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FRONT-OF-PACK LABELLING UNDER THE TBT REGIME — AN ANTICIPATORY ASSESSMENT OF INDIA'S NUTRITION LABELLING POLICIES

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International trade has played a part in global obesity epidemic that is causing an upsurge in non-communicable diseases. To address this, governments have sought to provide consumers with more nutritional information about the food that they consume, with the aim of encouraging them to make healthier dietary choices through the use of interpretative front-of-pack (FoP) labelling for packaged food. In the same vein, India released its 2019 draft regulations on interpretative labels, which prescribed 'RED' warning labels for food products containing high calorie content. Although this was rejected due to a lack of industry consensus, the Food Safety and Standards Authority of India (FSSAI) is again in deliberations, which raises questions under World Trade Organization (WTO) law, particularly the Agreement on Technical Barriers to Trade (TBT Agreement).

The TBT Agreement upholds the right of member states to adopt measures required for safeguarding human, animal, or plant life at thresholds they deem necessary. As FoP labels affect domestic and imported goods alike, Article 2.1 may be invoked to ensure adherence to the national treatment and most-favoured nation principles. Similarly, Article 2.2 mandates that technical regulations cannot create unnecessary obstacles to international trade. This involves analysing the design and operation of the measure to balance the degree of contribution towards the legitimate objective and the risks of non-fulfilment. Additionally, since the regulations refer to the Indian Council of Medical Research (ICMR) guidelines for scientific threshold, the use of relevant international standards under Article 2.4 becomes relevant.

Based on the TBT analysis, the article concludes with a recommendation to adopt a mandatory framework of health star ratings, while balancing trade liberalisation and members' rights to regulate consumer health.

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I. INTRODUCTION

The TBT Agreement came into effect when the WTO was founded on January 1, 1995.[1] It seeks to prevent unnecessary obstacles to trade through restrictions, standards, testing, and certification processes. Most technical regulations are adopted with the aim of protecting human health or animal safety. In fact, various plurilateral, bilateral, national, and multilateral agreements governing the trade in goods and services, and intellectual property (such as, packaged food products) are included in the field of international trade law. Therefore, regulations that impact

[1] Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994) [hereinafter TBT AGREEMENT].

trading in food products, such as those pertaining to nutrition labelling, may trigger commitments under trade law. The WTO has previously settled disputes relating to product labelling in cases such as the *US — Tuna II (Mexico)*,[2] *US — COOL*,[3] *Australia — Tobacco*,[4] etc., thereby providing an ocean of jurisprudence on the subject.

As countries become more cognisant of environment and health-related issues, they use labelling requirements as a means to invite the customers' attention to 'friendly' and 'unfriendly' product attributes and production methods. The understanding of policymakers has become more nuanced and specialised with the development of scientific evidence. Consequently, it is anticipated that the application of product labels for the purpose of informing consumers will increase. At the same time, product labels can also impact consumer patterns, expectations, and international trade.[5] This article describes how the TBT Agreement distinguishes between WTO-consistent and WTO-inconsistent product labelling standards.

In this paper, the author analyses the TBT trade concerns raised regarding FoP interpretive nutrition labelling that has been launched by governments as a response to obesity and related health concerns. As per the World Health Organization (WHO), FoP labels are nutrition labelling frameworks that are displayed on the front of food packages in the consumer's primary field of view and provide straightforward, frequently illustrative data on the nutrient content or nutritional quality of products. As most countries, including India, are experiencing a dietary shift with people increasing their consumption of processed goods and an expanding fast-food market, these factors prompt the need for FoP labelling measures.

The FoP policy introduced in India's previous draft regulations on nutrition labelling, or any future measures that the government may adopt, is analysed in this article. Accordingly, recommendations are made to ensure that India has adhered to its commitments under the TBT Agreement. Additionally, the research offers prospects for more robust policymaking around interpretive FoP labelling.

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[2] Appellate Body Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, ¶ 5133, WTO DOC. WT/DS381/AB/RW (adopted May 16, 2015)[hereinafter *US — Tuna II*].

[3] Panel Report, *United States — Certain Country of Origin Labelling (COOL) Requirements*, ¶ 2745, WT/DS384/R / WT/DS386/R (adopted July 23, 2012) [hereinafter *US — COOL*].

[4] Appellate Body Report, *Australia — Certain Measures concerning Trademarks, Geographical Indications and other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS435/AB/R (adopted June 29, 2020) [hereinafter *Australia — Tobacco*].

[5] Andrea Marchini et al. *Label Information and Consumer Behaviour: Evidence on Drinking Milk Sector*, AGRIC. ECONOMY (2021).

