known by its Spanish abbreviation, Mercosur). Since the bloc's creation

in 1991, Mercosur member countries have made uneven progress in the development of national consumer protection laws, which has prevented them from reaching basic agreements that would allow for a common regulatory framework. Brazil was the first country to enact a consumer protection law (Law 8078 of 1990), which it did prior to Mercosur's creation, followed by Argentina (Law 24420 of 1994) and then Paraguay (Law 1334 of 1998). Uruguay was the last country to adopt such a law (Law 17250 of 2000).

But since Mercosur's inception, there have been attempts to develop a regulation that would harmonize members' approaches to the protection of consumer rights within the bloc and that would be incorporated into each country's legal framework. In 1996, the Common Market Group, Mercosur's executive organ, adopted Resolution 124 establishing basic consumer rights. In line with the United Nations Guidelines for Consumer Protection, this resolution established minimum standards of human rights, such as

protection of life, health and safety against risks caused by practices in the supply of products and services considered dangerous or harmful; education and disclosure on the proper consumption of products and services that guarantee freedom of choice and equal treatment when contracting; sufficient and truthful information on the different products and services; [and] protection against misleading advertising. (Resolución GMC 124 de 1996)

That same year, the bloc also made progress in drafting a protocol on consumer relations within member states. Decision 10/96 of the Council of the Common Market approved the Santa María Protocol on International Jurisdiction in Consumer Relations, though this instrument never entered into force. The same fate awaited Resolution 123/96 of the Common Market Group, which created definitions for terms related to consumers but which was ultimately never complied with or integrated into member states' legal frameworks. In all of these cases, the representatives of Brazil were opposed to the fact that the policy advances within Mercosur represented a step backward

compared to Brazil's domestic regulations, which is why a basic consensus for a common regulation was never reached.

Finally, in 1997 a draft Protocol on Consumer Protection was presented for consideration before Mercosur, seeking to consolidate a series of consumer protection guidelines for members of the bloc. To date, Mercosur rules require that each member state apply its legislation and technical regulations to products and services marketed in its territory, with the caveat that it cannot impose a greater requirement on member states than that which is already in force for national or foreign products and services.

Right to Food: A Human Rights Perspective

It is impossible to understand the right to life without also considering the right to health and the right to food, as these are basic and essential rights necessary for a decent quality of life. That said, the international community's approach to the right to food and its relationship with the right to health has been modified over the years to include a focus on adequate and nutritious food. It has thus evolved away from the historical conception in which the right to food was seen merely as the guarantee of freedom from hunger (Ministerio de Salud y Desarrollo Social 2018).

The Universal Declaration of Human Rights recognizes in its article 25 that

1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.
2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

Meanwhile, the American Declaration of the Rights and Duties of Man notes, in its article 11, that "every person has

the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources." Further, article 30 highlights parents' duties toward their children: "It is the duty of the individual so to conduct himself in relation to others that each and every one may fully form and develop his personality."

Along the same lines, the United Nations Committee on Economic, Social and Cultural Rights (2000, para. 4) has clarified that the right to health encompasses a wide variety of determinants, including adequate nutrition. The right to adequate food is enshrined in various international treaties, though the International Covenant on Economic, Social and Cultural Rights is the one that addresses it most completely. Article 11 of the covenant enshrines the right of everyone to an adequate standard of living:

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.

In this regard, General Comment 12 of the Committee on Economic, Social and Cultural Rights (1999) states that the concept of adequate food "implies the availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture"; additionally, food must be "accessible for both present and future generations." It also notes that "the State must pro-actively engage in activities intended to strengthen people's access to and utilization of resources and means to ensure their livelihood, including food security" (ibid.).

Deepening this argument, the United Nations Special Rapporteur on the Right to Health issued a statement in 2020 regarding the right to health and the adoption of front-of-package warning labeling, highlighting the link between the right to health, food, and state obligations:

The right to health is an inclusive right extending not only to timely and appropriate health care but also to the underlying

determinants of health, such as an adequate supply of safe food and nutrition. States' obligations therefore include ensuring equal access for all to nutritiously safe food as an underlying determinant of health. (Office of the United Nations High Commissioner for Human Rights 2020)

Finally, the Convention on the Rights of the Child sets out comprehensive guidance for the development and protection of children and adolescents. It also enshrines the rights of children and adolescents to the highest attainable standard of health, to nutritious food, and to a clean and safe living environment. Moreover, all adults and children should have access to information on how to stay safe and healthy. Lastly, article 27 recognizes "the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development."

Consumer Rights and the Right to Food in Argentina

Many of the aforementioned rights are viewed as essential, as a collective aspiration, and as the responsibility of the state; but as they are traversed by market policies, they become shaped by consumer relations and, therefore, by consumer rights. Food obviously does not escape this logic, and today the right to food—which is enshrined as a human right—can also be viewed, with a certain degree of tension, as a good or product.

All of the international treaties mentioned above—which enjoy constitutional status in Argentina—mention food as a basic and universal right. Nonetheless, except in the case of social development policies (when addressing situations of vulnerability), questions surrounding the access, availability, stability, and utilization of food, as well as food consumption, are measured by individuals' economic capacity and by consumer relations in the context of a market economy.

The following phenomenon has thus been established: on the one hand are companies, legally and factually constituted as the dominant party in a consumer relationship, that are involved in producing, marketing, and selling ultra-processed

foods; and on the other are the people who need to satisfy their basic needs of life and nutrition, who are not subjects of the right to food but rather consumers. In other words, the human right to food operates largely in a market economy, mediated and shaped within the context of consumption, regardless of whether the goods being consumed are obtained with the help of the state or purchased with personal income.

Argentina's entire legal framework regarding food contains virtually nothing about consumer protection and consumers' relationship with food. Most legislation is concerned with food production, the development of the food industry, and food safety and security. Since the enactment of Law 18284, and including its subsequent reforms, the Argentine Food Code, together with most food-related laws, embraces a perspective focused largely on production.

An interpretative effort must thus be made to find food-related laws that are not focused on production. Among these, we can include the law establishing the National Program for Nutrition and Food (Law 25724 on eating disorders and its Regulatory Decree 1018/2003); Law 26873 on public promotion and awareness-raising around breastfeeding; Law 27454 creating the National Plan for the Reduction of Food Loss and Waste; and perhaps, with some effort, Law 26905 on sodium consumption. None of these laws, however, establish consumer rights or food rights, nor do they confer subjective rights on consumers; at best, they establish state powers and programs to enforce them.

In this sense, there is no institutional framework for addressing the relationship between consumers and healthy and nutritious food, with the sole exception of social policies and some supply and pricing agreements, which vary in their application depending on the government in power.

A Necessary Legislative Transformation

This was the backdrop for the formulation of Law 27642 on the Promotion of Healthy Eating, Argentina's policy on front-of-package warning labeling, which serves to highlight not only the tensions at play but also the importance and the strategic

potential of the law. The debates that took place during the informational meetings on Law 27642 are illustrative. Opponents of the law drew on traditional arguments, ranging from the defense of the “industry,” of “production,” or of “work” to purported trade barriers and the need for legislative harmonization within Mercosur. Moreover, these debates featured the participation of pseudo-academics and so-called technical experts, who, citing questionable scientific evidence, sought to divert the discussion and delay decision-making. These individuals had strong ties with the food industry but lacked the authority to determine the substance of the discussion.

What was under debate was the tension between two distinct aspects. First was the preeminence of basic human rights enshrined in the Constitution, such as the rights to life, to health, to food, and to adequate and truthful information for consumers. The second was the food industry’s interest in marketing ultra-processed foods as mere commodities, without having to warn consumers about the potential risks of consuming them (Pan American Health Organization 2015).

The adoption of the Law on the Promotion of Healthy Eating is important not just because of the law’s content but also because it marks a legislative milestone in this arena. The law represents a bridge between the production, advertising, and sale of food products and the entire range of consumer rights, departing from older notions that reduced regulation to food safety in order to facilitate the sale of food products. In this regard, the law takes an important step forward in linking human rights and food, even if in the context of a market economy.

The Importance of Warning Labeling

Consumer organizations understand that the Law on the Promotion of Healthy Eating is a leap forward in terms of how Argentina’s regulatory framework conceives of food. For these organizations, this is important not just because of what the law itself expresses but because it presents a strategic opportunity. From a consumer protection perspective, the issue being legislated has to do first and foremost with the right to life.

Approaching the production of food from this perspective—which examines not only whether food products are fit to be sold but also whether they comply with social protection criteria, given the effects that these products can have on human health—implies a fundamental transformation in which a view of social responsibility is built in relation to what is being sold in the marketplace.

Importantly, this situation calls for more than just state obligations—businesses must be responsive to this reality as well. Specifically, companies must bear responsibility for protecting life and promoting nutritious and healthy eating. With respect to the right to health and the right to life, every manufacturer or supplier has a legal obligation, within market conditions and under the terms of consumer law, to ensure the health of those who purchase their products. According to article 1757 of the Civil and Commercial Code:

Risky Products and Activities. Everyone is liable for damage caused by the risks or defects of products, or of activities that are risky or dangerous due to their nature, the means used, or the circumstances of their performance. The liability is objective. Administrative authorization for the use of the product or performance of the activity or the compliance with the prevention techniques shall not constitute a release of liability. (Código Civil y Comercial Nacional)

Similarly, articles 5 and 6 of Law 24240 on Consumer Protection—in chapter II, under the heading “Consumer Information and Health Protection”—state:

Article 5—Consumer Protection. Products and services must be supplied or rendered in a way that is not harmful or damaging to the health or physical integrity of consumers, under normal conditions of use.

Article 6—Risky Products and Services. Products and services, including public utilities, whose utilization may pose a risk to the health or physical integrity of consumers or users, must be sold in accordance with established or reasonable mechanisms, instructions, and rules for ensuring their safety. (Ley 24240 de 1993)

This type of regulation lays the foundation for introducing these premises, which should be complemented with other legal provisions that promote improvements in the entire food system. It is therefore necessary to increase the availability and affordability—in addition to promoting the consumption—of a variety of safe and nutritious foods. All of this should be done in line with dietary recommendations and environmental sustainability. It is worth pointing to the strong scientific evidence showing that nutrients of concern are added to ultra-processed foods in order to create addiction-like cravings and encourage consumption. With that in mind, ultra-processed products can be said to pose a risk to health in the terms described by the laws cited above.

Meanwhile, during the parliamentary debates on the Law on the Promotion of Healthy Eating, as well as the presentations of many of those invited to the informational meetings in the Senate and the Chamber of Deputies, repeated mentions were made of the right to information. Suppliers' liability in this regard is objective and has two components: (i) the information must be complete, truthful, timely, clear, and detailed; and (ii) the information must not cause confusion, misunderstanding, or false expectations that lead the consumer to make an error when acquiring, using, or consuming the product or service. Four criteria are used to evaluate the quality and characteristics of the information provided: (i) what the objective message being reported is, and how it is being reported; (ii) how this message aligns with the product or service being offered; (iii) whether the information provided is sufficient; and (iv) whether it is misleading.

When applied to the issue of food consumption, these principles become even more important, and the duty to provide information calls for an even more sensitive interpretation. This is why the interpretation must delve into more specific areas of this right/duty and why, from the perspective of consumer advocacy groups, it is important to address its core: *the warning*. The warning illuminates the rationale behind the relationship between food production and consumers.

In fact, in the debate over the Law on the Promotion of Healthy Eating, an argument was raised that encompasses

the most basic of human rights, and perhaps the most important—life and health—and their connection with the right to information. In this light, the right to information is necessary to uphold essential rights. *This gives rise to the need to warn, as a more specific aspect of the duty to inform.* With regard to front-of-package food labeling in Argentina, as a means of promoting healthy eating, information is not merely a piece of data presented to consumers to make them aware of the characteristics of a product, the conditions of sale, its use, its benefits, and its guarantees. Such information is aimed at something more: consumer safety and public health.

The rights to life and health are implicit in the promotion of healthy eating because it is the responsibility of those who produce and sell food products to moderate and measure the social impact of the items they place on the market—especially in the face of a worrying social situation such as the noncommunicable diseases that these products may cause. Given the levels and combinations of nutrients of concern that are contained in ultra-processed foods, the right to health cannot be ignored when it comes to the production, marketing, and sale of these products. Thus, whoever produces and markets them must fulfill their duty toward consumers' safety. They must also, at the very least, take extreme precautions by informing consumers in order to avoid being held liable for any harm caused.

This extreme level of care is expressed in the information that warns consumers about the risks while also refraining from encouraging consumption. To place this into context, let us point out that in Law 24240 on Consumer Protection, the right to information is discussed in the chapter on the rights to health and safety. Furthermore, articles 5 and 6, mentioned earlier, which refer to consumer protection and corporate liability for risks, are preceded within the same chapter by article 4, which states, "Information. The supplier is obligated to provide the consumer with information about the essential characteristics of its product or service, as well as the conditions of its sale, in a truthful, clear and detailed manner."

Similarly, the country's Civil and Commercial Code establishes in article 1100 that

The supplier is obligated to provide the consumer with information about the essential characteristics of its product or service, as well as the conditions of its sale and any other circumstances relevant for the contract, in a truthful and detailed manner. This information must always be free of charge for the consumer and provided with the necessary clarity to enable it to be understood. (Código Civil y Comercial Nacional)

This is why information, consumer health, and the responsibility of suppliers are closely related, as shown throughout this chapter.

It should also be noted that the supplier's liability for its products goes beyond the specific act of selling and marketing, since the supplier is the one who is liable for accidents or injuries caused even after purchase. This is because the duty of whoever produces and markets a product or service is to inform the consumer of everything regarding that product or service. This must be done with sufficient clarity and truthfulness; the consumer or user must be able to interpret the information without help, especially if the information being communicated is a health warning, which requires clear and compelling messages. This is so much the case that suppliers' liability extends to third parties when the damage is caused by products or services that they market.

To further illustrate this idea, it is worth mentioning that the supplier's duty to inform, which is broad and general in nature, contains two specific elements: the duty to counsel and the duty to warn. Counsel, geared more toward the point of sale, refers to specific data about the conditions of a product, providing information that helps the consumer determine whether the product will serve the purpose the customer is seeking. This could be specific technical data and knowledge unknown to the layperson or conditions of use that may shape the purchasing decision.

Meanwhile, the warning is the critical core of the duty to inform, aiming to prevent damage and risks. Warnings must stand out and draw consumers' attention so that they see and understand the warning before the purchase and during use or consumption. This allows risks to be assessed at all times, both

by consumers and by third parties, and allows for immediate and long-term consequences to be considered.

Beyond objective liability for the damages caused, what is being sought is precaution and prevention—in other words, avoiding the damages from happening in the first place. This is key, especially when it comes to ultra-processed foods that are made with new technologies (Breslin 2013; Ludwig 2011; Monteiro et al. 2016; Pan American Health Organization 2015) and whose composition or structure is determined by manufacturers or suppliers. In this sense, it is a self-created risk.

Argentina's new Law on the Promotion of Healthy Eating addresses two important and complementary extremes to what we have been discussing in this chapter: (i) restrictions on marketing and promotional activities and (ii) education. First, the law restricts marketing and promotional activities for products high in nutrients of concern in order to prevent advertising from trumping consumers' right to adequate information and warnings. Second, the law requires education on food and nutrition so that the population can better interpret and understand information. Thus, the chapter on education appears to be a key and complementary aspect that can help the law reach its full potential.

In conclusion, the front-of-package labeling required by Argentina's Law on the Promotion of Healthy Eating sets out the duty to warn—as a component of the right to information—for those who market products that endanger public health. In this way, whoever wishes to consume a given product can be made aware of the potential health damage that it poses.

Final Reflections

In addition to what we have argued regarding the enactment of Argentina's Law 27642 on the Promotion of Healthy Eating, one could argue that there is a need to further develop legislation connecting the right to food and consumer rights within the context of safeguarding the rights to health and to life. Such legislation should have a collective human rights approach and not focus only on the individual relationship between consumers and producers. The development of regulations that harmonize

these rights is essential to provide a legal framework for the food system in the context of a market economy.

In this way, the human rights to life and health gain prominence and enhance consumers' rights in relation to food, as these rights cannot be subject to market conditions alone like any other product or good. Laws such as the recent Law on the Promotion of Healthy Eating play a part in incorporating social and public health variables into hegemonic market discourses that are based on mass production, commercialization, and consumption with an eye only on profit and economic growth.

It goes without saying that food is important for all aspects of society's development, including social and human, and individual and collective aspects. Therefore, given the unequivocal and vital importance of this right, and in light of the abundance of international instruments and constitutions that enshrine it, it is critical to start generating the conditions and concepts for a legal framework to ensure that food—including its production, preservation, development, and sale—is mediated by the logic of human rights.

References

- American Declaration on the Rights and Duties of Man. May 2, 1948.
- Breslin, P. 2013. "An Evolutionary Perspective on Food and Human Taste." *Current Biology* 23(9): R409–R418.
- Código Civil y Comercial Nacional. Ley 26994/2014. October 7, 2014 (Argentina).
- Committee on Economic, Social and Cultural Rights. 1999. *General Comment No. 12: The Right to Adequate Food*. UN Doc. E/C.12/1999/5.
- . 2000. *General Comment No. 14: The Right to the Highest Attainable Standard of Health*. UN Doc. E/C.12/2000/4.
- Convention on the Rights of the Child. November 20, 1989.
- International Covenant on Economic, Social and Cultural Rights. December 16, 1966.

Ley 24240 de 1993. Ley de Defensa del Consumidor. October 13, 1993 (Argentina). <http://servicios.infoleg.gob.ar/infolegInternet/anexos/0-4999/638/texact.htm>

Ludwig, D. S. 2011. "Technology, Diet, and the Burden of Chronic Disease." *JAMA* 305(13): 1352–1353.

Ministerio de Salud y Desarrollo Social (Argentina). 2018. *Etiquetado nutricional frontal de alimentos*. Secretaría de Gobierno de Salud. Buenos Aires: Ministerio de Salud y Desarrollo Social.

Monteiro, C., G. Cannon, R. Levy, J. Moubarac, P. Jaime, A. Martins, D. Canella, M. Louzada, and D. Parra. 2016. "NOVA: The Star Shines Bright." *World Nutrition* 7(1–3): 28–38.

Office of the United Nations High Commissioner for Human Rights. 2020. "Statement by the UN Special Rapporteur on the Right to Health on the Adoption of Front-of-Package Warning Labelling to Tackle NCDs." July 27. <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26130&LangID=E>

Pan American Health Organization. 2015. *Ultra-processed Food and Drink Products in Latin America: Trends, Impact on Obesity, Policy Implications*. Washington, DC: Pan American Health Organization.

Resolución GMC 124 de 1996 [Mercosur]. Defensa del consumidor: Derechos básicos. December 13, 1996.

United Nations Conference on Trade and Development. 2016. *United Nations Guidelines for Consumer Protection*. New York: United Nations.

Universal Declaration of Human Rights. December 10, 1948.

PART THREE

**Nutrition Labeling: Case
Studies from Latin America**

Experiences and Lessons Learned from Mexico's Adoption of Front-of-Package Warning Labels

Ana Munguía¹

Carlos Cruz-Casarrubias²

Javier Zúñiga³

Gabriela Guzmán-Pérez⁴

Alejandra Contreras-Manzano⁵

Lizbeth Tolentino-Mayo⁶

Simón Barquera⁷

1 Nutritionist with a master's degree in public health in nutrition; currently a PhD student in population nutrition sciences at the National Institute of Public Health (Mexico).

2 Nutritionist with a master's degree in public health and a specialization in applied statistics; currently a PhD student at the School of Public Health of Mexico and a researcher at the Center for Nutrition and Health Research (Mexico).

3 Lawyer with a master's degree in global health law from Georgetown University (us); currently legal coordinator for El Poder del Consumidor (Mexico).

4 Lawyer; currently works at El Poder del Consumidor (Mexico).

5 Nutritionist and former Fulbright Scholar at Harvard University (us).

The Context behind Front-of-Package Labeling in Mexico

Noncommunicable diseases are currently a major public health concern worldwide. In Mexico in particular, the epidemiological situation is alarming. According to National Surveys of Health and Nutrition conducted in recent decades, Mexico's rates of overweight and obesity have been on the rise (Shamah Levy et al. 2020). In 2020, for example, 35.8% of women were overweight and 40.2% were obese, while 40.6% of men were overweight and 31.5% were obese. In addition, 37.3% of primary-school-age children were overweight or obese, along with 43.8% of adolescents (Shamah Levy et al. 2021). To address this situation, the country has undertaken a series of steps, including an amendment to its labeling rules for pre-packaged foods in 2020 (Modificación a la Norma Oficial Mexicana NOM-051-SCFI/SSA1-2010).

In 2011, the food industry voluntarily adopted front-of-package labeling based on guideline daily amounts, or GDAs (figure 1) (Stern et al. 2011). A few years later, in 2014, despite findings by the National Institute of Public Health showing that GDA labels were difficult to understand, even for nutrition students (Stern et al. 2011), the government introduced a

6 Researcher in medical sciences at the Center for Nutrition and Health Research at the National Institute of Public Health (Mexico).

7 Physician with a master's degree and doctorate in nutrition from Tufts University (us); currently director of the Center for Research in Nutrition and Health at the National Institute of Public Health (Mexico).

mandatory GDA labeling scheme via Mexican Official Standard NOM-051-SCFI/SSA1-2010, General Labeling Specifications for Pre-Packaged Foods and Non-Alcoholic Drinks. The design and rollout of this regulation—known as NOM-051 for short—did not involve the participation of experts in nutrition or public health, nor did it involve contributions by working groups; further, there are no official records of any public consultation being held, nor was there any scientific evidence proving GDA labels' greater efficacy compared to other labeling schemes. Yet the process did take into account the perspectives of the food industry (Carriedo et al. 2018; Comisión Federal para la Protección contra Riesgos Sanitarios 2014).

FIGURE I
Example of the GDA labeling system adopted in 2011

Por porción de 30 g



VNR* basado en una dieta recomendada de 2 000 Kcal (8 373KJ)

Source: Stern et al. (2011)

After the measure's rollout, scientific evidence confirmed that GDA labeling was poorly understood and rarely used by consumers in Mexico. The system also had numerous shortcomings, including the following: (i) its nutrient thresholds were high, given that they were established by the food industry and not experts in public health or nutrition; (ii) its interpretation required advanced knowledge of nutrition and the ability to perform mathematical calculations—that is, knowledge of the recommended daily intake of calories and the ability to calculate a product's contribution to these thresholds; (iii) the portion sizes included in the labels were arbitrary, preventing consumers from quickly and easily comparing products; and (iv) the nutritional criteria did not distinguish between recommended intakes for children versus those for adults (Hernández Ávila et al. 2016; Tolentino-Mayo et al. 2018). Furthermore, according

to the 2018/19 National Survey of Health and Nutrition, only ten out of every hundred Mexicans utilized the GDA labels—and of these, only three actually understood them (Shamah Levy et al. 2020; Tolentino-Mayo et al. 2020).

Throughout history, interference by actors unconcerned with public health has been one of the main barriers to improving food environments (Popkin et al. 2005). Similarly, in the international trade sphere, discussions on Mexico's proposal to implement a new system based on front-of-package warning labels sparked a fierce debate and significant opposition from transnational and domestic food companies. These actors raised concerns before the World Trade Organization (WTO) suggesting that the proposed warning labeling system would pose an unnecessary barrier to trade given that WTO members' regulations should not be more trade restrictive than necessary to fulfill a legitimate objective (World Trade Organization 2020).

This strategy of political and industry pressure has also been observed in the adoption of front-of-package warning labels in other countries, such as Chile, Peru (2013), and Uruguay (2019), and has focused largely on the technical aspects of these measures and on their implications for trade. However, these pressures have not succeeded in preventing countries from adopting front-of-package warning labeling schemes, as the Agreement on Technical Barriers to Trade (TBT Agreement) recognizes each WTO member's basic right to protect human health. States adopting these measures have thus neutralized objections on the basis that front-of-package warning labels empower consumers, improve consumers' knowledge of and decision-making on food, and, as a result, reduce the risk of noncommunicable diseases.

Against this backdrop, this chapter explores the technical and commercial obstacles that emerged in the course of Mexico's effort to amend NOM-051 to encompass a front-of-package warning labeling system. Specifically, we explore (i) the main arguments raised during NOM-051's amendment process and (ii) the key trade-related arguments raised before the WTO painting the proposed labeling measure as a technical barrier to trade.

Methodology

To uncover the main arguments used during the NOM-051 reform process, we collected information from official documents and press releases published between 2018 and 2020. These documents were published by various sources, including the Chamber of Deputies and the Senate; relevant authorities, such as the Federal Commission for Protection against Health Risks (COFEPRIS), the Ministry of Health, and the Ministry of Economy; the Official Federal Gazette; and press releases and reports from entities such as the National Institute of Public Health, the United Nations Children’s Fund (UNICEF), the Pan American Health Organization (PAHO), El Poder del Consumidor, Contrapeso, and Salud Crítica.

We analyzed the content of these documents, identifying the main arguments for and against the proposed amendment to NOM-051. With regard to the second focus of this chapter—an exploration of arguments painting the proposed warning labels as a barrier to trade—we analyzed the minutes of meetings held at the WTO and classified them according to the type of arguments raised.

The Standardization Process for Mexico’s Front-of-Package Warning Labeling System

Mexico’s current public health problems have pointed to the need for public policies aimed at improving food environments and the need to ensure that such policies are adapted to the specificities of the population. In this regard, scientific evidence has shown that front-of-package labeling is one of the most cost-effective regulatory measures available because it allows consumers to make healthier choices regarding pre-packaged foods and beverages and is relatively affordable to implement (Food and Agriculture Organization et al. 2018).

In 2017, the Ministry of Health asked the National Institute of Public Health to form a group of experts free from conflicts of interest who could issue recommendations on which front-of-package labeling system would be most appropriate for the Mexican population (Kaufer-Horwitz et al. 2018). This group of

experts recommended front-of-package labels that would warn consumers about high levels of nutrients of concern (sugars, saturated fats, trans fats, and sodium) that are important for public health. The group also highlighted the need for a labeling system that would provide straightforward, simple, visible, and easy-to-understand information that would allow consumers to quickly assess the nutritional quality of products at the time of purchase; in other words, it recommended a system similar to that adopted in Chile in 2016 (Kaufer-Horwitz et al. 2018). Thus, as of 2018, initiatives emerged to modify the provisions of Mexico's General Health Law related to labeling and to put the country on a path toward a front-of-package labeling system. Subsequently, in July 2019, working groups were formed for the purpose of modifying NOM-051, the regulation that implements this part of the General Health Law.

In accordance with the Federal Law on Metrology and Standardization, amendments to Official Mexican Standards (known as NOM, for their acronym in Spanish) are to be carried out in several phases. First, a preliminary draft is prepared and discussed in a working group consisting of all relevant stakeholders. Then, this draft must be approved by the competent authorities (Ministry of Economy and COFEPRIS) and be published in the Official Federal Gazette as a draft NOM, which marks the start of a period for receiving comments from the public (Ley Federal sobre Metrología y Normalización 2009). Once the public consultation period has concluded, working groups involving key stakeholders review the comments received, analyze them, and publish the official version of the NOM (ibid.).

With regard to NOM-051, the amendment process centered on the development of a front-of-package labeling system featuring the word "excess" (*exceso*) on five warning labels—for calories, sugars, saturated fats, trans fats, and sodium. In addition, the proposed amendment required labels indicating the presence of sweeteners; a warning caption noting the presence of caffeine; and a set of numerical warning labels for small packages to indicate the number of nutrients of concern whose thresholds are exceeded (figure 2) (Proyecto de Modificación a la Norma Oficial Mexicana NOM-051-SCFI/SSA1-2010).

FIGURE 2
Front-of-package labeling system proposed
under the draft amendment to NOM-051



After the draft amendment to NOM-051 was approved by the committees of COFEPRIS and the Ministry of Economy, it was published in the Official Federal Gazette on October 7, 2019, marking the start of a two-month public consultation period. The objective of this consultation period was to gather comments and perspectives from the population in general and from groups representing the areas of health, food production, commerce, civil society, and academia (Proyecto de Modificación a la Norma Oficial Mexicana NOM-051-SCFI/SSA1-2010).

A total of 5,200 comments were received during this consultation period, making it the public consultation with the most comments gathered in Mexico's history (Secretaría de Economía 2020). The comments were classified into 178 bullet points covering different aspects of the draft amendment. These points were reviewed and discussed in detail by the working groups involving representatives of the Federal Public Administration, industry, service providers, higher education institutions and scientific and technological research centers, international organizations (PAHO and UNICEF), civil society organizations, and

professional associations. Twenty meetings were held between August 14, 2019, and January 23, 2020, to analyze and discuss the comments received during the public consultation.

The public consultation highlighted a range of positions. For example, there were those in support of a warning labeling system and the regulation of advertising as a strategy to improve consumers' food choices. There were also positions against these measures that pointed to a lack of scientific evidence, to negative effects on the economy, and to violations of various trade agreements (Respuesta a los comentarios recibidos al Proyecto de Modificación a la Norma Oficial Mexicana PROY-NOM-051-SCFI/SSA1-2010).

However, one of the main barriers standing in the way of the adoption of front-of-package warning labeling was the fact that Mexico's standardization process allows for the participation of industry and commerce—in this case, the food and beverage industry—who represented more than 60% of the members of the working groups (Modificación a la Norma Oficial Mexicana NOM-051-SCFI/SSA1-2010). Although this practice is based on the notion of ensuring democratic participation in the standardization process, it fails to account for possible conflicts of interest.

The aim of the working groups was to discuss and analyze the various positions regarding the bullet points in order to reach a consensus⁸ supported by factual and scientific arguments. If this could not be achieved, the points would be put before a vote by the committees of COFEPRIS and the Ministry of Economy (Ley Federal sobre Metrología y Normalización 2009).

Certain bullet points were the focus of particular pushback by the food industry. Table 1 shows the main arguments raised by industry in this regard, along with the technical responses provided by academia, international organizations, and civil society organizations that supported the amendment's approval.

8 A general agreement characterized by the absence of opposition to substantial matters by any of the interests concerned. It also refers to a process that takes into account the views of all stakeholders and resolves any conflicts between arguments.

TABLE I
Main points of discussion during the NOM-051 amendment process

NOM-051 provision	Food industry arguments	Technical responses
Front-of-package warning labels	<ul style="list-style-type: none"> - Evidence regarding the inadequacy of the GDA system is inconclusive: “The GDA system is used by Mexican consumers”; “it has not been implemented long enough to draw conclusions about [consumers’] comprehension of the system.” - Other types of labeling systems would be better. - The phrase “high in” should be used instead of “excess” (Respuesta a los comentarios recibidos al Proyecto de Modificación a la Norma Oficial Mexicana PROY-NOM-051-SCFI/SSA1-2010). 	<ul style="list-style-type: none"> - Studies in Mexico show that the proposed front-of-package warning labeling system, compared to other labeling systems, is better understood and accepted by Mexican consumers and is more likely to influence their decisions (Nieto et al. 2019; Vargas-Meza, Jáuregui, Contreras-Manzano et al. 2019; Vargas-Meza, Jáuregui, Pacheco-Miranda et al. 2019). - The word “excess” better communicates the message of product unhealthfulness (Borgmeier and Westenhoefer 2009; Cabrera et al. 2017; Corvalán et al. 2019). In contrast, the phrase “high in” has a positive association; in Mexico, labels bearing the phrase “high in” are used to indicate high levels of vitamins and minerals.
Mexican nutrient profile	<ul style="list-style-type: none"> - “It is not based on scientific evidence.” - “It does not recognize portions or sizes.” - “It is very restrictive and does not promote reformulation” (Respuesta a los comentarios recibidos al Proyecto de Modificación a la Norma Oficial Mexicana PROY-NOM-051-SCFI/SSA1-2010). 	<ul style="list-style-type: none"> - The profile is based on scientific evidence and evaluated by FAO. In addition, it uses the World Health Organization’s nutrient thresholds in order to prevent noncommunicable diseases (World Health Organization and Food and Agriculture Organization 2003; Food and Agriculture Organization 2010; Pan American Health Organization 2016; World Health Organization 2015).
Warning label “Contains sweeteners – not recommended for children”	<ul style="list-style-type: none"> - Sweeteners have been deemed safe by the US Food and Drug Association, the Joint FAO/WHO Expert Committee on Food Additives, and the European Food Safety Authority. - The measure disincentivizes reformulation (Respuesta a los comentarios recibidos al Proyecto de Modificación a la Norma Oficial Mexicana PROY-NOM-051-SCFI/SSA1-2010). 	<ul style="list-style-type: none"> - Because the long-term effects of sweeteners are unknown (Toews et al. 2019), they are recognized as having a potential health risk for Mexico’s child population. - Studies have recognized the metabolic effects of sweetener consumption. These effects include decreased insulin sensitivity (Pepino et al. 2013; Suez et al. 2014), increased blood glucose concentration (Suez et al. 2014), habituation to sweet taste in the infant population (Mennella 2014; Swithers 2015;

NOM-051 provision	Food industry arguments	Technical responses
		<p>Sylvetsky et al. 2017), altered gut microbiota (Suez et al. 2014), and endoplasmic reticulum stress (Park et al. 2019).</p> <ul style="list-style-type: none"> - Various organizations recommend against the consumption of sweeteners among children. These include the Hospital Infantil de México Federico Gómez, the American Academy of Pediatrics (Sylvetsky et al. 2011), the American Heart Association, the American Dietetic Association (Johnson et al. 2018), the Association of UK Dietitians, and PAHO, as well as national recommendations on beverage consumption for the Mexican population (Rivera et al. 2008) and recommendations from key US health and nutrition organizations (Lott et al. 2019).
<p>Warning label “Contains caffeine – avoid in children”</p>	<ul style="list-style-type: none"> - National regulations already establish a limit of 200 mg/L in flavored beverages containing caffeine. - “There is no evidence that caffeine consumption is a public health problem” (Respuesta a los comentarios recibidos al Proyecto de Modificación a la Norma Oficial Mexicana PROY-NOM-051-SCFI/SSA1-2010). 	<ul style="list-style-type: none"> - Sugar-sweetened beverages, such as soft drinks, are widely consumed among all age groups in Mexico. Cola drinks are the main source of added caffeine among children and adolescents. - Caffeine consumption among children has been associated with hyperactivity and anxiety, as well as sleep disorders such as insomnia (Temple 2009; Warzak et al. 2010).
<p>Regulation of advertising aimed at children</p>	<ul style="list-style-type: none"> - Infringement of intellectual property rights. - Creates barriers to international trade (Respuesta a los comentarios recibidos al Proyecto de Modificación a la Norma Oficial Mexicana PROY-NOM-051-SCFI/SSA1-2010). 	<ul style="list-style-type: none"> - Advertising aimed at children has an effect on their consumption habits, food preferences, and purchase requests. - States have an obligation to protect the best interests of children and their right to health (Constitution of Mexico 2021; United Nations Children’s Fund 2014).

The nutrient profile was the only point on which a consensus could not be reached, so it was subjected to an additional process that included voting and approval by the National Standardization Advisory Committees of COFEPRIS and the Ministry of Economy. Finally, in January 2020, the nutrient profile was approved for rollout in three progressive stages of

implementation, in order to ease the transition for food and beverage manufacturers (Secretaría de Economía 2020).

NOM-051's final, approved version included requirements for five black octagonal seals to warn consumers about excess calories and nutrients of concern; two warning captions about sweeteners and caffeine content; and five numerical warning labels for packages smaller than 40 cm² to indicate the number of nutrients of concern whose thresholds are exceeded (figure 3).

FIGURE 3
Mexico's front-of-package labeling system
approved in 2020



Front-of-Package Warning Labels as a Technical Barrier to Trade

The commercial exchange of food and beverages between countries is subject to international trade rules, as outlined in WTO instruments and bilateral trade agreements, such as the free trade agreement between Mexico, the US, and Canada. As a result, any regulation, restriction, or prohibition adopted by a state that has the potential to impact international trade can be challenged (Food and Agriculture Organization and World Health Organization 1999).

The rules contained in front-of-package labeling systems are considered, in terms of the TBT Agreement, to constitute a technical regulation; as a result, any country planning to adopt such rules must communicate their intention to other

WTO member states so that these states have the opportunity to raise concerns about trade implications. Additionally, the reporting country must provide information requested by other members regarding the proposed measure, answer their questions, and hold bilateral meetings or consultations to address their concerns.

During the development of front-of-package labeling systems in Latin American countries (Chile, Uruguay, and Peru), objections were raised by the US, Switzerland, Guatemala, Canada, Costa Rica, Brazil, Australia, Argentina, and Mexico (during the 2012–2018 administration), as well as countries in the European Union. Key among their arguments were the following (WTO Committee on Technical Barriers to Trade 2013b, 2014a, 2014b, 2015, 2016, 2018a, 2018b):

- The front-of-package labeling system is more **trade restrictive than necessary** to fulfill a legitimate public health purpose, thus violating article 2.2 of the TBT Agreement.
- There are **other, less trade-restrictive measures** available for protecting public health; these include other types of labeling systems, education campaigns, and physical activity promotion.
- The front-of-package labeling system **does not conform to internationally adopted food standards**, such as the Codex Alimentarius—considered the international benchmark on the matter—thus violating article 2.4 of the TBT Agreement.
- The front-of-package labeling system **lacks a scientific basis**. Costa Rica specifically questioned the design of FAO's Nutrient Profile Model, and the European Union argued that there were no scientifically established risk thresholds for nutrients of concern.
- Regarding informing consumers and changing their consumption habits, front-of-package warning labels have **not been proven more effective** compared to other labeling systems.
- The front-of-package labeling system **leads to fear and confusion among consumers** since it causes products to be

classified as “good” or “bad” and does not feature products’ nutritional benefits.

- The system is a form of **negative labeling** that stigmatizes products bearing warning labels.
- The front-of-package labeling system **leads consumers to avoid products** that can be part of a balanced diet when consumed in moderation.
- The system, on account of its complexity, warrants a **long period for implementation and compliance** (between eighteen months and two years) because it requires significant investment by the industry to redesign packaging, relabel products, and adapt labels to the new format.

Nonetheless, objecting states presented no evidence to support these arguments, nor did they provide detailed justifications (wto Committee on Technical Barriers to Trade 2013a, 2013b, 2014b).

Similarly, in the case of Mexico, the proposed front-of-package labeling system, nutrient profile, and regulation of advertising aimed at children were challenged by the food industry from an international trade law perspective. These arguments focused on the idea that the proposed regulations violated Mexico’s bilateral trade agreements and international trade agreements. In order for Mexico to successfully reform NOM-051, it was thus critical to consider previous experiences in Latin America with an eye toward formulating a compelling defense.

Technical Barriers to Trade: Rules for Determining When a Measure Qualifies as an Exception to International Trade Obligations

To determine whether a public health measure constitutes a technical barrier to trade, the measure must be analyzed according to certain principles of international trade law. In the context of the wto, a technical barrier to trade is “any rule, technical regulation, or conformity assessment procedure that unjustifiably restricts international trade” (Ministerio de

Economía y Finanzas 2020). Thus, the TBT Agreement aims to ensure that countries' technical regulations, standards, and conformity assessment procedures do not discriminate or create unnecessary obstacles to trade. However, WTO members have the right to adopt measures to pursue legitimate objectives—in other words, objectives that seek, for example, to protect human health or safety or to protect the environment (TBT Agreement 1995). In this regard, a few basic principles of international trade must be considered in order to determine whether a technical barrier to trade exists:

- **Legitimate objective:** This principle is satisfied if the objective of the regulation can be met via the actions it proposes. If a regulation does not fulfill its stated objective, it should be considered a barrier to trade (TBT Agreement 1995; World Trade Organization 2020).
- **Not more trade restrictive than necessary:** It is not enough for a state to demonstrate that a measure pursues or achieves a legitimate objective; the state must ensure that this measure is the least restrictive to international trade. It must thus demonstrate that there are no less trade-restrictive alternative measures that could achieve the same objective (TBT Agreement 1995).
- **Necessity through a risk assessment:** The state must consider the “necessity” of the measure, taking into account the risks that would be created by not adopting the measure. This necessity must be justified based on the problem at hand and should be supported by factual and scientific evidence (WTO Appellate Body 2001).
- **Principle of nondiscrimination:** With regard to international trade, regulations should not be set arbitrarily or be used to protect domestic producers from foreign competition (World Trade Organization 2020).
- **Participation of the sectors involved:** Countries must ensure transparency in their domestic standardization processes. To this end, countries should provide space for interested parties in other WTO member states to submit comments, and they should share copies of any documents requested

concerning the regulations under development (World Trade Organization 2015).

As the experience in Mexico shows, it is advisable for these aspects to be addressed not only from a legal perspective but from a technical one as well, since in most of the objections raised it was necessary for the state to present technical and scientific evidence to support its legal arguments.

Technical Barriers to Trade during the Reform of NOM-051

During the NOM-051 working group sessions, evidence in support of the aforementioned principles was submitted by civil society organizations, academia, and international organizations. The two main areas of the proposed measure that were challenged as constituting technical trade barriers were (i) the front-of-package labeling system and the Mexican nutrient profile and (ii) the regulation of advertising aimed at children. In addition to arguments related to international trade rules, industry actors also presented arguments based on intellectual property and trademark law, as summarized in table 2.

Discussion

Mexico's front-of-package labeling system was developed through a democratic and transparent process that involved the voluntary participation of all relevant stakeholders, including governmental bodies, civil society, academics, and researchers. It also involved the participation of key players in the food industry, who posed one of the main barriers to the measure's adoption.

TABLE 2
Key arguments related to international trade during the reform of NOM-051

Health measure	Argument	Legal response	Principle of international law
<p>Front-of-package labeling system and the Mexican nutrient profile</p>	<p>The front-of-package labeling system violates the us-Canada-Mexico Agreement and the TBT Agreement, since it is a barrier to trade (Rodríguez 2020a).</p>	<ul style="list-style-type: none"> - States are allowed a wide “margin of appreciation” in the area of public health, meaning that they have significant discretion in exploring and adopting measures aimed at protecting public health. - Public health is a legitimate objective that allows regulations such as front-of-package labeling not to be deemed technical barriers to trade. - The TBT Agreement does not prevent countries from adopting the measures necessary to protect public health in accordance with their unique national context. 	<p>Legitimate objective</p>
<p>Front-of-package labeling system and the Mexican nutrient profile</p>	<ul style="list-style-type: none"> - There are other measures that serve the purpose of protecting public health that are less trade restrictive. Systems similar to GDA labels were cited as examples, as were education programs and campaigns to encourage physical activity. - The effectiveness of the front-of-package labeling system versus other labeling schemes was not proven, and this system would not eliminate public health problems such as obesity, overweight, and diabetes. 	<ul style="list-style-type: none"> - States do not have to prove the effect of each health measure in isolation; rather, they need only prove that the measures are public health measures aimed at an objective (such as consumers’ right to information). - Public policy measures must demonstrate only that they are capable of <i>contributing</i> to the objective—for example, contributing to a reduction in obesity, overweight, and diabetes. - It is not necessary to determine whether a public health measure has the desired effect but rather simply whether it is a “reasonable measure,” especially in light of the domestic context at hand. In Mexico, for example, the epidemiological alert regarding obesity and diabetes must be taken into account when determining whether front-of-package food labeling is a reasonable measure. 	<p>Not more trade restrictive than necessary; necessity through risk assessment</p>

Health measure	Argument	Legal response	Principle of international law
<p>Regulation of advertising aimed at children</p>	<ul style="list-style-type: none"> - The front-of-package labeling system constituted arbitrary or unjustifiable discrimination between countries, as it created a unique situation in Mexico. Under the TBT Agreement, Mexico was obligated to ensure that it required the same labeling conditions as other countries with which it had trade relationships, such as the US. - The ban on the use of cartoon characters and the like in advertising constituted an infringement of companies' trademark rights, largely as outlined in the Paris Convention. - The measure was more restrictive than necessary since it curtailed companies' right to use their registered trademarks. 	<ul style="list-style-type: none"> - The principle of nondiscrimination applies not to like products in the same country but rather to like products from different countries. The front-of-package labeling system and the nutrient profile would be applied to all products sold in the country, regardless of whether their origin was domestic or foreign. - PAHO and UNICEF have developed evidence-based guidelines to protect children from the harmful impact of marketing unhealthy foods (Pan American Health Organization 2011; United Nations Children's Fund 2015). - By taking into account the scientific evidence on food marketing directed at children and by seeking to address a public health problem among children, NOM-051 guaranteed the protection of the best interests of the child as part of its legitimate regulatory objective. - Supreme Court jurisprudence highlights that the best interests of the child should be "considered as guiding criteria in the elaboration of norms and their application in all areas related to the life of the child" (Suprema Corte de Justicia de la Nación, 2015); this principle would be violated if left unregulated. 	<p>Nondiscrimination</p>
			<p>Legitimate objective; necessity through risk assessment</p>

Health measure	Argument	Legal response	Principle of international law
	<p>The prohibition of the use of cartoon characters on product packages that bear a warning label violates companies' right to use their trademarks.</p>	<p>- The registration of a trademark does not confer an absolute right of use. Cartoon characters and other brand elements may be regulated in order to protect other rights, such as the rights to health and food, or to protect the best interests of children.</p> <p>- Reference was made to the case of <i>Uruguay v. Philip Morris</i>, in which an arbitration tribunal held that "ownership of a trademark does, in certain circumstances, grant a right to use it. It is a right of use that exists vis-à-vis other persons, an exclusive right, but a relative one." In other words, although it is a right that excludes third parties from using it (other companies cannot use the elements of another's trademark), companies must abide by the regulations that states establish.</p> <p>- <i>It is not an absolute prohibition.</i> Companies may continue to use their cartoon characters, animations, and other advertising elements provided that the product in question does not contain any warning seals or the caption about sweeteners.</p>	<p>Not more trade restrictive than necessary</p>

The food industry used a variety of interference tactics, including by trying to stall implementation and relying on decision-makers with conflicts of interest; casting doubt on scientific evidence supporting the measure; deflecting attention away from the problem at hand; and dividing public opinion (World Cancer Research Fund International 2019). These tactics have long been documented in other policy areas, and it is important to note that the food industry has tremendous lobbying power and influence over Mexico's domestic policies. For example, when the government established the Mexican Observatory on Noncommunicable Diseases, 50% of the participating organizations had conflicts of interest due to ties with or sponsorship from the food, soft drink, and tobacco industries (Barquera et al. 2018). The observatory lacked reliable indicators, a framework for evaluating results against the budget received, and a transparent accountability mechanism, which facilitated the mismanagement of resources (Blancas Madrigal 2020).