In the first part, the author has traced the policy development surrounding FoP labelling in India and the draft regulations introduced by the FSSAI. With this factual background, the second part introduces the relevance and applicability of the TBT Agreement to the Indian FoP labelling measure, following which a detailed analysis of Article 2.1 is undertaken in the third part. Here, to ascertain whether the FoP policy creates trade discrimination, the author first showcases that this policy affects 'like products' and, consequently delves into the issue of whether the policy measure is in furtherance of a legitimate objective, the presence of any detrimental impact on trade, and whether such an impact stems from a legitimate regulatory distinction. Using Article 2.1 as relevant context, the fourth part analyses the conformity of the FoP labelling policy with Article 2.2 of the TBT Agreement. To determine whether the measure constitutes an unnecessary obstacle to international trade, the author has addressed the trade restrictiveness of the measure, its contribution to the stated objectives, and the risk of non-fulfilment of such objectives. The fifth part explores alternative policy measures for FoP interpretative labelling that would be less trade-restrictive while equally effective in addressing the objectives of obesity, public health, and consumer awareness. In extension of the analysis under Article 2.2, the sixth part undertakes an important analysis under Article 2.4 to ascertain whether the nutrient thresholds forming the root of the FoP measure are in consonance with international standards, vis-à-vis the Codex Alimentarius Guidelines. In the concluding part, the author has clarified the Indian position by making recommendations on how the FSSAI should carry out FoP labelling measures to ensure compliance with the WTO TBT regime.

Elaborating on industry response, it is noteworthy that the FoP Regulations also specify the manner of printing the front pack labelling. For packaged food that exceeds the specified thresholds and falling into the warning category, it stipulates that the front labelling should be prominently displayed — the size of numerals and letters for the declarations should not be less than 3 mm based. While this effectively prevents manufacturers from mis-interpreting (or misusing) the regulations to place labels in a subtle and inconspicuous manner, it may bring trademark and related intellectual property (IP) claims. Since these labels interfere with the branding and packaging autonomy of companies, disputes referred under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) is entirely possible, as was the case with Chile's FoP labelling measures. However, challenges under the TRIPS are outside the scope of this article that pertains to TBT obligations for FoP labelling.

II. FoP Labelling Regulations in India and Recent Developments

WHO acknowledges that excessive intake of foods heavy in sugars, fats, and sodium that are simultaneously energy-dense and nutrient-poor is the primary contributor

to obesity. This increases the risk of non-communicable diseases (NCD) such as heart conditions, diabetes, and cancerous diseases, thereby significantly contributing to rising NCDs and related deaths and disabilities worldwide.[6] As obesity rates rise, especially in the least developed nations, governments are attempting to provide their consumers with the understandable information required for making healthy dietary choices.

In 2010, the groundwork for FoP labelling in India was laid by the Delhi High Court when it adjudicated a public interest litigation that flagged the problem of easy access to junk food and carbonated drinks for children. The Court called upon the FSSAI to take action and develop a comprehensive school canteen policy with improved focus on health and nutrition, and suggested ban of packaged food products containing FOP warning labels from school premises.[7]

In response, the FSSAI released FoP labelling provisions, which required mandatory calorie disclosures on the front pack of packaged foods. The Food Safety and Standards (Labelling and Display) Regulations, 2019 (2019 draft) included draft provisions on FoP warning labels wherein the block of nutrients for 'High Fat, Sugar, and Salt' (HFSS) on all packaged foods was to be coloured 'RED', indicating a consumption warning.[8] The nutrient thresholds for such high-content warning labels were set out based on the ICMR guidelines, which follow the WHO − SEARO benchmarks for salt, sugar, and fat consumption.[9]

According to the new draft law, fast-moving consumer goods businesses are now required to reveal, in a "clear, unambiguous, prominent, and readily visible manner", how much a food item contributes to the recommended dietary allowance for an average adult on the label of a packaged food. The regulations further stipulate that the labelling on pre-packaged goods cannot be detached from the packaging and must carry a complete ingredient list in the decreasing order of their volume composition. This includes a required notice of 'added sugars' if any artificial sweeteners are present.[10]

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[6] JOINT WHO/FAO EXPERT CONSULTATION ON DIET, NUTRITION AND THE PREVENTION OF CHRONIC DISEASES, GENEVA, SWITZERLAND, WHO TECHNICAL REPORT SERIES NO. 916 (2002).

[7] Uday Foundation for Congenital Defects & Rare Blood Groups v. Union of India, S.C.C. OnLine Del 8176 (2015) (India).

[8] Food Safety and Standards (Labelling and Display) Regulations, 2020, FSSAI, Chap. 2, Reg. 5 [hereinafter FSSAI Labelling Regulations].

[9] *Id.*

[10] *Id.*, Schedule II.

As per the FSSAI, the idea is to curb the consumption of junk food, but the law has been put on hold due to high opposition from the food industry and a lack of industry–government consensus.[11] According to industry representatives, the FoP measure would result in ethnic foods being classified as unhealthy, causing severe business losses for medium, small, and micro enterprises (MSMEs) in packaged food manufacturing and sellers while opening the floodgates for western packaged food to capture the Indian market. Additionally, the food associations have stated that the regulations are neither scientific nor practical since food consumption is a subjective choice of the consumer, and not of the manufacturer.[12] Therefore, all FoP measures have been put on hold due to protests from the packaged food sector while policy makers search for better alternatives.

As an alternative, the FSSAI is in the process of integrating FoP labelling laws by introducing FoP health star ratings (HSR), which would rate packaged food products out of five stars according to their sugar, fat, and salt content.[13] On this matter, however, discussions with the industry are underway, and interpretive labelling is yet to manifest in the Indian processed food sector.[14]

Therefore, it is clear that India is on its way to introducing FoP nutrient labelling measures that would affect domestic and imported packaged processed food products. This could take the form of 'RED' warning labels highlighting food products with high-calorie content, star ratings on the front pack, or any other policy that informs consumers about the nutritional values of the food they consume.

III. RELEVANCE OF THE TBT AGREEMENT

To encourage and assist customers in making better dietary choices, interpretive FoP labels offer simple explanations of crucial nutrient data and its impact on health. These labels may feature nutrient-specific language and/or illustrations, a

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[11] *Minutes of the Stakeholders' Meeting on Front of Pack Labelling*, FSSAI (Feb. 15, 2022), https://fssai.gov.in/upload/advisories/2022/02/6214c8ca94fedMinutes_FOPL_22_02_2022.pdf.

[12] Pearly Neo, *Wrong Move, Wrong Time: India's Colour Coded Labelling Regulations Draft Hit Red Light with Industry*, FOOD NAVIGATOR-ASIA (Jul. 15, 2019), https://www.foodnavigator-asia.com/Article/2019/07/15/Wrong-move-wrong-time-India-s-colour-coded-labelling-regulations-draft-hit-red-light-with-industry#.

[13] Priyanka Sharma, *FSSAI to Introduce Health Star Rating for Packaged Goods*, MINT (Mar. 03, 2022), https://www.livemint.com/companies/news/fssai-to-introduce-health-star-rating-for-packaged-goods-11646250552982.html.

[14] Sonal Matharu, *Colour Coding or Star Rating — FSSAI Food Labelling Plan can Trigger a New Nutrition War*, PRINT (Jul. 05, 2022), https://theprint.in/features/colour-coding-or-star-rating-fssai-food-labelling-plan-can-trigger-a-new-nutrition-war/1023619/.

summarised indication of a food's nutritional value, a classification of a food product within a group, and other forms of assisted suggestions.

The standardisation of nutrition labelling is the responsibility of both the health and trade sectors. As a result of international food trade, FoP labelling becomes a cross-border issue, with varying rules across nations. Thus, nutritional labelling laws may constitute 'technical barriers' to the international free flow of processed packaged food products and, hence, fall within the jurisdiction of WTO conventions, specifically the TBT Agreement.

Technical regulations are compulsory guidelines for the features of products, including labelling. The TBT Agreement governs the development, ratification, and implementation of technical norms impacting international trade in all commodities. A major objective of the TBT Agreement is to minimise policy measures, especially technical legislations, that amount to disguised trade restrictions. According to the TBT Agreement, regulations that seek to address legitimate policy objectives (such as safeguarding human health) are allowed, subject to ensuring that such regulations do not discriminate between imported and domestically manufactures producers, do not unduly restrict trade, and, when applicable and effective, are predicated on pertinent international standards.[15]

As per Annexure 1.1 of the TBT Agreement, technical regulations are documents that mandate conformity with product features or their related procedures and administrative provisions.[16] In *EC — Asbestos*, the Appellate Body (AB) laid down the factors that constitute a technical regulation: first, the measure must be applied to an identifiable group of products; second, it must prescribe product characteristics (labelling displayed, marketing, terminology); and third, compliance must be mandatory.[17] The 2019 draft and any other FoP labelling policy by India ought to satisfy all three conditions. The measure will apply to identifiable products, namely packaged food products that are sold in the Indian market. Labelling amounts to product characteristics, and the measure would be binding in its entirety and directly applicable to packaged food products sold in India. Therefore, it is evident that FoP or other labelling measures are technical regulations and hence subject to the provisions of the TBT Agreement.

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[15] TBT AGREEMENT, *supra* note 1, arts. 2.1, 2.2.

[16] TBT AGREEMENT, *supra* note 1.

[17] Panel Report, *European Communities — Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 3243, WT/DS135/AB/R (adopted Apr. 5, 2001) [hereinafter *EC — Asbestos*].

IV. TRADE DISCRIMINATIONS UNDER ARTICLE 2.1, TBT

Article 2.1 of the TBT Agreement demands adherence to both the national treatment and most-favoured nation (MFN) principle. The MFN obligation prevents discrimination caused by technical regulations between comparable goods (i.e., 'like products') imported from different countries, while the national treatment commitment forbids discrimination between similar national and imported goods.[18]

The threshold for trade discrimination under Article 2.1 of TBT Agreement entails, *inter alia*, establishing that "the treatment accorded to imported products must be less favourable than that accorded to like domestic products and like products from other countries."[19]

Article 2.1 forbids both legal and illegal discrimination between domestic and identical imported products. As was the case in *US — Tuna II* and *US — COOL*, de jure discrimination arises in labelling regulations that differentiate goods expressly on the basis of origin, and de facto discrimination may arise when a distinction is drawn in a way that imposes a heftier onus on imported goods or imports from specific nations.[20]