Another example can be seen in Mexico's adoption of a tax on sugar-sweetened beverages. When the proposed tax was being developed, the soft drink industry launched an aggressive media campaign against the measure in collaboration with opinion leaders and with allies from the fields of medicine and nutrition. This generated public uncertainty about the measure and ultimately led the government to decrease the proposed tax by half (from 20% to 10%, or 1 peso per liter) (Decreto por el que se reforman, adicionan y derogan diversas disposiciones de la Ley del Impuesto al Valor Agregado 2013).

But despite these precedents, in the case of the proposed front-of-package labeling system, technical, scientific, and legal arguments won the day, and the country successfully adopted a coherent policy for regulating information on the labels of pre-packaged foods and protecting consumers' rights. This policy has received national and international accolades, including an award issued by the United Nations Interagency Task Force on the Prevention and Control of NCDs ("La Secretaría de Salud de México gana premio" 2020).

The active involvement of key stakeholders was critical to the measure's success. Mexican civil society, especially the Alianza por la Salud Alimentaria, played a crucial role in

disseminating information on the measure. In particular, this group encouraged citizens to participate in the public consultation process, describing the aims of the NOM-051 reform in simple and easy-to-understand terms. It also helped cultivate the political will that allowed the proposal to find a place on the administration's agenda.

After the front-of-package labeling system was approved, transnational manufacturers of pre-packaged food and beverages continued their efforts to fight the measure, justifying their positions on the notion of adverse effects, seeking at least a two-year postponement of its implementation. Although these efforts failed to halt the system's implementation, they did lead to changes in the verification periods. Indeed, an additional two-month grace period was granted to food and beverage manufacturers to allow them to adjust their packaging to comply with the amended NOM-051 (regarding the use of cartoon characters and the like; nutritional and health claims; list of ingredients; and nutritional declaration and warning seals) (Acuerdo por el que se da conocer el Acuerdo Interinstitucional entre la Secretaría de Economía 2020).

The initial months following the policy's rollout saw positive effects, such as manufacturers' massive reformulation of pre-packaged foods and beverages—aimed mainly at reducing the number of calories and levels of nutrients of concern—in order to fall within the system's thresholds and avoid having to place warning labels on packages (Rodríguez 2020b). Nonetheless, manufacturers have also been documented using evasion tactics, such as by creating “double fronts” for their products that make the front and back of the package identical and that display the warning label only on one side (“Dan vuelta a nuevo etiquetado” 2021). In addition, opinion leaders with conflicts of interest have stoked confusion about the warning labels' correct use and interpretation, as well as about the policy's effectiveness overall. Other industry strategies used include lawsuits seeking to overturn the measure. As of October 2020 (when the policy formally took effect), more than fifty lawsuits had been filed by companies and business groups, and the number has been on the rise since then; these lawsuits allege

commercial constraints and a lack of scientific evidence (Usla and Gutiérrez 2020).

Lastly, it is worth noting that an exploration of the legal barriers to the implementation of this new labeling system goes beyond the scope of this chapter. Such barriers are relevant for the implementation of any labeling system; for example, it is possible to justify restrictions on freedom of expression as it concerns the use of trademarks such as cartoon characters. This requires a deeper level of analysis that could be addressed by future research.

Conclusion and Recommendations

In Mexico, arguments related to international trade were used to challenge and delay the rollout of the country's new front-of-package warning labeling system. However, legal, technical, and scientific arguments supporting stronger public health policies ultimately triumphed. Based on this experience, we offer the following recommendations for other Latin American countries seeking to adopt front-of-package labeling systems:

1. Identify the regulatory instruments that need to be modified in order to achieve such a labeling system, as well as congressional allies who are supportive of improving population health and positioning the issue on the government's agenda.
2. Form collaborative relationships with other public health actors in the region in order to share experiences regarding the implementation of such labeling systems, analyzing successes and areas of opportunity that can be drawn on in the development of the proposal.
3. Craft arguments based on scientific evidence from the domestic and international context, and ensure that these arguments are aligned with national and international regulatory frameworks on commerce and trade.
4. Promote strategic alliances with experts on regulatory matters, food, public health, and the right to health from different

backgrounds (academia, civil society, the public sector, and international organizations).

5. Identify and monitor the participation of actors or organizations with potential conflicts of interest in decision-making processes.
6. Use communication campaigns to educate the public about the process for amending laws, rules, or regulations on front-of-package labeling, and encourage broad participation in public consultations.
7. Ensure that arguments related to international trade include both legal and technical perspectives and that these approaches are complementary. As demonstrated by this case study, challenges that were raised before the WTO against Mexico's front-of-package labeling system were similar to those used in the cases of Chile and Peru; thus, certain arguments—both technical and legal ones—can be replicated when advocating for a similar system in another country.

References

Acuerdo por el que se da a conocer el Acuerdo Interinstitucional entre la Secretaría de Economía, por conducto de la Dirección General de Normas, la Secretaría de Salud, a través de la Comisión Federal para la Protección contra Riesgos Sanitarios, y la Pr. July 31, 2020.

Agreement on Technical Barriers to Trade. January 1, 1995.

Barquera, S., K. Sánchez-Bazan, A. Carriedo, and B. Swinburn. 2018. "Case 1. The Development of a National Obesity and Diabetes Prevention and Control Strategy in Mexico: Actors, Actions and Conflicts of Interest." In *Public Health and the Food and Drinks Industry: The Governance and Ethics of Interaction*, edited by M. Mwatsama. London: UK Health Forum.

Blancas Madrigal, D. 2020. "Observatorio contra obesidad, 0 resultados y gasto multimillonario de 2015 a 2018." *Crónica*, September 11. https://www.cronica.com.mx/notas-observatorio_contra_obesidad_0_resultados_y_gasto_multimillonario_de_2015_a_2018-1163400-2020.html

Borgmeier, I., and J. Westenhoefer. 2009. "Impact of Different Food Label Formats on Healthiness Evaluation and Food Choice of Consumers: A Randomized-Controlled Study." *BMC Public Health* 9(1).

Cabrera, M., L. Machín, A. Arrúa, L. Antúnez, M. R. Curutchet, A. Giménez, and G. Ares. 2017. "Nutrition Warnings as Front-of-Pack Labels: Influence of Design Features on Healthfulness Perception and Attentional Capture." *Public Health Nutrition* 20(18): 3360–3371.

Carriedo, A., C. Mena, C. Nieto, J. Alcalde, and S. Barquera. 2018. "Case 7. Participation of Non-state Actors in Developing a Food Labelling Policy in Mexico." In *Public Health and the Food and Drinks Industry: The Governance and Ethics of Interaction*, edited by M. Mwatsama. London: UK Health Forum.

Comisión Federal para la Protección contra Riesgos Sanitarios. 2014. *Respuesta a solicitud 1215100112514*. INFOMEX.

Constitution of Mexico. February 5, 1917 (amended May 28, 2021).

Corvalán, C., M. Reyes, M. L. Garmendia, and R. Uauy. 2019. "Structural Responses to the Obesity and Non-Communicable Diseases Epidemic: Update on the Chilean Law of Food Labelling and Advertising." *Obesity Reviews* 20(3): 367–374.

"Dan vuelta a nuevo etiquetado con 'doble frente' en productos chatarra." 2021. *El Universal*, January 6. <https://www.eluniversal.com.mx/cartera/dan-vuelta-nuevo-etiquetado-con-doble-frente-en-productos-chatarra>

Decreto por el que se reforman, adicionan y derogan diversas disposiciones de la Ley del Impuesto al Valor Agregado; de la Ley del Impuesto Especial sobre Producción y Servicios; de la Ley Federal de Derechos, se expide la Ley del Impuesto sobre la Renta. December 11, 2013.

Food and Agriculture Organization. 2010. *Fats and Fatty Acids in Human Nutrition: Report of an Expert Consultation*. Rome: Food and Agriculture Organization.

Food and Agriculture Organization and World Health Organization. 1999. "Codex and the International Food Trade." <https://www.fao.org/4/w9114e/W9114e06.htm>

Food and Agriculture Organization, World Health Organization, and Pan American Health Organization. 2018. *Políticas y programas alimentarios para prevenir el sobrepeso y la obesidad: Lecciones aprendidas*. <http://www.fao.org/3/i8156es/I8156es.pdf>

Hernández Ávila, M., J. Rivera Dommarco, T. Shamah Levy, L. Cuevas Nasu, L. M. Gómez Acosta, E. B. Gaona Pineda, M. Romero Martínez, et al. 2016. *Encuesta Nacional de Salud y Nutrición de Medio Camino*. Cuernavaca: Instituto Nacional de Salud Pública.

Johnson, R. K., A. H. Lichtenstein, C. A. M. Anderson, J. A. Carson, J.-P. Després, F. B. Hu, P. M. Kris-Etherton, et al. 2018. "Low-Calorie Sweetened Beverages and Cardiometabolic Health: A Science Advisory from the American Heart Association." *Circulation* 138(9): e126–e140.

Kaufer-Horwitz, M., L. Tolentino-Mayo, A. Jáuregui, K. Sánchez-Bazán, H. Bourges, S. Martínez, O. Perichart, et al. 2018. "Sistema de etiquetado frontal de alimentos y bebidas para México: Una estrategia para la toma de decisiones saludables." *Salud Pública de México* 60(4): 479–486.

"La Secretaría de Salud de México gana premio de las Naciones Unidas por avanzar con el etiquetado frontal de advertencia en alimentos y bebidas." 2020. *El Poder del Consumidor*, September 24. <https://elpoderdelconsumidor.org/2020/09/la-secretaria-de-salud-de-mexico-gana-premio-de-las-naciones-unidas-por-avanzar-con-el-etiquetado-frontal-de-advertencia-en-alimentos-y-bebidas/#:~:text=24%20septiembre%2C%202020.,de%20las%20enfermedades%20no%20transmisibles>

Ley Federal sobre Metrología y Normalización. July 1, 1992 (amended April 30, 2009).

Lott, M., E. Callahan, E. W. Duffy, M. Story, and S. Daniels. 2019. *Healthy Beverage Consumption in Early Childhood: Recommendation from Key National Health and Nutrition Organizations; Consensus Statement*. Durham, NC: Healthy Eating Research.

Mennella, J. A. 2014. "Ontogeny of Taste Preferences: Basic Biology and Implications for Health." *American Journal of Clinical Nutrition* 99(3): 704S–711S.

Ministerio de Economía y Finanzas (Uruguay). 2020. "Obstáculos Técnicos al Comercio." October 1.

<https://www.gub.uy/ministerio-economia-finanzas/institucional/tratados/obstaculos-tecnicos-comercio>

Modificación a la Norma Oficial Mexicana NOM-051-SCFI/SSA1-2010, Especificaciones generales de etiquetado para alimentos y bebidas no alcohólicas preenvasados: Información comercial y sanitaria, publicada el 5 de abril de 2010. Diario Oficial de la Federación 27-03-2020.

Nieto, C., A. Jáuregui, A. Contreras-Manzano, E. Arillo-Santillan, S. Barquera, C. M. White, D. Hammond, and J. F. Thrasher. 2019. "Understanding and Use of Food Labeling Systems among Whites and Latinos in the United States and among Mexicans: Results from the International Food Policy Study, 2017." *International Journal of Behavioral Nutrition and Physical Activity* 16(1).

Norma Oficial Mexicana NOM-051-SCFI/SSA1-2010, Especificaciones generales de etiquetado para alimentos y bebidas no alcohólicas preenvasados: Información comercial y sanitaria. Diario Oficial de la Federación 05-04-2010, 27-03-2020.

Pan American Health Organization. 2011. *Recommendations from a Pan American Health Organization Expert Consultation on the Marketing of Food and Non-Alcoholic Beverages to Children in the Americas*. Washington, DC: Pan American Health Organization.

———. 2016. *Pan American Health Organization Nutrient Profile Model*. Washington, DC: Pan American Health Organization.

Park, S., S. Sethi, and S. G. Bouret. 2019. "Non-nutritive Sweeteners Induce Hypothalamic ER Stress Causing Abnormal Axon Outgrowth." *Frontiers in Endocrinology* 10.

Pepino, M. Y., C. D. Tiemann, B. W. Patterson, B. M. Wice, and S. Klein. 2013. "Sucralose Affects Glycemic and Hormonal Responses to an Oral Glucose Load." *Diabetes Care* 36(9): 2530–2535.

Popkin, B. M., K. Duffey, and P. Gordon-Larsen. 2005. "Environmental Influences on Food Choice, Physical Activity and Energy Balance." *Physiology and Behavior* 86(5): 603–613.

Proyecto de Modificación a la Norma Oficial Mexicana NOM-051-SCFI/SSA1-2010, Especificaciones generales de etiquetado para alimentos y bebidas no alcohólicas preenvasados: Información comercial y sanitaria,

publicada el 5 de abril de 2010. Diario Oficial de la Federación 08-10-2019.

Respuesta a los comentarios recibidos al Proyecto de Modificación a la Norma Oficial Mexicana PROY-NOM-051-SCFI/SSA1-2010, Especificaciones generales de etiquetado para alimentos y bebidas no alcohólicas preenvasados: Información comercial y sanitaria. Diario Oficial de la Federación 10-03-2020.

Rivera, J. A., O. Hernandez, M. Peralta, C. A. Aguilar-Salinas, B. M. Popkin, and W. C. Willett. 2008. "Consumo de bebidas para una vida saludable: Recomendaciones para la población mexicana." *Salud Pública de México* 50(2): 173–195.

Rodríguez, A. 2020a. "Prevén que nuevo etiquetado de alimentos lleve a México a litigios internacionales: ConMéxico." *El Financiero*, February 4.

———. 2020b. "Menos sodio y menos azúcar: Así reformulan las marcas sus productos tras nuevo etiquetado." *El Financiero*, October 14. <https://www.elfinanciero.com.mx/empresas/el-nuevo-etiquetado-de-advertencia-obliga-a-reformular-productos/>

Secretaría de Economía. 2020. "Fue aprobada la modificación a la NOM 051 sobre etiquetado de alimentos y bebidas." January 26. <https://www.gob.mx/se/articulos/fue-aprobada-la-modificacion-a-la-nom-051-sobre-etiquetado-de-alimentos-y-bebidas>

Shamah Levy, T., M. Romero-Martínez, T. Barrientos-Gutiérrez, L. Cuevas-Nasu, S. Bautista-Arredondo, M. Colchero, E. B. Gaona Pineda, et al. 2021. *Encuesta Nacional de Salud y Nutrición 2020 sobre Covid-19: Resultados nacionales*. Cuernavaca: Instituto Nacional de Salud Pública.

Shamah Levy, T., E. Vielma-Orozco, O. Heredia-Hernández, M. Romero-Martínez, J. Mojica-Cuevas, L. Cuevas-Nasu, J. A. Santaella-Castell, and J. A. Rivera-Dommarco. 2020. *Encuesta Nacional de Salud y Nutrición 2018–19: Resultados nacionales*. Cuernavaca: Instituto Nacional de Salud Pública.

Stern, D., L. Tolentino, and S. Barquera. 2011. *Revisión del etiquetado frontal: Análisis de las guías diarias de alimentación (GDA) y su comprensión por estudiantes de nutrición en México*. Cuernavaca: Instituto Nacional de Salud Pública.

- Suez, J., T. Korem, D. Zeevi, G. Zilberman-Schapira, C. A. Thaiss, O. Maza, D. Israeli, et al. 2014. "Artificial Sweeteners Induce Glucose Intolerance by Altering the Gut Microbiota." *Nature* 514(7521): 181–186.
- Suprema Corte de Justicia de la Nación. 2015. *Semanario Judicial de la Federación*.
- Swithers, S. E. 2015. "Artificial Sweeteners Are Not the Answer to Childhood Obesity." *Appetite* 93(1): 85–90.
- Sylvetsky, A. C., E. M. Conway, S. Malhotra, and K. I. Rother. 2017. "Development of Sweet Taste Perception: Implications for Artificial Sweetener Use." *Endocrine Development* 32: 87–99.
- Sylvetsky, A., K. I. Rother, and R. Brown. 2011. "Artificial Sweetener Use among Children: Epidemiology, Recommendations, Metabolic Outcomes, and Future Directions." *Pediatric Clinics of North America* 58(6): 1467–1480.
- Temple, J. L. 2009. "Caffeine Use in Children: What We Know, What We Have Left to Learn, and Why We Should Worry." *Neuroscience and Biobehavioral Reviews* 33(6): 793–806.
- Toews, I., S. Lohner, D. Küllenberg de Gaudry, H. Sommer, and J. J. Meerpohl. 2019. "Association between Intake of Non-sugar Sweeteners and Health Outcomes: Systematic Review and Meta-analyses of Randomised and Non-randomised Controlled Trials and Observational Studies." *BMJ* 364.
- Tolentino-Mayo, L., S. Rincón-Gallardo Patiño, L. Bahena-Espina, V. Ríos, and S. Barquera. 2018. "Conocimiento y uso del etiquetado nutrimental de alimentos y bebidas industrializados en México." *Salud Pública de México* 60(3): 328–337.
- Tolentino-Mayo, L., J. Sagaceta-Mejía, C. Cruz-Casarrubias, V. Ríos-Cortázar, A. Jauregui, and S. Barquera. 2020. "Comprensión y uso del etiquetado frontal nutrimental: Guías diarias de alimentación de alimentos y bebidas industrializados en México." *Salud Pública de México* 62(6): 786–797.
- United Nations Children's Fund. 2014. *General Comments of the Committee on the Rights of the Child: A Compendium for Child Rights Advocates, Scholars and Policy Makers*. Pretoria: UNICEF South Africa.

———. 2015. *Estudio exploratorio sobre la promoción y publicidad de alimentos y bebidas no saludables dirigida a niños en América Latina y el Caribe*. Ciudad del Saber: UNICEF.

Usla, H., and A. L. Gutiérrez. 2020. “Este jueves inicia el nuevo etiquetado de alimentos ... y 50 empresas ya se ampararon.” *El Financiero*, September 30. <https://www.elfinanciero.com.mx/economia/unilever-hershey-y-concamin-entre-quienes-buscan-amparos-contra-nuevo-etiquetado/>

Vargas-Meza, J., A. Jáuregui, A. Contreras-Manzano, C. Nieto, and S. Barquera. 2019. “Acceptability and Understanding of Front-of-Pack Nutritional Labels: An Experimental Study in Mexican Consumers.” *BMC Public Health* 19(1).

Vargas-Meza, J., A. Jáuregui, S. Pacheco-Miranda, A. Contreras-Manzano, and S. Barquera. 2019. “Front-of-Pack Nutritional Labels: Understanding by Low- and Middle-Income Mexican Consumers.” *PLOS ONE* 14(11).

Warzak, W. J., S. Evans, M. T. Floress, A. C. Gross, and S. Stoolman. 2010. “Caffeine Consumption in Young Children.” *Journal of Pediatrics* 158(3): 508–509.

World Cancer Research Fund International. 2019. “Building Momentum: Lessons on Implementing a Robust Front-of-Pack Food Label.” <http://wcrf.org/buildingmomentum>

World Health Organization. 2015. *Guideline: Sugars Intake for Adults and Children*. Geneva: World Health Organization.

World Health Organization and Food and Agriculture Organization. 2003. “Diet, Nutrition and the Prevention of Chronic Diseases: Report of a Joint WHO/FAO Expert Consultation.” *WHO Technical Report Series* 916.

World Trade Organization. 2015. *Annex 3: Code of Good Practice for the Preparation, Adoption and Application of Standards*. https://www.wto.org/english/res_e/publications_e/ai17_e/tbt_annex3_oth.pdf

———. 2020. *The WTO Agreements Series: Technical Barriers to Trade* (3rd edition). Geneva: World Trade Organization Trade and Environment Division.

World Trade Organization (WTO) Appellate Body. 2001. *European Communities: Measures Affecting Asbestos and Asbestos-Containing Products*. WTO Doc. WT/DS135/AB/R.

World Trade Organization (WTO) Committee on Technical Barriers to Trade. 2013a. *Minutes of the Meeting of 6–7 March 2013*. WTO Doc. G/TBT/M/59.

———. 2013b. *Minutes of the Meeting of 17, 19 and 20 June 2013*. WTO Doc. G/TBT/M/60.

———. 2014a. *Minutes of the Meeting of 30–31 October 2013*. WTO Doc. G/TBT/M/61.

———. 2014b. *Minutes of the Meeting of 19–20 March 2014*. WTO Doc. G/TBT/M/62.

———. 2015. *Minutes of the Meeting of 17–18 June 2015*. WTO Doc. G/TBT/M/66.

———. 2016. *Minutes of the Meeting of 15–16 June 2016*. WTO Doc. G/TBT/M/69.

———. 2018a. *Minutes of the Meeting of 8–9 November 2017*. WTO Doc. G/TBT/M/73.

———. 2018b. *Eighth Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade under Article 15.4*. WTO Doc. G/TBT/41.

Ecuador's Traffic Light Labeling System: Its Impact and the Potential Need for Updating

Daniela Valdivieso Riofrío¹

Daniel Felipe Dorado Torres²

1 Researcher and consultant on corporate accountability.

2 International and Latin American director of policy organizing and the tobacco campaign at Corporate Accountability.

In 2014, Ecuador became a pioneer in Latin America when it adopted a mandatory traffic light labeling system via Ministerial Agreement 5103 of the Ministry of Public Health, which called for the government to “issue a substitute health regulation for labeling processed foods for human consumption.” However, since the rollout of this traffic light system, other countries in the region—including Chile, Uruguay, Peru, Mexico, and, most recently, Colombia—have opted for front-of-package warning labels in the form of octagons (Chile, Uruguay, Peru, and Mexico) or circles (Colombia). In light of these developments, the Ecuadorian government has begun exploring (in the context of the 2019 reform to Ministerial Agreement 5103 and recent discussions on the Organic Health Code) whether its traffic light system should evolve, for example, toward octagonal front-of-package warning labels.³ According to scientific evidence, front-of-package warning labels are more effective than traffic light labels in providing the information that consumers need, as well as in helping counteract overweight, obesity, and other health problems stemming from the consumption of ultra-processed products.

This chapter seeks to address the following. First, it reflects on the evolution of the food system in Ecuador and its

3 It is worth mentioning that as of 2024, the Ministry of Public Health and other public entities in Ecuador were engaged in discussions around the approval of a regulation requiring front-of-package octagonal warning labels. However, such a regulation has yet to be issued.

implications for the country's overweight and obesity epidemic. Second, it analyzes how this epidemic, exacerbated by the consumption of ultra-processed products, provided the impetus for Ecuador's adoption of a traffic light labeling system for processed and ultra-processed foods, paying special attention to the food industry's interference in the adoption, implementation, and strengthening of this public policy. Third, it explores the need for Ecuador's traffic light system to evolve, for example, toward octagonal front-of-package warning labeling, drawing on the country's domestic legal framework, human rights principles and instruments, inter-American jurisprudence, and scientific evidence.

Our analysis clearly demonstrates the importance of having a food labeling system that allows the population to make informed decisions about the products they are going to consume. In the case of Ecuador, traffic light nutrition labeling allows consumers to know how much salt, sugar, and fat a product contains. However, this system has remained largely unchanged in the eight years since its adoption, and there is evidence that front-of-package labeling, particularly in the form of octagonal warnings, fosters better eating habits among populations. In this light, we end the chapter with an exploration of whether Ecuador should update its regulations to embrace this type of labeling system instead.

Food Consumption Patterns in Ecuador: A Paradigm Shift?

The global food system has undergone a complete transformation. The idea of eradicating hunger, as cemented by the food industry in the global imaginary, calls for increasing productivity to improve the availability and accessibility of food and to decrease prices. Under this industrial paradigm, the food system has become a centralized model in which a range of processes are standardized and controlled. As part of this system, (i) food is reified, becoming a commodity or "just another good," fostering a rupture between agriculture, the processing of food, and consumption, and (ii) corporations begin to decide what, for whom, and how food is consumed, since

they control the various links in the chain, as well as production, distribution, and consumption (Cabeza 2010). One of the consequences of these two industrial “pillars” is the negative impact on consumers’ health.

The global phenomenon of chronic noncommunicable diseases⁴ (NCDs) is one such impact of the industrialized food system. According to the Pan American Health Organization (PAHO), NCDs are responsible for 71% of global deaths—41 million people—each year (Pan American Health Organization 2021). PAHO also reports that in the Americas, NCDs account for 81% of all deaths (5.5 million people) each year; but even more alarming is the fact that 39% of these deaths—2.2 million people—are of people under the age of seventy (i.e., premature deaths) (*ibid.*). In Ecuador in particular, data provided by the National Institute of Statistics and Censuses indicate that 52.4% of the country’s deaths are from NCDs (Instituto Nacional de Estadística y Censos 2019).

Ecuador—with a population of 17,640,784 (*ibid.*)—underwent a transformation in its dietary pattern beginning in the 1980s, when, in line with international trends, the country experienced (i) a decrease in farmland destined for domestic consumption, (ii) an increase in food imports, and (iii) increased agricultural exportation (Dorado Torres 2019). Together, these factors have translated into a society with a high prevalence of NCDs, as diets rich in complex carbohydrates and fiber have been replaced by fats and complex sugars.

The 2012 and 2018 National Health and Nutrition Surveys and the 2018 STEPS Survey (a household-based survey of the population aged eighteen to sixty-nine) underscore the reality of Ecuadorians’ dietary habits. One-third of the population consumes excessive amounts of carbohydrates. Furthermore, the highest levels of fat intake occur in the most developed and higher-income regions of the country. In terms of fruits and vegetables, nine out of ten adults do not eat the five recommended

4 According to the Pan American Health Organization (2021), “The term NCDs refers to a group of conditions that are not mainly caused by an acute infection, result in long-term health consequences and often create a need for long-term treatment and care.”

daily portions—and of those who do, they do so only four days a week. In addition, 11.1% consume processed foods “always” or “frequently,” and 67.7% read the salt or sodium content on food labels (Ministerio de Salud Pública et al. 2018). As reported by the 2012 National Health and Nutrition Survey (Freire, Ramírez-Luzuriaga, et al. 2014), almost all adolescents (81.5%) consume sugary drinks (soft drinks, energy drinks, or processed juices), and half (50.5%) eat fast foods such as french fries, hamburgers, *salchipapas* (french fries topped with sliced sausages or hot dogs), hot dogs, pizza, and so forth. Of the survey respondents, 64% are estimated to consume salty and sweetened snacks.

These data show that food consumption in Ecuador is a major health problem. They also point to the need to adopt public policies that protect people’s rights to health, to life, and to adequate food, as well as the rights of children and adolescents and of consumers, as discussed below.

The 2018 National Health and Nutrition Survey and the STEPS Survey both show that overweight and obesity have reached epidemic levels—they are affecting all population groups and ages, and their clearest impact is the alarming increase in NCDs (Instituto Nacional de Estadísticas y Censos 2019; Ministerio de Salud Pública et al. 2018). According to the STEPS Survey, 63.6% of Ecuador’s adults aged eighteen to sixty-nine are overweight or obese. And as reported by the National Health and Nutrition Survey, 35.38% of children aged five to eleven, 29.57% of adolescents aged twelve to nineteen, and 64.68% of adults aged nineteen to fifty-nine are overweight or obese.

According to PAHO, these types of problems begin during a fetus’s development, when a woman who becomes pregnant suffers from chronic malnutrition, iron-deficiency anemia, zinc deficiency, or overweight or obesity. A pregnancy marked by malnutrition leads to poor fetal nutrition, which, in turn, causes poor fetal growth. After birth, the newborn child’s situation is exacerbated by poor breastfeeding practices and poor complementary feeding—two common problems in Ecuador—which can lead to stunting and, in some cases, to overweight, increasing the chances that the child will suffer from NCDs in adulthood (Pan American Health Organization 2014).

Indeed, obesity and overweight play a leading role in Ecuador's epidemiological profile. Eight percent of the country's under-five population is already overweight or obese, and 21.6% are at risk of becoming overweight or obese (*ibid.*). Moreover, when children reach school age, this rate increases to 30%. Among adolescents, 26% are obese or overweight, a figure that rises to 62.8% among adults aged twenty to sixty. Finally, 59% of older adults are overweight or obese (*ibid.*, 7–8).

TABLE I
Absolute values of overweight and obesity among the Ecuadorian population, 2012

Under 5	School-age children	Adolescents	Adults over 20
148,779	678,000	413,064	5,558,185

Source: Dorado Torres (2019)

The risk scenario being unleashed by this situation should be of utmost concern for Ecuadorian authorities. Overweight and obesity from an early age can lead to problems such as type 2 diabetes, cardiovascular disease, coronary illnesses, certain types of cancer (including endometrial, colon, and breast cancer), respiratory illnesses, liver and gallbladder diseases, hypertension, dyslipidemia, and sleep apnea (Dorado Torres 2019). This represents a genuine public health problem. According to the Ministry of Economic and Social Inclusion and the Economic Commission for Latin America and the Caribbean (cited in Dorado Torres 2019), the aforementioned illnesses cost the country us\$1.7 billion in 2017. As a result of these health problems, there is a strong tendency among the population to develop NCDs at an early age, to suffer from premature death, and to enjoy a lower number of productive years (Pan American Health Organization 2014). Indeed, Stephen Sherwood notes that in Ecuador, six of the top ten causes of death and 24% of all deaths are caused by NCDs (Salcedo 2018).

In light of the above, any analysis of Ecuador's epidemiological situation must be framed within the country's social and economic context. According to Freire, Silva, et al. (2014, 1637S), "Rapid social and economic development in the face of persistent

poverty and inequality are factors that provide the context for the double burden of malnutrition.”⁵ It is also important to consider that such malnutrition is related to the accelerated rate of urbanization, the dramatic reduction in physical activity, and changes in the population’s eating habits, as seen by people’s increased intake of processed and ultra-processed foods. As reported by the 2012 National Health and Nutrition Survey (Freire, Ramírez-Luzuriaga, et al. 2014), 21% of children under the age of five and 26% of adolescents spend two hours each day watching television or playing video games. Meanwhile, 35% of adult men engage in little or no physical activity; this figure is even more alarming among women, at 54%.

The change in eating habits is also related to changes in the population’s work habits, which has meant that many Ecuadorians now eat at least one meal a day outside the home, where they lack control over the ingredients used, the quality of the carbohydrates offered, the amount of salt added, and the quality of fats used. Workers have also increased their consumption of processed and ultra-processed foods, which are easy to access and inexpensive (Pan American Health Organization 2014, 11).

In sum, the problems described above have allowed the state to recognize that part of this epidemic of overweight and obesity is due to the population’s increased intake of ultra-processed foods and the misinformation on traditional nutrition labels.⁶ This is partly why the state chose to adopt the

5 According to the National Survey of Employment, Unemployment and Underemployment, the adequate/full employment rate is 38.5% among men and 27.8% among women, with a statistical difference of eleven percentage points. In terms of salary, this translates into an average monthly wage of us\$311 (Instituto Nacional de Estadística y Censos 2021). What this means is that Ecuadorians’ working conditions have not significantly improved in more than a decade and are increasingly precarious. Moreover, the survey reveals that as of the end of 2020, income inequality in Ecuador, as measured through the Gini coefficient, was 0.5 (ibid.).

6 Nutrition labeling is any description intended to inform the consumer about the nutritional properties of a food. It consists of (i) a nutrient declaration, which is a standardized statement or listing of the nutrient content of a food, and (ii) supplementary nutrition information, which is information intended to facilitate the consumer’s understanding of the nutritional value of a food product (Codex Alimentarius Commission 2021).

traffic light graphic alert system for packaged foods. The aim of this labeling system is to help consumers better understand the nutritional content of processed and ultra-processed foods and thus be able to make more informed and healthier eating choices, as discussed in the following section.

From the Overweight and Obesity Epidemic to the Need for a Traffic Light System, with a Brief Mention of Industry Interference

As noted above, surveys show that Ecuador has a high rate of overweight and obesity—a problem made worse by the fact that the food industry uses marketing strategies to make processed foods and sugary drinks attractive to consumers, especially children and adolescents. To address this public health concern, the Ecuadorian government proposed adopting a set of evidence-based strategies, including the regulation of the labeling of processed foods, the promotion of breastfeeding, the promotion of healthy eating in schools, taxation measures, and the regulation of advertising (Díaz et al. 2017).

In 2012, the Ministry of Public Health, the Ministry for the Coordination of Social Development, and the National Agency for Health Regulation, Control and Surveillance met with various stakeholders to review a draft regulation for the graphic labeling of processed foods and sweetened beverages (*ibid.*). During these discussions, they evaluated the possibility of adopting a traffic light labeling system featuring large letters and free of any extra messaging that could confuse consumers. Two years later, the Ministry of Public Health issued the Health Regulation for the Labeling of Processed Foods, which was subsequently modified through three ministerial agreements.

As recommended by PAHO, curbing the rise in obesity in the Americas requires the adoption of policies aimed at improving people’s eating habits and promoting physical activity and health. These include taxation policies, the regulation of advertising, and food labeling measures (Pan American Health Organization 2022b).

Food labeling is considered an effective tool for protecting consumers’ health because it conveys information about

a product's identity and contents, as well as how to handle, prepare, and consume it safely. Moreover, nutrition labeling is a key tool in the fight against NCDs, which are frequently linked to diet, because it helps consumers make healthier choices (Food and Agriculture Organization 2022). However, this requires that labels be trustworthy and not misleading.

The traffic light labeling system⁷ first emerged in the UK, which adopted the system to make it easier for consumers to understand the contents of processed and ultra-processed foods (Iza Guayaquil 2016). In its original form, the traffic light was to be located on the front of food packages, with the aim of enabling consumers to make informed decisions when choosing products. The idea was to encourage healthy eating by highlighting the most important components: fat, salt, and sugar, which are the elements directly linked to the emergence of diseases (*ibid.*, 25).

Traffic light labels indicate the levels of these three components in an effort to facilitate consumer decision-making. A red traffic light indicates a high level of a particular component, meaning that the food is something that consumers should limit. Yellow indicates a medium level, suggesting that the product can be a good option but should be consumed in moderation. Lastly, a green light signals that the product has a low level of the ingredient, making it a "better" choice (Iza Guayaquil 2016, 25). In Ecuador, the thresholds used for the three levels (high, medium, and low) were taken from the Pan American Health Organization, as shown in table 2 (Díaz et al. 2017).

The use of traffic light labeling in Ecuador began in 2014, in light of the shortcomings of traditional nutrition labeling (Acuerdo Ministerial 5103). This new system sought to guarantee the constitutional right to information that is timely, clear, accurate, and not misleading (Constitution, art. 52) regarding the contents and characteristics of products—in this case, food

7 This system consists of two parts: the first part indicates a product's level of sugars, salt, and fats, while the second communicates whether a product contains non-caloric sweeteners or transgenics and warns against the consumption of energy drinks containing caffeine, taurine, or glucuronolactone (Acuerdo Ministerial 5103).

TABLE 2

Concentrations recommended by the Pan American Health Organization for labeling processed foods containing fats, sugars, and salt

	“Low” level	“Medium” level	“High” level
Total fats	≤ 3 g per 100 g	> 3 g to < 20 g per 100 g	≥ 20 g per 100 g
	≤ 1.5 g per 100 mL	> 1.5 g to < 10 g per 100 mL	≥ 10 g per 100 mL
Sugars	≤ 5 g per 100 g	> 5 g to < 15 g per 100 g	≥ 15 g per 100 g
	≤ 2.5 g per 100 mL	> 2.5 g to < 7.5 g per 100 mL	≥ 7.5 g per 100 mL
Salt (sodium) (substituted by article 3 of Acuerdo 00004832, R.O. 237-S, 2-V-2014)	≤ 120 mg of sodium per 100 g	> 120 g to < 600 mg of sodium per 100 g	≥ 600 mg of sodium per 100 g
	≤ 120 mg of sodium per 100 mL	> 120 g to < 600 mg of sodium per 100 mL	≥ 600 mg of sodium per 100 mL

Source: Pan American Health Organization (2017) cited in Díaz et al. (2017)

products—so that consumers could make informed purchases. But it also sought to bring the country in line with the recommendations contained in General Comment 14 issued by the United Nations Committee on Economic, Social and Cultural Rights. As explained by Diana Guarnizo and Ana María Narváez (2019, 16):

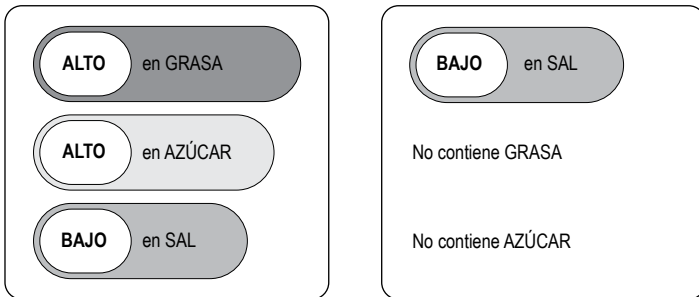
The right to access clear, accurate, and adequate information has been acknowledged as essential for the exercise of other rights, such as the rights to health, to food, to the environment, and to the free development of one’s personality, among others. In particular, regarding its importance for the exercise of the right to health, the Committee on Economic, Social and Cultural Rights has acknowledged a strong connection between these two rights. For the Committee, this relationship entails “the right to seek, receive and impart information and ideas concerning health issues.”

The new policy required all products, both domestic and imported, to include graphic labels on their packaging that

consumers could easily understand, as shown in figure 1. As established in chapter II of the Substitute Health Regulations on Processed Food Labeling for Human Consumption:

All processed food for human consumption must comply with Ecuadorian Regulation RTE INEN 022⁸ on the Labeling of Processed and Packaged Food Products. In addition, it must display a graphic system with horizontally placed colored bars; these colors shall be red, yellow, and green, depending on the concentration of the components: i) the red bar is assigned to a high content of a component and shall bear the phrase “HIGH IN ...”; ii) the yellow bar is assigned to a medium content of a component and shall bear the phrase “MEDIUM IN ...”; iii) the green bar is assigned to a low content of a component and shall bear the phrase “LOW IN ...”; ... The graphic system must be properly placed on a gray or white background, depending on the predominant colors on the packaging ... The graphic system should not be obstructed by any object or instrument for the consumption or use of the product, or by promotional products. (Acuerdo Ministerial 5103, art. 12)

FIGURE I
Traffic light label



Source: Díaz et al. (2017)

8 RTE INEN 022 outlines the labeling requirements for processed, canned, and packaged foods, while also including a prohibition on misleading information on labels or containers. In addition, the regulation outlines the requirements for the labeling of alcoholic beverages, energy drinks, and transgenic foods (Instituto Suramericano de Gobierno en Salud 2019).

Furthermore, the traffic light label must appear in the upper-left corner of the product's primary or secondary display panel. It is worth noting that the policy initially required the label to appear on the front of packaging; however, due to industry pressure, the policy was modified to allow the label to be placed in other parts, including the back (Instituto Suramericano de Gobierno en Salud 2019).

Following the policy's rollout, the government conducted an awareness-raising campaign via radio and television highlighting the benefits offered by the new labeling system. Additionally, the National Agency for Health Regulation, Control and Surveillance carried out a campaign aimed specifically at the food industry that sought to explain the regulation and which included the creation of a web page to resolve any doubts (Díaz et al. 2017).

Since then, the traffic light system has faced several challenges, as discussed in the next section. As observed by some experts on the subject, one of the main barriers has been industry interference. The original policy proposal was subject to negotiations with and concessions to the food industry, including

the elimination of the prohibition of images or animals; the inclusion of definitions of sugars (intrinsic or added), sweeteners (non-caloric, natural or artificial) and salt; the replacement of salt values in grams with milligrams; [and] the option of placing the label on the primary or secondary display panel, despite the available scientific evidence showing that front labeling contributes to the identification and selection of healthy foods. (Díaz et al. 2017, 3)

Yet perhaps the greatest advantage given to the food industry is the legal vacuum upon which this public health tool rests, since the muscle that could have been given to the measure by enshrining it in a legal provision was eschewed on account of the slowness and complexity of such a process. Instead, the government opted for a ministerial agreement—although the measure has been incorporated into the proposed Organic

Health Code, which is pending approval by the National Assembly⁹—which puts the measure in a complete state of violation, given the constant pushback by local and transnational business sectors. As noted by Díaz et al. (2017, 3):

i) the representative of the European Union reminded Ecuador that the Codex on Nutrition Labeling has not established minimum levels for the nutrients covered in the regulation ... suggesting that “the measure be suspended to allow companies at least six months to adapt to the new requirements”; ii) the representative of the United States of American indicated that Ecuador “did not carry out any public consultation with national stakeholders and [World Trade Organization] trading partners”; iii) Mexico issued a statement to the [World Trade Organization] raising doubts and requesting a series of modifications to Regulation RTE INEN 022, which coincided with the position expressed by the food industry.

Moreover, understanding that this measure could be the subject of analysis of future publications, it is worth considering the observation made by Freire et al. (2021, 69) in their *Qualitative Assessment of the Regulatory System for Processed Foods in Ecuador*:

Although this assessment did not analyze [Regulation RTE INEN 022 on the Labeling of Processed, Canned and Packaged Food Products issued by the Ministry of Industries and Productivity], this regulation should be reviewed together with the regulation issued by the Ministry of Public Health to prevent contradictions or conflicting provisions, to ensure that compliance with both regulations is compatible. For example, the regulation of the Ministry of Industries and Productivity should not give the same treatment to processed, packaged, and canned foods

9 “At a press conference on Friday, September 25, 2020 ... the Lenín Moreno administration announced its veto of the Organic Health Code. The bill was approved by the legislature on August 25, after eight years of debate. Thus, the 405 articles of the proposal were put on hold until September 25, 2021, since the Constitution provides that a total objection of the president can be reviewed and ratified only after one year, with a two-thirds vote of the Assembly” (Rosero 2020).

when the Ministry of Public Health's regulation talks only about processed foods.

It is clear that these overlapping regulations have inconsistencies between them, which opens the door for problems in their implementation.

Furthermore, as reported by Diana Guarnizo and Ana María Narváez (2019), a study published in the journal *Nutrients* used a randomized controlled experiment to evaluate consumers' understanding of the traffic light labeling system in Brazil and found that these labels generated confusion. When participants were presented with a product bearing a red light for one nutrient followed by a green light for another—for example, in packaged soup—they perceived the product as being healthier than it really was. Further, when traffic light labels were compared with warning labels, the latter proved to be more effective in facilitating consumer understanding. The study found that warning labels were evaluated more positively by consumers in terms of their design and usefulness and were more effective at communicating the importance of eating smaller, less frequent quantities of products bearing a label (Khandpur et al. 2018, cited in Guarnizo and Narváez 2019).

Finally, and without prejudice to the discussion in the next section, it is worth mentioning that after several years of implementation, the most apparent finding regarding Ecuador's traffic light labeling system is that it "is widely recognized and understood by consumers, who consider it to offer useful and important information" (Díaz et al. 2017). As found by the 2018 National Health and Nutrition Survey, 62.71% of Ecuadorians over the age of ten recognize, understand, and use these labels to make decisions; 84.34% have reduced their consumption of products with red lights; and 47.06% consume products with a red light (Instituto Nacional de Estadísticas y Censos 2019). In addition, other studies have reported that although consumers continue to purchase the same brands and products they used to buy before the traffic light system was adopted, they have reduced their consumption of products with high levels of sugars, salt, or fats (Poveda Guevara 2016).

This has had a positive impact on society in general, while posing an obstacle for the food industry because it has directly impacted the sales of certain products. In addition, the industry has argued that the deadlines for compliance with the new measure were too short and that the traffic light system fails to provide information that is useful or of interest to the population. According to the industry, overweight and obesity are not due to the consumption of processed foods, which represent “a tiny portion of Ecuadorians’ diet” (Instituto Nacional de Estadísticas y Censos 2019).

Ecuador’s labeling system has been hailed throughout the region for its success in facilitating informed decision-making among consumers and prompting companies to reformulate or withdraw certain products. That said, new research—including PAHO’s Nutrient Profile Model and analyses of the consumption of processed foods and sugary drinks—reveal that the population’s health remains at risk. Ecuador would therefore be wise to consider the need for additional measures to continue improving the dietary patterns described above.

Should Ecuador’s Traffic Light System Evolve?

Background

As noted by the United Nations Special Rapporteur on the Right to Health during his visit to Ecuador in September 2019:

Owing to the lack of an updated comprehensive legal framework, the Special Rapporteur was informed during the visit that the Ministry of Health has exercised its steering role, particularly in the area of regulation for protection against health risks, under ministerial agreements. Continuing to exercise its functions without a legal framework provided by the Constitution could eventually jeopardize the progress the country has made, for example in the area of food labelling. The Special Rapporteur stresses that an updated and comprehensive human rights-compliant legal framework is essential for the formulation of corresponding health regulations and policies. Without clear public health policies and regulations, the national health-care system risks being influenced by powerful interest groups that

often lobby for investment that may not be in the interests of the public. (Púras 2020, para. 25)

A consideration of whether Ecuador needs to update its traffic light labeling system should thus take into account certain elements, such as human rights principles and instruments, jurisprudence from the inter-American system, the country's legal framework, and scientific evidence. As pointed out by the Special Rapporteur, it is critical to guarantee the population's health through regulations that protect against health risks. In this regard, as explained throughout this chapter, one of the most effective policies for tackling malnutrition is a food labeling system that allows consumers to make healthier choices by being able to understand what components a given product contains. As stated by Guarnizo and Narváez (2019, 12, emphasis added):

According to the World Health Organization and the Pan American Health Organization, there are three fundamental measures that must be included in states' decision-making agendas in order to effectively encourage healthy eating habits among populations, including: i) taxation measures, particularly those that increase the sale price of sugary drinks by at least 20% ...; ii) *measures, such as labeling, aimed at adequately informing citizens of the nutritional content of products high in saturated fats, free sugars, and sodium ...*; iii) measures aimed at reducing the impact that the advertising of such products has on children ...; and iv) measures aimed at creating environments free of the advertising and marketing of unhealthy foods.

To this end, before providing an answer to the question posed in this section's heading, we will briefly review the scope of each of the aforementioned areas.

Ecuador's Legal Framework, Human Rights Principles and Instruments, and Inter-American Jurisprudence

Ecuador's Constitution provides that Ecuador is a constitutional state of rights and justice (art. 1). It also notes that one of the

state's primary duties is to guarantee, without discrimination, the effective enjoyment of the rights enshrined in the Constitution and in international instruments, particularly the rights to health, food, social security, and water (art. 3(1)); that people have the right to safe and permanent access to healthy, sufficient, and nutritious food (art. 13); that food is directly linked to the exercise of the right to health, in order to sustain a good life (art. 32); that people have the right to accurate information on goods and services that is not misleading (with respect to its content and characteristics) (arts. 18, 52); and that international human rights treaties ratified by the state are part of the Ecuadorian legal system, and if these treaties recognize rights that are more favorable than those enshrined in the Constitution, they shall prevail over any other legal regulatory system or action by public power (arts. 424, 425).

Therefore, in order to determine whether Ecuador needs to modify its traffic light labeling system, we must look at recent developments in the international and inter-American human rights systems regarding the rights to health and food, as well as these rights' relationship with the right to information in general and front-of-package labeling systems in particular. With this in mind, and recognizing that an in-depth exploration of these issues would exceed the scope of this chapter,¹⁰ we will focus on the statements of the United Nations Committee on Economic, Social and Cultural Rights (CESCR), the United Nations Special Rapporteur on the Right to Health, and the Inter-American Court of Human Rights.

As mentioned above, the CESCR has noted that the right to health, understood as "the right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realization of the highest attainable standard of health," is inextricably linked to the right to information and that access to health-related information is one of the underlying determinants of health (Committee on Economic, Social and Cultural Rights 2000, paras. 9, 11). In addition, one of the main components of the right to health is accessibility, which encompasses access

10 For more information, see Tovar Ramírez et al. (2020).

to information on issues regarding health (Tovar Ramírez et al. 2020, 19).

Similarly, we cannot ignore the fact that states have a duty to guarantee the right to health. The CESCR notes that this duty includes the obligation to “fulfill,” which requires states to, among other things, undertake actions that promote health, including “the dissemination of appropriate information relating to healthy lifestyles and nutrition, harmful traditional practices and the availability of services” (Committee on Economic, Social and Cultural Rights 2000, para. 37). Further, within this obligation to “fulfill” is the duty to “take measures against the health hazards posed by environmental pollution and occupational illnesses, as well as against any other threat identified by epidemiological data” (Tovar Ramírez et al. 2020, 19–20).

Finally, the CESCR has emphasized that some of the key obligations outlined in the International Covenant on Economic, Social and Cultural Rights¹¹ include the obligations to “adopt measures to prevent, address, and combat epidemic and endemic illnesses” and to “provide access to information on the main health problems in the community, including methods to prevent and combat those illnesses” (Tovar Ramírez et al. 2020, 20).

Meanwhile, former Special Rapporteur on the Right to Health Anand Grover was emphatic during his tenure in highlighting that the international human rights framework requires states to “institute measures in all areas of policymaking to reduce the burden of diet-related NCDs” (Grover 2014, para. 13). To prevent such illnesses, states must ensure that “information relating to healthy diets is accurate and available to encourage informed choices” (*ibid.*, para. 16).

Furthermore, Special Rapporteur Pūras issued a statement in 2020 highlighting the importance of states’ duty to ensure that everyone has access to essential food that meets the population’s dietary needs. He also mentioned the importance of taking measures to protect the rights to health and to food, such as front-of-package labeling for ultra-processed foods that are high in sugars, sodium, and saturated fats. This type of labeling

11 Ratified by Ecuador in 1969.

system has been recommended to help prevent chronic NCDs, and it has been successfully implemented in countries such as Chile, Uruguay, and Mexico. For this reason, Pūras urged governments to adopt such measures (Office of the United Nations High Commissioner for Human Rights 2020).

In the inter-American human rights system, the Inter-American Court of Human Rights has established that the right to adequate food is protected under article 26 of the American Convention on Human Rights.¹² As held by the court, “essentially, this right protects access to food that permits nutrition that is adequate and appropriate to ensure health,” and the notion of adequacy means that “it is not just any type of food that satisfies the right” (Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina, paras. 216, 220).¹³

The Inter-American Court has also held that “in specific cases of individuals or groups of individuals who are unable to access ... adequate food by themselves for reasons beyond their control, States must guarantee the essential minimum of food” (Advisory Opinion OC-23/17, para. 121).¹⁴ This reinforces the need for states to ensure the implementation of policies that promote adequate food for the population. The fact that people choose products with high levels of ingredients that are harmful to health—out of ignorance about this content—could be interpreted as being “unable to access ... adequate food by themselves.”

In light of the court’s holdings and the findings from the Special Rapporteur on the Right to Health’s visit to Ecuador in September 2019—and in accordance with international human rights treaties, which, by law, constitute part of Ecuador’s legal framework—it is possible to infer that the adoption of or evolution toward a front-of-package warning labeling system in Ecuador would contribute to the fulfillment of the country’s obligations concerning the rights to health and to adequate

12 Ratified by Ecuador in 1977.

13 See Tovar Ramírez et al. (2020, 22).

14 See *ibid.*, 45.

food, under the principle of progressive realization enshrined in the International Covenant on Economic, Social and Cultural Rights (art. 2(1)). As noted in Sentence 11-18-CN/19 of Ecuador's Constitutional Court:

It is clear from the Constitution that i) rights are found in the Constitution; ii) rights are also found in international human rights instruments; and iii) rights are found outside the Constitution and international instruments. This last category is known as unnamed rights.

... According to the body of constitutional law, the rights enumerated in the Constitution are illustrative and not exhaustive. The rights that are not listed in the Constitution are incorporated into this document in two ways: by reference to international instruments or by express recognition of unnamed rights, among which are "other rights stemming from the dignity of persons, communities, peoples and nations that might be needed for their full development" (article 11.7 of the Constitution).

... With regard to the recognition of rights by reference to international instruments, state authorities must observe the normative, jurisprudential, and doctrinal development of the mechanisms of international human rights protection. The sources of law, then, are international human rights treaties, human rights declarations, the jurisprudence of the Inter-American Court of Human Rights, the general comments of human rights committees, the reports of thematic rapporteurs and working groups of the United Nations, and the recommendations of the United Nations High Commissioner for Human Rights, among others. (Sentencia No. 11-18-CN)

As noted by PAHO, in order to reduce the consumption of processed and ultra-processed foods—which tend to be high in sugars, fats, and sodium—countries should adopt laws and regulations aimed at reducing the demand for and offer of this type of product; this includes the adoption front-of-package labeling measures that indicate whether products contain high percentages of these nutrients (Pan American Health Organization 2022a). According to the available scientific evidence, of the labeling models used to date in Latin America, the guideline

daily amount (GDA) system is the least effective in terms of communicating to consumers whether a product is healthy, followed by the traffic light system. In contrast, front-of-package warning labels—such as those used in Chile, Peru, and Uruguay—appear to be the most effective in communicating whether a product is healthy and, thus, in influencing consumers' purchasing decisions (Guarnizo and Narváez 2019). Such a labeling system is a simple, practical, and effective option for informing consumers about products that can affect their health and thereby helping them make informed choices.

Let us consider the case of Chile:

The implementation of this model in Chile—the only country to date with impact studies in this area—has shown positive results. Not only does the front-of-package warning labeling system seem to be the most effective labeling model in terms of communicating information about a product's healthiness, but it also has an important impact on consumers' purchasing choices.

According to a survey of 1,067 consumers conducted by the Universidad de Chile in 2017, one year after the system's rollout, 43.8% of people reported reading products' warning labels when buying food. Those who reported reading the warning labels were asked to rate how much the labels influenced their purchasing decisions. The survey found that the label influenced the purchasing choices of most people (91.6%): 67% indicated that the information prompted them to choose products with fewer warning labels; 9.7% reported that it prompted them to not buy products bearing labels; and 14.1% reported that it encouraged them to buy less of a product than they would have if it did not have warning labels. Only 8.4% indicated that the information had no effect on their purchasing decisions. Other studies conducted prior to this one or by private firms reported similar findings.

Thus, the scientific evidence is increasingly clear in showing that front-of-package warning labeling systems, compared to GDA and traffic light systems, are better at encouraging consumers to eat smaller and less frequent amounts of products whose regular consumption can have negative health effects. (Guarnizo and Narváez 2019, 33–34)

Scientific Evidence from Ecuador

Here, it is critical to look at the aforementioned *Qualitative Assessment of the Regulatory System for Processed Foods in Ecuador* conducted by Freire et al. (2021) of the Universidad San Francisco de Quito, the Universidad de Cuenca, and the Escuela Superior Politécnica del Litoral, with support from the United Nations Children’s Fund. The findings from this study—which analyzed consumers’ perceptions, use, and understanding of food labeling (included in the Substitute Health Regulations on Processed Food Labeling for Human Consumption)—are essential for the purposes of this chapter, which seeks to evaluate the need for a reform of Ecuador’s nutrition labeling model.

While we do not aim to discuss the *Qualitative Assessment* in depth, some of its conclusions and recommendations are in line with the guiding question of this chapter: is there a need for Ecuador’s traffic light labeling system to evolve? Freire et al.’s report offers analytical elements that are critical for Ecuador to consider as it continues to progressively develop this public policy in order to tackle the challenges facing the country.

Among the conclusions and recommendations offered by Freire et al.’s report are the following:

- Conclusions:

The traffic light labeling system is well known, and a significant portion of the population understands the information on account of its simple and eye-catching format and colors. In addition, consumers consider the labels to offer useful and important information, meaning that the labels make a positive contribution to their selection, purchase, and consumption of foods. However, the measure is not being entirely complied with, suggesting that there is a need for an effective oversight mechanism to deliver regular reports and help correct noncompliance. Another key problem is the fact that there are two applicable regulations in force, which means that some manufacturers tend to abide by the regulation issued by the Ministry of Industries and Productivity and not by the one issued by the Ministry of Health; this inhibits the correct application of the health regulation.

- Recommendations:
 - The appropriateness of Ecuador’s traffic light labeling system—which has been in force for several years—should be analyzed, since there is no assessment to date of the system’s performance in influencing consumers’ food purchasing behavior.
 - Since 2014, new graphic nutrition labeling systems have emerged in Latin America. *Examples include Mexico and Chile, two pioneers in adopting systems that provide information through front-of-package warning labels featuring simple text. This system has been shown to allow consumers to quickly, correctly, and easily identify products with excessive levels of nutrients of concern.* Legal and population studies in these two countries have demonstrated that this warning system is effective in leading to behavior change. The state should create an epidemiological surveillance and monitoring system that regularly and systematically provides information on the implementation of these regulations and on the nutritional status of the population. This would allow for the countries to know whether they are achieving their aim of reducing overweight and obesity among their populations.

The report’s conclusions and recommendations are compelling. In the same vein, the Ecuadorian legal system and the instruments that are considered part of it (such as international human rights instruments and inter-American jurisprudence) point to the need to update the current food labeling system in light of scientific evidence.

In an effort to protect the human rights to health and to food, PAHO and the World Health Organization have called on states to adopt measures to curb obesity. Among these measures are front-of-package labeling systems that clearly inform consumers about the levels of saturated fats, sugars, and sodium in certain products, as well as restrictions on the marketing of ultra-processed foods to children (Guarnizo and Narváez 2019). This is because people have the constitutionally enshrined right to information and to make free decisions about their health.

To conclude this section, it is worth looking at another study in Ecuador in which the majority of respondents (68.6%) reported reading nutrition labels, and half reported having stopped buying or consuming certain products due to their high content of sugars, salt, or fats. However, fewer than half of respondents (40%) believed that the information presented is sufficient. The study also concluded that the youngest respondents—those between the ages of eighteen and forty—were less aware than those over forty of what the red traffic light means. Finally, the study found that the vast majority of participants (82.6%) considered the traffic light system to be adequate for improving the population's health (Ramos Padilla et al. 2017).

These studies suggest that while consumers in Ecuador are aware of and utilize the traffic light nutrition labels, it is important to explore whether this labeling system should be updated in order to better meet the objective of reducing the population's consumption of products that are harmful to health when consumed in excess. Such a step is emphatically recommended by the World Health Organization and PAHO and is supported by the scientific evidence described above.

Current Landscape and the Challenges Ahead: Toward the Adoption of Octagonal Warning Labels

As discussed earlier, there is wide recognition of the importance of nutrition labeling aimed at protecting people's rights to health and to adequate food. Such labeling has the potential to convey clear information for consumers about a product's ingredients, quality, and nutritional value. Ecuador, in the eight years since its rollout of the traffic light labeling system, has borne witness to this. However, as acknowledged by the Inter-American Court of Human Rights:

Human rights treaties are living instruments whose interpretation must consider the changes over time and present day conditions ... That evolutive interpretation is consistent with the general rules of treaty interpretation established in Article 29 of the American Convention, and in the 1969 Vienna Convention on the Law of Treaties. By making an evolutive interpretation, the

Court has given special relevance to comparative law, and for this reasons has used domestic law or the case law of domestic courts when examining specific disputes in contentious cases. (Case of Gonzales Lluy et al. v. Ecuador, para. 21)

Similarly, as indicated by the authors of the *Qualitative Assessment* (Freire et al. 2021), it is clear that Ecuador’s traffic light system—adopted in 2014 in an effort to guide consumers toward healthier eating habits—should not remain etched in stone. At the time of its adoption, the Ministry of Public Health chose this labeling system (which, as mentioned earlier, has been subject to modifications¹⁵ and attempts at codification within the law¹⁶) for design reasons—namely, for the way that its simplicity and bright colors could help consumers make informed purchasing decisions. Further, the expectation was that manufacturers would lower the salt, fat, and sugar contents of many of their products (Ministerio de Salud Pública 2016). However, in order for the labeling system to meet its aim of conveying accurate and reliable information to consumers, as well as to contribute to fulfilling the rights to health and adequate food, it is necessary for it to evolve in accordance with the legal and technical considerations discussed above. In this regard, the statements of former Special Rapporteur Pūras, also mentioned above, highlight states’ obligation to respect, protect, and fulfill the right to health—in this case, by taking steps based on scientific

15 In 2016, the Ministry of Public Health saw the need to review and strengthen the labeling rules in order to ensure alignment with FAO’s Nutrient Profile Model. In particular, it sought to strengthen the monitoring of companies and sanction those that failed to comply with the regulation, to regulate advertising aimed at children and adolescents, to incorporate food taxes, and to require baby foods to include the labels for sugars, salt, and fats (Díaz et al. 2017). In 2019, the ministry embarked on a long process of reviewing Ministerial Agreement 5103, which culminated in a modification of the regulation. However, the modification—contained in Ministerial Agreement 00093-2019—included only a chapter on the “Labeling of Drinks Made with Whey” (Acuerdo Ministerial 00093-2019) and did not include any changes to the general process of food labeling, leaving the 2014 regulation largely untouched since its adoption, despite new evidence on the topic.

16 The inclusion of a provision on food and drink labeling in the Organic Health Code is still pending approval.

evidence to improve populations' eating habits (Office of the United Nations High Commissioner for Human Rights 2020).

We also must not forget principle 17, on the due diligence of companies, included in the Guiding Principles on Business and Human Rights:

In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. (United Nations 2011, 17)

The Ecuadorian state should thus take the appropriate legal or regulatory steps to ensure that—in accordance with the principle of due diligence—the rights to health, to healthy food, and to information are not violated when manufacturers of processed and ultra-processed foods fail to voluntarily update the tools that have been designed to protect the population from obesity. This means that food labeling measures, for example, should be updated according to the best available scientific evidence—specifically, to require front-of-package warning labels.

In light of the fact that a new presidential administration and new National Assembly were inaugurated on May 14, 2021, that the Organic Health Code is still pending approval, and that one of the new administration's priorities is to combat "child malnutrition,"¹⁷ there is a window of opportunity to foster a new debate encouraging the evolution of Ecuador's nutrition labeling system. Such an evolution could mean retaining the traffic light system but incorporating the recommendations of the *Qualitative Assessment* report (Freire et al. 2021) to address the coexistence of overlapping regulations, the lack of a monitoring and oversight mechanism, the absence of a law that lends greater stability to

17 Through Executive Decree 92 issued on July 6, 2021, President Lasso made this official by creating the "Ecuador Grows without Child Malnutrition" Technical Secretariat (previously the "Life Course Plan" Technical Secretariat) (García 2021).

the regulatory provisions, and the accuracy of the information being communicated on nutrition labels, among other things. Or the evolution could involve a move toward octagonal warning labels on the front of packaging (as is the case in Chile, Peru, Uruguay, and Mexico), which, according to scientific evidence, are more effective in communicating the information needed by consumers and in counteracting the high rates of overweight, obesity, and other illnesses linked to the consumption of ultra-processed foods (as mentioned earlier, labels in Ecuador can currently be placed on the backs of packages).

Based on the critical perspective that we, as authors of this chapter, should take, we are inclined to recommend the second scenario, for the reasons discussed throughout this chapter. For one, a labeling system adopted via ministerial agreement does not rest on legally stable ground. Furthermore, the need for the state to comply with its obligation to respect and fulfill the human rights to health and food means that a public health problem such as obesity requires the regular review and updating of tools that have been developed on the basis of scientific evidence free from conflicts of interest. Actors such as the World Health Organization, PAHO, and Special Rapporteurs have taken care to disseminate information on octagonal front-of-package warning labeling, which they see as the ideal tool for ensuring these rights, as well as the right to access clear and reliable information. Their statements reinforce our position. First and foremost, we believe that warning labels in Ecuador should be required on the front of packaging so that they can better be seen by consumers. Second, industry should not be allowed to have a say in determining the characteristics of such labels or their positioning on the product, as has been the case in the past. We invite Ecuadorian authorities to take these recommendations into consideration.

Finally, we would be amiss not to mention the need for Ecuador, when undertaking such a review of its traffic light system, to first adopt rules that—in the words of the Special Rapporteur on the Right to Health,¹⁸ the Inter-American Court

18 “The Special Rapporteur stresses that an updated and comprehensive human rights-compliant legal framework is essential for

of Human Rights,¹⁹ and the inter-American system’s Special Rapporteur on Economic, Social, Cultural and Environmental Rights²⁰—address the issues of industry interference and conflicts of interest, two issues to which Ecuador has not been immune, as evidenced during the adoption of its 2014 regulation. A starting point in this regard could be the provisions on conflicts of interest contained in the World Health Organization’s Framework Convention on Tobacco Control, which

the formulation of corresponding health regulations and policies. Without clear public health policies and regulations, the national health-care system risks being influenced by powerful interest groups that often lobby for investment that may not be in the interests of the public” (Puras 2020).

19 “States have the obligation not only to respect, but also to ensure the right to food, and should understand that this obligation includes the obligation to ‘protect’ this right as this was conceived by the CESCR: ‘[t]he obligation to protect requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food.’ Accordingly, the right is violated by a State’s ‘failure to regulate activities of individuals or groups so as to prevent them from violating the right to food of others’” (Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina, para. 221).

20 “The aforementioned rates of obesity and tobacco and alcohol consumption among the children of Latin America show a high rate of consumption of products that have the capacity to risk their right to health. According to information provided for the preparation of this report, the lack of compliance with the States’ obligations in addressing this problem and the behavior of the involved businesses themselves can be identified some of the causes of these statistics. In some cases it is reported that businesses may have strategies to increase their sales, as well as to prevent sanctions and implementation of effective policies that limit the commercialization, advertising, and consumption of these products in accordance with human rights standards through, for example, judicial proceedings or threatening suit against the State, lobbying and pressure on decision-makers, or financing studies questioned for their lack of objectivity, among others.

In all cases, the Commission recalls that States must establish and enforce legal frameworks and adopt measures that effectively prevent, address, and punish the negative commercial impact on the rights of children and adolescents, adopting whatever additional measures may be necessary. For their part, businesses have the responsibility to adjust their decisionmaking processes and operations taking into account their impact on children’s rights, particularly those industries with a differentiated impact on them” (Special Rapporteurship on Economic, Social, Cultural and Environmental Rights 2019, paras. 360–361).

Ecuador ratified in 2006.²¹ As noted by the Special Rapporteur on the Right to Health, this treaty could be used as a foundation to address the connection between public health and the interests of the food and drink industry:

The activities of transnational food and beverages companies, which account for one third of the food sales and are increasingly implicated in the global obesity and NCD epidemics needs to be regulated more closely. Their accountability for right to health violations leaves much to be desired. In this context, I welcome the recent resolution by the UN Human Rights Council, which moves in the direction of formulating international, legally binding standards on businesses with respect to human rights. It is also open to the World Health Organization to use its mandate as a treaty-making body to negotiate a framework convention on unhealthy diets, recognizing the inextricable link between unhealthy foods and NCDs as it has done for the Framework Convention on Tobacco Control. A specific binding framework convention on unhealthy diets would be more effective in responding to the global NCD disease burden. I call upon General Assembly to take this upon consideration in their outcome document. (Baby Milk Action 2014)

Conclusion

Ecuador urgently needs to take steps to address the eating habits of its population, which suffers from a double burden of malnutrition: on the one hand, chronic child malnutrition and, on the other, high rates of overweight and obesity, which are a serious risk factor for the development of NCDs. Indeed, this was why Ecuador paved the way in 2014, when it adopted a traffic light food labeling policy, positioning the country as a regional benchmark for public policies on nutrition. However, eight years later, Ecuador has yet to thoroughly update this regulation in accordance with international and inter-American standards and with its own constitutional framework.

21 https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IX-4&chapter=9&clang=en

In the meantime, other countries in the region—including Chile, Peru, Mexico, Uruguay, and, most recently, Colombia—have not only adopted food labeling policies but ensured that these policies require front-of-package warning seals (whether in octagonal or circular form). They have done so on account of the scientific evidence suggesting that such a system is more effective than others in encouraging the population to consume healthier foods.

National surveys have shown that most Ecuadorians are aware of and understand the traffic light labeling system and claim to have reduced their consumption of products with red lights—indeed, we must acknowledge that the colors are bright and eye-catching. However, this system has been the object of much criticism, and it is important to acknowledge its shortcomings. For example, some products give the false impression of being “healthy” merely because they have a green traffic light. It is important to remember that nutrition labeling influences consumers’ purchasing decisions, making it possible for them to make informed decisions about their diets.

It is clear that Ecuador needs to review and update its current food labeling regulation. This chapter has shown that such an update should involve *the adoption—via law, not ministerial agreement—of an octagonal front-of-package warning labeling system; further, the adoption process should be free from interference by the food and drink industry.* The updated policy should be based on the recommendations of the World Health Organization and PAHO, as well as the available scientific evidence discussed in this chapter, considering that eight years have passed since the adoption of the country’s current regulation.

References

- Acuerdo Ministerial 00093-2019 [Ministerio de Salud Pública]. Reforma al “Reglamento sanitario sustitutivo de etiquetado de alimentos procesados para el consumo humano.” December 17, 2019.
- Acuerdo Ministerial 5103. Reglamento sanitario sustitutivo de alimentos procesados para el consumo humano. August 25, 2014.

Advisory Opinion oc-23/17. Series A No. 23. Inter-American Court of Human Rights. November 15, 2017.

Baby Milk Action. 2014. "New Statement by the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health." July 7. <https://www.babymilkaction.org/archives/1272>

Cabeza, M. 2010. "El sistema agroalimentario globalizado: Imperios alimentarios y degradación social y ecológica." *Revista de Economía Crítica* 10: 32–61.

Case of Gonzales Lluy et al. v. Ecuador. Preliminary Objections, Merits, Reparations and Costs. Series C No. 298. Inter-American Court of Human Rights. September 1, 2015.

Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina. Merits, Reparations and Costs. Series C No. 400. Inter-American Court of Human Rights. February 6, 2020.

Codex Alimentarius Commission. 2021. *Guidelines on Nutrition Labelling*. Food and Agriculture Organization and World Health Organization.

Committee on Economic, Social and Cultural Rights. 2000. *General Comment No. 14: The Right to the Highest Attainable Standard of Health*. UN Doc. E/C.12/2000/4.

Constitution of the Republic of Ecuador. June 5, 1998.

Corte Constitucional del Ecuador. Sentencia No. 11-18-CN (matrimonio igualitario). June 12, 2019.

Díaz, A. A., P. M. Veliz, G. Rivas-Mariño, C. Vance Mafla, L. M. Martínez Altamirano, and C. Vaca Jones. 2017. "Etiquetado de alimentos en Ecuador: Implementación, resultados y acciones pendientes." *Revista Panamericana de Salud Pública* 41: e:54.

Dorado Torres, A. M. 2019. "El sistema alimentario agroindustrial: Un modelo para el detrimento de los sistemas locales y la salud de los consumidores." Master's thesis, Universidad Andina Simón Bolívar. <https://repositorio.uasb.edu.ec/bitstream/10644/6870/1/T2963-MCCSD-Dorado-El%20sistema.pdf>

Food and Agriculture Organization. 2022. "Food Labelling." <https://www.fao.org/food-labelling/en/>

Freire, W., A. M. Ochoa Áviles, D. Peñafiel, M. Castillo, M. L. Centeno, W. F. Waters, and P. Belmont. 2021. *Evaluación cualitativa del sistema de reglamento sanitario de alimentos procesados en Ecuador: Segunda evaluación 2021*. Quito: Universidad San Francisco de Quito USFQ.

Freire, W. B., M. J. Ramírez-Luzuriaga, P. Belmont, M. J. Mendieta, K. Silva-Jaramillo, N. Romero, K. Sáenz, P. Piñeiros, L. F. Gómez, and R. Monge. 2014. *Tomo I: Encuesta Nacional de Salud y Nutrición de la población ecuatoriana de cero a 59 años; ENSANUT-ECU 2012*. Quito: Ministerio de Salud Pública, Instituto Nacional de Estadística y Censos.

Freire, W., K. Silva, M. Ramírez, P. Belmont, and W. Waters. 2014. "The Double Burden of Undernutrition and Excess Body Weight in Ecuador." *American Journal of Clinical Nutrition* 100(6): 1636S–1643S.

García, A. 2021. "Presidente Lasso oficializó cambios estructurales en dos Secretarías de Estado." *El Comercio*, July 8. <https://www.elcomercio.com/actualidad/politica/presidente-lasso-cambios-secretarias-estado.html>

Grover, A. 2014. *Unhealthy Foods, Non-communicable Diseases and the Right to Health*. UN Doc. A/HRC/26/31.

Guarnizo, D., and A. M. Narváez. 2019. *Etiquetas sin derechos: Etiquetado de productos comestibles; Un análisis desde los derechos humanos*. Bogotá: Dejusticia.

Instituto Nacional de Estadísticas y Censos. 2019. *Encuesta Nacional de Salud y Nutrición ENSANUT 2018*. Quito: Ministerio de Salud Pública, Instituto Nacional de Estadística y Censos.

———. 2021. *Encuesta Nacional de Empleo y Desempleo ENEMDU*. Quito: Ministerio de Salud Pública, Instituto Nacional de Estadística y Censos.

Instituto Suramericano de Gobierno en Salud. 2019. *Determinación social de la salud: Interferencia de la industria de alimentos en las políticas; Etiquetado gráfico innovador de alimentos procesados en Suramérica*. <https://www.rets.epsjv.fiocruz.br/sites/default/files/arquivos/interferencia-de-la-industria-en-etiquetado-isags.pdf>

International Covenant on Economic, Social and Cultural Rights. December 16, 1966.

Iza Guayaquil, A. E. 2016. *Utilización del etiquetado nutricional por semáforo en bebidas procesadas por parte de los compradores adultos, que realizan sus compras en un*

supermercado del centro de Quito en los meses de octubre-noviembre del 2015. Quito: Repositorio PUCE.

Ministerio de Salud Pública. 2016. "Ecuador se posiciona como líder del etiquetado de alimentos." Gobierno de la República de Ecuador. www.salud.gob.ec/ecuador-se-posiciona-como-lider-del-etiquetado-de-alimentos/

Ministerio de Salud Pública, Instituto Nacional de Estadística y Censos, and Pan American Health Organization. 2018. *Encuesta STEPS Ecuador 2018: Vigilancia de enfermedades no transmisibles y factores de riesgo.* Quito: Ministerio de Salud Pública.

Office of the United Nations High Commissioner for Human Rights. 2020. "Statement by the UN Special Rapporteur on the Right to Health on the Adoption of Front-of-Package Warning Labelling to Tackle NCDs." July 27. <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26130&LangID=E>

Pan American Health Organization. 2014. "Prevención integral de las enfermedades crónicas no transmisibles – ENT." *Revista Informativa de la OPS/OMS: Representación Ecuador* 32: 7–77.

———. 2021. "Noncommunicable Diseases." <https://www.paho.org/en/topics/noncommunicable-diseases>

———. 2022a. "Front-of-Package Labeling." <https://www.paho.org/en/topics/front-package-labeling>

———. 2022b. "Obesity Prevention." <https://www.paho.org/en/topics/obesity-prevention>

Poveda Guevara, A. F. 2016. "Impacto del sistema de alertas 'semáforo' de contenido de azúcar, sal y grasa en etiquetas de alimentos procesados: Enfoque cualitativo." *Universitas* 14(25): 48–60.

Pūras, Dainius. 2020. *Visit to Ecuador: Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health.* UN Doc. A/HRC/44/48/Add.1.

Ramos Padilla, P. D., T. V. Carpio Arias, V. C. Delgado López, V. D. Villavicencio Barriga, E. Andrade, and J. F. Fernández-Sáez. 2017. "Actitudes y prácticas de la población en relación al etiquetado de tipo 'semáforo nutricional' en Ecuador." *Revista Española de Nutrición Humana y Dietética* 21(2): 121–129.

Rosero, M. 2020. "Código de Salud va al congelador por un año: El Ejecutivo vetó los 405 artículos." *El Comercio*, September 25. <https://www.elcomercio.com/actualidad/ecuador-codigo-salud-veto-ley.html>

Salcedo, I. 2018. "'Sin consumo responsable no habrá agroecología': Conversando sobre la vitalidad de la comida y los alimentos con Stephen Sherwood." *OCARU*, May 30. <https://ocaru.org.ec/en/sin-consumo-responsable-no-habra-agroecologia-conversando-sobre-la-vitalidad-de-la-comida-y-los-alimentos-con-stephen-sherwood/>

Special Rapporteurship on Economic, Social, Cultural and Environmental Rights. 2019. *Business and Human Rights: Inter-American Standards*. Washington, DC: Inter-American Commission on Human Rights.

Tovar Ramírez, A., B. Ríos, I. Barbosa, M. Medina Arellano, R. Gutiérrez Rivas, S. Serrano Guzmán, and O. Cabrera. 2020. *Etiquetado frontal de advertencia en productos comestibles: Materialización de obligaciones de los estados en derechos humanos*. Global Center for Legal Innovation on Food Environments, O'Neill Institute for National and Global Health Law, Georgetown University e Instituto de Investigaciones Jurídicas, Universidad Nacional Autónoma de México.

United Nations. 2011. *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*. New York: United Nations.

World Health Organization. 2005. *WHO Framework Convention on Tobacco Control*. Geneva: World Health Organization.

Advertising Warnings versus Front-of-Package Warning Labels: An Analysis of Peruvian Legislation

*Jaime Delgado Zegarra*¹

1 President of AVISA Perú – Asociación Vida, Salud y Ambiente.

Introduction

Why did Peru choose a system of advertising warnings and not just a front-of-package warning labeling system? The answer is that consumer behavior, preferences, and desires are shaped by external influences, especially advertising. Purchasing decisions are not made only at the moment when a consumer sees a product or its label; rather, they begin much earlier. Thus, the most logical approach to combat unhealthy eating behaviors in the population is to ensure that the *advertising* of foods containing trans fats or high in sugars, sodium, or saturated fats includes warnings urging consumers to reduce or eliminate their consumption of such products. Although placing warnings on product packaging is very effective because it targets a key moment in the decision-making process, by that time the consumer has likely already been seduced enough by the advertising to buy and consume the product.

Peru was one of the first countries in Latin American to adopt comprehensive legislation on the problem of overweight, obesity, and chronic noncommunicable diseases, which are the result of malnutrition and the powerful influence of industry advertising that promotes the consumption of unhealthy products. Specifically, the country's Law 30021 on the Promotion of Healthy Eating among Children and Adolescents (commonly known as the Healthy Eating Law) prohibits the sale of unhealthy food in schools, promotes nutrition education and daily physical activity in schools, prohibits trans fats, regulates food advertising, and establishes a warning system for processed foods.

Among the law's most notable aspects—and the aspect that faced the most pushback from the food industry and its political allies—are its provisions on advertising warnings. According to these provisions, such warnings must appear on all forms of advertising of unhealthy products, including on the front of packaging. For example, in the case of products whose levels of sugars, sodium, or saturated fats exceed established thresholds, the warning must say “high in [sugars/sodium/saturated fats]—avoid excessive consumption.” And in the case of trans fats, which the law seeks to progressively limit and eventually prohibit, the warning must state “contains trans fats—avoid consumption.”

For more than five years, the food industry and certain political sectors lobbied hard to remove the Healthy Eating Law's provisions requiring these types of warnings, but they were unsuccessful due in large part to the broad public support for such labels. Indeed, the Peruvian population appreciated the power of such information, whose simplicity encourages understanding without requiring expertise in nutrition.

This chapter explores the implications of these warnings, which must appear in all types of advertising for products containing trans fats or high in sugars, sodium, or saturated fats, including when social media influencers promote such products. Peruvian legislation requires these and other actors to clearly disclose the promotional nature of their references to or recommendations of such products while also abiding by rules regarding the size, shape, location, and duration of the required warnings. For example, if a sports commentator makes an advertising mention of a product containing trans fats or that is high in sugars, sodium, or saturated fats, the commentator must also narrate the respective warning. In this light, this chapter looks at the legal content, characteristics, implications, and impact of advertising warnings, as well as the food industry's efforts to restrict and prevent their application.

Scope of Law 30021 on the Promotion of Healthy Eating among Children and Adolescents

In 2012, with the introduction of Bill 1038/2011-CR, Peru's Congress began debating a law on healthy eating (Proyecto de Ley

1038/2011-CR). After a year of debate, the legislature approved Law 30021, which was published in the official gazette on May 17, 2013. However, due to a lack of implementing regulations and strong opposition from industry, especially ultra-processed food companies, the law did not take effect until 2019.

Among the key elements of the Healthy Eating Law are the following:

- The obligation to include nutrition education in schools.
- The obligation to promote daily physical activity in schools.
- The regulation of food advertising aimed at children and adolescents. The law prohibits certain marketing techniques, such as sweepstakes, contests, and other enticements to encourage consumption. It also bans the use of images of natural ingredients on packaging or ads if the product does not contain those ingredients.
- A ban on the sale of junk food in schools. According to the law, only healthy food may be dispensed in schools.
- The promotion of healthy eating in health care clinics.
- Warnings for products that contain trans fats or that are “high in” sugars, sodium, or saturated fats. Such warnings must appear not only on the front of packaging but also on any other type of publicity (including radio, television, internet, billboards, and posters).

In addition, Law 30021 has given rise to a series of complementary provisions, including the following:

- Implementing Regulations for Law 30021 on the Promotion of Healthy Eating (Decreto Supremo 017-2017-SA)
- Supreme Decree 015-2019-SA (2019) Modifying the Regulation of Law 30021 (Decreto Supremo 015-2019-SA)
- Manual on Advertising Warnings (Decreto Supremo 012-2018-SA)
- Technical Standard on Guidelines for the Promotion of Healthy Eating and the Management of Healthy School Kiosks and Cafeterias in Basic Education (Resolución Viceministerial 076-2019)

- *Advertising Guide for Influencers* (Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual 2019)
- Regulation for the Elimination of Trans Fats (Decreto Supremo 033-2016-SA)
- Directive for the Promotion and Encouragement of Healthy Eating in All EsSalud Facilities (Resolución 503-GG-ESSALUD-2019)
- Guidelines for the Design, Administration, Operation, Conduct, and Adjudication of Kiosks in Public Schools (Resolución Viceministerial 076-2019)
- Dietary Guidelines for the Peruvian Population, Ministerial Resolution 1353-2018/MINSA of December 29, 2018 (Lázaro Serrano and Domínguez Curi 2018)
- Ordinance 2366-2021 Promoting the Creation of Healthy Environments for Children and Adolescents in Metropolitan Lima of June 30, 2021 (Ordenanza 2366-2021)

One important aspect of Law 30021 is its requirement that schools dispense only healthy food and drinks. Healthy eating is understood as encompassing a varied diet and featuring food that is unprocessed or minimally processed, in addition to food containing the nutrients needed to maximize quality of life. This requirement had a significant impact on school cafeterias and kiosks, which are traditionally operated by third-party providers. These providers have historically prioritized profitability over other factors, facing no other requirement than needing to ensure the safety of their products, without regard to their nutritional content.

Concerning this issue, the Ministry of Education's Guidelines for the Promotion of Healthy Eating and the Management of Healthy School Kiosks and Cafeterias in Basic Education note that

school kiosks and cafeterias are educational spaces where students engage in social and leisure activities. It is important to identify these settings as an opportunity for the development of learning related to healthy eating habits, cultural appreciation, getting

along with others, and the strengthening of bonds. (Resolución Viceministerial 076-2019, para. 5.2)

In other words, school kiosks and cafeterias have ceased to exist in isolation and are now considered part of the “educational space” for children’s nutrition education. This makes sense: it is absurd to expect teachers to provide nutrition education to students in the classroom, only for students to go out for recess or lunch break and be offered ultra-processed foods by kiosks and cafeterias.

Similarly, most food product labels and packaging have failed to facilitate consumers’ understanding of the complex information contained therein, which is why Peru’s government introduced advertising warnings. While food labeling standards were originally conceived as a way to inform consumers about a product’s characteristics and composition, the presentation of such nutritional information has not generally contributed to that understanding. We could say that “labeling regulations have failed and no longer serve the purpose for which they were created” (Delgado-Zegarra 2011). Responding to this void, Law 30021 lays out a series of advertising warnings that can fulfill this purpose.

Peru’s Advertising Warnings: An Overview

The Healthy Eating Law provides for four types of warnings:

- Contains trans fats—avoid consumption
- High in sugars—avoid excessive consumption
- High in sodium—avoid excessive consumption
- High in saturated fats—avoid excessive consumption

The first transitional supplementary provision of the Healthy Eating Law established that the relevant parameters would be set by the Ministry of Health within sixty days of the law’s enactment. In addition, to prevent industry influence and the adoption of arbitrary criteria not based on science, this provision established that

the technical parameters on food and nonalcoholic beverages regarding high content of sugars, sodium, and saturated fats are set by the Ministry of Health via regulation within a term not exceeding sixty (60) calendar days from the date of this Law's entry into force and will be based on the set of recommendations issued by the intergovernmental health organization: World Health Organization–Pan American Health Organization.

However, these parameters were not set within the established period of sixty days; instead, they took more than four years. Moreover, when they were eventually approved via Supreme Decree 017-2017-SA, they set much more permissive thresholds than those recommended by the Pan American Health Organization's Nutrient Profile Model, although they did specify a two-part process in which the second phase would be more stringent than the first. The first phase began on June 16, 2019, and the second on September 17, 2021.

FIGURE I
Peru's two-part process for implementing advertising warnings

	First phase	Second phase
Sodium in solid foods	Greater than or equal to 800 mg/100 g	Greater than or equal to 400 mg/100 g
Sodium in beverages	Greater than or equal to 100 mg/100 g	Greater than or equal to 100 mg/100 g
Total sugars in solid food	Greater than or equal to 22.5 mg/100 g	Greater than or equal to 10 mg/100 g
Total sugars in beverages	Greater than or equal to 6 g/100 mL	Greater than or equal to 5 g/100 mL
Saturated fats in solid food	Greater than or equal to 6 g/100 g	Greater than or equal to 4 g/100 g
Saturated fats in beverages	Greater than or equal to 3 g/100 mL	Greater than or equal to 3 g/100 mL

Source: Decreto Supremo 017-2017-SA

In this regard, it is important to note that the Attorney General's Office, in response to civil society pressure, filed a class-action lawsuit calling for the enforcement of the law's mandate, specifically with respect to the fact that the implementing

regulations set more lax thresholds for sugars, sodium, and saturated fats than those required by the law. After drawn-out judicial proceedings, the Supreme Court issued a ruling in 2021 giving the executive branch six months to incorporate the Pan American Health Organization's parameters as a benchmark for the advertising warnings (*Acción Popular* 27461-2018). It is estimated that approximately 12% of products that lacked the warnings at the time of the court's ruling would need to include them once the new thresholds were applied (Delgado-Zegarra and Da Silva Gomes 2021).

Thresholds were not established for trans fats because Law 30021 required warnings for any level of trans fats in a product. Indeed, the law's wording for such warnings is "contains trans fats—avoid consumption." The warning does not say "high in trans fats" but rather "contains trans fats." And it does not say "avoid excessive consumption" but rather "avoid consumption." Further, the law called for the complete elimination of trans fats via a gradual process ending July 23, 2021. Thus, today the use of industrially produced trans fats (i.e., partially hydrogenated oils) is prohibited in Peru.

The food industry put up significant resistance to the trans fats warnings. Some companies claimed that if their products contained less than 0.5 grams of trans fats per serving, they could declare them free of trans fats—in line with the US Food and Drug Administration's standards—and thus not need to display a warning. On this issue, the National Institute for the Defense of Competition and the Protection of Intellectual Property's (INDECOP) Unfair Competition Commission established in litigation proceedings that the application of Law 30021 requires any product containing trans fats—regardless of the level—to display the warning (Resolución 005-2021/ccd). However, a second-instance decision issued by INDECOP's Defense of Competition Court, in response to an appeal filed by baking company Bimbo, revoked this criterion and allowed products containing less than 0.5 grams of trans fats to declare themselves as containing zero trans fats (Resolución 0134-2021-sdc). Unsurprisingly, this generated widespread protest, including by the Ministry of Health, the Office of the Ombudsperson, the Pan American Health Organization, and civil society organizations.

In a clear conflict of interest, this second-instance decision in favor of Bimbo was signed by Silvia Hooker, acting in her capacity as vice president of INDECOPI's Defense of Competition Court. However, at the time of the decision, she was also serving as international affairs manager of the National Society of Industries, an association staunchly opposed to Law 30021 and which includes Bimbo among its members. This decision has since been challenged before the courts by a consumer association—the Instituto del Derecho Ordenador del Mercado—and judicial proceedings are currently pending.