Generally, nutrition labelling measures do not cause any TBT concerns or allegations of national treatment discrimination under Article 2.1. However, most mandatory FoP labelling policies require warning labels and related FoP disclosures to be followed only by manufacturers of packaged foods that contain high-calorie contents beyond a certain threshold. Even the 2019 draft provides for a 'RED' label only for products containing high amounts of fat, sugar, and sodium. This could potentially lead to a scenario of de facto discrimination where a majority of imported goods would have to adhere to the 'RED' labelling as compared to national goods, thereby invoking Article 2.1. The possibility of such a scenario is further elaborated below, and to prove a non-violation of the MFN principle and de facto discrimination, it is important to show that the technical regulation is in furtherance of a legitimate objective and that "any detrimental impact on imports stems from a legitimate regulatory distinction",[21] in the absence of which it could lead to a disguised restriction of international trade.

A. Like Products

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[18] Panel Report, *United States — Measures Affecting the Production and Sale of Clove Cigarettes*, ¶ 87, WTO Doc. WT/DS406/AB/R (adopted Apr. 24, 2012) [hereinafter *US — Clove*].
[19] *US — Tuna II*, *supra* note 2, at ¶ 202.
[20] *US — Tuna II*, *supra* note 2; *US — COOL*, *supra* note 3.
[21] *US — Clove*, *supra* note 18, at ¶ 5751.

Before delving further, for application of trade discrimination under Article 2.1, it must first be established that the FoP labelling measure affects like products.

Likeness of products can be determined from the nature or extent of the competitive relationship between them,[22] which entails a four-step analysis of the product's physical characteristics, end-uses, consumer preferences, and HS categorization as laid down in EC — Asbestos.[23] Customer preferences represent how much customers evaluate the functions of the product in question, whereas end-uses explain the potential uses of a product. These parameters can be used to differentiate between goods that might otherwise be viewed as comparable.[24]

With regards to the 2019 Regulation, the applicability of FoP labelling has been further divided into sub-categories specified in Schedule 1, i.e., different nutritional thresholds have been prescribed depending on which category a product would fall under.[25] Therefore, packaged products falling within each category will be deemed 'like products' since they will have similar physical characteristics, end-uses, consumer habits, and HS classification.

For instance, "ready-to-eat cereals and breakfast cereals" is a sub-category under Schedule 1 with a designated threshold for sodium, saturated fat, and added sugars. Therefore, all brands of ready-to-eat and breakfast cereal products will be classified as 'like products' and will have to mandatorily impose FoP labels based on such thresholds.[26] In this regard, although the product composition and calorie content of two or more cereal brands may vary,[27] all products in that sub-category would have similar properties and HS Classifications, and the end-uses from the consumer's perspective would be largely substitutable.

Therefore, since the 2019 Regulations refer to packaged food products, they tantamount to "like or comparable products." Consequently, the regulations will be subject to the test of de-facto discrimination under Art. 2.1.

B. Legitimate Objective

In interpreting these TBT provisions, Dispute Settlement Body (DSB) has recognised relevant 'context' under Articles 31(1) and 31(2) of the Vienna

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[22] *Id.*, at ¶ 194.
[23] *EC — Asbestos*, *supra* note 17, at ¶ 101.
[24] *US — Clove*, *supra* note 18, at ¶125.
[25] FSSAI Labelling Regulations, *supra* note 8, at Schedule II.
[26] *Id.* at FSSAI Schedule I, Category 6.
[27] Appellate Body Report, *Japan — Taxes on Alcoholic Beverages*, WTO Doc. WT/DS8/AB/R (adopted Nov. 1, 1996).

Convention on the Law of Treaties (VCLT).[28] Particularly, the Preamble to the TBT Agreement offers appropriate context for analysing Article 2.1. The sixth recital stipulates that no nation can be prohibited from introducing technical regulations that are essential for the safeguarding of human, animal, or plant life at thresholds it deems necessary.[29]

Under Article 2.1, the list of possible "legitimate objectives" that may factor into the "treatment no less favourable" analysis is open, and any regulation that seeks to protect a legitimate objective is justified.[30] By extension, any interpretative FOP labelling is in furtherance of a legitimate health objective. In response to obesity and related NCDs, labelling policies, which India may introduce, will aim (i) to provide consumers with information about the nutritional content and the total number of calories of certain foodstuffs; and (ii) to prevent the use of labels or claims that deceive consumers about the nutritional content of foodstuffs.[31] Both of these objectives are essentially directed towards enhancing consumer information in connection with their choice of food products.

C. Legitimate Regulatory Distinction

In determining a legitimate regulatory distinction, i.e., in order to ascertain whether a discrimination is justified and stems from a legitimate distinction or not, the factual matrix and background of the technical regulation provide relevant context. There are two cases that provide labelling jurisprudence on Article 2.1. First, in *US — COOL*, the measure intends to provide consumers with details about the origin of their meat, thereby creating an incentive for U.S. producers to employ only domestic livestock since importers have to incur additional costs for recording, verification, and separation of livestock.[32] Therefore, the regulation was not based on a legitimate distinction; in fact, these additional costs do not correspond with additional information being provided to consumers. Rather, the more locations got involved vis-à-vis origin, the less accurate and more confusing the information became for the consumers.[33] In such circumstances, the goal of increasing consumer information is unlikely to justify discrimination in the measure.