The Impact of Advertising Warnings

Resistance from the business sector and some political groups to the Healthy Eating Law and its new system of octagon-shaped advertising warnings was so strong that the issue occupied a key place on the national agenda for almost five years. One could say that there was hardly a Peruvian who was unaware of this debate. Further, as soon as the law came into force, so many products bore the new required octagonal warning label that it was impossible for the change to go unnoticed.

Shortly after the law took effect and the warnings on packages and in advertising were being used, a study by Ipsos Perú (2020) found that three out of five consumers in the capital of Lima were reading the warning labels of the products they usually purchased. Of the respondents, 85% reported that they had seen the new warnings, and 37% said that they had a significant impact on their purchasing decisions. Meanwhile, 40% indicated that the impact was moderate, having abandoned only some products bearing the warnings.

Another study, titled "Impact of Octagons on the Eating Habits of Limeños"—conducted by Axer Consultores and cited by Perú Retail ("Ley de octágonos" 2019)—revealed that 84% of consumers in Lima planned on changing their habits as a result of the new law by reducing or eliminating their purchase of certain products. The labels for "high in sugars" (rated most important by 32% of respondents) and "high in saturated fats" (31%) were identified as the most influential ones in terms of changing consumers' habits. This degree of importance assigned

to the octagonal warnings stems from respondents' level of knowledge of each component in their current diet and the precautions they tend to take as a result.

Additionally, a study conducted by the *Compañía Peruana de Estudios de Mercados y Opinión Pública* (2020) found that just 27.5% of respondents reported not paying attention to the octagons; in other words, more than two-thirds of those surveyed reported paying some kind of attention—and therefore, reacting—to the warning labels' presence. To be more precise, people who pay some kind of attention to the octagons make up 72.5% of those surveyed, and they are divided between those who "occasionally pay attention" (28.7%), those who "almost always pay attention" (21.2%), and those who "always pay attention" (22.6%). In particular, sugar-sweetened beverages bore the warning labels ahead of the law's deadline, displaying their octagons starting in February 2019; coincidentally, one of the most notable findings from the study is that these beverages are the product most impacted by the new labeling requirements. According to the study, among those who said that they have stopped buying products with octagons, more than half (53.1%) noted that they have stopped buying soft drinks, a percentage well above the second most impacted product: snacks (20.1%).

A study by the firm Kantar (Oie 2019) indicates that 67% of Peruvians have reduced or replaced their consumption of products bearing warning labels since the system's rollout. Thus, Peruvians have demonstrated a prudent response in their dietary choices, shifting their eating habits toward healthier products. In its nationwide survey, Kantar found that since the implementation of octagonal warning labels on food products, 45% of Peruvians were reading the labels; 34% were reducing their consumption of products bearing labels; 33% were replacing these products with natural alternatives, such as fruit; and 8% stopped buying products with these warnings.

While more studies are needed to fully understand the impact that these warnings have had on the market, there is no question that they have had a significant effect in terms of guiding consumers' purchases and generating interest among manufacturers in offering products that are less harmful to health.

Advertising Warnings: A Step beyond Front-of-Package Labeling

Peru opted for a system of warnings instead of a front-end labeling system based on guideline daily amounts (GDAs)—which usually take the form of “traffic lights”—which the industry has been proposing in several countries. The reason for this approach is simple: the aim is to “warn” consumers of the presence of or excess levels of unhealthy components in packaged foods. The idea is not to provide an overall rating or score for products, which would require evaluating all of a product’s components, properties, processing methods, and nutritional aspects, among other things, which is a complex undertaking.

Indeed, in order for such an evaluation to provide clear, truthful, and accurate information to consumers, it would have to be based on a comprehensive assessment of all aspects of a product—including the nutritional quality and quantity of each of its ingredients, its production methods, the source of its ingredients, the use of additives, and so forth. Such an effort would also apply to natural products, which would clearly receive the best score. Although such a “health value” rating system would be ideal, unfortunately no tool has been developed to date to facilitate this type of assessment (Delgado-Zegarra 2021).

In light of this, Peruvian lawmakers focused on the elements identified by the World Health Organization as triggers of the global epidemic of overweight and obesity: sugars, sodium, saturated fats, and trans fats. They ruled out other types of front-of-package labeling systems—such as Nutri-Score, GDA, and traffic light labels, as well as any other type of positive labeling system—because such a system would allow ultra-processed products that simply substitute sugar with sweeteners to obtain a positive rating. Labeling would thus work to the harm—rather than benefit—of consumers, which would be counterproductive.

Moreover, Peruvian lawmakers did not limit their approach to front-of-package labeling, instead taking a step further by establishing advertising warnings that apply to all forms of product advertising, packaging included. This approach gives wider meaning to the concept of health warnings. While it is

important that warnings about trans fats content and the accompanying recommendation to “avoid consumption”—or the warning about high sugars, sodium, and saturated fat content and the accompanying recommendation to “avoid excessive consumption”—appear on the fronts of packages, warnings in all forms of advertising add another dimension. Such forms of advertising include advertising in audiovisual media (radio, television, etc.) and print media (newspapers, magazines, billboards, posters, etc.), as well as influencer marketing. In other words, whenever a product containing trans fats or high in sugars, sodium, or saturated fats is mentioned or promoted, the relevant warnings must be featured clearly and prominently.

The reason for this rule is because consumers are informed about products through advertising, which invites and persuades them to buy a given product. In fact, children and adolescents are constantly and aggressively influenced through various types of media, and today more than ever digital and social media are the most commonly used channels for product marketing. Although actual contact with a given product occurs at the time of purchase, consumers have already been encouraged to buy it prior to that point. Against this backdrop, it would not make sense to rely only on product labels to warn consumers about trans fats content or high levels of sugars, sodium, or saturated fats; the appropriate thing to do would be to tell the consumer beforehand, whenever—and however—the product is advertised. This allows the target audience to gradually form an opinion of the product and decide with greater discretion whether it is in their best interest to purchase or consume it. Advertising warnings are thus more effective in informing consumers than are mere warnings on product labels. The other alternative would be to ban altogether the advertising of products with harmful content, but this—at least in the Peruvian context—was not possible.

Moving on, when we talk about advertising, it is important to consider all forms of advertising—not just the traditional, direct, and overt forms. Today, marketing strategies include more subtle and camouflaged methods, such as advertorials, product placement in television and film, and testimonials and recommendations from influencers.

In this regard, Law 30021 establishes the following:

Article 10. Advertising warnings

Advertising, including package advertising, for foods and non-alcoholic beverages that contain trans fats or are high in sugars, sodium, or saturated fats must include the following phrases, as appropriate, in a manner that is clear, legible, prominent, and understandable:

“High in [sodium/sugars/saturated fats]: Avoid excessive consumption,” “Contains trans fats: Avoid consumption” (Ley 30021 de 2013)

Meanwhile, the Manual on Advertising Warnings, approved via Supreme Decree 012-2018-SA, outlines the specifications for such warnings—their size, shape, color, location, etc.—so that nothing remains open to the interpretation of the manufacturer.

FIGURE 2
Required graphics for advertising warnings



Source: Decreto Supremo 012-2018-SA

The manual also indicates how such warnings should be reproduced according to the media outlet:

6.2 Advertising in print media and on the internet

6.2.1 Advertising in print media, on billboards, and on the internet shall include legible warnings in an area covering up to 15% of the size of the advertisement. [Each warning] shall occupy 3.75%, regardless of the number of warnings included on the product.

6.3 Advertising in radio and audiovisual media

6.3.1 Advertising in radio and audiovisual media (video, television, and film) shall include clear, prominent, and understandable warnings.

6.3.2 The audio warning in radio ads shall be played back at the speed and volume of the original recording.

6.3.3 In audiovisual media (video, television, and film), the warning caption shall appear for a period proportional to the duration of the ad. (Decreto Supremo 012-2018-SA)

Warnings and Advertising Principles in Peruvian Legislation

In 1991, Peru began regulating advertising more extensively, through Legislative Decree 691 approving the Advertising Rules for Consumer Protection, which were later modified via Legislative Decree 1044 (2008) on the suppression of unfair competition. This legislation outlines the principles governing advertising, including the principle of legality and the principle of authenticity. For the case at hand, these two principles must be applied.

Principle of Authenticity

This principle aims to ensure that the public can easily recognize the advertising and commercial nature of information regarding a product or service. “The principle of authenticity proscribes those advertising practices that could cause confusion among consumers regarding the advertising nature of the communication” (Megías Quirós 2013). The aim is thus to prevent advertising from appearing as if it were journalistic, academic, or other impartial information.

Respecting this principle in advertising is important, since the public, when presented with information, may assign

information a different value depending on the credibility and impartiality of the source. If something is clearly presented as advertising, the viewer will understand that there is a commercial interest behind it, thereby assimilating the information with greater caution. By contrast, if it is presented as academic, scientific, or journalistic information, the viewer's assessment will be different. With respect to this issue, the International Chamber of Commerce's *Advertising and Marketing Communications Code* (2018) notes that "a communication promoting the sale of a product should not be disguised as, for example, market research, consumer surveys, user-generated content, private blogs, private postings on social media or independent reviews."

Under Peruvian law, acts against the principle of authenticity consist of the performance of acts whose real or potential effect is to prevent the recipient of the advertising from recognizing it clearly as such (Decreto Legislativo 1044, art. 16). Such acts also include the dissemination of advertising under the guise of news, journalistic pieces, or entertainment material that does not clearly disclose its advertising nature—in other words, without expressly and prominently stating that it is a paid promotion.

The binding precedent of Resolution 289-97-TDC from 1997 indicates that the most important criterion for determining a media outlet's intention in this regard is the existence of payment or consideration of any kind in exchange for the space in which the disguised advertising was broadcast (Resolución 289-97-TDC). However, in the absence of such evidence, any other relevant element may be taken into account to show that the media outlet's action was aimed at advertising goods or services under the veil of news, reporting, or interviews.

Thus, if an influencer, artist, television host, or other famous person uses a media outlet to express their preference for a certain product without clarifying that their message is a paid promotion, they could be improperly shaping the public's assessment of that message. This is all the more true in the case of people who are respected and admired by the public for their objectivity and impartiality. Any recommendation that these individuals give for a particular product that fails to mention its advertising nature would have a greater influence on the public.

In this regard, according to INDECOPI's *Advertising Guide for Influencers* (2019), the material connection between a brand/ advertiser and an influencer must be disclosed when (i) the influencer promotes the brands, products, or services of a third party; (ii) the influencer receives payment or compensation of any kind by a brand or advertiser; and (iii) the viewer is unable to determine that they are seeing a paid promotion simply by watching it. In the event that it is not clear to consumers that they are seeing advertising content, the influencer must place or specifically mention the word "advertising" or "paid promotion" in their message. One way to make this disclosure is through the use of hashtags such as #publicity or #paidpromotion.

Principle of Legality

According to this principle, advertising must respect the legal system in general, the Constitution, and the laws and sectoral regulations that apply to the diversity of products and services. Article 17 of Legislative Decree 1044 states that acts against the principle of legality are those that disseminate advertising that does not respect legal binding norms concerning advertising activities. In addition, such acts include advertising that fails to observe sectoral provisions regulating the conduct of advertising activity with regard to its content, dissemination, or scope.

As mentioned above, Law 30021 clearly outlines the obligation to incorporate relevant warnings (octagons) into the advertising of products containing trans fats or high in sugars, sodium, or saturated fats. For audiovisual advertising, such warnings must be prominently displayed on the screen for the duration of the content.

Industry Resistance to the Healthy Eating Law and Its Implementing Regulations

The ultra-processed food and beverage industry opposed Law 30021 from the outset and has continued to put up obstacles since. For example, when the law was first passed, the National Society of Industries argued that it was unconstitutional because it was "specifically anti-industry" and that successful

outcomes are not achieved through bans and restrictions. It also claimed that banning the sale of packaged foods in schools would expose children to infectious diseases given that the alternative—informally prepared foods—does not guarantee food safety. Lastly, the association claimed that the law negatively affected consumers' right to free choice (“*OMS apoya Ley de Comida Saludable*” 2013).

Several public figures, including former president Alan García, joined the cause, arguing that “the law will not discourage the population from eating unhealthy foods.” According to García, “laws are not going to prevent people from eating fat,” and the measure posed a risk of job loss for many Peruvians (“*Alan García*” 2013). Similarly, Luis Cipriani, the archbishop of Lima, referred to the Healthy Eating Law in the middle of a sermon, stating that “the government should not decide what food we eat and calling on President Humala to worry about public security [instead]” (“*Cardenal Cipriani*” 2013).

Meanwhile, economist Pedro Pablo Kuczynski—who would serve as Peru's president from 2016 to 2018—described the law as “a mistaken measure that will crush advertising and the jobs of many workers” (Melgar 2013). He pointed out that the law sounded charming, like something that one would find in Scandinavia:

The law against junk food will affect advertising agencies; it won't reduce the appetites of those who want to eat a double hamburger ... It's a mistake, it is something that they innocently believe is a good intention. It's going to pummel advertising [as well as] a ton of workers who work in these restaurants. (Melgar 2013).

He concluded by saying that engaging in the fight against obesity is something best reserved for a country like Sweden (Melgar 2013).

Up until 2016, various attempts were made to modify Law 30021, though none were successful. However, this outlook changed following the inauguration of the new administration and Congress on July 28, 2016. With Fujimorists in control of Congress, and President Pedro Pablo Kuczynski in office—both of whom were opposed to the Healthy Eating Law—a machinery

was set in motion to nullify its most important provisions, such as those on advertising warnings and front-of-package labeling.

As pointed out in a newspaper editorial entitled “Stark Naked Lobbying” (“Lobby al desnudo” 2018), Fujimorists’ involvement in these anti-health processes formally began on June 12, 2017, with the introduction of Bill 1519-2016 by Congressman Daniel Salaverry (later president of Congress), who, as could be seen during the ensuing debate, demonstrated a total lack of knowledge about his own bill. A review of the bill’s content revealed reasoning similar to those used by executives and “specialists” hired by companies that promote traffic light labeling over the octagon-based warning system. It is worth recalling that octagonal warning symbols are recommended by the World Health Organization, Peru’s Office of the Ombudsperson, academia, and medical and nutrition associations.

This bill was preceded by another (Proyecto de Ley 865-2016 CR), even more harmful one sponsored by Congressman Salvador Heressi—representative of the ruling PPK (Peruanos por el Cambio) party—and backed by Congressman Pedro Olaechea, a vocal opponent of the Healthy Eating Law who had been president of the National Society of Industries (2009–2012) and would later serve as minister of production (2017–2018) and president of Congress (2019–2020). This bill sought to eliminate warnings and replace them with nutritional tables, as if they were a novel development.

In 2018, Congress—with a Fujimorist majority and its political allies behind the cause—approved a bill modifying Law 30021 (Reyes 2018). This reform sought to replace the octagonal warning system with labels based on GDAs and nutritional traffic lights. The result was a complicated and hard-to-understand system, much to the industry’s delight. President Martín Vizcarra, the former vice president who was sworn into office following Kuczynski’s resignation, vetoed the reform and sent it back to Congress. Then, in a revelation that shook the country, Vizcarra said that Fujimorist leader Keiko Fujimori had visited the Government Palace to ask him to dismiss Minister of Health Silvia Pessah because the Fujimorists did not agree with the octagons (“Presidente Vizcarra” 2018).

FIGURE 3**Proposed graphics to replace the octagonal warning seals**

Una porción de XXX gramos contiene

**EVITAR SU CONSUMO**

Source: Dictamen de los proyectos de ley 865/2016-CR, 1519/2016-CR, 1589/2016-CR, 1700/2016-CR, 959/2017-CR, 2036/2017-CR

At this point, industry interference in politics was widely presumed, but these speculations were confirmed when news broke of campaign donations that various food industry leaders had made to Fuerza Popular, Keiko Fujimori's party. For example, Dionisio Romero Paoletti, chairman of Credicorp and president of Grupo Romero, confessed to having given us\$3.6 million to Fujimori's presidential campaign in 2011, as well as us\$450,000 in 2015. Meanwhile, the founder of Grupo Gloria, Vito Rodríguez, admitted having donated us\$200,000 in cash to Fujimori, also in 2011. Both businessmen revealed this information during testimony given to investigators of Operation Car Wash, as none of these campaign donations had been registered with the National Office for Electoral Processes ("FP buscó eliminar octógonos" 2019).

The effort to dismantle the Healthy Eating Law was joined by a number of other organizations that emerged during this period. One such organization was the self-proclaimed consumer rights association Elegir (meaning "to choose"), which—against the recommendations of the World Health Organization, the Peruvian Ministry of Health, the Association of Nutritionists of Peru, and other consumer organizations—openly supported the reform being promoted by Fujimorists. Elegir argued that Law 30021 was "inoperable," that "it was impossible to have healthy food stands in schools," that the law "was not well understood," that labeling "highlighted only negative aspects," and that the law was an "anti-packaging law." As noted by the association's president, Rosario Sasieta, in an interview with ATV during her campaign to overturn the law, "I recommend that the law be

revised. Everything that has been done can be undone. A law should be made that looks not only at obese people but those with anemia” (Cubas 2020). Similar arguments were made by another of its members, Carlos Zúñiga, in an article titled “Alarms That Do Not Inform” (Zúñiga 2017).

In 2017, nutritionist Monica Saavedra, shortly after leaving her post as head of DIGESA, Peru’s food safety authority, founded the Peruvian Food and Nutrition Association, an organization sponsored by companies Molitalia, Alicorp, Laive, and Consultora Nutritiva. This organization launched a website (comebien.pe, now defunct) that was openly opposed to the use of octagonal warnings for packaged foods. Later, in March 2019, Saavedra was appointed vice minister of social benefits at the Ministry of Development and Social Inclusion (Torres and Cárdenas 2019).

Nonetheless, despite the fierce opposition of the ultra-processed food industry and a Fujimorist-controlled Congress, lawmakers ultimately decided not to pursue the modification of Law 30021, as the law had already gained widespread public support. At this point, the industry’s hand in the reform process—and the public’s rejection of this involvement—had become too obvious.

Attempts to Neutralize Advertising Warnings

But the industry did not remain idle. For example, it filed a lawsuit alleging that the Healthy Eating Law’s labeling rules constituted illegal bureaucratic barriers (Resolución 0072-2020-CEB). In fact, similar lawsuits have been lodged in other Latin American countries that have adopted front-of-package labeling laws. These legal strategies are described in a 2020 study published by the Colectivo de Abogados José Alvear Restrepo (Colombia) and El Poder del Consumidor (Mexico).

The first-instance decision in this case—Resolution 0072-2020 issued by INDECOPI’s Commission for the Elimination of Bureaucratic Barriers on February 25, 2020—caused quite the scandal. The commission’s decision declared admissible a complaint filed against the Ministry of Health by a small businessman named Esteban Alfredo Pérez—seller of meat

products, mainly chorizos and cold meats—regarding the alleged illegality of various aspects of Law 30021.

The lawsuit's main arguments against the rules on advertising warnings were these:

- The Ministry of Health lacks the authority to regulate advertising warnings.
- The warnings generate cost overruns and threaten businesses' survival since they force companies to redo their packaging and advertisements and to incur new expenses in graphic design and printing.
- The law increases the cost of product packaging and limits access to imported products that have warnings in a different location.
- The requirement for front-of-package labeling is irrational because it serves no purpose, does not satisfy any public interest, and is confusing and disproportionate.
- The warnings require the same shape, size, color, and location, representing a total lack of flexibility in how the contents of the law must be conveyed.
- There is no justification for why the warnings must appear in crude black octagons.
- The measure increases advertising costs.
- There is no reason why a warning must appear throughout the duration of an audiovisual advertisement.
- The measure senselessly limits the creativity of advertising agencies.
- It does not make sense to require warnings to occupy a certain percentage of the advertising space.

In response to the claim, the commission held that the following requirements set by the Ministry of Health constituted illegal bureaucratic barriers:

- The requirement that advertising warnings in print media, on billboards, and on the internet occupy 15% of the advertising space, with each individual warning occupying 3.75%

of the ad, regardless of the number of warnings included on the product.

- In audiovisual media (video, television, and film), the requirement that the warning caption appear for the duration of the ad.
- The requirement that the audio warning in radio ads be played back at the speed and volume of the original recording.
- The requirement that fixed and moving images of processed foods bearing warnings clearly show the warnings on camera so that viewers are aware of them.
- If there is more than one advertising warning referring to sodium, sugars, or saturated fats, the requirement that the audio include the variations set forth in paragraph 6.3.4 of the Manual on Advertising Warnings.

As the commission explained in its decision, these measures violated the principle of legality. The commission held that the Ministry of Health did not have the authority to regulate publicity. This argument is nonsensical because the regulation of advertising is not the issue at stake. The octagons are not publicity; they are health *warnings* that aim—like those on cigarette or alcohol packaging—to alert consumers of the health risks posed by products high in sugars, sodium, or saturated fats or that contain trans fats. In other words, the Ministry of Health is not regulating advertising; it is finding a way to ensure that these health warnings are clear, visible, and easily noticed and understood by the population, especially children and adolescents.

The decision also states, among other things, that the ministry's establishment of a minimum size for the octagons on outdoor advertisements is an illegal bureaucratic barrier. In this light, companies would have the right to make the warnings whatever size—and to place them in any location—they wish, with the aim of reducing their visibility. For example, they could include a warning that is just 0.001% of the advertising area and put it in a non-contrasting color.

The commission also held that the rule requiring radio ads to include the phrase “high in [sugars/sodium/fat]” at the same speed as the rest of the ad was an illegal bureaucratic barrier. Companies could thus mention these warnings at whatever speed they wish, including one that is impossible for listeners to comprehend. Further, the commission found the requirement for audiovisual media (television, internet, film) to include warning captions throughout the duration of the advertisement to be an illegal bureaucratic barrier. Thus, companies could include the warning in such a way that it lasts, for example, one tenth of a second. These, among other things, were among the absurd findings of INDECOPI’s Commission for the Elimination of Bureaucratic Barriers.

As argued by Julio Durand (2020), it cannot be said that the implementing regulations for Law 30021 are an infringement of freedom. On the contrary, both the law and its implementing regulations aim to provide citizens with information that allows them to exercise their right to freely decide what to consume or not consume. It is not a case of the state interfering in our lives to decide what we eat, but rather a case of the state fulfilling its role in sectors where there is a public interest at stake and regulating—efficiently and intelligently—those situations that pose a risk to citizens.

The commission’s decision was appealed by the Ministry of Health. The second-instance decision, issued in Resolution 0556-2021/SEL, overturned the first decision, declaring that the rules on advertising warnings remain in force and do not constitute illegal bureaucratic barriers. Thus, the food industry’s attempts to hinder the enforcement of advertising warnings were once again thwarted.

Conflicts of Interest That Came to Light

In the aforementioned case, what most provoked public outrage was the fact that two of the officials who signed the first-instance decision had serious conflicts of interest, as they had close ties to industry (“Un fallo a favor de los alimentos procesados” 2020). Gonzalo Zegarra Mulanovich, vice president of the Commission for the Elimination of Bureaucratic Barriers, was also a member

of the Azerta consulting firm, which had Coca-Cola as one of its main clients. Similarly, commission member Carlos Enrique Mendoza Gutiérrez was legal manager of the National Society of Industries and had served as its general manager on more than one occasion. Interestingly, the commission's president, Luis Ricardo Quezada Oré, the only member without any apparent conflict of interest, cast a dissenting vote in the case. As a result of this scandal, Gonzalo Alonso Zegarra Mulanovich resigned from the commission (Resolución 000077-2020-PRE).

The entity that broadcast the 2020 decision, which led to so much outcry in the midst of the COVID-19 pandemic, was the Association for the Elimination of Bureaucratic Barriers, an association led by a group of businesspeople that, under the slogan "Peru without barriers," seeks to identify and dismantle bureaucratic barriers. The association issued the following public appeal: "companies that wish to benefit from this ruling must file a complaint before the Commission for the Elimination of Bureaucratic Barriers requesting [the regulation's] non-application; or wait for the resolution to be confirmed in the second instance for it to take general effect" (Asociación de Eliminación de Barreras Burocráticas 2020).

One of the association's directors is Luis Salazar, also director of packaged meat company Sociedad Suizo Peruana de Embutidos, who, as president of the National Society of Industries (2012–2014), was a vocal opponent of the Healthy Eating Law. When the law was enacted in 2013, Salazar said that "this law should be repealed because the way it is designed and conceptualized, instead of fostering healthy eating, is going to end up jeopardizing it" ("SNI se opone" 2013).

Conclusion

When it comes to informing the public about the unhealthy content of certain foods, the advertising warnings in Peruvian legislation are a more powerful tool than front-of-package warning labels alone. Extending health warnings to all forms of advertising (instead of just product packaging) helps the public make healthier purchasing and consumption decisions. In addition, Peruvian law ensures that new forms of

advertising—particularly advertising in social media and by high-impact individuals such as influencers—reveals the commercial, advertising, or contractual nature between the product being promoted and the person promoting it. Moreover, it requires the person to include the relevant warnings each time the product in question is mentioned.

References

“Alan García: ‘Ley de comida chatarra no evitará que la gente coma grasa.’” 2013. *Perú 21*, May 19. <https://peru21.pe/politica/alan-garcia-ley-comida-chatarra-evitara-gente-coma-grasa-107214-noticia/>

Asociación de Eliminación de Barreras Burocráticas. 2020. “INDECOPI declara ilegales normas que regulan la publicidad de octógonos.” <http://adeb.com.pe/novedades/noticias/indecopi-declara-ilegales-normas-que-regulan-la-publicidad-de-oct%2F162>

“Cardenal Cipriani: Estado no debe imponer que cosas puede comer el hombre.” 2013. *Panamericana Televisión*, May 20. <https://panamericana.pe/buenosdiasperu/locales/127791-cardenal-cipriani-debe-imponer-cosas-comer-hombre>

Colectivo de Abogados José Alvear Restrepo and El Poder del Consumidor. 2020. *La interferencia de la industria es nociva para la salud: Estrategias corporativas contra el etiquetado frontal de advertencias; Estudio comparado de Chile, Perú, México y Uruguay*. Bogotá and Mexico City: Colectivo de Abogados José Alvear Restrepo and El Poder del Consumidor.

Compañía Peruana de Estudios de Mercados y Opinión Pública. 2020. “Los octógonos: Su impacto sobre el consumidor.” *Market Report No. 02*. http://cpi.pe/images/upload/paginaweb/archivo/26/mr_febrero_2_2020_oct_ok_1202.pdf

Corte Suprema de Justicia de la República – Sala de Derecho Constitucional y Social Permanente. Sentencia AP 27461-2018. August 26, 2021.

Cubas, F. 2020. “La ministra de la Mujer fue una férrea opositora de los octógonos.” *El Foco*, August 13. <https://elfoco.pe/informes/la-ministra-de-la-mujer-fue-una-ferrea-opositora-a-los-octogonos/>

Decreto Legislativo 691 de 1991 [Presidencia de la República]. Normas de la Publicidad en Defensa del Consumidor. November 6, 1991.

Decreto Legislativo 1044 de 2008 [Presidencia de la República]. Aprueba la Ley de Represión de la Competencia Desleal. June 28, 2008. https://repositorio.indecopi.gob.pe/bitstream/handle/11724/4170/896_ccd_Decreto_044-2008-ccd-INDECOPI_Ley_represion_competencia_desleal.pdf?sequence=3&isAllowed=y

Decreto Supremo 012-2018-SA [Presidencia de la República]. Manual de Advertencias Publicitarias. June 16, 2018. <https://busquedas.elperuano.pe/download/url/aprueban-manual-de-advertencias-publicitarias-en-el-marco-de-decreto-supremo-n-012-2018-sa-1660606-1>

Decreto Supremo 017-2017-SA [Presidencia de la República]. Aprueba el reglamento de la Ley No. 30021, Ley de Promoción de la Alimentación Saludable. June 17, 2017. <https://busquedas.elperuano.pe/normaslegales/decreto-supremo-que-aprueba-el-reglamento-de-la-ley-n-30021-decreto-supremo-n-017-2017-sa-1534348-4/>

Decreto Supremo 015-2019-SA [Presidencia de la República]. Modifica el Reglamento de la Ley No. 30021 (Decreto Supremo No. 017-2017-SA) y el Manual de Advertencias Publicitarias. June 15, 2019. <https://busquedas.elperuano.pe/normaslegales/decreto-supremo-que-modifica-el-reglamento-de-la-ley-no-30021-decreto-supremo-n-015-2019-sa-1779615-4/>

Decreto Supremo 033-2016-SA [Ministerio de Salud]. Aprueban reglamento que establece el proceso de reducción gradual hasta la eliminación de las grasas trans en los alimentos y bebidas no alcohólicas procesados industrialmente. July 26, 2016. https://cdn.www.gob.pe/uploads/document/file/193352/192081_ds_033.pdf20180904-20266-lpnvee.pdf

Delgado-Zegarra, J. 2011. *Consumo al desnudo: Que no le den gato por liebre*. Lima: Asociación Peruana de Consumidores y Usuarios.

———. 2021. “Nutriscore vs. etiquetado frontal de advertencia.” NuevaTribuna.es, March 1. <https://www.nuevatribuna.es/articulo/sociedad/nutriscore-vs-etiquetado-frontal-advertencia/20210301092624185089.html>

Delgado-Zegarra, J., and F. Da Silva Gómes. 2021. "Perfil de nutrientes de productos alimentarios eximidos de la aplicación de advertencias en el frente del envase durante la primera etapa de la Ley de alimentación saludable en Perú: Estudio de caso." *Pan American Journal of Public Health* 45.

Durand, J. 2020. "Los octógonos y la alimentación saludable: El mercado creciente y competitivo necesita resoluciones sencillamente sensatas." *Enfoque Derecho*, July 10. <https://enfoquederecho.com/los-octogonos-y-la-alimentacion-saludable-el-mercado-creciente-y-competitivo-necesita-resoluciones-sencillamente-sensatas-segunda-parte/>

"FP buscó eliminar octógonos para favorecer productos de Gloria y Grupo Romero." 2019. *La República*, November 20. <https://larepublica.pe/politica/2019/11/21/keiko-fujimori-dionisio-romero-fuerza-popular-busco-eliminar-octogonos-para-favorecer-productos-de-gloria-y-grupo-romero/>

Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual. 2019. *Guía de publicidad para influencers*. Lima: Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual.

International Chamber of Commerce. 2018. *ICC Advertising and Marketing Communications Code*. Paris: International Chamber of Commerce.

Ipsos Perú. 2020. "Tres de cada cinco limeños revisan la información nutricional de los productos." *Gestión*, January 29. https://www.ipsos.com/sites/default/files/ct/publication/documents/2020-01/tres_de_cada_cinco_limenos_revisan_la_informacion_nutricional_de_los_productos.pdf

Lázaro Serrano, M. L., and C. H. Domínguez Curi. 2019. *Guías alimentarias para la población peruana*. Lima: Ministerio de Salud.

Ley 30021 de 2013. Ley de promoción de la alimentación saludable para niños, niñas y adolescentes. May 17, 2013. <https://leyes.congreso.gob.pe/Documentos/Leyes/30021.pdf>

"Ley de octágonos: El 84% de los limeños modificará sus hábitos de compra." 2019. *Perú Retail*, April 26. <https://>

www.peru-retail.com/ley-octagonos-limenos-habitos-compra/

“Lobby al desnudo.” 2018. *La República*, August 29. <https://larepublica.pe/politica/1307998-editorial-republica-lobby-desnudo/>

Megías Quirós, J. 2013. “El principio de autenticidad en la comunicación comercial.” *Revista Comunicación* 12(1): 65–81.

Melgar, G. P. 2013. “PPK: Promover la lucha contra la obesidad es para un país como Suecia.” *La Mula*, May 19. <https://redaccion.lamula.pe/2013/05/19/ppk-promover-la-lucha-contr-la-obesidad-es-para-un-pais-como-suecia/ginnopaulmelgar/>

Oie, R. 2019. “7 de cada 10 hogares cambian sus hábitos de consumo.” *Kantar*, July 26. <https://www.kantarworldpanel.com/pe/Noticias/7-de-cada-10-hogares-cambian-sus-habitos-de-consumo>

“OMS apoya Ley de Comida Saludable, SNI la rechaza.” 2013. *La República*, May 18. <https://larepublica.pe/sociedad/711757-oms-apoya-ley-de-comida-saludable-sni-la-rechaza/>

Ordenanza 2366-2021 [Municipalidad de Lima]. Promueve la generación de entornos saludables para los niños, niñas y adolescentes en Lima Metropolitana. June 30, 2021. <https://busquedas.elperuano.pe/download/url/ordenanza-que-promueve-la-generacion-de-entornos-saludables-ordenanza-no-2366-2021-1967586-1>

“Presidente Vizcarra: Keiko Fujimori solicitó reserva de las reuniones.” 2018. *La República*, August 27. <https://andina.pe/agencia/noticia-presidente-vizcarra-keiko-fujimori-solicito-reserva-las-reuniones-723271.aspx>

Proyecto de Ley 865-2016-CR. Que modifica los artículos 3, 6, 9 y 10 y la primera disposición complementaria de la Ley 30021, Ley de promoción de la alimentación saludable para niños, niñas y adolescentes. January 12, 2017. https://www.congreso.gob.pe/Docs/comisiones2016/Salud/files/pley/proy_ley_865.pdf

Proyecto de Ley 1038/2011-CR. Ley de promoción de la salud para la protección de los consumidores, niños, niñas y adolescentes. April 23, 2012. http://www2.congreso.gob.pe/Sicr/TraDocEstProc/Contdoc01_2011.nsf/d99575da99e

Reyes, J. C. 2018. "Etiquetado de advertencias: Congreso aprobó cambiar los sellos rojos por el semáforo." *Gestión*, February 28. <https://gestion.pe/economia/etiquetado-advertencias-congreso-aprobo-cambiar-sellos-rojos-semaforo-228291-noticia/>

"SNI se opone a Ley de Promoción de Alimentación Saludable." 2013. *RPP Noticias*, May 17. <https://rpp.pe/politica/actualidad/sni-se-opone-a-ley-de-promocion-de-alimentacion-saludable-noticia-595691>

Torres, F., and A. Cárdenas. 2019. "Una viceministra aliada de la industria alimentaria." *Salud Con Lupa*, July 8. <https://saludconlupa.com/series/la-salud-en-la-mesa-del-poder/una-viceministra-aliada-de-la-industria-alimentaria/>

"Un fallo a favor de los alimentos procesados revela conflictos de intereses en Indecopi." 2020. *Salud Con Lupa*, June 19. <https://saludconlupa.com/noticias/un-fallo-favorable-empresas-de-alimentos-procesados-revela-conflictos-de-interes-en-indecopi/>

Zúñiga, C. 2017. "Alarmas que no informan." *El Comercio*, August 25. <https://elcomercio.pe/opinion/columnistas/alarmas-informan-carlos-zuniga-noticia-453041-noticia/>

Human Rights and Food Labeling in Argentina: Social Actors and Economic Interests

*Berenice Cerra*¹

*Luciana Castronuovo*²

*Leila Guarnieri*³

*Maria Victoria Tiscornia*⁴

*Maria Elisabet Pizarro*⁵

1 Lawyer with a master's in human rights and an LLM in national and global health law from Georgetown University (US).

2 PhD in social sciences and a bachelor's degree in sociology; research coordinator at the Inter-American Heart Foundation–Argentina.

3 Bachelor's degree in nutrition with postgraduate courses in obesity and the prevention of chronic noncommunicable diseases; part of the research team at the Inter-American Heart Foundation–Argentina.

4 Master's degree in human nutrition and bachelor's degree in nutrition; part of the research team at the Inter-American Heart Foundation–Argentina.

5 Master's degree in epidemiology and health policy and management; MD; advocacy advisor for the Healthy Americas Coalition.

Introduction

Argentina is home to one of Latin America's highest rates of overweight and obesity (Food and Agriculture Organization et al. 2021). According to the 2018 National Survey of Risk Factors, 61.6% of the country's adults are overweight or obese (Ministerio de Salud y Desarrollo Social de la Nación 2019b). Specifically, 36.2% are overweight (defined as having a body mass index between 25 and 29.9), while 25.4% are obese (defined as having a body mass index of 30 or more). Further, this problem has been trending upward: the obesity rate in 2018 was 22% greater than in 2013 and 74% greater than in 2005 (ibid.). And according to the 2018 National Survey of Nutrition and Health, 41.1% of children and adolescents between the ages of five and seventeen are overweight or obese, as are 13.6% of children under the age of five (Ministerio de Salud y Desarrollo Social de la Nación 2019a).

Vulnerable groups are especially affected by this problem because they are exposed to less healthy environments (Monteiro et al. 2004; Peña and Bacallao 2000). Moreover, obesity is on the rise in low- and middle-income countries, particularly urban areas (World Health Organization 2021). Indeed, in Argentina, the National Survey of Nutrition and Health shows significant differences in obesity prevalence among adults according to income level: 36.9% of those in the first quintile (the group with the lowest income) are obese, compared to 29% of those in the fifth quintile (the group with the highest income) (Ministerio de Salud y Desarrollo Social de la Nación 2019a).

High rates of overweight and obesity affect not only adults from vulnerable populations but also children, who are more

likely to grow up in “obesogenic” environments (Wickins-Drazilova and Garrath 2011). In Argentina, adolescents whose parents have a lower level of education are 31% more likely to be overweight than those whose parents have higher educational attainment (Ponce et al. 2016). Additionally, overweight and obesity increase the risk of suffering from noncommunicable diseases and contribute to a decreased quality of life and a higher demand for health goods and services (Temporelli and Viego 2012).

This panorama sheds light on the need for evidence-based public policies aimed at reducing obesity. One such policy recommended by the World Health Organization is front-of-package food labeling, as it is a cost-effective tool for providing consumers with accurate and concrete information about food and drinks in order to discourage the consumption of unhealthy products. Further, the implementation of such a measure would be in line with Argentina’s human rights obligations (Food and Agriculture Organization et al. 2018; Office of the United Nations High Commissioner for Human Rights 2020).

In October 2020, Argentina’s Senate preliminarily approved the Promotion of Healthy Eating Law (Law 27642) requiring front-of-package black octagonal warning labels in accordance with the metrics outlined in the Pan American Health Organization’s (PAHO) Nutrient Profile Model. Several months later, on August 13, 2021, the standing committees of the Chamber of Deputies, Argentina’s lower house, discussed and approved the bill; and on October 26, in a sweeping vote, the bill was approved by the Chamber of Deputies. Then, on March 2, 2022, the president issued a decree regulating the implementation of the new law and designating the Ministry of Health as the law’s enforcement authority. In addition to requiring front-of-package nutrition labeling, the law bans the marketing and sale of unhealthy products in schools and the advertising of such products to children and adolescents. It also requires the inclusion of special captions for foods containing caffeine or sweeteners.

While Law 27642 represents a step forward in terms of the adoption of measures aimed at preventing noncommunicable diseases, Argentina’s experience has been a complex one marked

by constant industry interference. This industry has utilized a number of tactics to prevent the rollout of policies and other initiatives aimed at addressing the problems of obesity and malnutrition (Freudenberg 2014; Special Rapporteurship on Economic, Social, Cultural and Environmental Rights 2019; Office of the United Nations High Commissioner for Human Rights 2020).

Within this framework, this chapter analyzes the case of Argentina, exploring the roles of various actors during the law's trajectory in Congress. In particular, we look at the following: the state as a complex actor embodying a variety of rationalities within the executive branch and a diversity of voices and interests in the legislative branch; the questioning (both legal and technical) of the law by the private sector; and the human rights-based research and advocacy carried out by civil society to promote the law on healthy eating and to counter the industry's arguments.

Front-of-Package Labeling: Scientific Evidence, Human Rights Implications, and International Trade

Front-of-Package Warning Labels: The Gold Standard

To confront the problems of overweight, obesity, and malnutrition, United Nations treaty monitoring bodies, the World Health Organization, and PAHO recommend that states adopt effective public policies to ensure that populations make healthy food choices (Committee on Economic, Social and Cultural Rights 2018; Committee on the Rights of the Child 2018; Pan American Health Organization 2014).

Front-of-package food labeling is one measure that comes highly recommended due to its ability to provide consumers with detailed information. Such labeling has the potential to increase the consumption of healthy foods and reduce the intake of unhealthy foods and sugary drinks in all age groups, including infants, due to its easy-to-understand information about nutritional content (World Health Organization 2016).

However, PAHO notes that in order for such labeling to be considered effective, it should be mandatory for processed foods, including beverages; inform consumers in a direct, simple, and quick manner; warn consumers about high levels of nutrients associated with health problems, such as sugar, fat, and salt; and be accompanied by campaigns aimed at encouraging better food purchasing habits among the population. Labeling policies should also be complemented by measures prohibiting the use of images, colors, and other graphic elements that are misleading or influence the perceptions of consumers, especially children. Additionally, they should determine which products will be subject to other rules, such as advertising restrictions, taxation, and bans on the sale and provision in schools, health facilities, workplaces, and other locations (Pan American Health Organization 2018).

Among the different types of labeling systems, the warning system has proven the most effective in terms of signaling products with high levels of nutrients of concern while providing useful information that consumers can quickly understand and that supports the selection of healthier foods (Ares et al. 2018; Arrúa et al. 2017). This type of labeling has also been endorsed by the international community and in Argentina (Ministerio de Salud de la Nación 2020a), as it is the one most understood systems among children and people with lower levels of education (Khandpur 2018)—a crucial element for ensuring that public policies take inequality and vulnerability into account, given that vulnerable groups are the most likely to suffer from obesity, malnutrition, and chronic diseases in general.

Front-of-Package Labeling: A Human Rights Obligation

Argentina's obligation to protect health and the right to food is outlined in the country's Constitution and in international human rights treaties. In fact, article 75(22) of the Constitution accords a number of international treaties a higher status than national laws. As a result, international instruments guaranteeing the right to food—such as the Convention on the Elimination of All Forms of Discrimination against Women; the Universal

Declaration of Human Rights; the International Covenant on Economic, Social and Cultural Rights; the American Convention on Human Rights; and the Convention on the Rights of the Child—have the same status as the Constitution. This means that the obligations outlined in the treaties ratified by Argentina must be satisfied through the adoption of policies that guarantee the rights enshrined in those treaties.

Human rights treaty bodies recommend that states adopt concrete measures to fulfill the right to adequate food, which means not only guaranteeing access to food but also ensuring that food meets the dietary needs of each person in accordance with their age, living standards, health, occupation, and sex, among other factors. Similarly, to be considered adequate, food must be fit for human consumption and be culturally acceptable (Committee on Economic, Social and Cultural Rights 1999).

In the context of the obesity epidemic, the obligation to protect the rights to health and to food becomes even more important, since there is a vulnerable population—children and adolescents—at particular risk. States must therefore “establish and enforce legal frameworks and adopt measures that effectively prevent, address, and punish the negative commercial impact on the rights of children and adolescents” (Special Rapporteurship on Economic, Social, Cultural and Environmental Rights 2019, para. 361). Children’s unique situation of vulnerability requires the state to play an especially active role in protecting against human rights violations committed by public and private actors alike, including food companies (Special Rapporteurship on Economic, Social, Cultural and Environmental Rights 2019; United Nations 2011). With regard to food warning labels in particular, United Nations Special Rapporteur on the Right to Health Dainius Pūras has noted that the adoption of policies requiring such labeling would be in line with states’ obligation to protect the right to health. According to Pūras, “food that is not labelled may be harmful as it prevents consumers from making healthy and informed choices” (Office of the United Nations High Commissioner for Human Rights 2020).

Prior to the enactment of Argentina’s healthy eating law, various human rights mechanisms noted that the country’s

regulations were ineffective in ensuring consumers' rights to health and information. For example, the Committee on Economic, Social and Cultural Rights (2018) called on Argentina to take effective measures to strengthen the Argentine Food Code's rules on front-of-package labeling by requiring the inclusion of information on products' sugar content. Similarly, following her visit to Argentina, Special Rapporteur on the Right to Food Hilal Elver pointed out that Argentina's regulations on nutrition labeling and information were not in line with international recommendations. She called on the state to implement policies regarding foods with high levels of nutrients of concern—such as sodium, sugars, and fats—with the aim of preventing noncommunicable diseases (Elver 2019). As these recommendations show, the panorama in Argentina prior to the adoption of the Promotion of Healthy Eating Law failed to adhere to international human rights standards and the obligations assumed by the Argentine state.

Front-of-Package Labeling: An Obstacle to International Trade?

Argentina, as a member of the Southern Common Market (commonly known by its Spanish abbreviation, Mercosur), must ensure that its regulations conform to the bloc's policies, meaning that rules adopted by Mercosur must be incorporated into Argentina's regulatory framework.⁶ Thus, in terms of food labeling, Argentina should incorporate the resolutions issued by Mercosur's Common Market Group into its domestic Food Code. The Argentine Food Code, a technical regulation that is regularly updated, establishes the food safety, labeling, and other rules that manufacturers, sellers, and marketers of food and beverages must follow.⁷

6 Mercosur is the economic bloc of South America, whose members include Argentina, Brazil, Paraguay, Uruguay, and Venezuela. Venezuela's membership has been suspended in accordance with article 5(2) of the Ushuaia Protocol.

7 The Argentine Food Code—established by Law 18284 and regulated by Decree 2126—is periodically updated and modified by the National Food Commission, a technical body responsible

With regard to food labeling specifically, Argentina has incorporated two Mercosur resolutions into its legal framework: the Technical Regulation on the Labeling of Packaged Foods (Resolución GMC 26 de 2003) and the Technical Regulation on the Nutrition Labeling of Packaged Foods (Resolución GMC 46 de 2003). These regulations specify the information that all food products must include in their labeling (such as the sales denomination and the identification of origin) and indicate the nutrients that must be mentioned.⁸ There is therefore a general rule among Mercosur countries that seeks to ensure the harmonization of regulatory frameworks on nutrition labeling.

However, Mercosur does not expressly prohibit countries from adopting policies at the national level that diverge from harmonized rules. Some member states have thus recognized exceptions to the general rule of promoting harmonization. Brazil and Argentina, for example, have regulations requiring a series of health warnings that have not been harmonized with each other. With regard to gluten, Brazil requires products to bear either the phrase “contains gluten” or the phrase “does not contain gluten” (Lei 10674/03 de 2003), while Argentina requires gluten-free products to include the phrase “without TACC”⁹ and the crossed grain symbol (in color or black and white, depending on the product’s label) (Ley 18284 de 1969; Resolución Conjunta 201/2011 y 649/2011).

At the same time, the regulatory frameworks of both Mercosur¹⁰ and the World Trade Organization¹¹ (WTO) recognize the right of states to adopt the policies they deem necessary—in

for supporting and monitoring the National Food Control System established via Decree 815/1999.

8 Resolution 46/03 requires products to mention their content of carbohydrates, protein, total fats, saturated fats, dietary fiber, sodium, and trans fats.

9 TACC stands for *trigo* (wheat), *avena* (oats), *cebada* (barley), and *centeno* (rye).

10 “MERCOSUR member states have the right to adopt the sanitary and phytosanitary measures necessary to protect human health and life” (Mercosur Council of the Common Market 1993, annex, art. 2).

11 “No country should be prevented from taking measures necessary to ensure ... the protection of human, animal or plant life or

sanitary and phytosanitary matters—to protect people’s health and lives, even when such measures might pose a barrier to international trade. Specifically, the wto has pointed out that its provisions should not be interpreted as preventing states from adopting or applying measures that are necessary to protect the health and lives of their populations (Rios et al. 2020).¹²

In this context, states have the right to design and implement policies that result in a higher level of health protection than would be achieved by simply following existing trade rules. This power is referred to as “flexibilities,” and in order for a state to use them, it must have a scientific justification or the objective of ensuring a level of sanitary or phytosanitary protection that it deems appropriate.¹³

Thus, the legal frameworks of the wto and Mercosur recognize states’ authority to legislate in order to protect people’s rights to health and to life. Moreover, Mercosur broadens the margin of guarantees by recognizing the rights of consumers and the corresponding obligations of states and suppliers.¹⁴ In so doing, it expressly recognizes consumers’ access to adequate and accurate information about products and services¹⁵ and to protection against misleading advertising,¹⁶ among others.

health, [or] of the environment” (Agreement on Technical Barriers to Trade, preamble).

12 “Nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures ... necessary to protect human, animal or plant life or health” (General Agreement on Tariffs and Trade, art. xx(b)).

13 “[States] may introduce or maintain sanitary or phytosanitary measures which result in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations, if there is a scientific justification, or as a consequence of the level of sanitary or phytosanitary protection a Member determines to be appropriate” (wto Agreement on the Application of Sanitary and Phytosanitary Measures, art. 3.3).

14 Resolución GMC 34 de 2011; Resolución GMC 45 de 2006; Resolución GMC 124 de 1996; Resolución GMC 125 de 1996; Resolución GMC 126 de 1996.

15 Resolución GMC 34 de 2011; Resolución GMC 124 de 1996; Resolución GMC 125 de 1996.

16 Resolución GMC 45 de 2006; Resolución GMC 124 de 1996; Resolución GMC 126 de 1996. “Misleading advertising” is understood as

This information is worth keeping in mind because it debunks the claim—which was frequently voiced by the food industry and by representatives of the Ministry of Foreign Affairs—that Mercosur posed an obstacle to Argentina’s ability to move forward with a food labeling system that diverged from Mercosur standards (“Cancillería objetó la Ley de Etiquetado” 2020).

Discussion of the Labeling Policy in Congress: Actors and Rationalities in Dispute

Argentina has various settings at its disposal for discussing food labeling policies. As mentioned above, one of these is Mercosur. But, as was the case with gluten labeling, such policies can also be discussed within the executive branch or Congress. Below, we take a look at the discussions that took place in Congress.

The Process in Congress

For many years preceding the adoption of the healthy eating law, various lawmakers presented bills on front-of-package food labeling before Congress. These bills can be classified into two types: (i) those that specified the labeling system to be implemented and that sometimes also specified the nutrients of concern to be addressed and their thresholds; and (ii) those that indicated the need for a clearer front-of-package food labeling system than that dictated by the Argentine Food Code but that did not clearly define the type of labeling style or nutrient profile that should be used. Bills in the latter category considered the definitions of such aspects to fall within the

any form of information, dissemination, or communication of an advertising nature that is totally or partially false or that in any other way, including by the omission of essential information, is capable of misleading the consumer about a product or service’s nature, characteristics, quality, quantity, properties, origin, price, conditions of sale, or any other information affecting consumer relations (Resolución GMC 126 de 1996, art. 2). In cases related to potentially misleading advertising, the burden of proving the truthfulness [of advertising] rests with the advertiser (Resolución GMC 45 de 2006, art. 3).

responsibilities of the executive branch, which would address them in the implementing regulations once the bill became law.

The law approved by Congress in October 2021 embraces the highest standards in the field: a graphic system of warnings in the form of black octagons and including the word “excess” for nutrients of concern (sodium, fats, saturated fats, and sugars) and calories, as well as adherence to PAHO’s Nutrient Profile Model. Law 27642 also includes two warning captions for foods that have sweeteners (“contains sweeteners – not recommended for children”) or caffeine (“contains caffeine – avoid in children”). In addition, for foods and beverages bearing at least one warning label, the law bans their sale in school settings,¹⁷ bans advertising aimed at children and adolescents, and prohibits the inclusion of supplementary nutritional claims.

Political Actors: Legislators and Policy Advisors

Over time, changes could be observed in the bills being developed. At the beginning of 2015, the issue of food labeling found a place on the agendas of various lawmakers, who were mainly inclined toward the traffic light system (similar to that of Ecuador) or the guideline daily amount system with colors, similar to the one used in the UK. Subsequently, after Chile’s rollout in 2016 of octagonal warning labels, bills incorporating front-of-package warning labeling with black octagons began gaining traction in Argentina’s congressional debates. Thus, as a result of the repercussions of Chile’s law in Argentina, two legislators from the province of Mendoza (which borders Chile), representing the two most important political parties in Argentina,¹⁸ each presented their own bills with the guidance of the Inter-American Heart Foundation–Argentina (FIC Argentina), a civil society organization.

17 The law prohibits such products from being sold at the “pre-school, primary, and secondary levels,” covering children from four to eighteen years of age, according to Argentina’s education system.

18 Anabel Fernández Sagasti (Justicialist Party) and Julio Cleto Cobos (Radical Civic Union).

Importantly, these bills shared three key traits that were maintained over time and that made it possible to propel the discussion in Congress. First, they enjoyed the cross-cutting support of political parties, preventing them from being branded as “partisan” measures that would benefit one arm of the political spectrum at the expense of the other. Second, the fact that legislators who introduced and backed these bills came from different provinces¹⁹ meant that the proposed labeling measure was not seen as centralized or emanating from the nation’s capital. Finally, the bills benefited from the advice and support of civil society actors free from conflicts of interest. In this regard, the mounting evidence on the effectiveness of Chile’s warning labeling system and the limitations of other labeling systems in the region allowed various actors from civil society to offer scientific evidence to support the decision-making process.

As time wore on, the black octagonal warning system gained greater legitimacy vis-à-vis other models, becoming the one preferred by legislators when it came time to consider Argentina’s law. In particular, since PAHO’s publication of its Nutrient Profile Model in 2016 (Pan American Health Organization 2016), a growing number of lawmakers understood the importance of ensuring that the law adopted by Congress incorporated this profile into its provisions, if the law’s purpose was to embrace the highest standards in public health according to national research (Ministerio de Salud de la Nación 2020b). This imperative was also supported by the work of various civil society organizations urging the inclusion of both components—the labeling format and the nutrient profile, key to any nutrition labeling policy—in the text of the law. Here, the experiences of Chile and Peru were telling: these countries’ laws, when adopted by the legislatures, did not specify the labeling system or the nutrient profile to be implemented, meaning that such decisions were left to the relevant regulatory bodies. Policymakers in Argentina understood the importance of not leaving these concerns to the discretion of executive authorities.

19 Argentina has a federal system of government and is composed of twenty-three provinces and the Autonomous City of Buenos Aires.

FIGURE I
Argentina's food warning labels

SELLOS DE ADVERTENCIAS



LEYENDAS PRECAUTORIAS



Source: Decreto Reglamentario 151/22

Although front-of-package labeling bills were presented in both houses of Argentina's Congress, the Senate stood out from the beginning due to the large number of stakeholders involved, including senators and advisors. These actors presented various bills on this issue and also sought the assistance of civil society prior to and following the bills' presentation in order to facilitate discussion in Congress. At the same time, all of the front-of-package labeling bills were referred for initial scrutiny to the Senate's Health Committee, whose chair since 2018 was a senator from the sugar-producing province of Jujuy. This delayed and hindered the legislative discussion.

The process of arriving at a final text was thus a long one marked by the multiparty origins of the various bills. In this regard, fluid dialogue between civil society and senators from different parties played a crucial role in building common ground to facilitate consensus. The final bill was presented to the Health Committee and Industry Committee in August 2020 for discussion.

The labeling issue rose to the top of the public agenda as a result of strong pressure exerted by a united civil society front, mainly through media outlets. In this context, on October 22, 2020, the bill received a joint green light from the Health

Committee and Industry Committee. The following week, on October 29, it was approved by the Senate, with sixty-four votes in favor and three against, out of a total of seventy-two senators (sixty-seven were present for the vote).

With the Senate's approval, the bill was then sent to the Chamber of Deputies, where it was turned over to six committees for review. Although the number of committees was later reduced to four, this part of the legislative process exhibited greater interference by the food industry, as well as significant difficulties in achieving consensus among the different political blocs. This was due not only to the food labeling bill itself but also to inherent tensions in the internal politics of the lower house. The situation was further compounded by changes to meeting procedures implemented during the COVID-19 pandemic ("Las personas con coronavirus o en aislamiento están eximidas de obligación de votar" 2021).

On July 13, 2021, the bill was reviewed in a joint session of the four committees that had been assigned to it, where it received their approval. Then, on October 5, 2021, the ruling coalition called for a special session of Congress to discuss the front-of-package labeling bill, among other issues. However, the discussion of the bill in the Chamber of Deputies failed to materialize due to partisan differences between the main blocs concerning the upcoming elections, resulting in the opposition's absence in the lower house. Thus, the ruling coalition failed to obtain the number of deputies required to hold a session, securing only 122 of the 129 needed for a quorum ("Máximo Kirchner no consiguió quórum" 2021).

Here it is important to note that the bill was nearly derailed by political disagreements due to the opposition's refusal to facilitate a quorum and to the ruling coalition's discourse arguing that the opposition was refusing to legislate in support of people's rights, followed by the ruling coalition's decision to hold a session without first reaching a consensus with the opposition, as is typical in Congress. However, civil society called for dialogue among lawmakers, pressuring them to prioritize collaborative work and the right to health by voting for the bill ("Etiquetado frontal: Especialistas afirman" 2021).

After internal negotiations between the two sides that went beyond the issue of food labeling, lawmakers agreed on a new date for the session. Finally, at nearly midnight on October 26, the Chamber of Deputies approved the bill by an overwhelming majority, with 200 votes in favor among the 239 present (out of a total of 257). With this step, Argentina became the latest country in the region to pass a law on this issue, applying the highest international standards in health.

Civil Society

During the legislative process, a critical role was played by civil society actors free from conflicts of interest who provided scientific evidence in support of the proposed front-of-package warning labeling system. Similarly, support from international agencies such as PAHO and the United Nations Children's Fund (UNICEF) was key for boosting the proposal's legitimacy. In fact, since 2019, the collaborative and individual actions of local organizations, United Nations agencies, and representatives of PAHO helped place the issue of front-of-package food labeling on Argentina's legislative agenda. In this regard, although a large number of public events were held (Pan American Health Organization 2018) and the issue was widely discussed in social networks and traditional media outlets, what was truly decisive in promoting the policy was civil society's direct lobbying of legislators regarding the scope of the public health problem at hand.

FIC Argentina was the first civil society organization that began working on this issue, in 2016. From the outset, the organization demonstrated its ability to combine political advocacy and its own research conducted from a human rights perspective. Drawing on its previous experience advocating for tobacco control policies, FIC Argentina began to meet with policymakers and advisors to put the labeling issue on the legislative agenda. It also played a key role in helping put the issue on the radar of international human rights bodies, including by presenting reports to the Special Rapporteur on the Right to Food during her visit to Argentina in 2018. This work allowed FIC Argentina in 2017, with the support of UNICEF, to form the National

Coalition to Prevent Obesity in Children and Adolescents, a network of civil society organizations from across Argentina. This coalition proved to be a key player. Its presence in different parts of the country allowed it to hold meetings with legislators, particularly during the COVID-19 pandemic, who were located in various provinces and not in the national capital.

One of the coalition's member organizations, based in the province of Córdoba, is FUNDEPS, which, like FIC Argentina, uses a human rights approach in its work. Meanwhile, at the national level is FAGRAN (the Argentine Federation of Nutritionists), which brings together the country's nutrition schools and associations. Since its inception, FAGRAN has conducted advocacy and research aimed at addressing food and nutrition problems in the country. Further, like FIC Argentina, it has provided advisory support for bills in Congress. And from the academic side, CALISA (the Network of Open Education Programs for Food Sovereignty)—with thirty-six professorships, largely in public universities—has also been a key player, advocating for front-of-package food labeling as a tool for achieving food sovereignty. Lastly, in 2020, different groups joined the coalition's call for clear nutrition labeling; these ranged from consumer groups such as Consumidores Argentina to younger organizations such as SANAR and Consciente Colectivo. Consciente Colectivo stood out not only for its representation of young people but also for its environmental approach to policy advocacy.

In this way, civil society provided guidance regarding the available scientific evidence and also constantly monitored the public positions of legislators (for example, as expressed in the media). Civil society organizations also analyzed the bills presented in Congress concerning food labeling, noncommunicable diseases, adequate food, and overweight and obesity, among other issues. This allowed them to develop a clear mapping of the actors involved and to then work with these actors to revise the bills being presented to Congress and to use model bills drafted by civil society itself, incorporating best standards. Through this effort, they sensitized not only the legislators but also their support teams and political advisors. Such liaising was fundamental for advancing internal congressional discussions and for encouraging public debate.

Furthermore, civil society actors carried out specific advocacy actions to promote the proposed law. For example, in late October 2020, their advocacy helped lead to a reduction in the number of lower-house committees assigned to the bill (from six to three), which facilitated its review.²⁰

In 2021, civil society organizations continued to play a leading role in the political process by launching two communication campaigns aimed at securing the bill's approval in the Chamber of Deputies. The first, #DeFrente, began on March 4, 2021, World Obesity Day, and was conducted entirely online. The second campaign, "Que no te tapen los ojos" ("Don't let them pull the wool over your eyes"), was launched in Buenos Aires on June 28 via radio, online media, and newspapers, and the following week in different provinces and cities across the country. These campaigns, especially the second one, were key for raising the public's awareness of the bill and building demand for Congress to pass the Law on the Promotion of Healthy Eating.

Voices against the Policy: Sugar-Producing Provinces and Companies

The political process leading up to the passage of the labeling law was shaped primarily by two factors. First was the interference by certain actors linked to the food industry—in this case, representatives from the sugar-producing provinces. Second was the complexity of the federal system of representation embodied by Congress. The legislative debate on labeling, as mentioned above, began in the Senate, where each province has the same number of representatives,²¹ regardless of its population size. This means that the representatives of provinces whose local economies might be affected by proposed public

20 However, the bill was later assigned to the Industry Committee as well, bringing the number of committees to four: General Legislation, Social Action and Public Health, Consumer Protection, and Industry.

21 Each province has three senators—two from the party that received the most votes, and one from the party with the next-highest number of votes.

health policies (such as tobacco control measures) are able to wield significant pressure, thus hindering debate in Congress.

In Argentina, sugar production is concentrated in three provinces: Jujuy, Tucumán, and Salta (Secretaría de Política Económica and Subsecretaría de Programación Microeconómica 2018). Since 2018, the president of the Senate's Health Committee has been a senator from Jujuy, a fact that hindered the progress of congressional discussions on front-of-package food labeling given that all bills submitted on this subject were sent to this committee for initial scrutiny. However, a dissenting voice emerged from this same province, from a senator belonging to the opposition coalition. She not only presented a bill in 2019 proposing the establishment of a labeling policy (Giacoppo 2019) but also worked closely with FIC Argentina and other civil society actors to advocate for the bill before the Senate.

When the bill was discussed in the Chamber of Deputies, the sugar producers—represented by the trade association Centro Azucarero Argentino—not only attempted to exert more pressure but were also well received. To start, the format of this house of Congress is distinct from that of the Senate: each province's number of legislators depends on its population size. And while the sugar-producing provinces are not the most populated ones, they occupy important political spaces both in this house and in the national and provincial executive branches. Indeed, during the time the bill was being discussed, the president of the Committee on Social Action and Public Health was from Tucumán; and when the vote on the labeling measure took place in the Chamber of Deputies, the governor of that province was the country's cabinet chief.

Additionally, a few days after the bill was sent to the Chamber of Deputies for approval, the house's president—a key actor within the ruling coalition—expressed his support for these provinces' economies, stating that “sugar producers need to be calm because they have a group of deputies who fight for Tucumán's interests.” He also said that he himself would be “accompanying the work of the Tucumán deputies. There are policies that are thought of in a general sense without looking at the specifics. I think that we need to be cognizant of the power

that the sugar sector offers Tucumán” (“Ley de Etiquetado de alimentos” 2020).

Statements such as these meant that once the labeling bill entered the Chamber of Deputies, it was sent to six committees (four more than in the Senate) for review: General Legislation; Social Action and Public Health; Consumer Protection; Industry; Agriculture and Livestock; and Economies and Regional Development. These referrals slowed the bill’s progress, since it had to be approved individually by each committee or jointly by all committees through the consensus of their leaders. Then, after the law was passed by both houses of Congress and before it was signed by the president, the Centro Azucarero Argentino tried to halt the process by submitting a letter asking the president to veto article 6 of the law, which applies PAHO’s Nutrient Profile Model (“Etiquetado frontal: La industria azucarera pidió vetar un artículo de la ley” 2021).

The Food Industry

As many countries’ experiences have shown, the food industry has continually tried to thwart the development of national health policies (Mialon and Da Silva Gomes 2019). At the congressional level in Argentina, food companies employed a variety of tactics in order to hinder the political process, particularly after the bill obtained the Senate’s approval. Among these were information and messaging strategies, especially direct lobbying before lawmakers. Such lobbying actions included mailings and requests for meetings and hearings, with the aim of convincing lawmakers to modify certain provisions of the bill.

Food industry representatives also participated in the debates and briefings of the various congressional committees. During these sessions, industry was invited—along with civil society and other government sectors, such as the Ministry of Health and the Secretariat of Commerce—to give formal presentations, where it utilized a tactic known as “stressing the economic importance of the industry” to argue that the measure would harm various sectors of the economy (Mialon and Da Silva Gomes 2019).

After receiving Senate approval, the bill was sent to the Chamber of Deputies. There, the food industry exerted even more pressure, both in media outlets and directly with legislators (for example, by going from office to office in an attempt to pressure lawmakers), so that the bill would not be passed. This pressure was reported by various deputies to members of civil society when these deputies requested civil society's support in advocating for the bill in the committees.

Finally, despite the food industry's interference, on October 26, 2021, the Chamber of Deputies overwhelmingly approved the Law on the Promotion of Healthy Eating. And on November 12, 2021, Law 27642 was published in the official gazette following the president's approval.

Final Considerations

The increasing prevalence of overweight and obesity, as well as associated noncommunicable diseases, in all age groups of the Argentine population highlights the urgency of adopting effective public health policies, as recommended by various human rights and health organizations at the international and regional level. Front-of-package warning labeling is considered one of the most cost-effective measures to ensure the protection and promotion of the right to health, the right to life, and consumers' right to information, especially among children and adolescents.

As we have demonstrated in this chapter, Argentina's discussion of food labeling underwent a protracted process in terms of time, the range of stakeholders involved (lawmakers, advisors, civil society, the business sector, and the sugar industry), and the inevitable partisan debates typical of a complex political environment. More than a year after the Senate's approval of the bill, the Chamber of Deputies passed law 27642 on the Promotion of Healthy Eating. Then, on March 22, 2022, the executive branch issued implementing regulations for the new law.

The experience of Argentina's civil society over the years demonstrates that the private sector does not give up easily; there is thus a danger that industry will continue to interfere,

both in regulatory and implementation-related processes and through judicial claims, in order to protect its economic interests. Therefore, it is essential that civil society organizations continue to engage in research and advocacy to support the implementation of the new front-of-package food labeling policy, which embraces the highest standards of public health and human rights.

Similarly, it is important to note that the most transparent setting for debating a policy that involves fundamental human rights, such as the rights to health and to adequate food, is Congress. This space, a naturally democratic one due to its representativeness in terms of population and geography, is also one where debates are public and where draft laws are accessible to the entire population. Moreover, this setting allows civil society to participate, whether by requesting meetings, taking part in committee debates, or presenting scientific evidence. This space is also open to industrial sectors, which allows the public to evaluate the various opinions expressed on an equal basis.

Finally, now that it is the executive branch's turn to implement and oversee the front-of-package food labeling policy, it is hoped that this branch will follow Congress's lead and issue complementary policies that are also based on the highest international standards and the best scientific evidence free from conflicts of interest. In so doing, Argentina will be able to continue paying its debt in terms of public health, putting human rights above economic and business interests.

References

Additional Protocol to the Treaty of Asunción on the International Structure of Mercosur (Ouro Preto Protocol). December 17, 1994.

Agreement on Technical Barriers to Trade. January 1, 1995.

Agreement on the Application of Sanitary and Phytosanitary Measures. January 1, 1995.

Ares, G., F. Varela, L. Machin, L. Antúnez, A. Giménez, M. R. Curutchet, and J. Aschemann-Witzel. 2018.

"Comparative Performance of Three Interpretative Front-

of-Pack Nutrition Labelling Schemes: Insights for Policy Making." *Food Quality and Preference* 68: 215–225.

Arrúa, A., M. R. Curutchet, N. Rey, P. Barreto, N. Golovchenko, A. Sellanes, G. Velazco, M. Winokur, A. Giménez, and G. Ares. 2017. "Impact of Front-of-Pack Nutrition Information and Label Design on Children's Choice of Two Snack Foods: Comparison of Warning and the Traffic-Light System." *Appetite* 116: 139–146.

"Cancillería objetó la Ley de Etiquetado y pidió consensuar con los países compradores de alimentos." 2020. *Agrofy News*, November 16. <https://news.agrofy.com.ar/noticia/190498/cancilleria-objeto-ley-etiquetado-y-pidio-consensuar-paises-compradores-alimentos>

Committee on Economic, Social and Cultural Rights. 1999. *General Comment No. 12: The Right to Adequate Food*. UN Doc. E/C.12/1999/5.

———. 2018. *Concluding Observations on the Fourth Periodic Report of Argentina*. UN Doc. E/C.12/ARG/CO/4.

Committee on the Rights of the Child. 2018. *Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Argentina*. UN Doc. CRC/C/ARG/CO/5-6.

Decreto 815/99 [Poder Ejecutivo Nacional]. Crea el Sistema Nacional de Control de Alimentos. July 26, 1999.

Decreto 2126/71 [Poder Ejecutivo Nacional]. Reglamentario de la Ley 18.284. June 30, 1971.

Decreto Reglamentario 151/22 [Poder Ejecutivo Nacional]. Reglamentación de la Ley 27.642, Promoción de la alimentación saludable. March 22, 2022.

Elver, H. 2019. *Visit to Argentina: Report of the Special Rapporteur on the Right to Food*. UN Doc. A/HRC/40/56/Add.3.

"Etiquetado frontal: Especialistas afirman que se 'desaprovechó una gran oportunidad' al no votar la ley." 2021. *Ámbito*, October 5. <https://www.ambito.com/politica/congreso/etiquetado-frontal-especialistas-afirman-que-se-desaprovecho-una-gran-oportunidad-al-no-votar-la-ley-n5293033>

"Etiquetado frontal: La industria azucarera pidió vetar un artículo de la ley." 2021. *La Nación*, November 1. <https://www.lanacion.com.ar/economia/campo/regionales/etiquetado-frontal-la-industria-azucarera-pidio-vetar-un-articulo-de-la-ley-nid01112021/>

Food and Agriculture Organization, International Fund for Agricultural Development, Pan American Health Organization, United Nations Children's Fund, and World Food Programme. 2021. *Latin America and the Caribbean: Regional Overview of Food Security and Nutrition 2021; Statistics and Trends*. Santiago: Food and Agriculture Organization.

Food and Agriculture Organization, World Health Organization, and Pan American Health Organization. 2018. *Políticas y programas alimentarios para prevenir el sobrepeso y la obesidad: Lecciones aprendidas*. <http://www.fao.org/3/i8156es/I8156es.pdf>

Freudenberg, N. 2014. *Lethal but Legal: Corporations, Consumption, and Protecting Public Health*. New York: Oxford University Press.

General Agreement on Tariffs and Trade. April 15, 1994.

Giacoppo, S. 2019. "S-1920/19: Proyecto de Ley que implementa un sistema de etiquetado frontal de alimentos envasados destinados al consumo humano." <https://www.senado.gob.ar/parlamentario/comisiones/verExp/1920.19/S/PL>

Khandpur, N., P. de Morais Sato, L. A. Mais, A. P. Bortoletto Martins, C. G. Spinillo, M. T. Garcia, C. F. Urquizar Rojas, and P. Constante Jaime. 2018. "Are Front-of-Package Warning Labels More Effective at Communicating Nutrition Information Than Traffic-Light Labels? A Randomized Controlled Experiment in a Brazilian Sample." *Nutrients* 28(10).

"Las personas con coronavirus o en aislamiento están eximidas de obligación de votar." 2021. *Telam*, September 3. <https://www.telam.com.ar/notas/202109/567337-servini-ratifico-personas-coronavirus-aislamiento-eximidas-votar.html>

Ley 18284 de 1969. Código Alimentario Argentino. July 18, 1969.

"Ley de Etiquetado de alimentos: Massa demuestra apoyo a la industria azucarera." 2020. *El Resaltador*, November 4. <https://elresaltador.com.ar/ley-de-etiquetado-de-alimentos-massa-demuestra-apoyo-a-la-industria-azucarera/>

"Máximo Kirchner no consiguió quórum en Diputados para debatir el proyecto de ley de etiquetado frontal

de alimentos.” 2021. *iProfesional*, October 5. <https://www.iprofesional.com/legales/349115-sin-quorum-en-diputados-para-la-ley-de-etiquetado-frontal>

Mercosur Council of the Common Market. 1993. Decisión no. 06/93: Acuerdo sanitario y fitosanitario entre los Estados Partes del Mercosur. July 1.

Mialon, M., and F. Da Silva Gomes. 2019. “Public Health and the Ultra-processed Food and Drink Products Industry: Corporate Political Activity of Major Transnationals in Latin America and the Caribbean.” *Public Health Nutrition* 22(10): 1898–1908.

Ministerio de Salud de la Nación. 2020a. *Análisis del nivel de concordancia de sistemas de perfil de nutrientes con las guías alimentarias para la población argentina*. Dirección Nacional de Abordaje Integral de las Enfermedades No Transmisibles, Ministerio de Salud de la Nación. <https://fagran.org.ar/documentos/seccion/organismos-nacionales/2020/08/analisis-del-nivel-de-concordancia-de-sistemas-de-perfil-de-nutrientes-con-las-guias-alimentarias-para-la-poblacion-argentina/>

———. 2020b. *Evaluación del desempeño del etiquetado frontal de advertencia frente a otros modelos en Argentina*. Dirección Nacional de Abordaje Integral de las Enfermedades No Transmisibles, Ministerio de Salud de la Nación. <https://fagran.org.ar/wp-content/uploads/2020/08/MINSAL-Investigacio%cc%81n-Etiquetado-Frontal-de-Alimentos.pdf>

Ministerio de Salud y Desarrollo Social de la Nación. 2019a. *2° Encuesta Nacional de Salud y Nutrición*. Buenos Aires: Secretaría de Gobierno de Salud.

———. 2019b. *4° Encuesta Nacional de Factores de Riesgo: Principales resultados*. Buenos Aires: Secretaría de Gobierno de Salud.

Monteiro, C. A., W. L. Conde, B. Lu, and B. M. Popkin. 2004. “Obesity and Inequities in Health in the Developing World.” *International Journal of Obesity* 28: 1181–1186.

Office of the United Nations High Commissioner for Human Rights. 2020. “Statement by the UN Special Rapporteur on the Right to Health on the Adoption of Front-of-Package Warning Labelling to Tackle NCDs.” July 27. <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26130&LangID=E>

Pan American Health Organization. 2014. *Plan of Action for the Prevention of Obesity in Children and Adolescents*. Washington, DC: Pan American Health Organization.

———. 2016. *Pan American Health Organization Nutrient Profile Model*. Washington, DC: Pan American Health Organization.

———. 2018. “Llaman a avanzar en el etiquetado frontal de alimentos para promover la alimentación saludable.” August 21. <https://www.paho.org/es/noticias/21-8-2018-llaman-avanzar-etiquetado-frontal-alimentos-para-promover-alimentacion-saludable>

Peña, M., and J. Bacallao, eds. 2000. *La obesidad en la pobreza: Un nuevo reto para la salud pública*. Washington, DC: Pan American Health Organization.

Ponce, M., L. Allemandi, L. Castronuovo, V. Tiscornia, P. Gutkowski, and V. Schoj. 2016. *Brechas sociales de la obesidad en la niñez y adolescencia*. Buenos Aires: UNICEF and Fundación Interamericana del Corazón Argentina.

Resolución Conjunta 201/2011 y 649/2011 [Secretaría de Políticas, Regulación e Institutos y Secretaría de Agricultura, Ganadería y Pesca]. Código Alimentario Argentino. October 6, 2011.

Resolución GMC 26 de 2003 [Mercosur]. Reglamento técnico Mercosur para rotulación de alimentos envasados. December 10, 2003.

Resolución GMC 34 de 2011 [Mercosur]. Reglamentación del código aduanero del Mercosur. December 17, 2011.

Resolución GMC 45 de 2006 [Mercosur]. Defensa del consumidor: Ppublicidad engañosa. November 24, 2006.

Resolución GMC 46 de 2003 [Mercosur]. Reglamento técnico Mercosur sobre el rotulado nutricional de alimentos envasados. December 10, 2003.

Resolución GMC 124 de 1996 [Mercosur]. Defensa del consumidor: Derechos básicos. December 13, 1996.

Resolución GMC 125 de 1996 [Mercosur]. Defensa del consumir: Protección a la salud y seguridad del consumidor. December 13, 1996.

Resolución GMC 126 de 1996 [Mercosur]. Defensa del consumidor: Publicidad. December 13, 1996.

Rios, B., B. Cerra, and C. Cury. 2020. "Etiquetado frontal de alimentos en Argentina y Brasil: Barreras y facilitadores jurídicos." *Microjuris Argentina*, April 21.

Secretaría de Política Económica and Subsecretaría de Programación Microeconómica. 2018. *Informes de cadena de valor*. Buenos Aires: Ministerio de Hacienda.

Special Rapporteurship on Economic, Social, Cultural and Environmental Rights. 2019. *Business and Human Rights: Inter-American Standards*. Washington, DC: Inter-American Commission on Human Rights.

Temporelli, K., and V. Viego. 2012. "Obesidad, sobrepeso y condiciones socioeconómicas: El caso argentino." *Ecos de Economía* 16(34): 151–162.

United Nations. 2011. *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*. New York: United Nations.

Wickins-Drazilova, and W. Garrath. 2011. "Ethics and Public Policy." In *Epidemiology of Obesity in Children and Adolescents*, edited by L. Moreno, I. Pigeot, and W. Ahrens. New York: Springer.

World Health Organization. 2016. *Report of the Commission on Ending Childhood Obesity*. Geneva: World Health Organization.

———. 2021. "Obesity and Overweight." June 9. <https://www.who.int/news-room/fact-sheets/detail/obesity-and-overweight>

The Challenges of Brazil's Adoption of Front-of-Package Nutrition Labeling

*Láís Amaral Mais*¹

*Mariana de Araújo Ferraz*²

*Mariana Gondo dos Santos*³

*Patrícia Chaves Gentil*⁴

*Janine Giuberti Coutinho*⁵

*Renato Barreto Florentino*⁶

*Ana Paula Bortoletto Martins*⁷

1 Bachelor's degree in nutrition from the Pontifical Catholic University of Campinas (Brazil) and master's degree and PhD from the Federal University São Paulo (Brazil); coordinator of the Healthy and Sustainable Diets Program of the Brazilian Institute for Consumer Defense.

2 Law degree, master's degree in human rights, and PhD in constitutional law from the University of São Paulo (Brazil); associate director of advocacy at the Global Health Advocacy Incubator.

3 Law degree from the University of São Paulo (Brazil); currently pursuing a bachelor's degree in nutrition from the same university.

4 Bachelor's degree in nutrition, specialization in public health, and master's degree in nutrition from the University of Brasília (Brazil); director of healthy eating at the Secretariat of Food Security and Nutrition of the Ministry of Social Development and Fight against Hunger in Brazil.

According to data on Brazil's nutrition situation, overweight and obesity among adults have increased steadily in recent years. In 2014, 52.5% of adults reported being overweight and 17.9% reported being obese (Ministério da Saúde 2015a); in 2019, these rates increased to 55.4% and 20.3%, respectively (Ministério da Saúde 2020). Similarly, among children aged five to nine, the most recent data—from 2008 and 2009—show that 33.5% are overweight and 14.2% are obese (Instituto Brasileiro de Geografia e Estatística 2010).

Despite the fact that Brazilians consume more fresh and minimally processed foods than ultra-processed food products, there has been a notable decrease in the adult population's regular consumption of fruits, vegetables, and legumes—from 36.5% (fruits and vegetables) and 66.1% (legumes) in 2014 (Ministério da Saúde 2015a) to 34.3 and 59.7%, respectively, in 2019 (Ministério da Saúde 2020). Meanwhile, in 2019, 18.2% of the

5 Bachelor's degree in nutrition, specialization in public health, and master's degree and PhD in nutrition from the University of Brasília (Brazil); nutritionist and technical consultant for the Healthy and Sustainable Diets Program of the Brazilian Institute for Consumer Defense.

6 Bachelor's degree in social sciences from the University of São Paulo (Brazil); advocacy coordinator at the Brazilian Institute for Consumer Defense.

7 PhD in nutrition and public health; professor of nutrition at the School of Public Health of the University of São Paulo (Brazil) and researcher at the university's Center for Epidemiological Research in Nutrition and Health.

adult population reported regularly consuming ultra-processed food products (*ibid.*).

The country's worsening state of nutrition and health—as demonstrated by the rise in overweight, obesity, and other noncommunicable diseases (NCDs) such as diabetes, cardiovascular disease, and metabolic syndrome—is directly related to the population's increased consumption of ultra-processed food products, as confirmed by recent systematic reviews and meta-analyses (Askari et al. 2020; Chen et al. 2020; Meneghelli et al. 2020; Pagliai et al. 2021; Santos et al. 2020). This worrying context gave rise to the need for Brazil to adopt regulatory measures aimed at helping the population make healthier food choices, including by improving the information presented on food and beverage packages.

Adequate and effective nutrition labeling based on scientific evidence and combined with other strategies such as bans on advertising aimed at children, the regulation of marketing, the taxation of ultra-processed food products, and the regulation of food environments in public institutions such as schools can be an effective measure in combating overweight and NCDs. Such labeling seeks to inform consumers about the presence of potentially harmful nutrients and thus facilitate healthier food choices (World Health Organization 2014).

However, the lack of understanding of food labels—exhibited by 40% of Brazilian consumers (“O rótulo pode ser melhor” 2016)—is due mainly to the presence of “small print” (i.e., overly technical terms and numbers) on packaging, visual clutter on labels, and the need for consumers to perform complex calculations per serving. Additional problems related to food labeling are the inclusion of technical and non-standardized terms on the list of ingredients, potentially misleading health claims, and marketing content aimed at children. This context explains Brazil's recent effort to revise its nutrition labeling regulations (Rodrigues et al. 2016; Kliemann et al. 2018; Machado et al. 2018).

The Dietary Guidelines for the Brazilian Population (Ministério da Saúde 2015b), published by the Ministry of Health to facilitate healthier food choices among consumers, recommends the consumption of fresh or minimally processed foods and freshly made dishes over ultra-processed food products.

Ultra-processed food products promote the excessive consumption of calories for two reasons: first, because of certain intrinsic characteristics in their formulation (high amounts of sugars, fats, sodium, flavor-enhancing additives, and energy density, along with lower levels of fiber) that deceive the body's appetite-regulation mechanisms, and second, due to the way they are promoted and marketed, such as through aggressive advertising that highlights the products' long shelf life, low price, wide availability and accessibility, and ability to be consumed without utensils, among others (Monteiro et al. 2012).

The Dietary Guidelines for the Brazilian Population note that among the possible obstacles preventing consumers from following the food-choice recommendations are information and advertising. In this regard, in order for the population to be able to follow these recommendations, the state must require food and beverage companies to provide information on the content of their products. In light of this panorama surrounding the promotion of adequate nutrition and healthy eating, this chapter explores relevant legal frameworks and the country's process of revising its nutrition labeling regulations for packaged foods, focusing on the evolution of the regulatory process and the roles played by various actors.

Methods

This chapter is based on an analysis of numerous documents and materials, including laws and policies, documents from the regulatory process led during 2014–2020 by the Brazilian Health Regulatory Agency (known as Anvisa) on the issue of nutrition labeling for packaged foods, press releases, scientific and legal articles, guidance documents, and online reports and videos about the regulatory process. It is worth mentioning that the authors of this chapter are professionals from civil society organizations who played an active role in the regulatory process and therefore witnessed firsthand the events described here.

The question that this chapter seeks to answer is as follows: What was the process leading up to Brazil's adoption of front-of-package nutrition labeling like? To answer this question, we begin by analyzing the Brazilian and international legal

frameworks that provided a foundation for the process. Next, we analyze the regulatory process itself, including by providing a brief overview of the institutional context, the stakeholders involved, industry interference, the role of civil society, and lessons learned.

National and International Legal Frameworks

There are a variety of provisions in the Brazilian legal system that enshrine the right to clear and adequate information. Brazil's Constitution of 1988, known as the "Citizens' Constitution," outlines a long list of rights guaranteeing human dignity. In fact, the Constitution guarantees consumer protection and the inviolability of consumers' right to life and security as fundamental rights. The Constitution also sets limits on the country's economic order by establishing that its purpose must be to ensure a life with dignity for all Brazilians. This means that the country's economic development must be compatible with the protection of consumers, ensuring that the relationship between consumers and suppliers is based on the principles of good faith and balance. Furthermore, at the collective level, the Constitution establishes health, food, and the protection of children as social rights, imposing a duty on the state to develop policies for their fulfillment.

Meanwhile, Law 8078 of 1990, known as the Consumer Defense Code, protects several basic rights of consumers: (i) the protection of their life, health, and safety against risks in the supply of dangerous or harmful products; (ii) instruction on the proper consumption of products in order to ensure freedom of choice; and (iii) access to clear, adequate, accurate, and visible information about the characteristics and composition of products, including the risks they may present, in order to ensure understanding by the consumer (Lei 8078 de 1990).

In 1999, Law 9782 created Anvisa, an independent agency linked to the Ministry of Health with the task of regulating, controlling, and inspecting products that involve public health risks. This includes food and beverages, as well as their packaging and labels. It is important to note that under Law 9782, Anvisa's institutional purpose is to promote the health of the

population through the sanitary control of the manufacturing and sale (including labeling) of products subject to health regulation (Lei 9782 de 1999). Only after five years of Anvisa's existence did Brazil—seeking to harmonize its standards with the Southern Common Market (Mercosur) framework—become the sixth country in the world to adopt mandatory nutrition labeling (Monteiro et al. 2005).

About the same time as Anvisa's creation, in 1999 the Ministry of Health published its first edition of the National Food and Nutrition Policy, which proposed to respect, protect, promote, and fulfill the human rights to health and food (Ministério da Saúde 2013). This period was when concerns about overweight, obesity, and other NCDs began to emerge. As a result, the issue of mandatory nutrition labeling was put on the government's agenda.

Updated in 2013, the National Food and Nutrition Policy provides for the control and regulation of food in addition to outlining actions for the prevention and treatment of obesity. This new edition reinforces the role of mandatory nutrition labeling as part of the strategies of promotion of healthy and adequate diets. In terms of preventive actions, the focus is on fostering environments conducive to healthy habits, including through the improvement of nutrition labeling in order to strengthen consumers' ability to evaluate and choose products (Ministério da Saúde 2013).

Brazil thus has a set of well-established standards that guarantee the population's right to health and to nutritious and adequate food, including by guaranteeing the right to clear information about the foods that are available in the marketplace. Moreover, this same set of standards includes the state duty to develop policies aimed at fulfilling these rights.

In addition to obligations outlined in national legislation, Brazil has substantive commitments and obligations deriving from international human rights treaties, such as the Convention on the Rights of the Child. Among this convention's binding obligations is the duty to undertake legislative or administrative measures concerning children that have the best interests of the child as a primary consideration (arts. 3–4). In some cases, this obligation means that states may develop a legal framework that

imposes limits and duties on certain actors, such as businesses, to restrict behaviors that violate the rights of children. In such a scenario, a state's inaction—due to its failure to adopt legislative, policy, or administrative measures—could constitute a violation by the state (Contró and Pla 2016). This is particularly important when we look at the Brazilian state's duty to regulate the labeling and advertising of unhealthy foods.

Brazil has ratified the Convention on the Rights of the Child in addition to the International Covenant on Economic, Social and Cultural Rights, both of which recognize the right of children and all persons to enjoy the highest attainable standard of health (art. 24 and art. 12, respectively). This right encompasses the right “to grow and develop [one’s] full potential and live in conditions that enable them to attain the highest standard of health” (Committee on the Rights of the Child 2013a, para. 2). Ensuring such conditions requires active measures by the state to avoid an obesogenic environment, as well as other more basic measures such as guaranteeing the right to information on the health risks of consuming certain foods. Therefore, the right to health is intrinsically linked to the right to food (Committee on Economic, Social and Cultural Rights 2000), as enshrined in articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights.

Recommendations for states to adopt legislative or regulatory measures on food labeling—so that consumers are adequately informed about health risks—have been included in a variety of documents issued by international organizations, including the World Health Organization (2020), the Pan American Health Organization (PAHO) (2020), and the United Nations Children’s Fund (United Nations Children’s Fund and Universidad de la República de Uruguay 2020; United Nations Children’s Fund and Instituto Nacional de Salud Pública 2016; United Nations Children’s Fund and Instituto Brasileiro de Defesa do Consumidor 2019).

In this light, we can conclude that the Brazilian state’s obligation to regulate the food market to ensure that consumers receive adequate information—in order to protect their health—is supported not only by the national legal framework but also by the international one.

The Regulatory Process to Update Nutrition Labeling Rules

Brazil's effort to modify its rules on nutrition labeling for packaged foods was spurred by developments in Mercosur agreements on the issue and by pressure from civil society. In 2013, the National Council for Food and Nutrition Security (known as Consea), an advisory body to the Brazilian presidency that is responsible for monitoring public policies on food and nutrition security, addressed the subject for the first time in its Recommendation 007/2013. In this recommendation, Consea called on Anvisa to be "agile in the processes of updating and evaluating regulatory proposals for food labeling" (Recomendação do Consea 007/2013).⁸

Anvisa heeded Consea's request and in 2014 created the Working Group on Nutrition Labeling, composed of representatives from government, civil society, academia, and the private sector. For the next two years, the working group held a series of in-person and online meetings aimed at identifying the main problems related to the disclosure of nutritional information and possible solutions regarding nutrition warnings, the nutrition facts panel, and front-of-package nutrition labeling (Anvisa 2017).