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[28] Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331.
[29] TBT AGREEMENT, *supra* note 1, rec. 6.
[30] *Id.*
[31] Roseann B. Termini, *The Prevention of Misbranded Food Labelling: The Nutrition Labelling and Education Act of 1990 and Alternative Enforcement Mechanisms*, 18(1) OHIO N. UNIV. L REV. 77, 80 (1991).
[32] *US — COOL*, *supra* note 3.
[33] *Id.*, at ¶ 338.

In *US — Tuna II*, the measure sought to inform consumers of tuna products that were a result of harming dolphins. However, the regulation imposes larger constraints on tuna obtained within the Eastern Tropical Pacific ocean (ETP) by setting on dolphins, despite the fact that tuna captured outside the ETP using alternative means have also resulted in substantial quantities of dolphin hazards.[34] Thus, even though the labelling measure responds to a consumer preference for tuna products caught without endangering dolphins, it fails to satisfy that preference because it draws distinctions that are not explained by the impact on dolphins.

Therefore, the question is whether the same burden is imposed on domestic and imported goods and whether the burden to provide FoP labels is commensurate with the objective of raising consumer awareness.

In this regard, it has been accepted by the AB in *US — Clove* that "technical regulations, by their very nature, establish distinctions between products" based on their features or associated processes.[35] Consequently, Article 2.1 does not suggest that every differentiation, including those predicated only on specific product features or their associated methods, automatically imparts less favourable treatment under the TBT Agreement.[36] Product labelling requirements frequently distinguish between particular types of products or the way those products have been made (e.g., products' impact on the environment or contribution to a healthy lifestyle). Indeed, the very purpose of a product labelling requirement is often to alert consumers about these distinctions and encourage particular types of behaviour. As per the AB's reasoning, the mere existence of such distinctions in a product labelling requirement is insufficient to establish its inconsistency with Article 2.1.[37]

Article 2.2 offers relevant context for the application of TBT Article 2.1, indicating that the latter does not preclude international trade restrictions *a priori*. If any barrier to global trade were adequate to constitute a breach of Article 2.1, then Article 2.2 would become ineffective. This would be inconsistent with the 'principle of effectiveness', which states that WTO agreements cannot be construed in a manner that renders whole clauses or texts of a treaty redundant or ineffective, i.e., *effet utile*.[38] Thus, the fact that a product labelling requirement restricts trade cannot, per se, evince a breach of Article 2.1.

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[34] *US — Tuna II*, *supra* note 2, at ¶ 298.
[35] *US — Clove*, *supra* note 18, at ¶ 169.
[36] *US — COOL*, *supra* note 3, at ¶ 268; *US — Tuna II*, *supra* note 2, at ¶ 211.
[37] *US — Clove*, *supra* note 18, at ¶ 169.
[38] *Id.*, at ¶ 171; Appellate Body Report, *United States — Continued Dumping and Subsidy Offset Act of 2000*, ¶ 271, WTO Doc. WT/DS217/AB/R (adopted Jan. 27, 2003).

However, a significant loophole with the 2019 draft is that it declares the threshold amounts for added sugar. This may amount to a disguised restriction on trade, which, as stated in *US — Shrimp*, "can be inferred from the design, architecture, revealing structure, and application of the technical regulation."[39] The 2019 draft policy is designed to inaccurately distinguish between natural and added sugars by classifying only added sugars as risky, whereas the WHO does not differentiate between the two as risk factors of obesity and recommends a reduction in the intake of sugars in general (fructose may be more or equally harmful as added sugars).[40] Therefore, a food product with no added sugars but high amount fructose (processed natural sugar) would be classified as healthy, which not only misleads consumers but also amounts to a disguised restriction since a few products in the market would be favoured over the others.[41]

In the context of Article 2.1, if an imported product has high amounts of added sugar, it would have to impose a 'RED' FoP warning label. However, if a national product has low amounts of sugar but a high quantity of fructose (natural sugars), it would be exempt from the warning label despite having an overall higher content of total sugar, thereby causing discrimination between an imported and domestic product on illegitimate and scientifically incorrect grounds.

Therefore, while it is true that a situation wherein a majority of imported products are mandated to place warning labels or contain low star ratings might be coincidental, Indian policymakers have to ensure that any distinctions between the labelling published on domestic and imported products stem from a legitimate regulatory distinction and that there are no disguised restrictions. By extension, anomalies in the nature of differentiating added and natural sugars have to be resolved.

V. UNNECESSARY OBSTACLES TO INTERNATIONAL TRADE UNDER ARTICLE 2.2, TBT

Article 2.2 of the TBT Agreement lays down the general principle that technical regulations must not create "unnecessary obstacles to international trade."[42] The AB

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[39] Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 2755, WTO Doc. WT/DS58/AB/R (adopted Nov. 6, 1998) [hereinafter *US — Shrimp*].