When the working group came to an end in 2016, Anvisa invited its members to submit proposals for reforming Brazil's nutrition labeling standards. As a result, proposals were received by the private sector (represented by the Brazilian Association of Food Industries, or ABIA); the Interministerial Chamber for Food and Nutritional Security; the Ezequiel Dias Foundation; and the Brazilian Institute for Consumer Defense (IDEC) and researchers from the Federal University of Paraná. These proposals included changes to the information included on the nutrition facts panel (such as the inclusion of information on the amount of sugars per 100 g/100 mL) and the adoption of a front-of-package labeling model. The front-of-package labeling

8 Consea closed its doors in 2019; it was the first of several councils eliminated by the Bolsonaro administration as a way to limit civic engagement. On February 28, 2023, the council was reinstated by the Lula administration.

scheme was the point of greatest divergence among the various proposals, with ABIA recommending a traffic light model and the other organizations, aligned with public health interests, preferring warning labels.

The proposal submitted by IDEC and the Federal University of Paraná was based on studies free from conflicts of interest that were conducted in collaboration with the Center for Epidemiological Research in Nutrition and Health at the University of São Paulo. These studies addressed the effectiveness of different front-of-package labeling models (Khandpur et al. 2018; Khandpur et al. 2019; Sato et al. 2019) and found that the most desirable option in terms of facilitating consumers' understanding of nutrient content was a warning label featuring a black triangle with the words "high in" followed by the name of the nutrient of concern. Meanwhile, ABIA commissioned public opinion research showing Brazilians' preference for the traffic light model (Rede Rotulagem 2017).

In June 2017, following the private sector's submission via ABIA, the food industry formed a coalition called Rede Rotulagem (Labeling Network) composed of major associations from the ultra-processed food and beverage industry and from other industries, such as ABIA, the Brazilian Association for Soft Drinks and Non-Alcoholic Beverages, the Brazilian Supermarket Association, the Brazilian Dairy Association, the Brazilian Animal Protein Association, and the National Confederation of Industry. Rede Rotulagem's discourse, which opposed the warning label model, was based on the ideas of autonomous and conscious food choices, the provision of information according to portion size, a balanced diet, and freedom of choice (Associação Brasileira da Indústria de Alimentos 2020).

In December 2017, Anvisa officially began the regulatory process to reform the country's nutrition labeling standard for packaged foods (Despacho 113 de 2017), which would be conducted within the framework of the regulatory impact analysis (*análise de impacto regulatório*) that is applied to all of the agency's regulatory efforts. The regulatory impact analysis "is the procedure that, based on the definition of a regulatory problem, ... will contain information and data on its likely effects in order to determine the reasonableness of the impact and to support

decision-making” (Decreto 10411 de 2020). This tool improves regulatory quality by systematizing the agency’s analysis of the issue at hand, collecting and analyzing data, identifying alternatives by comparing costs and benefits, and addressing each alternative (Secretaria de Advocacia da Concorrência e Competitividade 2021).

As part of the process, Anvisa held an online technical consultation (*tomada pública de subsídios*, or TPS) in May and July 2018 on the basis of the agency’s *Preliminary Report of the Regulatory Impact Analysis on Nutrition Labeling*, which contained suggestions for improving Brazil’s nutrition labeling system according to the aforementioned proposals sent by the members of the Working Group on Nutrition Labeling, scientific evidence, and international experiences (Anvisa 2018). Anvisa’s preliminary recommendation, as outlined in this report, was that the warning model was the most appropriate option for Brazilian consumers. The TPS was scheduled to end on July 9, 2018, but was extended by two weeks after ABIA filed a judicial action arguing that more studies on the traffic light model needed to be submitted (Seção Judiciária do Distrito Federal 2018). By the time the consultation came to an end, 3,579 individuals and organizations had participated and 33,531 contributions had been received (Anvisa 2019a).

The submissions from food industry organizations were very similar to one another (Mialon et al. 2021), considering that ABIA took advantage of the consultation to adjust its proposal, especially the design of the traffic light. Now the traffic light included the words “low,” “medium,” and “high” for nutrients of concern and featured typical traffic light colors. To improve its proposal, the food industry hired several consultants, such as nutrition researchers and companies in the fields of research, design and communications, packaging, economic analysis, and law (Associação Brasileira da Indústria de Alimentos 2020). Civil society organizations and academia did not alter their proposals, maintaining the approach confirmed by scientific evidence as the most effective for protecting the population’s health.

By the end of the TPS in July 2018, Anvisa’s director-president, Jarbas Barbosa—a physician and epidemiologist passionate about public health and the need to reform Brazil’s nutrition

labeling model—concluded his term in office. His successor, William Dib, was appointed by President Temer (“Exclusivo: Presidente da Anvisa” 2018). Prior to the appointment, Temer, at a public lunch event with industry representatives, had shown his opposition to warning labels for unhealthy foods, referring to them as “a danger sign.” At the same event, a representative of the private sector had spoken with Temer about the need to choose a new director-president for Anvisa who would be open to dialogue with the industry. As Anvisa’s new director-president, Dib publicly voiced his approval of the traffic light model being proposed by the food industry, contradicting the conclusions of Anvisa’s own technical team in its regulatory impact analysis on nutrition labeling (“Temer, o valor do silêncio” 2018).

In April 2019, after nearly a year of analyzing the submissions from the TPS, Anvisa held a meeting to present the results and a timeline outlining next steps in the regulatory process. That same year, Anvisa organized technical meetings on the issue of nutrition labeling with key stakeholders, including public officials, civil society, academia, and the private sector. During these meetings, Anvisa’s technical team presented its recommendations on various aspects of the nutrition labeling standard, such as the exclusion criteria for front-of-package nutrition labeling, the use of the warning labels, the declaration for sugars, readability criteria, and the deadline for compliance with the updated regulation, among others. These recommendations were based on the analysis of submissions from the TPS, scientific evidence, and international experiences. It is important to note that the front-of-package nutrition labeling system’s design and nutrient profile model were not discussed during these meetings.

In September 2019, public consultations 707 and 708—which included the proposals for the resolution of the Collegiate Board (Resolução da Diretoria Colegiada, or RDC) and the normative instruction (Instrução Normativa, or IN) on the nutrition labeling of packaged foods, respectively—were opened. Alongside the public consultation, Anvisa also published the final version of the *Regulatory Impact Analysis Report on Nutrition Labeling*, presenting its technical justification for the proposals (Anvisa

2019c). Anvisa's front-of-package nutrition labeling proposal consisted of a magnifying glass indicating high amounts of added sugars, sodium, and saturated fats based on a nutrient profile developed by the agency.

The public consultations were supposed to be open for forty-five days. However, the day before they were set to end, Anvisa issued a thirty-day extension (until December 9). It made this decision in response to a request by ABPA, an association representing Brazilian poultry and pork production and a member of Rede Rotulagem. With this request, the association—which until that point had not made any statements about the process—emerged as a new actor representing the agribusiness sector. In a single paragraph, ABPA justified its request by stating that it needed more time to conduct studies on the readability of labels on animal products. The day after this request was submitted, Anvisa published an order authorizing the extension (Despacho 142 de 2019).

The public consultation on the nutrition labeling of packaged foods boasted an unprecedented level of participation, with 82,158 submissions from 23,435 participants (Anvisa 2019b). These figures demonstrate the effect of civil society's efforts to encourage participation in the consultation and to promote the triangle warning label. Meanwhile, ABIA's submission—representing the position of the food and beverage industry—included a further modification to its original proposal. It now proposed a more flexible front-of-package nutrition labeling model that featured a smaller and less eye-catching magnifying glass than the one proposed by Anvisa.

Anvisa noted that it was in a hurry to publish the new nutrition labeling standard—mainly because of pressure from Alessandra Bastos, one of Anvisa's directors and rapporteur of the regulatory process, who had put the standard's approval on the agenda of Anvisa's five-member Collegiate Board meeting in December 2019. However, as a result of industry pressure and the arrival of the COVID-19 pandemic, in March 2020 the agency decided to delay the publication of the standard. Anvisa also said that it needed more time to analyze the contributions from the public consultation. Meanwhile, the industry used the pandemic as a justification to request a longer deadline for

compliance once the new standard was eventually published, from twelve months to twenty-four months (Peres 2021).

In 2020, there were also difficulties relating to the directors of the Collegiate Board, who are responsible for voting on the approval and the publication of standards. In order for a vote to take place, at least three of the five directors must be present. In April, Anvisa did not have a quorum after three of its directors left the agency. On that occasion, by means of a decree issued by the Brazilian president and the Ministry of Health, three individuals were appointed as interim directors, but they did not take office right away. This nomination process lacked transparency, as did other events that occurred during this presidential administration.

According to the agency's regulatory calendar, the process for the nutrition labeling standard publication would be completed by the end of September 2020. Nonetheless, on September 16, 2020, and without explaining why, Anvisa canceled the last Collegiate Board meeting of the month, which had been set to take place on September 29. This caused much concern because the date of the meeting coincided with the ends of the terms of three of the five directors. Thus, in early October 2020, Anvisa once again lacked a quorum to hold a vote. Furthermore, there was no guarantee that the labeling issue would be decided at the next meeting, since the lack of a quorum was related to a series of actions and omissions of its Collegiate Board and director-president, as well as the president of Brazil (Torres 2020).

In light of this situation, IDEC filed a writ of security before the Supreme Court, asking the court to ensure (i) the appointment of new Anvisa directors and (ii) the inclusion of the nutrition labeling issue in the agenda of the next Collegiate Board meeting. This legal action garnered widespread media attention ("Grupo recorre ao STF" 2020; "IDEC aciona STF" 2020; Vidale 2020), which prompted Anvisa to take action.

The agency's solution was to renew the mandates of its directors. Thus, on October 8, 2020, the Collegiate Board held its meeting, where directors unanimously approved the new nutrition labeling standard for packaged foods. In her vote, Anvisa's director-rapporteur, Alessandra Bastos, said that "the aim of the standard is not to impose a choice but to enable understanding,

respecting the freedom of choice of all people living in Brazil.” During the technical presentation of the standard, Anvisa’s general manager of food, Thalita Lima, said that “with these new rules, consumers will have an easier time comparing foods and deciding what to consume, in addition to reducing situations of misleading information on nutritional composition.”

Unlike what had been presented in the public consultation, this new labeling standard—as outlined in regulations RDC 429/2020 and IN 75/2020—approved a front-of-package nutrition label based on the magnifying glass model that took up less space on the package and that had a smaller font. Information design experts considered this modification to be a great loss in terms of the graphic’s readability, clarity, and simplicity (Laboratório de Design de Informação/Universidade Federal do Paraná 2020).

At this point, there was no international experience regarding the implementation of such a model, nor was there scientific evidence to support its efficacy. In fact, the magnifying glass had been proposed in Canada but proved to be less effective than other models (Goodman et al. 2018). Since Anvisa’s regulatory process had been based on scientific evidence, the agency’s adoption of a magnifying glass model was controversial, and the final modification was a sign of deep industry interference. In addition, the nutrient profile model used to determine which products would have to include such labels was watered down with higher thresholds, meaning that many unhealthy products would not be required to include the magnifying glass (table 1). Moreover, according to the new rules, nutrition claims would be prohibited only to the extent that they referred to the same nutrients as those contained in the magnifying glass label, thus allowing products to mislead consumers through claims about other nutrients, such as dietary fiber, vitamins, and minerals (table 2).

Acquiescing to the food industry’s request, the deadline for the new standard’s entry into force was pushed back by twenty-four months, meaning that it began to take effect only in October 2022; and for soft drinks in returnable bottles, Anvisa granted a total of five years (until October 2025) for its full implementation. The agency’s justification for these extended

deadlines was the ongoing Mercosur discussions on front-of-package nutrition labeling. After years of debate, Mercosur's full members—Argentina, Brazil, Paraguay, and Uruguay—were still not making progress on the revision of the Mercosur nutrition labeling standards, which include front-of-package nutrition labeling. This means that such standards would be disharmonized among the bloc's member countries. Anvisa argued that if a different standard were approved by Mercosur, Brazil would need to undergo another national review process, including the possibility of a new public consultation. Establishing a longer implementation process would thus allow more time to adjust the national regulation if the regional standards changed during this period.

TABLE I
Nutrient profile models as proposed by
Anvisa in the 2019 public consultation and as
contained in the 2020 approved standard

Nutrient profile model presented by Anvisa in the 2019 public consultation, in two phases of implementation				
	Profile 1 (phase 1)		Profile 2 (phase 2)	
Nutrients / High in	Solids (100 g)	Liquids (100 mL)	Solids (100 g)	Liquids (100 mL)
Added sugars (g)	≥15	≥7.5	≥10	≥5
Saturated fats (g)	≥6	≥3	≥4	≥2
Sodium (g)	≥600	≥300	≥400	≥200
Nutrient profile model contained in the standard approved by Anvisa in 2020				
Profile 1 only				

TABLE 2
Summary of RDC 429/2020 and IN 75/2020

Design: Magnifying glass accompanied by the words “high in” for added sugars, saturated fats, and sodium

1 Nutrient of concern

2 Nutrients of concern

3 Nutrients of concern

Size: Proportion of the package’s front panel that the label must occupy

Front panel of package	Percentage of front panel’s surface area			Required font size	
	1 nutrient of concern	2 nutrients of concern	3 nutrients of concern	Minimum	Maximum
35 cm ² to 100 cm ²	3.5%	5.25%	7%	N/A	9 point
More than 100 cm ²	2%	3%	4%	9 point	15 point

Nutrient profile model:		
Nutrients of concern	Solids (100 g)	Liquids (100 mL)
Added sugars (g)	≥15	≥7.5
Saturated fats (g)	≥6	≥3
Sodium (g)	≥600	≥300

Definition of added sugars: art. 3(I) of the resolution makes an exception for powdered fruit, dried fruits, fruit pulps, purees, pastes, reconstituted juices, and concentrated juices. This is explained in the Contribution Analysis Report from the public consultation. According to the report, these exceptions (i) allow greater possibilities for the reformulation of food products in light of concerns expressed by some stakeholders about the potential for the increased use of sweeteners instead of added sugars and (ii) facilitate the implementation and monitoring of the standard by eliminating the need to perform a subjective evaluation of the role of these ingredients in foods—that is, having to determine whether the sugars' addition is meant to shape the product's identity, perform a scientific function, or simply sweeten the product.

Nutrition claims: Such claims may not appear at the top part of the main panel of packages that bear a magnifying glass label. Foods high in sodium cannot make claims about sodium or salt. Foods high in saturated fats may not make claims about total fats, saturated fats, trans fats, or cholesterol. Foods with high added sugar content may not make claims about sugars or added sugars.

Implementation deadline: The standards enter into force 24 months after the date of publication (October 8, 2020). There are exceptions for:

- Products manufactured before the implementation deadline of 24 months, which may be marketed until their expiration date.
- Products manufactured by smaller enterprises (including small farmers, family entrepreneurs in rural areas, enterprises in the solidarity economy, individual entrepreneurs, small-scale agro-industries, and artisanal agro-industrial producers), which have an additional 12 months.
- Soft drinks in returnable bottles, which have an additional 36 months.

Interference by the Food and Beverage Industry

Food and beverage associations have a deep influence on all spheres of government in Brazil (ACT Promoção da Saúde and Instituto Brasileiro de Defesa do Consumidor 2022). This influence has become even more dangerous to public health and human rights as a result of the reduced space for public participation in policymaking processes, such as the case of the Bolsonaro administration's shuttering of Consea in 2019.

Specifically, representatives of large food manufacturers had a voice in all stages of the regulatory process for nutrition labeling of packaged foods. From their participation (albeit

dispersed) in the Working Group on Nutrition Labeling to their creation of Rede Rotulagem—a network of twenty-one trade associations representing agribusiness, the ultra-processed food and beverage industry, and supermarkets—big food companies engaged in numerous corporate political activities to defend their interests. It is important to note that this sector did not publicly position itself as an opponent of updated labeling standards but rather painted itself as part of the solution. Thus, it initially submitted a front-of-package nutrition labeling proposal based on the traffic light model, which evidence shows is not very effective in informing consumers or reducing the consumption of foods that are potentially harmful to health. According to Rede Rotulagem, the traffic light model would respect consumers' "freedom of choice" (Sua Liberdade de Escolha n.d.).

Among the main tactics used by industry to exert pressure was "information and messaging"—a key strategy outlined in the conceptual framework developed by Mialon and Mialon (2017)—which included the commissioning of technical and economic studies, as well as the launch of a social media campaign entitled "Your freedom of choice" ("Sua liberdade de escolha") (Sua Liberdade de Escolha n.d.). Industry also recruited health professionals, celebrities, and consumers to support its effort, thereby legitimizing its discourse (Associação Brasileira da Indústria de Alimentos 2018). In addition, it employed legal strategies, such as requests to extend the TRS and policy substitution. For example, industry supported the introduction of bills in the National Congress to promote other, less effective measures, and adopted a voluntary agreement to reduce the sugar content in foods, signed by trade associations and the Ministry of Health in 2018 (Associação Brasileira das Indústrias de Refrigerantes e de Bebidas Não Alcoólicas 2018). Other examples of industry interference can be seen in table 3.

Throughout all of these efforts, constant close contact could be seen between representatives of Rede Rotulagem and high-level decision-makers, including technical experts of Anvisa's Office of General Management for Food Products, Anvisa's directors, ministers of health who were in office during the regulatory process, and President Temer. These ongoing

relationships (“Anvisa: Cerca de 90% das reuniões” 2020) ensured, for example, the participation of Anvisa and Ministry of Health representatives at events promoted by Rede Rotulagem, as well as Rede Rotulagem’s ability to convene numerous meetings with Anvisa’s technical team and directors to lobby during different stages of the process.

TABLE 3
Examples of food industry interference in the regulatory process for front-of-package nutrition labeling

- **Involvement in politics:** ABIA pressured President Temer on the need to halt the front-of-package warning label proposal and supported William Dib’s appointment as Anvisa’s director-president (“Temer, o valor do silêncio” 2018). Dib made statements defending the traffic light labeling system proposed by industry, showing his alignment with the food industry from the moment he took office, and contradicted the conclusions of Anvisa’s own regulatory impact analysis (“Exclusivo: Presidente da Anvisa” 2018). Additionally, the Italian Embassy sent a letter to Anvisa and the Ministry of Health on behalf of “Italian agribusiness,” warning that Anvisa’s regulatory proposal would stoke fears among consumers and would hurt business between Brazil and Italy (Processo SEI 25351.920718/2020-17). The food industry also promoted bills in the National Congress that proposed other types of front-of-package nutrition labeling models. Finally, it collaborated with other sectors, such as the congressional agribusiness caucus, to prevent bills of interest to civil society from moving forward (Comissão de Seguridade Social e Família 2019).

- **Legal actions:** ABIA filed a legal action against Anvisa on the last day of the TPS and was granted a court order extending the consultation’s time frame (Seção Judiciária do Distrito Federal 2018).

- **Acting in coalition:** Front groups, such as Rede Rotulagem and the Institute of Food Technology, published communication pieces against the proposed front-of-package warning label model. Further, industry engaged other stakeholders, such as the National Association for Diabetes Care and the National Federation of Diabetes Associations and Entities, to promote the traffic light labeling model. It also engaged groups with conflicts of interest—such as the consumer protection group *Proteste* (Nunes Filho 2019) and the Question of Science Institute (Rede Rotulagem 2018), a platform for the promotion and production of scientific evidence—to defend its proposals. Further, starting in 2018, Rede Rotulagem used social networks to promote its “Your Freedom of Choice” initiative, in which it shared information on the traffic light labeling model and criticized junk food bans, alarmism, and the Chilean labeling model; it also sought to divert the discussion toward other factors related to obesity reduction, such as nutrition education, the reduction of portion sizes, and the promotion of physical activity. This campaign was supported by fitness coach and influencer Marcio Atalla. The results of the opinion polls financed by ABIA were also widely disseminated via the “Your Freedom of Choice” campaign (Sua Liberdade de Escolha n.d.). Another example of the industry acting in coalition was during the public consultation, with ABPA’s request for an extension of the deadline (Processo SEI 25351.939455/2019-86).

- Information management: ABIA and Rede Rotulagem commissioned an economic impact study to argue that warning label models would have catastrophic economic effects on the country. In particular, they argued that it would cost Brazil R\$1.7 billion in exports; R\$7 billion in production; 130,000 jobs and R\$1 billion in wages; and R\$617 million in taxes (GO Associados and Associação Brasileira da Indústria de Alimentos 2018). These estimates were extrapolated on the basis of consumer preference surveys commissioned by the food industry, and they relied on questionable assumptions regarding the data. The weaknesses of this study were revealed by economists from the University of São Paulo, at the request of IDEC (Deal Assessoria e Consultoria and Instituto Brasileiro de Defesa do Consumidor 2018).

Food companies used a variety of narratives and arguments in their public messaging and in their contributions submitted during the TPS and the public consultation. The main arguments were focused on defending the industry as a legitimate actor in the regulatory process, as well as criticizing the regulatory process and the front-of-package nutrition warning model.

To defend its legitimacy, industry highlighted issues such as the protection of consumer choice, industry's importance for the country's economic well-being, the need for nutrition education to improve the population's eating habits, and industry's contributions to the search for solutions to the NCD epidemic (such as the reduction of portion sizes and actions aimed at nutrition education and physical activity). In terms of its critiques of the regulatory process and Anvisa's proposed labeling system, industry raised questions about its representation in the regulatory process, the scientific evidence used by Anvisa, the need for alignment with Mercosur and Codex Alimentarius, the risks for the economy posed by front-of-package nutrition warning labels (the food industry estimated 130,000 lost jobs and around R\$10 billion in losses for the sector), and the inefficiency of the nutrition warning label model adopted in Chile (which it cited as alarmist and ineffective) (Mialon et al. 2021).

A 2020 document—a presentation consisting of seventy-three slides—that was leaked from ABIA outlined the strategies and narratives planned and executed by Rede Rotulagem to influence Anvisa's final decision (Peres 2021). Some key highlights from this internal document include a description of the triangle model based on PAHO's nutrient profile as the "worst-case scenario – avoid"; the numerous technical, legal, and economic analyses that were commissioned to support Rede

Rotulagem's positioning; and the evolution in industry's stance and arguments throughout the regulatory process.

It is worth noting that as the regulatory process moved forward, Rede Rotulagem adapted its proposal accordingly (table 4). At first, it called for a traffic light labeling model with a nutrient profile model based on reduced portion sizes. By the end of the process, industry was open to a loosened version of Anvisa's proposal, ultimately accepting a "high in" front-of-package nutrition labeling model with a magnifying glass, a nutrient profile based on 100 g/100 mL, and certain restrictions on nutrition claims. However, industry was successful in securing a longer time frame for compliance with the new policy, in reducing the size of the magnifying glass, and in securing a less restrictive nutrient profile model than the one set forth by Anvisa during the public consultation.

TABLE 4
Evolution of the food and beverage industry's front-of-package labeling proposal

<p>Beginning of the regulatory process (Peres 2021): nutritional traffic light model</p>	<p>Uma porção de 30g (3 biscoitos) fornece:</p> <p>Essa embalagem contém aproximadamente 6 porção % calores diários de referência com base em uma dieta de 2000 Kcal</p>
<p>TPS (Rede Rotulagem n.d.): adapted traffic light model</p>	<p>Por porção de 25g (1 1/2 xícara):</p> <p>% valores diários de referência com base em um dieta de 2000 Kcal.</p>
<p>Public consultation (Associação Brasileira da Indústria de Alimentos 2019): Magnifying glass in a smaller size than that proposed by Anvisa</p>	

TPS: tomada pública de subsídios, or online public consultation

Industry's successful wielding of influence to secure a weaker nutrient profile model—and, as a result, the classification of fewer products as “high in”—is not unique to Brazil. This same phenomenon has been seen in countries such as Argentina (“Exceso de lobby” 2020) and Uruguay (“Etiquetado en Uruguay” 2021) during their processes of adopting front-of-package nutrition labeling systems, where industry voiced its opposition to FAHO's Nutrient Profile Model, whose aim is precisely to protect public health.

The Role of Civil Society

Civil society's participation in the regulatory process from the outset was fundamental to the final outcome. In the beginning, the most significant involvement was by researchers and IDEC in the technical discussions of the Working Group on Nutrition Labeling and in the production of scientific evidence to support the regulatory process. Joint work between IDEC and researchers from the Federal University of Paraná and the University of São Paulo made it possible to develop a body of research comparing different front-of-package nutrition labeling approaches and designs in Brazil, including a randomized controlled experimental study that looked at different front-of-package warning label models and the nutritional traffic light proposed by the ultra-processed food industry (Khandpur et al. 2018). The results of this research showed that the triangle warning model was the most effective in helping consumers identify products with high levels of nutrients of concern. Similarly, other studies conducted by independent research groups such as the University of Brasília and the Brazilian Agricultural Research Corporation were carried out with funding from Anvisa. These studies also showed the superiority of the warning label approach for promoting Brazilian consumers' understanding and use of labels (Deliza et al. 2020; Bandeira et al. 2021).

But even the best scientific evidence and facts have not always been enough to counter the influence of the food and beverage industry in policymaking. Thus, the mobilization of organizations and institutes working on the issues of food and

health, as well as the commitment of society in general, has been fundamental for protecting the interests of consumers.

As the discussions on nutrition labeling moved forward, in 2017 the Alliance for Adequate and Healthy Diets (hereinafter called the Alliance), a network of civil society organizations and individuals, launched the media campaign “You have the right to know what you eat” (“Você tem o direito de saber o que come”) throughout Brazil (Aliança pela Alimentação Adequada e Saudável 2017, 2018). This campaign sought to raise public awareness of the need for clear and reliable information on food labels, while also promoting civil society’s front-of-package nutrition labeling proposal: the warning triangles.

After that, civil society carried out other media campaigns and public activities, such as the “labeling tent” campaign (*tenda da rotulagem*), in which tents were set up more than twenty-five times in various parts of the country, including São Paulo, Rio de Janeiro, Rio Grande do Sul, Paraná, Minas Gerais, São Luís do Maranhão, and the country’s capital, Brasília. The tents—which were placed in public squares, farmers’ markets, universities, conferences, and a building next to the Presidency of the Republic—displayed real food products with and without triangle warnings so that people could see how labeling affected their perceptions of products.

Other political support during the regulatory process came from eminent and trusted actors in society. For example, countless statements in support of the model were issued by municipal chambers, public policy councils, and consumer protection associations, such as the National Association of Consumer Public Prosecutors, the Brazilian Institute for Consumer Policy and Law, the Consumer Defense Commission of the Brazilian Bar Association, and the Brazilian Association of Consumer Protection Offices, among others. In addition, medical associations such as the Brazilian Association for the Study of Obesity and Metabolic Syndrome, the Brazilian Society of Hypertension, and the Brazilian Society of Endocrinology and Metabolism spoke favorably of the front-of-package nutrition warning model and, together with representatives of Anvisa, adopted a position on the issue. Moreover, international organizations such as the United Nations Children’s Fund Brazil

supported the Alliance's campaign and took an official stance during the public consultation and in meetings with Anvisa.

It is also important to mention civil society's actions in the National Congress. Parallel to the discussions of the labeling standard in Anvisa, the food industry was involved in the presentation of bills to the National Congress that proposed the traffic light labeling system. IDEC and the Alliance actively responded to this situation through technical and policy strategies, as well as communication efforts with legislators, which attracted supporters in the National Congress and kept the industry-backed bills from moving forward. Meanwhile, IDEC also supported bills that echoed the demands of civil society.

With Anvisa's delay in publishing the results of the TPS and in moving the regulatory process forward, the Alliance launched another nationwide communication campaign in late 2018. This campaign was based on statements from doctors, parents, patients with NCDs, and young people about the need for proper food labels (Aliança pela Alimentação Adequada e Saudável 2019a, 2019b). Its aim was to pressure Anvisa to hold the final public consultation on the nutrition labeling regulation.

The following year, during the public consultation, civil society mobilized once again via the Alliance and its member organizations to disseminate information and encourage public participation in the consultation. In addition to the communication campaign "When you open your mouth, don't close your eyes" ("Quando abrir a boca, não feche os olhos") promoting the triangle warnings, the Alliance produced a tutorial video with step-by-step instructions on how to complete the public consultation form, in an effort to mitigate Anvisa's difficult-to-navigate website (Aliança pela Alimentação Adequada e Saudável 2019c, 2019d). Additionally, members of the Alliance set up the labeling tents once again throughout the country, with the aim of explaining the triangle model and encouraging citizens to participate in the public consultation. Civil society also organized a number of events and speeches on the issue in public universities throughout Brazil.

The use of legal tools was fundamental for ensuring that the regulatory process was transparent and that the voice of civil society was heard. Law 9784/1999, which regulates

administrative processes within the scope of the executive branch, establishes citizens' right to submit briefs and documents to the government before an administrative decision is made, which the government is obliged to consider. During the final stage of the regulatory process, IDEC drew on this law to prepare a document with final technical and legal arguments regarding the labeling process, which it personally delivered to each of Anvisa's directors.

This document mapped out the possible outcomes of the regulatory process, outlining and responding to several key questions:

- *List of scenarios:* Considering the forces at play, what can happen to either propel or hinder the regulatory process? What possible scenarios are provided for in the law and in the agency's internal regulations? For example, do Anvisa's internal rules allow the process to be suspended?
- *Analysis and description of the scenarios identified:* What are the possible sub-scenarios within the main scenarios listed? For example, step 1 identified the possibility of the food industry filing a legal claim. How many sub-scenarios exist within this scenario? (What types of legal actions can be presented? What arguments?) Do these sub-scenarios require different strategies in response?
- *Main legal bases:* What legal arguments could be used to address the identified scenarios? Is there useful case law?
- *Main legal instruments:* What are the most appropriate legal instruments for dealing with the scenario in general? A formal communication? A lawsuit?
- *Timing:* When should these legal instruments be utilized? Is there a particularly advantageous or strategic moment?
- *Study of other possibilities:* Are there scenarios for which more actions (such as communication or advocacy) are required? Are such actions exclusive or complementary?

IDEC's analysis identified two main groups of scenarios. In the first group, the regulatory process would either continue unhindered or be subject to informal interference by industry. In

the second, the food industry would use the courts to explicitly interfere in the process.

Within the first group, the document envisaged different possibilities: compliance with the regulatory timetable, resulting in the conclusion of the process; approval of a satisfactory standard; approval of an unsatisfactory standard; continuation of the process, but with a request for adjustments to the standard by Anvisa's directors; and the directors' discontinuation of the process. With regard to the last option, the document outlined all possible justifications for discontinuing the process, such as a lack of a quorum for the vote, a request for a hearing by the directors, and a request to suspend the process in order to harmonize the standard with Mercosur rules. This group of scenarios considered the industry's ability to lobby Anvisa, as well as how the agency's own rules could be used to halt the process.

For the second group, the document mapped the possible ways that the process could end up in the courts. This analysis presented two possibilities: either industry would file a lawsuit while the regulatory process was still underway, in order to suspend the process, or it would file a lawsuit after the regulation's approval, in order to have the regulation struck down. In developing these scenarios, the document drew on extensive jurisprudential research in order to identify the main legal grounds that could be used to suspend the regulatory process or to rescind a regulation that has already been issued.

For all of the scenarios identified, the document discussed the possible judicial and administrative tools, as well as the possible legal grounds, that could be drawn on by civil society.

Finally, in light of all the obstacles to concluding the process according to Anvisa's regulatory timetable, IDEC filed a legal action to safeguard the process, ensuring that the agency would issue a decision on the new standard. Within a few days of this filing, even before the courts ruled on it, Anvisa completed the necessary administrative procedures to ensure that there would be a quorum for a vote and to include the issue on its meeting agenda. Against the backdrop of the COVID-19 pandemic, which the industry tried to use as justification to halt all regulatory

processes, in October 2020 Brazil's new regulation on the nutrition labeling of packaged food was published.

Lessons Learned and Recommendations

This process offered important lessons learned for civil society actors working on the issue of adequate and healthy food in Brazil. One such lesson is the value of employing a variety of strategies simultaneously, including the following:

360

- Bringing together all of the main organizations in the field of health and securing the support of various oversight bodies and actors from across the political spectrum.
- Monitoring other regulatory processes conducted by Anvisa.
- Constructing and continually updating the range of possible political scenarios, considering all of the technical and political decisions that could arise.
- Conducting high-quality and relevant scientific research within the appropriate time frame.

Another lesson learned that turned out to be incredibly important was the need for collaboration between civil society and academia, and the consequent strengthening of scientific evidence as an essential pillar of argumentation. The stance of IDEC and the Alliance remained unchanged throughout the regulatory process because it was based on robust scientific evidence showing that the proposed warning model—the triangle format based on PAHO's Nutrient Profile Model—is the most effective front-of-package nutrition labeling option for helping consumers make healthier food choices.

A key point is worth emphasizing here. According to Anvisa, its overall objective in this particular regulatory intervention was “to facilitate the understanding of the nutrition information present on food labels and thereby help consumers make more conscious food choices” (Anvisa 2020). With this phrasing—namely, its emphasis on “conscious” choices—Anvisa sidestepped the need for the regulation to help consumers make *healthier* food choices, which made it easier to ultimately choose

a model that diverged from the World Health Organization's recommendations.

The definition of the regulatory objective should be the object of great attention for the development of robust nutrition labeling standards in other countries. Despite the various contributions of civil society and academia indicating the need for the regulatory objective to focus on guaranteeing the presence of information on labels that furthers the protection of consumers' health, Anvisa did not assume this commitment (and accompanying legal obligation) in its stated objective. This omission served to prevent the adoption of a front-of-package labeling model backed by evidence of consumers' decreased consumption of potentially health-damaging food products and in line with PAHO's Nutrient Profile Model (Pan American Health Organization 2016), which was developed to guide countries' regulatory measures to ensure healthy diets in accordance with the World Health Organization's recommended nutrient intakes (World Health Organization and Food and Agriculture Organization 2003).

In relation to the participation of different actors in the process, Anvisa's technical team, instead of positioning itself on the side of public health and considering the best available evidence for its decision-making on the issue, positioned itself as a "mediator" of a supposed polarization between civil society and industry. This approach strengthened the legitimacy of the food industry as a necessary party to the conversation and gave it the ability to participate in all stages of the process. Moreover, it allowed industry to comfortably influence the process and gain access to updated information at every step of the way, including during the most critical decision-making moments. Had Anvisa embraced a position showing greater concern about the conflicts of interest held by industry representatives vis-à-vis the regulatory objective of nutrition labeling, it could have reduced the food industry's level of interference. It would also have allowed Anvisa to make decisions more aligned with public health objectives and its own objectives as a regulatory agency.

In addition to Anvisa's "mediator" position, there was also significant asymmetry in terms of the meetings it held with key stakeholders. In 2019, for example, about 90% of the engagements

recorded in the agendas of the agency's leaders were with companies ("Anvisa: Cerca de 90% das reuniões" 2020). Obviously, these actors are the ones with the organizational and financial means to maintain this type of sustained contact with regulatory agencies. Meanwhile, Anvisa made no effort to increase the voice of civil society, especially through direct meetings with agency directors. Civic participation cannot be relegated merely to public consultations—in this case, for example, by the time the public consultation was opened, the regulatory process was already too far along to allow for the voices of civil society to have a significant impact on the final decision.

One of the achievements of civil society, despite not having much direct influence on agency directors, was its ability to monitor the regulatory process through Anvisa's electronic system. Starting in 2019, when the regulatory process entered decision-making territory, IDEC began closely monitoring all relevant movements. Because of its direct role in the process, and also because of its legal status as an association representing consumers, IDEC was able to draw on the provisions of Law 9789/1999 guaranteeing access to information regarding the status of cases and to copies of relevant documents. This work was very important because it allowed civil society to obtain information about the status of the regulatory process, the agency's decisions, and industry interference in the process. Moreover, through civil society's monitoring and analysis of potential legal routes that the process could take, it was possible to predict other actors' movements, allowing civil society to prepare advocacy and communication strategies as needed.

In addition, throughout the final phase, as well as in particularly vulnerable moments (for example, during the public consultation period), civil society actively monitored industry's legal actions. The aim here was to identify and anticipate any attempts before the courts to halt or invalidate the regulatory process.

The mapping of all possible scenarios was critical for IDEC to be able to make strong and agile decisions in the final stage of the process, especially in the context of Anvisa's lack of a quorum, when civil society decided to file a lawsuit to guarantee the completion of the process.

Application of the New Regulation and Compliance with Brazil's Legal Obligations

Under Brazil's legal framework, the state is required to implement regulatory or legislative measures to ensure that consumers receive the best information possible, with special regard for children, in order to protect the health of the population. With this in mind, and in light of the Brazilian experience regarding the regulation of nutrition labeling as described in this chapter, a question arises: Is it possible to say that Brazil, through its new nutrition labeling regulation, is fulfilling its constitutional and international obligations to protect the health of its population?

An analysis of the regulatory process shows that concessions were made to the food industry. These concessions include the adoption of the magnifying glass design model (which lacks scientific evidence on its effectiveness); the acceptance of the argument that front-of-package warning labels such as triangles or octagons would generate “fear” among the population; the decrease in the size of the required labels; and the approval of a nutrient profile far removed from PAHO's recommendations, which means that a greater number of products that are potentially harmful to health are not required to include labels. Also worth noting is the significant amount of time it took to make a decision (more than six years) and the extended time frame provided for the new standard's entry into force. These observations allow us to conclude that Brazil will still have to make an effort to properly evaluate the new standard and to improve its technical aspects so that it is in line with the best available scientific evidence regarding the protection of consumers' health.

As mentioned above, it took more than six years for Anvisa to conclude the regulatory process. During this period, Brazil had three different presidents, and its political context suffered many moments of instability, which resulted in multiple changes in health ministers and Anvisa directors. In addition to these changes in power that frustrated the regulatory process, the Bolsonaro administration adopted an extremely lax approach that was notable for its prioritization of commercial interests over public health, even in the face of the COVID-19 pandemic.

Further, the government implemented a number of measures during the regulatory process that resulted in setbacks to social rights, such as large budget cuts; the shuttering of programs and agencies that were key for promoting food and nutrition policies; and the persecution of civil society actors and representatives of Indigenous peoples and communities (FIAN Brasil 2019).

Considering this context, the final outcome of the regulatory process thus far—which is closer to the front-of-package warning label model than to the initial proposal of Rede Rotulagem—represents an important step forward and is a testament to the work of civil society, which was able to exert pressure and to demand that scientific evidence and public health interests be prioritized. Indeed, Anvisa’s decision on the front-of-package nutrition labeling model represents one of the few (or perhaps the only) political losses that food and beverage corporations had under the previous Brazilian administration, as they were able only to mitigate the impact of the regulation but not to prevent its adoption.

Regardless, it is important to mention that Brazil has yet to fulfill its obligation to defend the best interests of the child through the broader regulation of advertising of products that are unhealthy, ultra-processed, or “high in” nutrients of concern. Brazil’s regulation is an outlier within the broader regional trend (as observed in Chile, Peru, Mexico, and Argentina) of linking nutrition labeling measures with other restrictions, such as restrictions on advertising aimed at children and in school settings. This is a serious shortcoming, since a key pillar of protecting children from market practices is to limit their exposure to advertising.

The United Nations Committee on the Rights of the Child recommends that states regulate the advertising and sale of substances harmful to children’s health and regulate the promotion of such substances in places where children congregate, as well as in the media and in publications accessed by children.⁹ In this regard, states must not only adopt standards requiring

9 The committee recognizes that children, because of their vulnerability, are more likely to view advertising messages as truthful and unbiased and to therefore consume and use harmful products.

companies, for example, to implement clear and accurate product labeling and to provide the necessary information for parents and children to informed decisions as consumers but also ensure that food advertising, packaging, and labeling, as well as any other marketing gimmicks, do not adversely impact the rights of children and adolescents (Committee on the Rights of the Child 2013a, 2013b). This can be done through legislation or food labeling standards and other information-sharing mechanisms that allow children and their parents to make informed choices.

This obligation becomes even more critical in the face of the marketing of products high in fats, sugars, or sodium, as well as high-energy products, such as drinks with caffeine, or other substances with possible harmful effects, such as sweeteners (Committee on the Rights of the Child 2013a). This fact has been reaffirmed by United Nations Special Rapporteurs on the Right to Health. During his term, Anand Grover (2014), for example, called on the food industry to refrain from advertising unhealthy products to children and promoting misleading messages about the health properties of their products, in accordance with national laws and regulations. He also noted that the failure to comply with such regulations may represent a violation not only of the law itself but also of the right to health generally.

Conclusion

Ultimately, we can conclude that Brazil took a step forward in the protection of health by placing the labeling issue on the political agenda and by adopting a “high in” front-of-package nutrition labeling standard. However, the limitations described in this chapter demonstrate that despite the progress made, challenges still remain with regard to fully achieving the right of children and all people to the enjoyment of the highest attainable standard of health.

Finally, it should be noted that adding warnings on unhealthy foods and beverages and clearly informing consumers of the risks of consuming certain nutrients does not impede individual freedom of choice in any way. On the contrary, it

guarantees this freedom because as consumers, we are only able to make a conscious choice when we are well informed. Brazil's new front-of-package nutrition labeling standard is, without a doubt, a milestone in the country's history, but civil society and academia must continue fighting so that the entire population can enjoy the right to know what they eat.

References

- ACT Promoção da Saúde and Instituto Brasileiro de Defesa do Consumidor. 2022. *Dossiê Big Food: Como a indústria interfere em políticas de alimentação*. São Paulo: ACT Promoção da Saúde and Instituto Brasileiro de Defesa do Consumidor.
- Agência Nacional de Vigilância Sanitária (Anvisa). 2017. *Relatório do Grupo de Trabalho sobre Rotulagem Nutricional*. <https://www.abia.org.br/vsn/temp/z2017912RelatoriodoGrupodeTrabalhosobreRotulagemNutricional.pdf>
- . 2018. *Relatório preliminar de análise de impacto regulatório sobre rotulagem nutricional*. http://antigo.anvisa.gov.br/documents/33880/2977862/An%C3%A1lise+de+Impacto+Regulat%C3%B3rio+sobre+Rotulagem+Nutricional_vers%C3%A3o+final+3.pdf/2c094688-aeec-441d-a7f1-218336995337
- . 2019a. *Relatório da Tomada Pública de Subsídios (TPS) nº 1/2018: Relatório preliminar de análise de impacto regulatório (AIR) sobre rotulagem nutricional*. http://antigo.anvisa.gov.br/documents/219201/219401/Relat%C3%B3rio+da+TPS+n.1_2018.pdf/e901c710-f06f-4207-ab6a-118f972debc3
- . 2019b. *Relatório de análise da participação social nº 48/2019*. http://antigo.anvisa.gov.br/documents/10181/3882585/Relat%C3%B3rio+de+An%C3%A1lise+da+Participa%C3%A7%C3%A3o+Social+%28RAps%29+-+Cps+707+e+708_2019.pdf/fadc718f-39fe-4c03-a1df-9e7dbf2b853c
- . 2019c. *Relatório de análise de impacto regulatório sobre rotulagem nutricional*. <http://antigo.anvisa.gov.br/documents/33880/5313808/Relat%C3%B3rio+de+An%C3%A1lise+de+Impacto+Regulat%C3%B3rio+sobre+Rotulagem+Nutricional.pdf/31d15194-568c-4862-82ec-97e38202b1a1>

———. 2020. “Perguntas e respostas: Rotulagem nutricional.” <https://www.gov.br/anvisa/pt-br/assuntos/noticias-anvisa/2020/perguntas-e-respostas-rotulagem-nutricional>

Aliança pela Alimentação Adequada e Saudável. 2017. “Você tem o direito de saber o que come: Anúncio para tv.” <https://www.youtube.com/watch?v=FC6ewYBYSSQ>

———. 2018. “Você tem o direito de saber o que come: Anúncio para tv.” <https://www.youtube.com/watch?v=FTTrZergNQVS>

———. 2019a. “Doutores Carlos Monteiro, Maria Edna e Luiz Bortolotto: Médicos.” <https://www.youtube.com/watch?v=RLRccGbajbA>

———. 2019b. “Fabiano Luder: Portador de diabetes tipo 2.” https://www.youtube.com/watch?v=6Xru_YtIRNk

———. 2019c. “Você sabe o que você come? Quando abrir a boca, não feche os olhos.” https://www.youtube.com/watch?v=P_LiBfdP7C8

———. 2019d. “Consulta pública sobre rotulagem nutricional de alimentos.” <https://www.youtube.com/watch?v=lK733O1A5Yg>

“Anvisa: Cerca de 90% das reuniões da diretoria são com empresas.” 2020. *O Joio e o Trigo*, August 20. <https://ojoioetrigo.com.br/2020/08/anvisa-cerca-de-90-das-reunioes-da-diretoria-sao-com-empresas>

Askari, M., J. Heshmati, H. Shahinfar, N. Tripathi, and E. Daneshzad. 2020. “Ultra-processed Food and the Risk of Overweight and Obesity: A Systematic Review and Meta-Analysis of Observational Studies.” *International Journal of Obesity* 44(10): 2080–2091.