[40] WORLD HEALTH ORG., BEST BUYS' AND OTHER RECOMMENDED INTERVENTIONS FOR THE PREVENTION AND CONTROL OF NONCOMMUNICABLE DISEASE (2013-2020) [hereinafter WHO'S RECOMMENDED INTERVENTIONS FOR NCD].

[41] Mary E. Gearing, *Natural and Added Sugars: Two Sides of the Same Coin,* HARV. UNIV. BLOG (Oct. 5, 2015), https://sitn.hms.harvard.edu/flash/2015/natural-and-added-sugars-two-sides-of-the-same-coin/.

[42] TBT AGREEMENT, *supra* note 1, art. 2.2.

addressed Article 2.2 in *US — Tuna II (Mexico)*, *US — COOL*, and *US — Clove*, all of which unsurprisingly adopted terminology and concepts in interpreting and applying that provision similar to those applicable under Article XX of the General Agreement on Tariffs and Trade (GATT).[43] The WTO has emphasised that, in determining if a certain technical regulation creates an unjustified barrier to global trade (i.e., the policy measure under the TBT Agreement is more trade restrictive than necessary to achieve a legitimate goal), then under Article 2.2, a Panel should consider the following:[44]

(i) the extent of the trade restrictiveness of the measure;
(ii) the contribution made by the policy measure in achieving the legitimate purpose; this is often demonstrated by "the arrangement, architecture, and functioning of the measure, and its subsequent implementation";[45] and
(iii) the nature and severity of the risks at hand and the resultant repercussions of non-fulfilment of the policy goal pursued by the member state through the technical regulation.[46]

In the majority of instances, the study will also include a comparative analysis with alternative measures. Particularly, the complainant country(s) may strive to find a feasible alternative policy that is less trade restrictive, contributes similarly to the underlying legitimate objective, and is practically available.[47] Below, an analysis of FoP labels and their adherence to this article is explored.

A. Legitimate objective

The test for the presence of a legitimate objective is the same under Articles 2.1 and 2.2 of TBT and it has already been established above that the technical regulation of FOP labelling is in furtherance of a legitimate objective of health and consumer awareness. Furthermore, the text of Article 2.2 explicitly stipulates human health as one of the 'legitimate objectives' covered by that provision. The AB has repeatedly acknowledged the significance of public health and confirmed that each member state has the freedom to choose its preferred degree of protection against health hazards. Consequently, countries' rights to control and adopt

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[43] General Agreement on Tariffs and Trade 1994 art. XX, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994).
[44] Appellate Body Report, *Brazil — Measures Affecting Imports of Retreated Tyres*, ¶ 178, WTO Doc. WT/DS332/AB/R (adopted Dec. 17, 2007).
[45] Dispute Settlement Report, *China — Measures Affecting Imports of Automobile Parts*, ¶ 252, WTO Doc. WT/DS342/AB/R (adopted Jan. 12, 2009).
[46] *US — Tuna II*, *supra* note 2, at ¶ 471.
[47] *US — COOL*, *supra* note 3, at ¶ 379.

required measures to preserve human health and prevent deceptive practises cannot be constrained as long as they are not applied in an unfair or unjustifiable manner and are in accordance with TBT provisions.

B. Nexus between the Regulation and the Objective Sought

In the AB Report of *US — COOL*, *US — Clove*, and *US — Tuna II*, it was held that, apart from being in furtherance of a legitimate objective under Article 2.2 of TBT, further analysis must show that "the technical regulation contributes to the stated purpose" and the burden imposed by the measure should be justified by the risk of harm.[48] Therefore, any FOP labelling introduced by India must have a rational nexus with the stated objective of promoting consumer health and awareness.[49]

Holistically speaking, the central cause of obesity is a disproportion between calories consumed and expended, and an increasing intake of foods that have high levels of sugar, sodium, and saturated fats.[50] These labels, depending on the policy measure, may positively affect consumers' ability to make healthy purchasing decisions, and by extension, they may also encourage food industries to modify production methods to reduce unhealthy nutritional content (e.g., fats, sugar, and salt).[51] Hence, any FoP labelling measure that positively affects consumers' ability to make healthy purchasing decisions would have a nexus with the objective of reducing obesity.

However, if the FSSAI were to proceed with the 2019 draft, the strictness of the measure may mislead consumers into believing that obesity and related diseases are caused only by consumption of food containing specific nutritional contents and that there is an exact quantitative knowledge about consumption.[52] For instance, take two breakfast cereals: product A, which contains high amounts of healthy substances like whey protein, oats, and wheat but also contains 'added sugars' exceeding the prescribed thresholds, and product B, which contains minimal nutritional value and high natural sugars but negligible amounts of 'added sugars'. In this case, under the FSSAI Regulations, a 'RED' warning would be imposed on Product A because of the 'added sugar' content, which would mislead consumers

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[48] *US — COOL*, *supra* note 3, at ¶ 347.

[49] Dispute Settlement Report, *Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 164, WTO Doc. WT/DS169/AB/R (adopted Jan. 10, 2001).

[50] *Key Facts: Obesity and Overweight*, WORLD HEALTH ORG. (Sept. 15, 2022), https://www.who.int/news-room/fact-sheets/detail/obesityand-overweight.

[51] Mary Ellen Shoup, *Study: What Kind of Impact does Food Labeling have on Consumption?*, FOOD NAVIGATOR USA (Sept. 15, 2022), https://www.foodnavigator-usa.com/Article/2019/01/14/Study-What-kind-of-impact-does-food-labeling-have-on-consumption#:~:text=and%20healthier%20eating%3F-,%E2%80%8B,unhealthy%20food%20options%20by%2013%25.

[52] FOOD & AGRI. ORG., CODEX NUTRITIONAL LABELLING GUIDELINES (1985).

into believing that A is 'unhealthy'. The manufacturers of product A have no way of indicating the health properties in it, while Product B would be favoured by consumers even though it has high amounts of natural sugars, which, scientifically speaking, are just as unhealthy as added sugars. Essentially, by prescribing straightjacket calorie thresholds, the labelling measure would push consumers away from products with high nutritional values.

This stands in direct breach of the Codex Alimentarius guidelines, and even the WHO cautions against providing straightjacket nutritional thresholds.[53] For instance, WHO only recommends reduction in the intake of sugars in general,[54] and prescribes a maximum limitation of 50 grams of 'any' sugar for an adult; it refrains from providing rigid values that classify food as healthy or unhealthy. It also recommends consuming less than 10% of total energy intake from saturated fats and less than 1% from trans-fat.[55] WHO makes a general recommendation for the intake of a balances diet rich in fruits, vegetables and whole grains, while limiting fats, sodium and sugars. Similarly, the Food and Agricultural Organisation (FAO) also refrains from prescribing a nutrient threshold above which risk of obesity exists.[56]

FoP labelling policy that is based on nutritional benchmarks would also be rigid and unbending under Article 2.2 of the TBT, as there is no scientific evidence that prescribes an identifiable threshold above which the risk of obesity exists and there is no quantitative information about what constitutes healthy food. The regulation does not account for the different kinds of fatty substances that exist; and classifies a single nutrition intake value, without accounting for difference in consumption patterns of adult and children. Although there is a nexus between calorie intake and obesity, there is no scientific evidence that prescribes an identifiable calorie threshold above which the risk of obesity exists, and there is no quantitative information on what constitutes healthy food. Therefore, a FoP measure that prescribes a certain level of calorie intake as 'unhealthy' is not justified. This fact has also been endorsed by the FAO, which has refused to prescribe thresholds for high content since all food is inherently healthy and has instead only classified products into those with no or low content of sugar, fat, and sodium.[57]

Therefore, it would remain advisable to hold multilateral talks or discuss the appropriateness of the technical regulation with other members before enacting it.

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[53] WHO'S RECOMMENDED INTERVENTIONS FOR NCD, *supra* note 40.
[54] WORLD HEALTH ORG., GLOBAL ACTION PLAN FOR THE PREVENTION AND CONTROL OF NONCOMMUNICABLE DISEASES 2013-2020 (2013).
[55] WORLD HEALTH ORG., HEALTHY DIET (2020).
[56] FOOD & AGRI. ORG., FOOD-BASED DIETARY GUIDELINES (1998).
[57] FOOD & AGRI. ORG., CODEX ALIMENTARIUS GUIDELINES FOR USE OF NUTRITION AND HEALTH CLAIMS (1997).

Although such talks would merely amount to a good faith move, the AB in *US — Shrimp* recognised the importance of promoting a multilateral solution on trade-restrictive matters affecting international trade.[58]

In this sense, India would benefit from implementing Australia's HSR system, which is a nutrient-based FoP labelling scheme that evaluates the 'healthiness' of food products on a scale of 0.5 to 5 stars depending on their quantitative proportions of 'risk' and 'positive' nutrients.[59] The rating is therefore established by assessing the dietary quality of the food as a whole. It considers both positive and negative attributes of the food product rather than imposing a warning label based on rigid nutritional benchmarks.

C. More Trade Restrictive than Necessary

The TBT Agreement does not preclude all policies with a "restrictive impact on trade"; rather, it prohibits unnecessary obstacles.[60] In the *Australia — Tobacco* dispute, the Australian government introduced a measure providing for plain packaging on tobacco products (the Tobacco Plain Packaging (TPP) measures), because of which all tobacco manufacturers were barred from printing any front pack logos except for the brand name.[61] In determining the effectiveness of the measure in educating consumers about the hazards of smoking, the AB primarily conducted a "weighing and balancing" of all variables for a holistic analysis, which involves examining qualitative variables in terms of their degree of contribution to the stated objective and the threat of non-fulfilment.[62] Nonetheless, these risks must be effectively and meaningfully considered when balancing relevant factors.