Associação Brasileira da Indústria de Alimentos. 2018. “Rótulo às claras.” *O Globo*, December 13. <https://oglobo.globo.com/epoca/rotulo-as-claras-23302718>

———. 2020. “Rotulagem Nutricional Webinar Outubro 2020.” <https://www.documentcloud.org/documents/20507598-rotulagem-nutricional-webinar-outubro-2020>

Associação Brasileira das Indústrias de Refrigerantes e de Bebidas Não Alcoólicas. 2018. “Em iniciativa inédita, indústrias de alimentos e bebidas lançam plano de redução voluntária de açúcares.” November 26.

<https://abir.org.br/em-iniciativa-inedita-industrias-de-alimentos-e-bebidas-lancam-plano-de-reducao-voluntaria-de-acucares/>

Bandeira, L. M., J. Pedroso, N. Toral, and M. B. Gubert. 2021. "Desempenho e percepção sobre modelos de rotulagem nutricional frontal no Brasil." *Revista de Saúde Pública* 55(19).

Chen, X., Z. Zhang, H. Yang, P. Qiu, H. Wang, Q. Zhao, J. Fang, and J. Nie. 2020. "Consumption of Ultra-processed Foods and Health Outcomes: A Systematic Review of Epidemiological Studies." *Nutrition Journal* 19(1).

Comissão de Seguridade Social e Família. 2019. *1ª sessão legislativa ordinária da 56ª legislatura (audiência pública extraordinária)*. November 5. <https://escriba.camara.leg.br/escriba-servicosweb/html/57416>

Committee on Economic, Social and Cultural Rights. 2000. *General Comment No. 14: The Right to the Highest Attainable Standard of Health*. UN Doc. E/C.12/2000/4.

Committee on the Rights of the Child. 2013a. *General Comment No. 15: The Right of the Child to the Enjoyment of the Highest Attainable Standard of Health*. UN Doc. CRC/C/GC/15.

———. 2013b. *General Comment No. 16: State Obligations regarding the Impact of the Business Sector on Children's Rights*. UN Doc. CRC/C/GC/16.

Constitution of the Federative Republic of Brazil. October 5, 1988.

Consulta pública 707 de 2019 [Agência Nacional de Vigilância Sanitária]. Proposta de Resolução da Diretoria Colegiada que dispõe sobre a rotulagem nutricional dos alimentos embalados. September 13, 2019. http://antigo.anvisa.gov.br/documents/10181/3882585/SEI_ANVISA+-+0734885+-+Consulta+P%C3%BAblica.pdf/a123b3c4-436a-421a-b035-b0950034ed97

Consulta pública 708 de 2019 [Agência Nacional de Vigilância Sanitária]. Proposta de Instrução Normativa que estabelece os requisitos técnicos para declaração da rotulagem nutricional nos alimentos embalados. September 13, 2019. http://antigo.anvisa.gov.br/documents/10181/3882585/SEI_ANVISA+-+0734894+-+Consulta+P%C3%BAblica+708.pdf/60eb27d4-a2c7-4c04-bbc3-08927fb4d85b

Contró, M. G., and I. L. Pla. 2016. *Los derechos de los niños y niñas en México frente al ambiente obesogénico*. Mexico City: Universidad Nacional Autónoma de México.

Convention on the Rights of the Child. November 20, 1989.

Deal Assessoria e Consultoria and Instituto Brasileiro de Defesa do Consumidor. 2018. *Parecer sobre o estudo de "Impactos socioeconômicos da implementação de modelos de rotulagem nutricional no painel frontal das embalagens de alimentos e bebidas" realizado pela GO Associados*.

Decreto 10411 de 2020 [Presidente da República]. Regulamenta a análise de impacto regulatório, de que tratam o art. 5º da Lei nº 13.874, de 20 de setembro de 2019, e o art. 6º da Lei nº 13.848, de 25 de junho de 2019. June 30, 2020. http://www.planalto.gov.br/ccivil_03/_Ato2019-2022/2020/Decreto/D10411.htm

Deliza, R., M. Alcântara, R. Pereira, and G. Ares. 2020. "How Do Different Warning Signs Compare with the Guideline Daily Amount and Traffic-Light System?," *Food Quality and Preference* 80.

Despacho 113 de 2017 [Agência Nacional de Vigilância Sanitária]. December 26, 2017. http://antigo.anvisa.gov.br/documents/10181/3882585/DI_113_2017.pdf/086442b0-d6a9-43ae-af03-0eb8cc2da497

Despacho 142 de 2019 [Agência Nacional de Vigilância Sanitária]. November 5, 2019. <https://www.in.gov.br/web/dou/-/despacho-n-142-de-5-de-novembro-de-2019-226224965>

"Etiquetado en Uruguay: La salud (de la industria) primero." 2021. *Bocado*, February 10. <https://bocado.lat/etiquetado-en-uruguay-la-salud-de-la-industria-primero/>

"Exceso de lobby." 2020. *Bocado*, November 12. <https://bocado.lat/exceso-de-lobby>

"Exclusivo: Presidente da Anvisa acenou à indústria de alimentos antes de nomeação." 2018. *O Joio e o Trigo*, October 1. <https://ojoioeotrigo.com.br/2018/10/exclusivo-presidente-da-anvisa-acenou-a-industria-de-alimentos-antes-de-nomeacao/>

FIAN Brasil. 2019. *Informe DHANA 2019: Autoritarismo, violação de direitos e fome*. Brasília: FIAN Brasil.

GO Associados and Associação Brasileira da Indústria de Alimentos. 2018. *Impactos socioeconômicos da implementação*

de modelos de rotulagem nutricional no painel frontal das embalagens de alimentos e bebidas.

Goodman, S., L. Vanderlee, R. Acton, S. Mahamad, and D. Hammond. 2018. "The Impact of Front-of-Package Label Design on Consumer Understanding of Nutrient Amounts." *Nutrients* 10.

Grover, A. 2014. *Unhealthy Foods, Non-communicable Diseases and the Right to Health*. UN Doc. A/HRC/26/31.

"Grupo recorre ao STF para garantir alerta em produtos alimentícios." 2020. *Correio Braziliense*, October 5. <https://www.correiobraziliense.com.br/economia/2020/10/4879991-olho-vivo-na-embalagem.html>

"IDEC aciona STF para que processo sobre rotulagem seja julgado logo pela Anvisa." 2020. *Jota*, October 6. <https://www.jota.info/stf/do-supremo/idec-stf-rotulagem-anvisa-06102020>

Instituto Brasileiro de Geografia e Estatística. 2010. *Pesquisa de Orçamentos Familiares (POF) 2008–2009: Antropometria e estado nutricional de crianças, adolescentes e adultos no Brasil*. Rio de Janeiro: Ministério da Saúde and Ministério do Planejamento, Orçamento e Gestão.

Instrução Normativa (IN) 75 de 2020 [Agência Nacional de Vigilância Sanitária]. Estabelece os requisitos técnicos para declaração da rotulagem nutricional nos alimentos embalados. October 8, 2020. http://antigo.anvisa.gov.br/documents/10181/3882585/IN+75_2020_.pdf/7d74fe2d-e187-4136-9fa2-36a8dcfc0f8f

International Covenant on Economic, Social and Cultural Rights. December 16, 1966.

Khandpur, N., L. A. Mais, P. M. Sato, A. P. B. Martins, C. S. Spinillo, C.F. U. Rojas, M. T. Garcia, and P. C. Jaime. 2019. "Choosing a Font-of-Package Warning Label for Brazil: A Randomized, Controlled Comparison of Three Different Label Designs." *Food Research International* 121: 854–861.

Khandpur, N., P. M. Sato, L. A. Mais, A. P. B. Martins, C. S. Spinillo, M. T. Garcia, C. F. U. Rojas, and P. C. Jaime. 2018. "Are Front-of-Package Warning Labels More Effective at Communicating Nutrition Information Than Traffic-Light Labels? A Randomized Controlled Experiment in a Brazilian Sample." *Nutrients* 10(6).

Kliemann, N., M. V. S. Kraemer, T. Scapin, V. M. Rodrigues, A. C. Fernandes, G. L. Bernardo, P. L. Uggioni,

and R. P. C. Proença. 2018. "Serving Size and Nutrition Labelling: Implications for Nutrition Information and Nutrition Claims on Packaged Foods." *Nutrients* 10(7).

Laboratório de Design de Sistemas de Informação/ Universidade Federal do Paraná. 2020. "Considerações gerais sobre a Instrução Normativa da Anvisa (02/10/2020) quanto ao design da informação da rotulagem nutricional frontal proposta." Facebook, October 7. https://www.facebook.com/labdsi/posts/828252707948637?_rdc=1&_rdr

Lei 8078 de 1990. Dispõe sobre a proteção do consumidor e dá outras providências. September 11, 1990. http://www.planalto.gov.br/ccivil_03/Leis/L8078.htm

Lei 9782 de 1999. Define o Sistema Nacional de Vigilância Sanitária, cria a Agência Nacional de Vigilância Sanitária, e dá outras providências. January 26, 1999. http://www.planalto.gov.br/ccivil_03/leis/19782.htm

Lei 9784 de 1999. Regula o processo administrativo no âmbito da Administração Pública Federal. January 29, 1999. http://www.planalto.gov.br/ccivil_03/leis/19784.htm

Machado, P. C. I., A. M. Santos, P. L. Uggioni, R. K. Fabri, and J. Müller. 2018. "Labeling of Packaged Foods in Brazil: Use of Terms such as Homemade, Traditional, and the Like." *Revista de Nutrição* 31(1): 83–96.

Meneghelli, T. S., J. V. Hinkelmann, H. H. M. Hermsdorff, M. A. Zulet, J. A. Martínez, and J. Bressan. 2020. "Food Consumption by Degree of Processing and Cardiometabolic Risk: A Systematic Review." *International Journal of Food Sciences and Nutrition* 71(6): 678–692.

Mialon, M., N. Khandpur, L. Amaral Mais, and A. Bortoletto Martins. 2021. "Arguments Used by Trade Associations during the Early Development of a New Front-of-Pack Nutrition Labelling System in Brazil." *Public Health Nutrition* 24(4): 766–774.

Mialon, M., and J. Mialon. 2017. "Corporate Political Activity of the Dairy Industry in France: An Analysis of Publicly Available Information." *Public Health Nutrition* 20(13): 2432–2439.

Ministério da Saúde. 2013. *Política Nacional de Alimentação e Nutrição (PNAN)*. Brasília: Ministério da Saúde.

———. 2015a. *Vigitel 2014: Vigilância de Fatores de Risco e Proteção para Doenças Crônicas por Inquérito Telefônico*;

Estimativas sobre frequência e distribuição sociodemográfica de fatores de risco e proteção para doenças crônicas nas capitais dos 26 estados brasileiros e no Distrito Federal em 2014. Brasília: Ministério da Saúde.

———. 2015b. *Dietary Guidelines for the Brazilian Population.* Translated by C. A. Monteiro. Brasília: Ministério da Saúde.

———. 2020. *Vigitel 2019: Vigilância de Fatores de Risco e Proteção para Doenças Crônicas por Inquérito Telefônico; Estimativas sobre frequência e distribuição sociodemográfica de fatores de risco e proteção para doenças crônicas nas capitais dos 26 estados brasileiros e no Distrito Federal em 2019.* Brasília: Ministério da Saúde

Monteiro, C. A., G. Cannon, R. Bertazzi Levy, R. Claro, J. C. Moubarac, A. P. Martins, M. L. Loouzada, L. Baraldi, and D. Canella. 2012. "The Big Issue Is Ultra-Processing: The Price and Value of Meals." *World Nutrition* 3(12): 527–569.

Monteiro, R. A., J. G. Coutinho, and E. Recine. 2005. "Consulta aos rótulos de alimentos e bebidas por frequentadores de supermercados em Brasília, Brasil." *Revista Panamericana de Salud Pública* 18(3): 172–177.

Nunes Filho, R. 2019. "Rotulagem de alimentos e bebidas vai mudar." *Superhiper*. <https://www.abia.org.br/vsn/temp/z2019724Rotulagem.pdf>

"O rótulo pode ser melhor." 2016. *Revista do IDEC* (Sept./Oct.) <https://idec.org.br/em-acao/revista/rotulo-mais-facil/materia/o-rotulo-pode-ser-melhor>

Pagliai, G., M. Dinu, M. P. Madarena, M. Bonaccio, L. Iacoviello, and F. Sofi. 2021. "Consumption of Ultra-Processed Foods and Health Status: A Systematic Review and Meta-Analysis." *British Journal of Nutrition* 125(3): 308–318.

Pan American Health Organization. 2016. *Pan American Health Organization Nutrient Profile Model.* Washington, DC: Pan American Health Organization.

———. 2020. *Front-of-Package Labeling as a Policy Tool for the Prevention of Noncommunicable Diseases in the Americas.* Washington, DC: Pan American Health Organization.

Peres, J. 2021. "Indústria de junk food levou Anvisa na lãbia para seguir bombando Danoninho." *Intercept Brasil*,

March 12. <https://www.intercept.com.br/2021/03/12/anvisa-junk-food-seguir-bombando-danoninho>

Processo SEI 25351.920718/2020-17 [Agência Nacional de Vigilância Sanitária]. Manifestação das empresas italianas do setor agroalimentar com proposta de revisão para as novas regras de rotulagem frontal de alimentos. June 5, 2020.

Processo SEI 25351.939455/2019-86 [Agência Nacional de Vigilância Sanitária]. Prorrogação do prazo de 45 dias para o envio de comentários e sugestões às Consultas Públicas nº 707 e 708/2019 que tratam da nova proposta de rotulagem nutricional dos alimentos: Necessidade de análise de volumosa categoria de produtos impactados.

Recomendação do Consea 007/2013 [Conselho Nacional de Segurança Alimentar e Nutricional]. September 30, 2013.

Rede Rotulagem. n.d. "Rede Rotulagem." <http://rederotulagem.com.br/>

———. 2017. "A opinião dos consumidores." <https://rederotulagem.com.br/pesquisa-ibope>

———. 2018. *Newsletter semanal da Rede Rotulagem*. December 3. <https://www.abia.org.br/vsn/temp/z2018124ConexaoRedeRotulagem031218.pdf>

Resolução da Diretoria Colegiada (RDC) 429 de 2020 [Agência Nacional de Vigilância Sanitária]. Dispõe sobre a rotulagem nutricional dos alimentos embalados. October 8, 2020. http://antigo.anvisa.gov.br/documents/10181/3882585/RDC_429_2020_pdf/9dc15f3a-db4c-4d3f-90d8-ef4b80537380

Rodrigues, V. M., M. Rayner, A. C. Fernandes, R.C. Oliveira, R. P. C. Proença, and G. M. R. Fiates. 2016. "Nutritional Quality of Packaged Foods Targeted at Children in Brazil: Which Ones Should Be Eligible to Bear Nutrient Claims?" *International Journal of Obesity* 41: 71–75.

Santos, F. S., M. S. Dias, G. C. Mintem, I. O. Oliveira, and D. P. Gigante. 2020. "Processamento de alimentos e fatores de risco cardiometabólicos: Revisão sistemática." *Revista de Saúde Pública* 54.

Sato, P. M., L. A. Mais, N. Khandpur, M. D. Ulian, A. P. B. Martins, M. T. Garcia, C. G. Spinillo, C. F. U. Rojas, P. C. Jaime, and F. B. Scagliusi. 2019. "Consumers' Opinions on Warning Labels on Food Packages: A Qualitative Study in Brazil." *PLoS One* 14(6).

Seção Judiciária do Distrito Federal (14ª Vara Federal Cível). Mandado de Segurança 1013249-88.2018.4.01.3400. July 9, 2018. http://antigo.anvisa.gov.br/documents/33880/2977862/Mem._00313_2018_CAJUD_PFANVISA_PGF_AGU-2-3.pdf/6a561d51-bd12-48e6-9aff-23fd9e9a0c97

Secretaria de Advocacia da Concorrência e Competitividade. 2021. *Guia para elaboração de análise de impacto regulatório (AIR)*. Brasília: Ministério da Economia.

Sua Liberdade de Escolha. n.d. Facebook webpage. <https://www.facebook.com/SuaLiberdadeDeEscolha/>

“Temer, o valor do silêncio e o clamor da indústria de alimentos por intervenção.” 2018. *O Joio e o Trigo*, July 1. <https://ojoioeotrigo.com.br/2018/07/temer-o-valor-do-silencio-e-o-clamor-da-industria-de-alimentos-por-intervencao>

Torres, R. 2020. “O esvaziamento literal da Anvisa.” *Outra Saúde*, October 6. <https://outraspalavras.net/outrasaude/o-esvaziamento-literal-da-anvisa>

United Nations Children’s Fund and Instituto Brasileiro de Defesa do Consumidor. 2019. *Influência dos rótulos de alimentos ultraprocessados na percepção, preferências e escolhas alimentares de crianças brasileiras*. São Paulo: UNICEF and Instituto Brasileiro de Defesa do Consumidor.

United Nations Children’s Fund and Instituto Nacional de Salud Pública. 2016. *Análisis de regulaciones y prácticas para el etiquetado de alimentos y bebidas para niños y adolescentes en algunos países de América Latina (Argentina, Chile, Costa Rica y México) y recomendaciones para facilitar la información al consumidor*. <https://www.unicef.org/lac/media/1396/file/PDF%20An%C3%A1lisis%20de%20regulaciones%20y%20pr%C3%A1cticas%20para%20el%20etiquetado%20de%20alimentos%20y%20bebidas.pdf>

United Nations Children’s Fund and Universidad de la República de Uruguay. 2020. *Efectos inmediatos de la implementación del rotulado nutricional frontal en Uruguay*. Montevideo: UNICEF Uruguay.

Vidale, G. 2020. “Anvisa é alvo de mandado de segurança por novo rótulo de alimentos.” *Veja*, October 5. <https://veja.abril.com.br/saude/anvisa-e-alvo-de-mandado-de-seguranca-por-novo-rotulo-de-alimentos/>

World Health Organization. 2014. *Global Status Report on Noncommunicable Diseases 2014*. Geneva: World Health Organization.

———. 2020. *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*. Geneva: World Health Organization.

World Health Organization and Food and Agriculture Organization. 2003. "Diet, Nutrition and the Prevention of Chronic Diseases: Report of a Joint WHO/FAO Expert Consultation." *WHO Technical Report Series* 916.

Civil Society Efforts during Uruguay's Adoption of Its Front-of-Package Food Labeling Policy: Health over Economic Interests?

*Lucía Martínez*¹

*Diego Rodríguez*²

*Raquel Sánchez*³

1 Bachelor's degree in physical education and master's degree in physical education and sport; conducts research, planning, and project development in the areas of health, physical activity, and risk factors for noncommunicable diseases for CIET Uruguay.

2 Sociologist and marketing analyst with expertise in tobacco control policy, social management, and front-of-package food labeling; professor at the University of the Republic (Uruguay) and researcher on issues relating to the sociology of health and the evaluation of tobacco control policies.

3 Nutritionist specializing in noncommunicable diseases; professor at the University of the Republic (Uruguay); member of the university's Right to Food Observatory; representative of the Uruguayan Association of Dietitians and Nutritionists before the Alianza ENT Uruguay.

Introduction

This chapter describes Uruguay's policymaking process on front-of-package nutrition labeling, focusing on civil society's involvement throughout the process, particularly within the framework of the "Etiquetado Uy" ("Uruguay Labeling") initiative led by Alianza ENT Uruguay, a civil society alliance centered on raising awareness of and addressing noncommunicable diseases (NCDs). We describe this group's activities between August 2020 and April 2021 aimed at establishing a labeling model in Uruguay that adheres to international public health recommendations and scientific evidence free from conflicts of interest. The main focus of these activities was to encourage the Uruguayan population to adopt a critical perspective regarding the products being offered by the food industry, what they are consuming as a society, and how this affects their health and well-being.

In response to the country's growing epidemiological crisis of NCDs and their risk factors—and adding to Uruguay's commitments under its 2013–2020 public health goals and the 2030 Agenda for Sustainable Development—the country adopted a regulation on front-of-package warning labels in 2018. This regulatory process, which began in 2016, was marked by a number of ups and downs, as reflected in the multiple changes that the regulation underwent during its development and rollout.⁴

4 The regulatory process was sparked by the country's decision to fulfill its commitments under its 2013–2020 national public health goals and the 2030 Agenda for Sustainable Development.

Civil society's involvement in this process—under the leadership of Alianza ENT Uruguay—encompassed three key components: research, communication, and advocacy.⁵ The activities under each component were part of an intervention strategy that sought to raise the visibility of the labeling issue, to make it a priority on the public agenda, and to defend the right to health through a regulation free from industry interference. Of the various activities carried out by civil society, one that was particularly noteworthy was the communication campaign aimed at the public and government authorities. In addition, civil society conducted important monitoring activities aimed at facilitating enforcement of the regulation. Overall, civil society's actions generated evidence to assist health authorities in their decision-making, reduce interference by the food industry, and defend the population's right to health over economic interests.

In 2018, Uruguay issued its first decree requiring front-of-package nutrition labeling. This decree outlined the labeling model's graphic design and nutrient profile but did not include the regulation of the advertising and marketing of processed and ultra-processed products,⁶ among other possible measures linked to food and food environments. This decree was then modified on two separate occasions after a new presidential administration took office in 2020.⁷ The new administration adopted a revised nutrient profile, ignoring international public health recommendations, available scientific evidence, and the entire policy process that had taken place leading up to the first decree.

When civil society—alongside academia and political actors—was part of the original policymaking process, decisions

5 The term *advocacy* usually refers to actions related to the defense of rights—in this case, the right to health—as well as, in this case, actions related to decision makers' work on food and health policies.

6 With respect to ultra-processed foods, this chapter follows the definition of the NOVA Food Classification System.

7 Decree 246 of 2020 Modifying the National Bromatological Regulation with regard to Food Labeling (September 8, 2020) and Decree 34 of 2021 Substituting the Annex to Decree 246/020 regarding Food Labeling and Creation of the Interministerial Commission (February 1, 2021).

were made by consensus among all parties. Then, with the new, non-participatory approach embraced by the government for the subsequent modifications of the labeling measure, civil society intervention became necessary in order to raise public awareness of the changes to the policy and to ensure that the labeling issue remained on the agenda. To develop its intervention strategy, civil society conducted research involving a systematization of background data from the national and regional levels. From there, it developed a comprehensive communication and advocacy plan anchored in the population's everyday realities and the evolving food labeling implementation process.

Background

In modern-day Uruguay, behavioral risk factors—such as tobacco use, harmful alcohol consumption, low levels of physical activity, and unhealthy diets—are associated with the prevalence of NCDs (such as hypertension, type 2 diabetes, and cardiovascular and chronic respiratory diseases) (Ministerio de Salud Pública 2018). The growing rate of these diseases is linked to a change in eating habits and lifestyle, making overweight and obesity one of the main risk factors for their development.

Moreover, research over the years has demonstrated the importance of early life experiences in the shaping of people's eating habits. These experiences are developed starting in childhood, with individuals' exposure to different food environments, such as family, school, social spaces, and workplaces. Thus, we naturally acquire the practices found in our environment and naturalize behaviors that later impact our state of health in adulthood.

In this regard, Uruguay's current panorama regarding diet, the type of food products available, and the increase in the consumption of ultra-processed products is a cause for concern. Nationwide, the percentage of people who consume fewer than five servings of fruits and vegetables per day increased from 84.9% in 2006 to 90.8% in 2013 (Ministerio de Salud Pública 2018). Further, per capita sales of ultra-processed products grew by 146% between 1999 and 2013 (Pan American Health Organization 2015). In addition, the period 2006–2013 saw increases in

the prevalence of high blood pressure, obesity and overweight, and hyperglycemia.

NCDS “are collectively responsible for 74% of all deaths worldwide” (World Health Organization 2021). And in Uruguay, they account for 54.5% of all deaths (Ministerio de Salud Pública 2018). Further, when taking into account mortality caused by COVID-19, of the cases for which information is available (529 people of those who died as of March 10, 2021), 479 had comorbidities: 340 had heart disease (64%); 148 had diabetes (28%); and 68 were obese (13%). This suggests that associated comorbidities increase the risk of dying from this illness (Ministerio de Salud Pública 2021).

Since 2006, Uruguay has required the nutrition labeling of packaged foods under the framework of Mercosur Resolutions 46/03 and 47/032, which are incorporated into the country’s National Bromatological Regulation via Decree 117/006. However, this policy did not meet its intended objectives, as many studies reported that consumers were not reading the information contained on packages, partly because of the small font size and partly because of the use of highly technical terms not understood by many laypeople. This motivated the government to begin working toward measures that would allow consumers to quickly and easily understand the nutritional content of packaged foods. The aim was to improve consumers’ decision-making and reduce the consumption of nutrients of concern that are risk factors for NCDS.

Faced with the aforementioned epidemiological situation, it was imperative to strengthen the country’s public health policies. Thus, in 2013, Uruguay passed the Law for Promotion of Healthy Eating Habits among Children and Adolescents.⁸ Then, in 2016, the Ministry of Public Health called for the creation

8 Law 19140 on the Promotion of Healthy Eating Habits among Children and Adolescents, approved in 2013, provides the legal framework for promoting school-based interventions aimed at improving the habits of children and adolescents in relation to food and physical activity. This law tasks the Ministry of Public Health with drawing up a list of nutritionally adequate food and beverage groups (Ordinance 116/014), in addition to prohibiting the advertising of ultra-processed foods in school settings.

of a multidisciplinary working group to begin drafting a law that would inform consumers about packaged foods' nutritional content and encourage healthier eating habits. This call emerged from the recognition that "for decades, approaches to tackle obesity have failed to recognize the influence of the food system and the environment in shaping food preferences and undermining children and parents' capacity of making informed choices" (Arrúa, Curutchet, et al. 2017, 139).

The working group understood the importance of generating scientific evidence to support decision-making in the development of health policies. It thus sought to ensure that the measure was based on an analysis of information generated in the domestic context and to contextualize the findings with data from other parts of the world, with the aim of "modify[ing] the food environment to overcome barriers to healthy eating and promote consumption of healthful products" (Arrúa, Curutchet, et al. 2017, 139).

Table 1 provides an outline of some of the research carried out in Uruguay that allowed the design of the nutrition warning system to be adapted to the country's domestic context based on international scientific evidence. In addition, this research served as input for discussions on front-of-package nutrition labeling.

TABLE I
Baseline research for the design of a front-of-package food labeling law

Authors	Objective	Main conclusions
Arrúa, Machín et al. (2017, 2309)	"Compare warnings with the two most common non-directive and semi-directive [front-of-package] nutrition labels (guideline daily amount and traffic light system, respectively) in terms of goal-directed attention, influence on perceived healthfulness of products with high energy, sugar, fat and/or sodium content, and ability to differentiate between healthful and less healthful products."	<ul style="list-style-type: none"> • Nutrition warning labels have the potential to improve consumers' ability to identify products with nutrients of concern. • Nutrition warnings can raise consumers' awareness of unhealthy foods.

Authors	Objective	Main conclusions
Arrúa, Curutchet et al. (2017, 140)	“Evaluate the relative influence of two front-of-pack (FOP) nutrition labelling schemes, the traffic light system and Chilean warning system, and label design on children’s choice of two popular snack foods in Uruguay.”	<ul style="list-style-type: none"> • Nutrition warnings could improve children’s awareness of products’ nutrition profile. • The inclusion of nutrient claims, cartoon characters, and fruit drawings on packaging influences children’s decision-making. • The octagonal warning system is better than the traffic light system in terms of encouraging informed decisions among children.
Cabrera et al. (2017, 3360)	“Evaluate the influence of design features of warnings as a [front-of-pack] nutrition labelling scheme on perceived healthfulness and attentional capture.”	<ul style="list-style-type: none"> • Octagonal warnings with the word “excess” have a greater potential to influence consumers’ unhealthfulness perceptions. • In terms of color, black has the highest attentional capture. • The position and size of the warning label are important factors to keep in mind in order to maximize their influence on decision-making.
Machín et al. (2018a, 56)	“Evaluate the influence of two [front-of-pack] nutrition labelling schemes—the traffic light labelling and the warning scheme—on consumer food purchases when facing a health goal.”	<ul style="list-style-type: none"> • Consumers with the intention of choosing healthy products are positively influenced by the presence of front-of-packaging nutrition information, whether in the form of a traffic light or an octagonal warning.
Machín et al. (2018b, 670)	<ol style="list-style-type: none"> 1. “Evaluate how information about a low nutrient content included in the traffic light labeling system influenced consumers’ perception of the healthfulness of products with a high content of 1 key nutrient.” 2. “ Compare the traffic light system with nutritional warnings in terms of the perception of healthfulness.” 	<ul style="list-style-type: none"> • The inclusion of a warning system (in the form of a traffic light) can lead to healthier decision-making. • Traffic light labels could discourage frequent consumption of unhealthy products. The disadvantage is that consumers’ evaluation of a product’s healthfulness may be complicated when the label includes multiple colors for different nutrients.

Alongside this research effort, and in relation to its actions taken with regard to public health policies, especially regarding food, in 2016, the Ministry of Health—with the technical support of the United Nations Food and Agriculture Organization and

a broad group of government institutions, academics, and civil society organizations—published the Dietary Guidelines for the Uruguayan Population (Ministerio de Salud Pública 2016). These guidelines focused on consumer decision-making by providing information to encourage reflection and a critical view toward food.

Similarly, the research that provided a scientific basis for decision-making on front-of-package nutrition labeling analyzed aspects such as graphic design (color and shape) and content of the warning message, as well as the impact of the message on consumer decision-making. The results suggested that a warning system with an octagonal design, black background, white borders, and white lettering was the most effective. In addition, the research recommended including the word “excess” to indicate levels of sugars, total fat, saturated fat, or sodium added during the manufacturing process that exceeded the thresholds established in the nutrient profile recommended by the Pan American Health Organization (PAHO). According to the research, these design elements had better results in terms of leading to healthier decision-making by consumers at the moment of purchase.

In addition, the working group recommended passing a presidential decree at an early stage in the policy process in order to shorten the time that it would take to approve an eventual law. Thus, in 2018, the executive branch approved its first decree (Decree 272/018) establishing a front-of-package warning labeling system with the design aspects mentioned above. However, this decree embraced a weaker nutrient profile model than the one recommended by PAHO.

The drafting of this decree involved the participation of the Ministries of Public Health; Industry, Energy and Mining; Livestock, Agriculture and Fisheries; Economy and Finance; Education and Culture; and Social Development. Other participants included the National Food Institute, the Municipality of Montevideo (representing the Congress of Mayors), the Honorary Commission for Cardiovascular Health, and academia, represented by the “Food and Wellness” interdisciplinary group from the University of the Republic. Finally, international organizations such as PAHO, the United Nations Children’s Fund

(UNICEF), and the Food and Agriculture Organization were also involved in the process.

Once a first draft of the decree was complete, international consultations were held with the World Trade Organization (WTO), and a sixty-day consultation period was opened for the public and national and international organizations to submit their opinions and suggestions (Ministerio de Salud Pública 2017). The public consultation, held between June and August 2017, resulted in a total of 140 submissions from citizens, national and international institutions, academia, academic and trade associations, consumer organizations, and the food industry (*ibid.*). The Ministry of Public Health carefully reviewed all of the contributions, as reflected in its official report summarizing the outcomes of the consultation (Ministerio de Salud Pública 2019).

After Decree 272/018 on front-of-package labeling was issued and a bill with similar content was presented to parliament on August 29, 2018, the government notified the WTO on November 15, 2018. There, a comment period was opened until February 15, 2019, which was later extended to March 30, 2019, at the request of WTO member states. During this period, thirty-four comments were received from public and private institutions at the national and international level, and from the European Commission (Ministerio de Salud Pública 2017). Favorable feedback on the bill was received from citizens, academic associations, and national and international organizations, who highlighted the measure's usefulness for the control and prevention of obesity and NCDs. Additionally, suggestions for modifications were received from trade associations and the food industry.

Although Decree 272/018 was the result of cross-sectoral work, was supported by rigorous scientific evidence, and was made available for public feedback, the administration that assumed office on the same day that it entered into force (March 1, 2020) postponed the measure and put it up for review. This review led to two modifications in less than a year, including a revised calculation method and a different nutrient profile model.

The first change was made via Decree 246/020 issued in September 2020. This new decree moved the nutrient profile

model away from the PAHO model and gave industry a further extension for compliance until February 1, 2021. Then, just a few months later, on January 26, 2021, this decree was repealed and a third decree (034/021) was published, which incorporated even more flexibility into the nutrient profile model. This decree emerged from a proposal from the Ministry of Industry, Energy and Mining and is the one in force today.

Successive Changes to the Nutrition Labeling Rules

Because the front-of-package labeling measure was created via presidential decree and not through legislation, it was easily modified by the government. In the first regulation (the one from 2018), and at the request of industry, companies had been given eighteen months to adapt to the new standard, under the idea that this would allow them time to reformulate their products before compliance became mandatory. The regulation's entry into force was thus set for March 1, 2020, which also happened to be the date on which a new presidential administration would take office. In the days leading up to this deadline, the food industry lobbied the government to modify the measure, arguing, among other things, that the policy would have negative economic impacts, including price increases and job losses, and that another type of labeling system, such as the traffic light model, would be better. Industry voiced these opinions publicly on television and in newspapers.

The initial decree was in effect from March 1 to 10, 2020, meaning that food companies were required to label their products as necessary. However, a look at stores during this period revealed that this was not the case, with only a few companies complying with the measure. The measure's short duration was due to the fact that the new presidential administration called for its review, issuing Decree 91/020⁹ suspending the measure for 120 days while a cross-sectoral working group reviewed

9 Decree 91/010 on Extension of the Term Established in art. 11 of Decree 272/018 regarding Food Labeling and Creation of a Multidisciplinary Working Group.

it. Notably absent from this working group were civil society, scientific associations, and academia. This situation, in essence, served as an additional grace period during which industry did not have to comply with the labeling rules.

During the ten days in which labeling was mandatory, academia and UNICEF evaluated the measure's impact on consumers' decision-making. Their evaluation found that most people, upon seeing the warning labels on packages, were opting for products with fewer octagons or products without such warnings. Despite this evidence supporting the effectiveness of the new warning system, when the regulatory review process concluded in September 2020, changes were made to the nutrient profile (including the calculation method) through the publication of a new decree (246/020). This new standard moved even further away from PAHO's recommendations and included a new deadline for compliance, which was now set for February 1, 2021.

Yet the modifications to weaken the nutrient profile did not end with Decree 246/020. Three days before mandatory compliance was set to take effect, the government announced a new modification via Decree 034/021. Table 2 compares the different nutrient profiles established in the three decrees.

During this period in which the various modifications were issued, civil society tried to engage in dialogue with key decision-makers on health policies but were met with silence or the postponement of scheduled meetings. The failure to consult professional and academic organizations and civil society was a form of action taken by the authorities at the time. The various changes made to the front-of-package labeling rules were not based on available scientific evidence. Moreover, the state did not hold any public consultations or follow international public health recommendations, nor did it consult with international organizations with expertise on the issue. All of this is evidence of a process with little transparency.

TABLE 2
Comparison of nutrient thresholds established
in Decrees 272/018, 246/020, and 034/021

	Decree 272/018	Decree 246/020		Decree 34/021	
		100 g of solid food	100 mL of liquid food	100 g of solid food	100 mL of liquid food
Total fat threshold	Calories per serving 35% of total calories	9 g	4 g	13 g	4 g
Saturated fat threshold	12% of the caloric value of the serving	4 g	3 g	6 g	3 g
Sugar threshold	20% of the total caloric value or 3 g per 100 g	- 10 g -12 g/100 g in products meeting the following conditions: maximum of 80% of calories from sugars; no artificial sweeteners	- 3 g - 5 g/100 mL in products without artificial sweeteners - 7 g/100 mL in products meeting the following conditions: maximum of 80% of calories from sugars; no artificial sweeteners	13 g	- 3 g - 5 g/100 mL in products without artificial sweeteners - 7 g/100 mL in products meeting the following conditions: maximum of 80% of calories from sugars; no artificial sweeteners
Sodium threshold	500 mg/100 g, or 8 mg/1 calorie	400 mg	200 mg	500 mg	200 mg

	Decree 272/018	Decree 246/020	Decree 34/021
	Exceptions		
Decree 272/018	<p>Products that simultaneously meet the following three conditions shall be exempt from placing a warning for excess sugars:</p> <ul style="list-style-type: none"> - Sugar content less than or equal to 7 g/100 g - No artificial sweeteners - Calories from sugars represent less than 80% of the total caloric value <p>Lactose and sugars naturally present in fruits and vegetables that are used as ingredients in foods do not count toward the threshold.</p> <p>Saturated fats from nuts and seeds that are used as ingredients in foods do not count toward the threshold.</p>		
Decree 246/020	Saturated fats from nuts and seeds that are used as ingredients in foods do not count toward the threshold.		
Decree 34/021	Saturated fats from nuts and seeds that are used as ingredients in foods do not count toward the threshold.		

The last modification went against Mercosur rules—contained in Resolution 36/19¹⁰—on consumer protection. Article 1 of this resolution establishes the principle of progressivity and non-retrogression. It states:

States Parties shall adopt appropriate measures to progressively achieve the full realization of consumer rights derived from international and national standards, without regressing on the standards of protection achieved in the regulatory levels of protection or in the implementation of consumer protection policies, considering the costs and benefits of the measures proposed. (Resolución GMC 36 de 2019)

Similarly, in article 8, the principle of risk prevention states that “suppliers shall act preventively when there is a reasonable probability of a threat arising from products or services affecting the health or safety of consumers” (Resolución GMC 36 de 2019).

The form in which these modifications took place and the decisions made by authorities reveal strong interference by the food industry, in addition to lobbying by the Food Industry Chamber and the Association of Wholesale Warehouse Importers. As other authors have mentioned, “the food industry has been identified as a vector of disease, through their supply of unhealthy food products, their marketing strategies and their corporate political activity” (Mialon et al. 2015, 519).

Nonetheless, the advocacy carried out by civil society, especially by Alianza ENT Uruguay, together with academics and leading professionals in the field, ensured that the design elements recommended by FAHO—the word “excess” and the octagonal shape with a black background, white border, and white text—remained unchanged.

Mialon et al. (2015) propose a number of categories for classifying the food industry’s interference tactics, some of which are described in table 3.

10 Resolution 36/19 sets forth fourteen fundamental principles for updating member states’ consumer protection systems; among these are the principle of sustainable consumption and the principle of nondiscrimination.

TABLE 3
Food industry strategies

Category	Description
Information and messaging	Practices through which industry disseminates information beneficial to its activities in order to influence public health policies and outcomes in a way that favors corporations
Financial incentives	Provision of funds, gifts, and other incentives to politicians, political parties, and other decision-makers
Constituency building	Gaining the favor of public opinion and other stakeholders, such as the media and the public health community; proposal of alternatives such as voluntary initiatives or self-regulation
Legal	Legal challenges filed against opponents and against public policies
Fragmentation and destabilization	Practices to prevent and counteract criticism of a company's products or practices

Source: Adapted from Mialon et al. (2015, 521)

In the case of Uruguay, the food industry utilized the following strategies:

- 1) Industry adopted an **information strategy** to argue how protecting domestic industry would benefit the national economy (such as through jobs, income, and investment in companies' infrastructure). It also argued that the labeling measure would lead to price increases, thereby harming consumers. Large companies also continued to highlight their corporate social responsibility activities.
- 2) Industry offered **financial initiatives** to the Ministry of Public Health at the onset of the COVID-19 pandemic. Coca-Cola, for example, donated an ambulance and offered other types of support, while McDonald's offered the "McGracias Menu" free of charge to health officials in May 2020 (Agencia Uruguay de Cooperación Internacional 2020; "Un combo McDonald's gratis" 2020).
- 3) Industry participated in **meetings with the government** to present its views on the measure, while also using **media outlets** to promote alternative proposals to front-of-package

warning labeling, such as the guideline daily amount and the traffic light. Although the final regulation did not address advertising or marketing, the Uruguayan Chamber of Advertisers stated that restrictions on advertising and marketing were ineffective and that self-regulation was better. Food companies also made public statements noting that they needed more time to adapt to the policy by reformulating their products and updating the packages that were already on the market.

- 4) Once the labeling measure was enacted, industry took **legal action**¹¹ by filing administrative appeals before the executive branch.

All of these strategies succeeded in weakening the front-of-package labeling model embodied in the decree in force today (034/021). They also meant that a year went by without the labeling rules being applied, without oversight, and with only partial compliance by companies. In turn, this led to unfair competition between companies, harming those that complied from the outset. As for consumers, the final policy led to confusion and deprived them of clear and concise nutritional information, especially in products aimed at children.

Due to the way in which these changes took place, when the last decree was enacted, alarm bells were raised in different sectors of society and in numerous organizations working in health, particularly those belonging to Alianza ENT Uruguay. These organizations informed the public about their opposition to the modifications and met with relevant authorities to express their concern about the manner in which decisions had been made. In parallel, Alianza ENT Uruguay undertook actions aimed at preventing further industry interference and achieving the best possible front-of-package labeling model, as described in the following two sections.

11 Ministry of Public Health records 12/001/1/4998/2018, 12/001/1/6133/2018, 12/001/1/6135/2018, 12/001/1/1332/2019, 12/001/1/5194/2020, and 12/001/3/5733/2020.

Objectives

Within the framework of the national epidemiological situation and the regulatory process described above, civil society's efforts—as led by Alianza ENT Uruguay—had the following objectives:

General Objective

To carry out actions aimed at the prevention and control of NCDs and their risk factors, contributing to the implementation of a tool that provides consumers with clear and concise information that promotes healthier decisions when purchasing packaged foods.

Specific Objectives

1. To ensure that a front-of-package nutrition warning labeling system is achieved.
2. To understand the population's opinions about front-of-package warning labeling.
3. To determine the population's willingness to change its purchasing behavior vis-à-vis packaged foods, mainly ultra-processed ones.
4. To monitor industry compliance with the current regulation.
5. To develop and implement a communication strategy to raise the public's and decision-makers' awareness of the importance of front-of-package nutrition labeling and of being conscious of the products we consume.
6. To prevent further industry interference in the development of public health policies.

Methodology

In terms of its methodology for this effort, Alianza ENT Uruguay drew on the results-based management (RBM) framework, which is

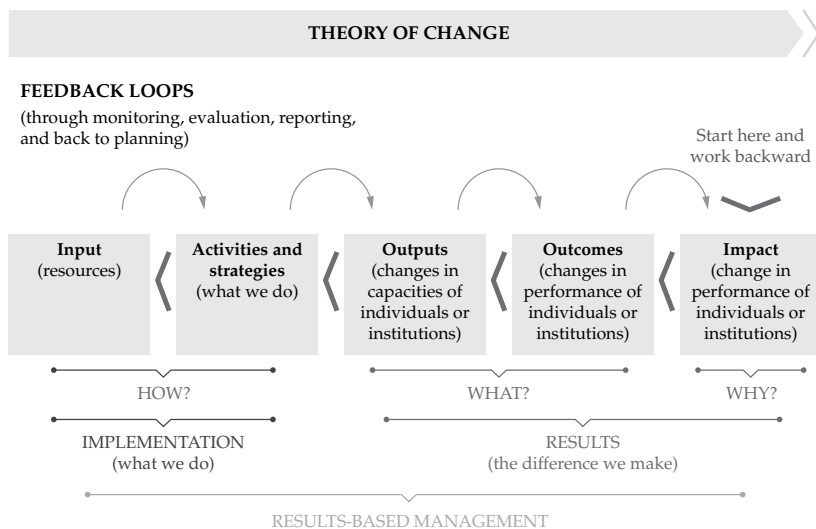
a management strategy or approach by which all actors, contributing directly or indirectly to achieving a set of results, ensure that their processes, products and services contribute to the desired results (outputs, outcomes and impact). It involves the use of information and evidence on actual results to inform decision-making on the design, resourcing and delivery of programmes and activities as well as for accountability and reporting. (UNICEF 2017, 6)

In order to meet its proposed objectives, Alianza ENT Uruguay drew up a work plan for the following activities:

- Development and implementation of advocacy actions.
- Design and administration of a public opinion survey on front-of-package food labeling and people's consumption habits.
- Periodic monitoring, at points of sale, of industry compliance with front-of-package nutrition labeling rules.
- Creation of an online tool that allows consumers to find out whether the products they buy are complying with current rules, as a way of empowering citizens and protecting their health.
- Development and launch of a media campaign (via television, radio, social media, etc.).
- Networking with other organizations to strengthen the role of Alianza ENT Uruguay in society vis-à-vis the control and prevention of NCDs and their risk factors.

The methodology developed by UNICEF for promoting positive change in children (see figure 1) offers a helpful lens for analyzing civil society's actions directed at influencing decision-makers in public health, as well as decision-makers in household purchasing in terms of promoting healthier diets.

FIGURE I
Results-based management



Source: UNICEF (2017), 7

Civil society’s activities around the issue of population health, particularly healthy eating, led by Alianza ENT Uruguay involved mainly (i) research aimed at uncovering the population’s opinions on the issue, shedding light on consumers’ willingness to change their purchasing habits, and assessing companies’ compliance with labeling rules; (ii) advocacy aimed at preventing industry interference and ensuring that public authorities make decisions based on scientific evidence free from conflicts of interest, in addition to allowing civil society to participate in decision-making processes; and (iii) a communication campaign aimed at raising the profile of and support for the activities being carried out.

Gathering the public’s opinion on nutrition labeling, monitoring compliance with the labeling policy at points of sale, monitoring mass media and social networks, utilizing evidence produced by academia, and gathering advice from subject-matter experts represent an approach that is in line with RBM. Table 4 compares some of the stages of the RBM cycle with the actions carried out during the “Etiquetado Uy” initiative.

TABLE 4
Comparative analysis of the results-based management cycle and “Etiquetado Uy”

Stages of the results-based management cycle	“Etiquetado Uy” initiative
Strategic planning	Gathering of background information on nutrition labeling: government actions, research, scientific evidence, positions at the regional level, and models adopted in other countries
Implementation	Work in the field of intervention of front-of-package food labeling; meetings with key stakeholders
Monitoring	Tracking of news and evidence as they emerged
Evaluation	Evaluation of activities undertaken based on the public statements of stakeholders, feedback from society via different communication channels, and public policy decisions
Reporting	Preparation of monitoring reports and publication of articles in non-peer-reviewed journals in order to inform the public about the process and status of front-of-package labeling

Civil Society Actions

The main actions undertaken by civil society were centered on making information available to the population; calling for greater transparency in decision-making in public health; requesting that such policies be based on scientific evidence free from conflicts of interest; and requesting that civil society participate in policy development, follow-up, and evaluation.

Actions to Influence Decision-Makers

Alianza ENT Uruguay held meetings with the main actors involved in the modifications to the labeling measure, in addition to convening a press conference to express its perspective on the situation. These interventions are detailed in table 5.

TABLE 5
Main advocacy activities

Activity	Participants
Meeting with the minister of industry, energy and mining	Alianza ENT Uruguay
Meeting with the minister of health	Alianza ENT Uruguay, Medical Union of Uruguay, and Uruguayan Society of Cardiology
Meeting with Congress of Mayors	Alianza ENT Uruguay and Medical Union of Uruguay
Meeting with chair of the Health Committee of the Chamber of Representatives	Alianza ENT Uruguay
Press conference	Alianza ENT Uruguay, Medical Union of Uruguay, Uruguayan Society of Cardiology, and Uruguayan Transplantation Association

Among the arguments that civil society raised to voice its opposition to the reforms were the following:

- That there was a loss of information due to the weakening of the nutrient profile, which now had higher thresholds for classifying products as containing “excess” amounts of sugars, sodium, total fat, or saturated fat.
- That the modifications mainly affected products intended for children.¹²
- That the modifications to the front-of-package labeling measure originated in the Ministry of Industry, Energy and Mining, despite the fact that the policy at hand is a public health concern.

12 There is a need to modify food environments to promote the consumption of healthy products. The strategies used by the food industry are aimed at making children think that products are healthier, tastier, and more fun. To this end, companies often use cartoon characters, pictures of fruits, and nutrient-related claims on packaging to influence children’s perception of their products. The use of front-of-package warning labels has been shown to discourage children from choosing these products despite such marketing strategies.

- That there was a lack of information on how the state would measure compliance with the measure, in addition to a failure to identify the institution responsible for carrying out monitoring and what form of sanctions would be applied in the event of noncompliance.
- That the modifications were made without considering scientific evidence or public health recommendations.

Public Opinion Survey

In order to understand people’s opinions on front-of-package food labeling and their willingness to change their behavior when buying food products, Alianza ENT Uruguay conducted a survey in major cities across the country between October and November 2020. The information obtained shed light on perceptions about labeling from the demand side.

According to the survey results, 74.7% of the population was aware of the government’s measure requiring warning labels on packaged foods. In addition, 80.3% of respondents had seen the octagonal warnings on packaging, compared to 13.7% who had not and 6.0% who could not recall seeing such warnings (figures 2 and 3, respectively).

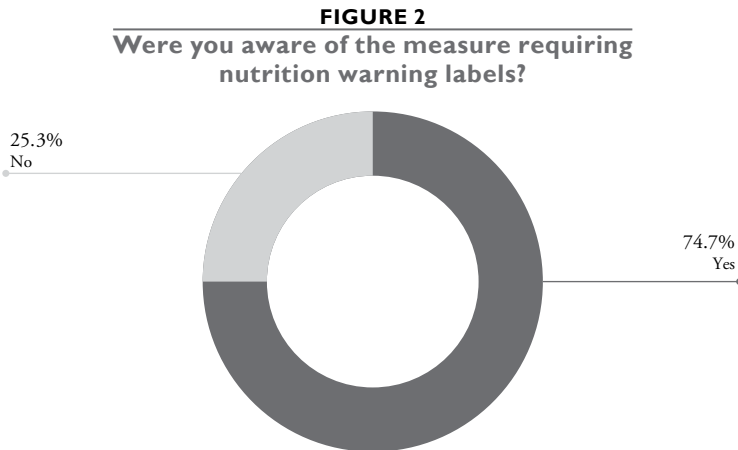
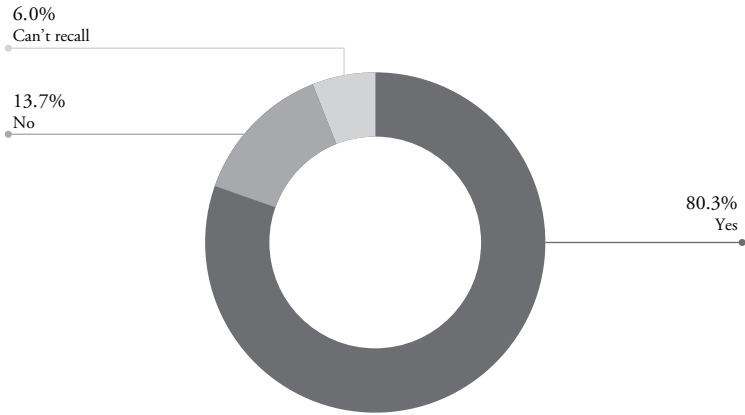
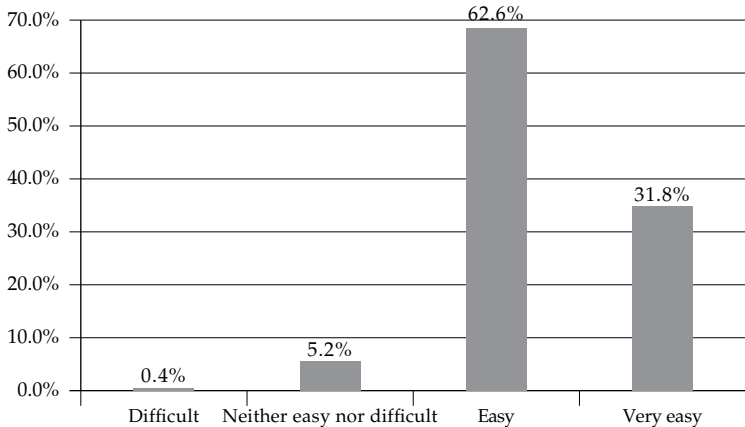


FIGURE 3
Have you seen these warning labels on food or drink packaging?



One of the main objectives behind policymakers' choice of the warning system and previous research on nutrition labeling was to guarantee the accessibility of information to consumers in order to facilitate their ability to make informed decisions when purchasing packaged products. In this regard, 94% of respondents indicated that the warning labels were easy or very easy to understand (figure 4).

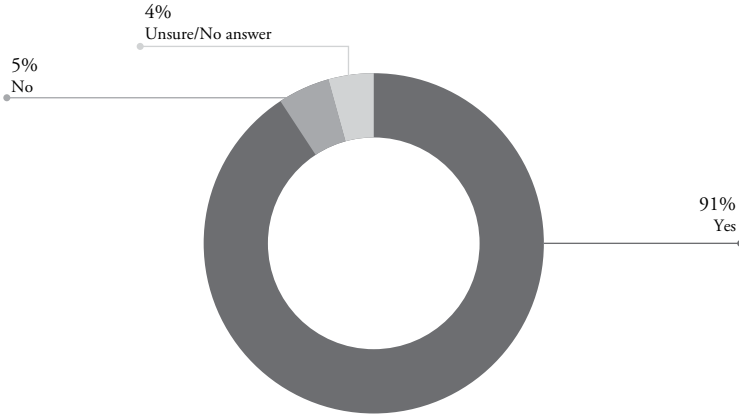
FIGURE 4
How easy or difficult was it to understand the warning labels?



Regarding the inclusion of warning labels (i.e., octagons) to indicate that a product has excess levels of sugar, total fat, saturated fat, or sodium, 91% of those surveyed perceived such a measure as beneficial for consumers' health (figure 5).

FIGURE 5

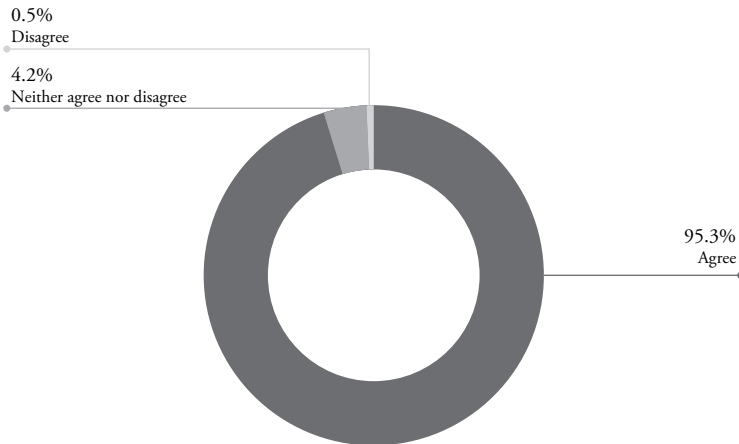
In your opinion, are there any health benefits to including warning labels on food?



This result coincides with respondents' degree of acceptance of front-of-package nutrition labeling, since 95% approve of the measure, as shown in figure 6.

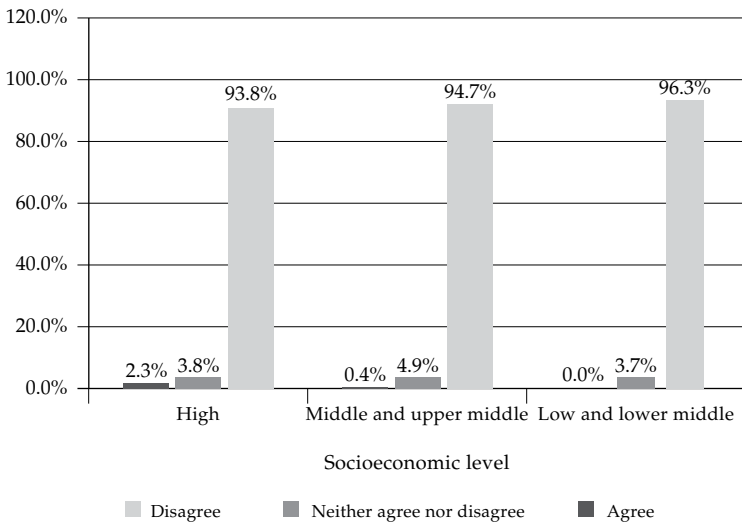
FIGURE 6

Do you agree with the inclusion of these warning labels on food and beverages?



These approval levels are maintained even when disaggregating responses by socioeconomic level. As shown in figure 7, 93.8% of respondents with high socioeconomic status agreed with the measure, as did 94.7% of those with middle- and upper-middle status and 96.3% of those with low- and lower-middle status.

FIGURE 7
Approval of front-of-package warning labels on food packages, by socioeconomic status



In terms of deciding whether to buy a product bearing a warning label, 46% indicated that they would still buy the product but in smaller quantities; 20% said that they would continue to buy it as usual; and 33% said that they would not buy the product (figure 8).

Given that the survey was conducted during the COVID-19 pandemic, it was pertinent to ask respondents about their method of grocery shopping in light of the differences between product appearances in physical points of sale and product appearances in online catalogs. The results showed that 97% of respondents were shopping in person, compared to 2% who shopped by phone or WhatsApp and 1% who purchased their groceries online.

In households with children, respondents were asked if their children consumed sugary beverages, dairy-based desserts, cookies, crackers, dairy products, and other packaged snacks. Although there were variations in respondents' answers depending on the type of product in question, more than half of the households reported that their children consumed these products (figure 9).

FIGURE 8

If the package of the product you are about to purchase included a warning symbol indicating that it contains excess levels of sugars, sodium, fats, or saturated fats, what would you do?

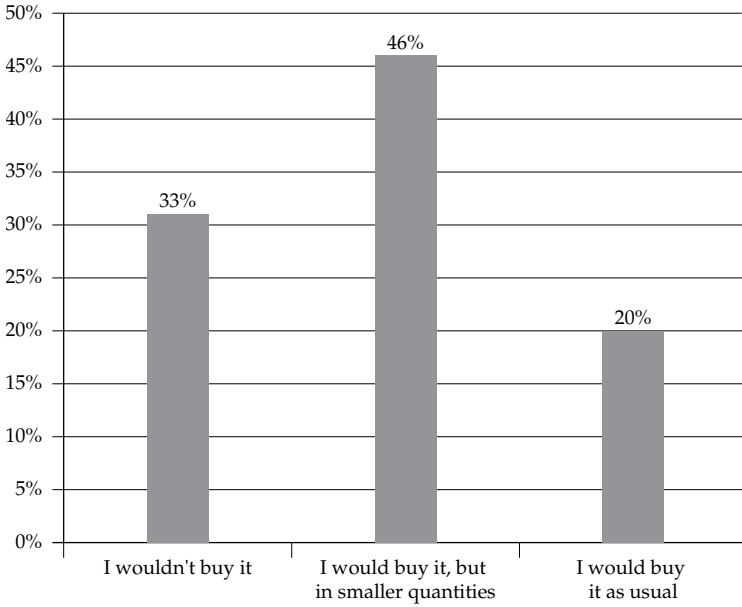
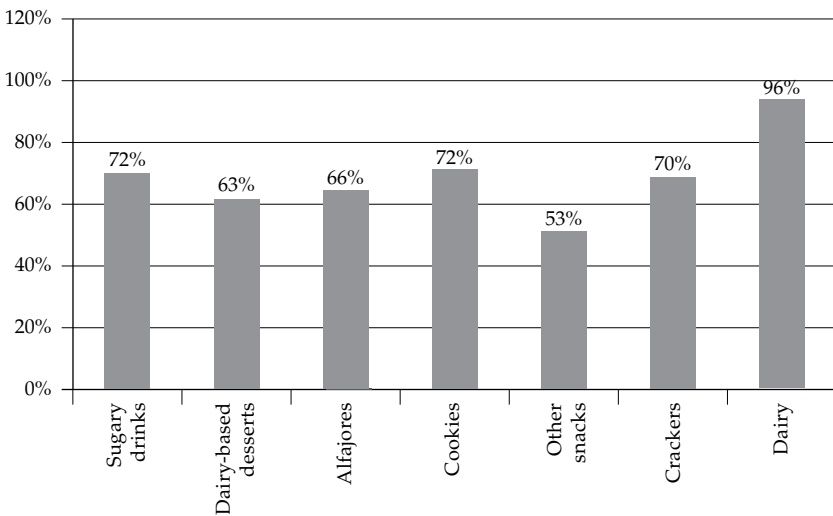


FIGURE 9

Do the children in your household consume any of these products?

(question for households with children)



Point-of-Sale Compliance

In order to understand the consumer experience at the moment of purchase and to determine the extent to which food companies were complying with the labeling measure, Alianza ENT Uruguay visited various points of sale to see which products bore the warning labels. It also sought to evaluate whether those products that did not have warning labels were indeed correct in omitting them or whether the manufacturers were simply not complying with the regulation.

Communication Campaign

Alianza ENT Uruguay's background research for its activities revealed a lack of information among certain segments of the population regarding nutrition and healthy food choices. The research showed that this deficiency could be minimized if front-of-package nutrition labeling measures, as food-related health policies, were accompanied by concerted communication campaigns (Ares et al. 2018). Such campaigns could assist people in decoding nutrition information, help them understand how to use labels, and empower them in their decisions regarding the purchase and consumption of packaged products.

The civil society communication campaign had to pay careful attention to the particular moment of rollout, given that the evolving policy panorama could imply new challenges or the need to transmit new concepts to the population. According to Ares et al. (2018, 322), "mass media communication campaigns can encourage people to use nutritional warnings through direct exposure to persuasive messages."

Although warning labels were something that gradually began to appear at points of sale, the struggle between the government and civil society regarding the nutrient profile thresholds was reflected in the presence and absence of warnings on products accessible to the population. In light of this situation, it was essential for the campaign to allow the population to take ownership of the message around the need to be informed about the content of products. The communication campaign also focused on bringing greater transparency to the

polycymaking process on nutrition labeling. The idea was to keep the population informed about the process and to stimulate critical thinking about the situation at hand and the food products being consumed.

Taking into account the constant evolution of the labeling measure, Alianza ENT Uruguay adapted its communication efforts to address each specific moment in the process, as shown in table 6.

TABLE 6
Communication campaign

Situation at hand	Key message of the campaign
September 2020: Advocate for compliance with Decree 246/020 and monitor industry behavior	“When you see it, you understand it.” Call to action for the population to take hold of its right to be nutritionally informed
October 2020: Conduct survey on the public’s perceptions of the labeling policy	“What does the Uruguayan population think about labeling?”
November 2020: Request for information on the process of monitoring the decree’s implementation	“It’s healthy to know.” Information to the population on nutrition labeling
December 2020–January 2021: Countdown to the entry into force of Decree 246/020	“Countdown” Request for information on the process for monitoring companies’ compliance with the regulation
January 2021: New decree (034/021)	“Do you know what you’re eating?” Consumer loss of information due to the weakened nutrient profile, lack of transparency in the policy modification process
February–March 2021: Lack of information about monitoring	“What you eat matters.” With the help of health professionals and labeling experts, launch of videos and live streaming events on social media aimed at raising the public’s awareness of the importance of good nutrition
April 2021: Silence from authorities on the monitoring process	“In the meantime” Messaging focused on the passage of time between the first decree and the present day, emphasizing what has been happening while the current policy remains unenforced

FIGURE 10

“When you see it, you understand it”

**CUANDO LO VES
LO ENTENDÉS**

EXCESO GRASAS NFP
EXCESO GRASAS SATURADAS NFP
EXCESO AZUCARES NFP

El etiquetado frontal de alimentos es obligatorio a partir de Febrero 2021.
Es saludable saberlo

Alianza ENT
ULTIMA LITON



FIGURE II
Alternative advertising for “What you eat matters”



FIGURE 12
“Countdown”

FALTAN
25
DÍAS
PARA QUE SEA
OBLIGATORIO

#ELETIQUETADOMEAYUDA

ETIQUETADOUY

Alianza
ENT
URUGUAY

FIGURE 13
“What you eat matters”

Algunas diferencias entre los Decretos

ANTES	Quesos de untar	AHORA
Decreto 246/020		Decreto 034/021
<ul style="list-style-type: none"> EXCESO GRASAS SATURADAS MSP EXCESO GRASAS MSP EXCESO SODIO MSP 	Requetón Light	<ul style="list-style-type: none"> EXCESO GRASAS SATURADAS MSP

LO QUE COMÉS IMPORTA

MÁS INFORMACIÓN EN
WWW.ETIQUETADO.UY

Alianza
ENT
URUGUAY

Impact of the Activities

Civil society's advocacy efforts before decision-makers were coordinated with and nourished by the other components: communication, community-based actions, monitoring of points of sale, and the production of scientific evidence. This process resulted in a number of achievements:

- Preservation of a labeling design supported by scientific evidence (i.e., the black octagon with the word "excess"). This warning is in line with PAHO's recommendations.
- Joint activities with professional and academic organizations, under the coordination of Alianza ENT Uruguay.
- Increased public visibility of the position being advanced by Alianza ENT Uruguay.
- Meetings with decision-makers (namely ministers, directors, and legislators) involved in front-of-package labeling.
- Increased public awareness of dietary habits.
- Collaboration with academia to create a mechanism to monitor companies' compliance with the labeling measure. This was done by visiting points of sale to obtain information on packaged products and by creating a labeling-related website for consumers. This, together with social media channels, served as a tool for the public to find out whether products were complying with the labeling rules, as well as to submit questions regarding processed and ultra-processed foods. The queries gathered were analyzed with the help of leading academics in the field, and answers were published on social media outlets and the website.
- Online catalog of products indicating which warning labels each product has (or should have).
- Commencement of efforts aimed at the drafting of a law related to healthy eating habits that, among other things, would enshrine the front-of-package warning labeling system in legislation, based on scientific evidence and PAHO's recommendations.

Each component of civil society’s efforts included a number of strategies, as outlined in table 7.

TABLE 7
Strategies in each component

Component	Strategy
Advocacy	<ul style="list-style-type: none"> • Forge alliances with academic and professional organizations to ensure a collective approach to health policy. • Develop a position based on scientific evidence free from conflicts of interest. • Request information from the government. • Seek support from international organizations. • Contact and dialogue with legislators.
Communication	<ul style="list-style-type: none"> • Empower the population about their right to be informed. • Transmit messages from a diverse range of professional on the issue of dietary habits and nutrition labeling. • Expose industry interference. • Hold press conferences. • Make appearances in mass media. • Maintain an ongoing social media presence and attempt to communicate with companies and political decision-makers.

Final Reflections

Prior to 2018, Uruguay had no history of front-of-package food labeling aimed at warning consumers of the potential harm to their health resulting from the excessive consumption of certain products. Starting with the first decree issued in 2018, the country’s front-of-package warning measure joined other regulations that had been brewing with regard to the promotion of healthy environments. This measure seeks to inform consumers about excess levels of sugars, fats, and sodium in packaged foods so that they can make healthier purchasing decisions. The hope is that nutrition labeling, together with other health-related policies, will help reduce diseases such as type 2 diabetes, cancer, obesity, and cardiovascular diseases.

Today, Uruguay has a front-of-package warning labeling policy whose design adheres to PAHO’s recommendations, even if its nutrient profile model does not. If we compare the current

nutrient profile model with the one from the original regulation issued in 2018, we can see that products intended for children, especially dairy products, are the most affected.

In general, Uruguay's current labeling rules do not follow the recommended standards for identifying products with excess sugars, sodium, or fats. Moreover, advertising aimed at children is not regulated, contrary to the practices of other countries such as Chile and Mexico. In addition, packaged foods should ideally disclose the total amount of sugars they contain (which is currently not the case in Uruguay), and other complementary policies should be implemented, such as taxes on sugary drinks, reductions in the prices of fruits and vegetables (which promotes access to healthy foods), and bans on the advertising and marketing of ultra-processed products in order to achieve healthier environments.

Civil society's efforts, mainly through Alianza ENT Uruguay, in collaboration with other institutions and organizations, such as the Uruguayan Medical Association, the University of the Republic, and international organizations (Healthy Americas Coalition, the NCD Alliance, and the Inter-American Heart Foundation), managed to ensure the preservation of the front-of-package warning label model, despite its not adhering to international standards. Furthermore, civil society was able to engage in dialogue with policymakers working on this health issue.

Yet simply having a regulation is not enough—it must also be enforced. Otherwise, companies may just choose not to comply with it while not risking sanction. At the time of writing, the final decree had been in force for five months and an enforcement plan was just beginning to take shape in the public statements of health authorities. In this regard, the role of civil society in terms of monitoring the situation and demanding answers has functioned as an important element of accountability.

The current enforcement vacuum, from consumers' point of view, ultimately represents a loss of rights. The failure of many companies to add the required warning labels to their products may lead consumers to choose those products under the assumption that they are healthier, when they could be

just as unhealthy or even unhealthier than products bearing the octagonal warnings. Such a practice also constitutes unfair competition against those companies that do comply with the regulations.

In the case of Uruguay, it is important to get public authorities to commit to evaluating the results of the labeling policy and to continue improving the nutrient profile, as stated by the minister of health in appearances before the media and before the Chamber of Representatives' Health Committee. It is also essential that improvements to the regulation be based on rigorous scientific evidence and that civil society, scientists, and academia be allowed to participate in the policy's evaluation and follow-up processes. Ultimately, Uruguay must strive to achieve a regulation that prioritizes the health of the population over the interests of the food industry.

Lessons Learned

In light of civil society's interventions aimed at promoting the health of Uruguayans and defending front-of-package nutrition labeling as a means of protecting the right to information about what we eat, the following lessons learned emerge:

- It is critical to work together across all of civil society so that there is strong and solid messaging around the right to health when dialoguing with and advocating before policymakers.
- Scientific evidence free from conflicts of interest is essential for decision-making on front-of-package nutrition labeling.
- Any noncompliance by the food industry regarding the current policy must be exposed.
- Mass communication campaigns via television, radio, and social media are key to raising the issue's visibility and shaping public opinion.
- Collaboration with academia and health professionals helps deliver high-impact messages to public authorities.
- Monitoring by civil society is essential for encouraging and demanding compliance with the current policy.

- Civil society activities in Uruguay must be coordinated with similar efforts in the rest of Latin America, which requires ongoing communication with advocates in neighboring countries and the exchange of information and lessons learned about the food industry's actions.

References

Agencia Uruguaya de Cooperación Internacional. 2020. "Locatarios de Cuchilla de Guaviyú de Salto recibieron ambulancia adquirida por donación del PNUD y la empresa Coca-Cola." September 7. <https://www.gub.uy/agencia-uruguaya-cooperacion-internacional/comunicacion/noticias/locatarios-cuchilla-guaviyu-salto-recibieron-ambulancia-adquirida-donacion>

Ares, G., J. Aschemann-Witzel, M. R. Curutchet, L. Antúnez, X. Moratorio, and I. Bove. 2018. "A Citizen Perspective on Nutritional Warnings as Front-of-Pack Labels: Insights for the Design of Accompanying Policy Measures." *Public Health Nutrition* 21(18): 3450–3461.

Arrúa, A., M. R. Curutchet, N. Rey, P. Barreto, N. Golovchenko, A. Sellanes, G. Velazco, M. Winokur, A. Giménez, and G. Ares. 2017. "Impact of Front-of-Pack Nutrition Information and Label Design on Children's Choice of Two Snack Foods: Comparison of Warnings and the Traffic-Light System." *Appetite* 116: 139–146.

Arrúa, A., L. Machín, M. R. Curutchet, J. Martínez, L. Antúnez, F. Alcaire, A. Giménez, and G. Ares. 2017. "Warnings as a Directive Front-of-Pack Nutrition Labelling Scheme: Comparison with the Guideline Daily Amount and Traffic-Light Systems." *Public Health Nutrition* 20(13): 2308–2317.

Cabrera, M., L. Machín, A. Arrúa, L. Antúnez, M. R. Curutchet, A. Giménez, and G. Ares. 2017. "Nutrition Warnings as Front-of-Pack Labels: Influence of Design Features on Healthfulness Perception and Attentional Capture." *Public Health Nutrition* 20(18): 3360–3371.

Decreto 34 de 2021 [Consejo de Ministros]. Sustituye el Anexo del Decreto 246/020, de 2 de septiembre de 2020. February 1, 2021.

Decreto 91 de 2020 [Consejo de Ministros]. Prórroga del plazo establecido en el art. 11 del Decreto 272/018,

referente al rotulado de alimentos y creación de una comisión de trabajo multidisciplinaria. March 11, 2020.

Decreto 117 de 2006 [Ministerio de Salud Pública]. Actualización del Reglamento Bromatológico Nacional. April 21, 2006.

Decreto 272 de 2018 [Ministerio de Salud Pública]. Modificación del Reglamento Bromatológico Nacional, relativo al rotulado de alimentos. August 31, 2018.

Decreto 246 de 2020 [Consejo de Ministros]. Modificación del Decreto 272/018, el cual modificó el Reglamento Bromatológico Nacional, relativo al rotulado de alimentos. September 8, 2020.

Ley 19140 de 2013. Protección de la salud de la población infantil y adolescente a través de la promoción de hábitos alimenticios saludables. October 11, 2013.

Machín, L., J. Aschemann-Witzel, M. R. Curutchet, A. Giménez, and G. Ares. 2018a. "Does Front-of-Pack Nutrition Information Improve Consumer Ability to Make Healthful Choices? Performance of Warnings and the Traffic Light System in a Simulated Shopping Experiment." *Appetite* 121: 55–62.

———. 2018b. "Traffic Light System Can Increase Healthfulness Perception: Implications for Policy Making." *Journal of Nutrition Education and Behavior* 50(7): 668–674.

Mialon, M., B. Swinburn, and G. Sacks. 2015. "A Proposed Approach to Systematically Identify and Monitor the Corporate Political Activity of the Food Industry with Respect to Public Health Using Publicly Available Information." *Obesity Reviews* 16(7): 519–530.

Ministerio de Salud Pública. 2016. *Guía alimentaria para la población uruguaya: Para una alimentación saludable, compartida y placentera*. Montevideo: Ministerio de Salud Pública.

———. 2017. *Consolidado de respuestas a los comentarios recibidos durante la consulta pública nacional e internacional al proyecto relativo al rotulado de alimentos envasados*. Montevideo: Ministerio de Salud Pública.

———. 2018. *2ª Encuesta de Factores de Riesgo de Enfermedades No Transmisibles*. Montevideo: Ministerio de Salud Pública.

———. 2019. *Consolidado de respuestas a la consulta pública por el Etiquetado Frontal*. Montevideo: Ministerio de Salud Pública.

———. 2021. *Informe Epidemiológico COVID-19 del 10 de marzo de 2021*. Montevideo: Ministerio de Salud Pública.

Ordenanza 116 de 2014 [Ministerio de Salud Pública]. Lineamientos para la venta y publicidad de alimentos en los centros de enseñanza. March 11, 2014.

Pan American Health Organization. 2015. *Ultra-processed Food and Drink Products in Latin America: Trends, Impact on Obesity, Policy Implications*. Washington, DC: Pan American Health Organization.

Resolución GMC 36 de 2019 [MERCOSUR]. Defensa del consumidor: Principios fundamentales. July 15, 2019.

“Un combo McDonald’s gratis para trabajadores de la salud.” 2020. *InfoNegocios*, May 13. <https://infonegocios.biz/amp/default/un-combo-mcdonald-s-gratis-para-trabajadores-de-la-salud>

UNICEF. 2017. *Results-Based Management Handbook: Working Together for Children*. New York: UNICEF.

World Health Organization. 2021. “Noncommunicable Diseases.” <https://www.who.int/health-topics/noncommunicable-diseases>

Contributors

Laís Amaral Mais holds a nutrition degree from the Pontifical Catholic University of Campinas (Brazil). She has a master's degree and a PhD from the Federal University of São Paulo (Brazil) and completed a doctoral stay at the Johns Hopkins University School of Medicine (us). She is currently the coordinator of the Healthy and Sustainable Diets Program of the Brazilian Institute for Consumer Defense.

Paula Angarita Tovar holds a law degree from the Externado University of Colombia and an LLM in public interest law and policy from the University of California, Los Angeles (us). She specializes in social justice advocacy and socioeconomic inequalities in vulnerable contexts, particularly in relation to issues such as climate change.

Mariana de Araújo Ferraz holds a law degree, a master's degree in human rights, and a PhD in constitutional law from the University of São Paulo (Brazil). She is currently associate director of advocacy at the Global Health Advocacy Incubator.

María Paula Barbosa holds a law degree from the University of the Andes (Colombia). In 2021, she was a semifinalist in the John H. Jackson Moot Court Competition on WTO law. Since then, she has focused on conducting research and providing legal advice on issues related to international trade, the implementation of trade agreements, the use of trade defense instruments, and customs procedures.

Simón Barquera is a physician with a master's degree and doctorate in nutrition from Tufts University (us). He is also a level III member of Mexico's National Research System, a member of the National Academy of Medicine and the Mexican Academy of Sciences, director of the Center for Research in Nutrition and Health at Mexico's National Institute of Public Health, and president of the World Obesity Federation.

Renato Barreto Florentino has a degree in social sciences from the University of São Paulo (Brazil). He is currently advocacy coordinator at the Brazilian Institute for Consumer Defense.

Ana Paula Bortoletto Martins holds a PhD in nutrition and public health. Currently, she is a professor at the School of Public Health of the University of São Paulo (Brazil) and a researcher at the university's Center for Epidemiological Research in Nutrition and Health.

Juan Martín Carballo holds a law degree from the National University of Córdoba (Argentina) and an LLM from Georgetown University (us). He is a former Fulbright Scholar and has been involved in research, litigation, and human rights advocacy, particularly regarding the rights to health and to food. Currently, he is legal coordinator for food and nutrition policies at the Global Health Advocacy Incubator.

Luciana Castronuovo holds a PhD in social sciences from the University of Buenos Aires (Argentina) and a sociology degree from the University of Salvador (Argentina). She was previously a doctoral fellow at the National Scientific and Technical Research Council (Argentina) and has undertaken several research projects in the field. She is currently research coordinator at the Inter-American Heart Foundation–Argentina.

Bernice Cerra holds a law degree from the University of Buenos Aires (Argentina), a master's in human rights from the National University of Lanús (Argentina), and an LLM in national and global health law from Georgetown University (us). She is a human rights advocate specializing in global health law,

noncommunicable diseases, food policies, human rights, and gender equality. She is an international consultant at the Pan American Health Organization.

Patrícia Chaves Gentil holds a nutrition degree, a specialization in public health, and a master's degree in human nutrition from the University of Brasília (Brazil). Previously, she was a consultant for the Healthy and Sustainable Diets Program of the Brazilian Institute for Consumer Defense. She is currently director of healthy eating at the Secretariat of Food Security and Nutrition of the Ministry of Social Development and Fight against Hunger in Brazil.

Alejandra Contreras Manzano is a nutritionist with a doctorate in population nutrition sciences. She is a former Fulbright García-Robles Scholar at Harvard University (us) and a researcher affiliated with the Center for Nutrition and Health Research (Mexico). She has participated in various local and international working groups focused on food standards, including front-of-package labeling.

Carlos Cruz Casarrubias is a nutritionist with a master's degree in public health and a specialization in applied statistics. He is currently a PhD student at the School of Public Health of Mexico and a researcher at the Center for Nutrition and Health Research (Mexico).

Maria Cecília Cury Chaddad holds a master's degree and a PhD in constitutional law from the Pontifical Catholic University of São Paulo (Brazil). She is a consultant in public law and regulation and founder of Põe no Rótulo, a civil society movement that seeks to ensure that food labeling fulfills its function of clearly informing consumers of food products' composition and health risks so that they can make conscious and informed decisions.

Jaime Delgado Zegarra is a lawyer and business administrator with a specialization in public law and good governance and a master's degree in health policy. For the past thirty-six years, he has worked on consumer protection issues in Peru. He is also

a former congressman and author of the country's healthy food law. He is president of AVISA Perú – Asociación Vida, Salud y Ambiente.

Daniel Felipe Dorado Torres is an LLM candidate at Georgetown University (US). He is a human rights activist and lawyer specializing in global health law, constitutional law, liability and accountability of transnational corporations, tobacco control, administrative law, and consumer law. He is currently international and Latin America director of policy organizing and the tobacco campaign at Corporate Accountability.

Janine Giuberti Coutinho holds a nutrition degree with a specialization in public health, as well as a master's degree and a PhD in human nutrition from the University of Brasília (Brazil). She is currently a nutritionist and technical consultant for the Healthy and Sustainable Diets Program of the Brazilian Institute for Consumer Defense.

Mariana Gondo dos Santos holds a law degree from the University of São Paulo (Brazil), where she is also pursuing a bachelor's degree in nutrition. She has experience in strategic litigation, especially concerning the rights to health and to food.

Leila Guarnieri holds a nutrition degree from the University of Buenos Aires (Argentina). She has undertaken postgraduate courses on obesity and the prevention of chronic noncommunicable diseases. She is currently pursuing a master's degree in public policy and development at the Latin American Faculty of Social Sciences. In addition, she is part of the research team at the Inter-American Heart Foundation–Argentina.

Diana Guarnizo Peralta holds a PhD in law and an LLM in international human rights law from Essex University (UK), as well as a law degree and a specialization in constitutional law from the National University of Colombia. Her work focuses on the promotion of social rights and the use of the law as a tool for addressing global health and food problems. She currently directs the economic justice team at Dejusticia (Colombia).

Julián Gutiérrez-Martínez holds an msc in sociology from the University of Oxford (UK), as well as a law degree and a specialization in constitutional law from the National University of Colombia. His work combines interdisciplinary research and strategic litigation on issues related to the enforceability of economic, social, cultural, environmental, and biocultural rights. He currently leads business and human rights research for the economic justice team at Dejusticia (Colombia).

Gabriela Guzmán Pérez holds a law degree from the National Autonomous University of Mexico. She also has a certification in strategic litigation on economic, social, cultural, and environmental rights from the Institute for Legal Research at the same university. She currently works at El Poder del Consumidor (Mexico).

Lucas Landivar holds a law degree from the National University of Mar del Plata (Argentina), with specializations in human rights and the rights of nature. His work embraces a legal-administrative, legislative, judicial, research, and knowledge-dissemination approach for the promotion of food, scientific, and technological sovereignty.

María Luján Abramo holds a law degree from the National University of Córdoba (Argentina), an LLM in global health law from Georgetown University (US), and human rights diplomas from the University of Buenos Aires (Argentina). She is global legal advisor for the food and nutrition program at the Global Health Advocacy Incubator.

Lucía Martínez has a bachelor's degree in physical education and a master's degree in physical education and sport. She has performed research, planning, and project development in the areas of health, physical activity, and risk factors for noncommunicable diseases for CIET Uruguay. She is currently the teaching and academic coordinator at Liceo Francisco Espínola (Uruguay) and a university professor of didactics and motor learning.

Ana Munguía is a nutritionist with a master's degree in public health in nutrition and is currently a PhD student in population

nutrition sciences at Mexico's National Institute of Public Health. She is also a researcher at the institute's Center for Nutrition and Health Research, where she studies issues related to food marketing to children and front-of-package labeling. In addition, she carries out advocacy activities such as those related to NOM-051.

María Elisabet Pizarro has a master's degree in epidemiology and health policy and management (Institute of Collective Health at the National University of Lanús in Argentina), an MD (National University of La Plata in Argentina), and a specialization in clinical practice and internal medicine. She has been part of the team of the Inter-American Heart Foundation–Argentina since its beginnings and was formerly its co-executive director. She is currently an advocacy advisor for the Healthy Americas Coalition.

Sergio Procelli holds a law degree from the National University of Mar del Plata (Argentina) and a specialization in consumer law. He is a professor of the master's programs in consumer law at the National University of General San Martín (Argentina) and the National University of La Plata (Argentina). He served as an advisor to the Senate of Buenos Aires Province from 2006 to 2008 and as an advisor to the Argentine Chamber of Deputies' Commission on Consumer Protection from 2010 to 2015. He is a former regional delegate of the country's regulatory authority for gas and an advisor to the users' commissions of the regulatory authorities for electricity and for communications and information technologies.

Diego Rodríguez is a sociologist and a marketing analyst. He has a background in tobacco control policy, social management, and front-of-package food labeling. He teaches at the University of the Republic (Uruguay) and researches issues related to the sociology of health and the evaluation of tobacco control policies.

Raquel Sánchez is a nutritionist specializing in noncommunicable diseases. She is a professor at the University of the Republic (Uruguay) and a member of its Right to Food Observatory. She represents the Uruguayan Association of Dietitians

and Nutritionists before the Alianza ENT. She has training in food policy, consumer rights, and front-of-package food labeling.

Gianella Severini is a lawyer and journalist with an LLM in global health law from Georgetown University (us), with additional certification in international trade and human rights. She is currently legal coordinator at the Campaign for Tobacco-Free Kids and the Global Health Advocacy Incubator.

Rafael Tamayo-Álvarez is a professor of international law at the Faculty of Jurisprudence at the University of the Rosary (Colombia). He holds a PhD in law from the University of the Andes (Colombia) and an LLM in international law from the University of Chile and Heidelberg University (Germany).

María Victoria Tiscornia holds a master's degree in human nutrition from the National University of La Plata (Argentina) and a bachelor's degree in nutrition from Maimónides University (Argentina). Since 2016, she has been teaching child nutrition at the University of Business and Social Sciences (Argentina) and is part of the research team at the Inter-American Heart Foundation–Argentina.

Lizbeth Tolentino-Mayo is a researcher in medical sciences at the Center for Research in Nutrition and Health at Mexico's National Institute of Public Health. She coordinates projects related to the monitoring of obesogenic environments and food systems, such as advertising and food labeling. She is also collaborating on several research projects with universities in Latin America.

Adriana Torres holds a law degree from the Andrés Bello Catholic University (Venezuela) and a master's degree in human rights from Friedrich-Alexander-Universität Erlangen-Nürnberg (Germany). In 2018, she completed research stays at the Max Planck Institute for Comparative Public Law and International Law, the International Nuremberg Principles Academy, and the Nuremberg Human Rights Center (all in Germany). Since 2023, she has been the coordinator for Dejusticia's economic justice

team, where she focuses on issues concerning the right to adequate food.

René Urueña Hernández is an associate professor at the University of the Andes (Colombia), a Max Planck Law Fellow, and a wto Chair (2022). He has served as a research fellow at New York University (us), a docent at Harvard Law School's Institute for Global Law and Policy (us), and a visiting professor at Tel Aviv University (Israel), the University of Utah (us), the University of Helsinki (Finland), the University of Lapland (Finland), and the City University of New York (us). He holds an LLM and PhD from the University of Helsinki, as well as a law degree and postgraduate degree in economics from the University of the Andes.

Daniela Valdivieso Riofrío is a researcher with a degree in psychology (subspecialty in nutrition), a master's in psychology and education, and a PhD in psychology. She is currently a consultant on corporate accountability and has a private psychology practice.

Javier Zúñiga holds a law degree from Mexico's Center for Economic Research and a master's degree in global health law from Georgetown University (us). He has experience in strategic human rights litigation, especially concerning the rights to health and to food. Currently, he is legal coordinator for El Poder del Consumidor (Mexico).

Editors

Diana Guarnizo Peralta holds a PhD in law and an LLM in international human rights law from Essex University (UK), as well as a law degree and a specialization in constitutional law from the National University of Colombia. Her work focuses on the promotion of social rights and the use of the law as a tool for addressing global health and food problems. She currently directs the economic justice team at Dejusticia (Colombia).

René Urueña Hernández is an associate professor at the University of the Andes (Colombia), a Max Planck Law Fellow, and a WTO Chair (2022). He has served as a research fellow at New York University (US), a docent at Harvard Law School's Institute for Global Law and Policy (US), and a visiting professor at Tel Aviv University (Israel), the University of Utah (US), the University of Helsinki (Finland), the University of Lapland (Finland), and the City University of New York (US). He holds an LLM and PhD from the University of Helsinki, as well as a law degree and postgraduate degree in economics from the University of the Andes.

Juan Martín Carballo holds a law degree from the National University of Córdoba (Argentina) and an LLM from Georgetown University (US). He is a former Fulbright Scholar and has been involved in research, litigation, and human rights advocacy, particularly regarding the rights to health and to food. Currently, he is legal coordinator for food and nutrition policies at the Global Health Advocacy Incubator.

Law, Trade, and Nutrition Labeling: Reflections and Experiences from Latin America

Overweight and obesity are two of the most pressing issues on today's public health agenda. Latin America in particular is home to some of the world's highest consumption levels of sugar-sweetened beverages and ultra-processed foods, putting its population at greater risk of noncommunicable diseases. To promote healthier eating environments and habits, the World Health Organization and Pan American Health Organization have called on countries to adopt a variety of measures, including front-of-package warning labels based on the best available scientific evidence.

Several countries in the region, such as Chile, Mexico, and Peru, have adopted the octagonal warning label model, with positive results. However, the adoption of these and similar policies has not been easy. The ultra-processed food industry has put up significant resistance, citing economic, political, and legal concerns. In particular, it has argued that such policies violate international trade agreements, despite the fact that international law allows for exceptions in favor of legitimate objectives such as public health.

This multi-authored volume contributes to the debate on the adoption of front-of-package nutrition labeling from two perspectives. First, from a legal viewpoint, the book's authors examine the main arguments against this public health measure and provide counterarguments based on international law. Second, from a lived experience perspective, the authors recount how they successfully advocated for this public health policy in their respective countries and overcame opposition.

The book offers a perspective from the Global South on front-of-package warning labels, one of the most important obesity prevention policies in recent years. It is aimed at academics, activists, and others interested in the intersections of public health, law, and international trade.

ISBN 978-628-7517-99-8



Dejusticia

Global Health
Advocacy Incubator



Universidad de
los Andes | Facultad
de Derecho