While determining the trade-restrictiveness of a measure under Art. 2.2, the standard set is comparable to the necessity test under the GATT, general exceptions.[63] First, the Panel must consider and balance the regulation's possible trade restrictions, its contribution to the legitimate objective, and the risks posed by its non-fulfilment. Second, the Panel will examine the availability of less trade-restrictive alternatives

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[58] *US — Shrimp*, *supra* note 39, at ¶¶ 41, 115.
[59] Maria Shahid et al., *Uptake of Australia's Health Star Rating System 2014-2019*, NUTRIENTS (June 16, 2020).
[60] *US — Tuna II*, *supra* note 2, at ¶ 319.
[61] Appellate Body Report, *Australia — Certain Measures concerning Trademarks, Geographical Indications and other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, ¶ 7.1724, WTO Doc. WT/DS435/AB/R (adopted June 06, 2020) (the AB upheld the decision of the Panel Report in its decision).
[62] Appellate Body Report, *Australia — Certain Measures concerning Trademarks, Geographical Indications and other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Doc. WT/DS435/AB/R (adopted June 19, 2022).
[63] *US — Tuna II*, *supra* note 2, at ¶ 318.

that could contribute equally to the goal if the action is deemed required.[64] However, it is noteworthy that in contrast to GATT, the burden of proof to establish the violation of Article 2.2 of the TBT agreement lies with the complainant.[65]

In the event that a case is brought before the WTO regarding India's implementation of a FOP labelling measure, the onus is on the complainant country(s) to present arguments and evidence demonstrating that the contested technical regulation causes an unnecessary barrier to international trade. Following US — COOL, two factors must be weighed against each other when ascertaining whether the trade-restrictiveness of a measure is in excess: the barriers caused by the regulation along with the significance of the interests at stake and the contribution made by the measure towards the accomplishment of the stated objective.[66]

1. Degree of Contribution

The TBT Agreement establishes that member nations have the freedom to specify the extent of safeguarding (e.g., of public health) that they believe necessary when seeking legitimate policy goals. In *US — COOL*, the conclusions drawn by the Panel on whether the United States country of origin labelling measure violates Article 2.2 were overturned, primarily because the Panel wrongly centred its decision on whether the technical regulation completely achieved its goal or whether it met some "minimum level of fulfilment" as opposed to ascertaining the "degree of contribution achieved by the measure."[67]

In this regard, it is important to analyse the degree of contribution made by the technical regulation towards the objective. According to *US — Tuna II*, the term 'fulfil' in Article 2.2 of the TBT Agreement does not necessitate the total accomplishment of the pursued objective; rather, it refers to the extent to which the measure aids in the accomplishment of the legitimate goal.[68] Completeness is not necessary for a policy to be implemented. In the Indian context as well, the FoP labelling that the FSSAI introduces need not result in a perfectly healthy population in India; it simply has to contribute to the policy objective. Displaying nutrient information on pre-packaged foods could positively encourage consumer behaviour toward healthier options, resulting in an aggregate enhancement in the quality of the average diet. Therefore, it is clear that FoP labelling initiatives can

[64] *US — COOL*, *supra* note 3, at ¶ 376.
[65] Appellate Body Report, EC — Measures prohibiting the importation and marketing of Seal Products, ¶ 5.169, WT/DS400/AB/R (May 22, 2014).
[66] *US — COOL*, *supra* note 3, at ¶ 461.
[67] *US — COOL*, *supra* note 3, at ¶ 468.
[68] *US — Tuna II*, *supra* note 2, at ¶ 457.

contribute to the aforementioned goals; they target the cause of obesity and warn consumers about packaged foods rich in sugar, fatty substances, and sodium.

In fact, FOP labels have proven to be effective in other countries, such as Chile,[69] by affecting consumption behaviours and enabling manufacturers to reformulate their products by reducing the quantity of harmful components.

Therefore, it cannot be asserted that FOP interpretative labels do not contribute to public health; the only relevant consideration is that the policy is capable of contributing to the healthy food choices of Indian consumers.

2. Trade Restrictiveness

In determining whether a measure is trade restrictive, the focus is the impact on competitive opportunities.[70] If implemented, the FSSAI's FoP regulations is likely to bring about negative trade effects for manufacturers that have to apply the 'RED' labelling. Therefore, *prima facie*, there is a trade restriction that will be created. However, for the purpose of Art. 2.2, if the regulation is in furtherance of a legitimate objective, vis-à-vis human health in the instant matter, what must be ascertained is whether the measure is more trade-restrictive than necessary. For this, the necessity test must be undertaken. The test takes into account the measure's structure, architecture, and design; the goals it seeks to achieve; the degree of scientific ambiguity surrounding the measure; its influence on trade; and the balance between the possible risks and rewards of the contested technical regulation.[71] Essentially, "there should be a degree of proportionality between a measure's trade restrictiveness and the risk of non-fulfilment of its objective."[72]

The Panel in *Australia — Tobacco* hinted that WTO countries have flexibility to undertake experimental policies to ascertain the degree of achievement towards a legitimate objective.[73] Therefore, India could undertake an experiment to ascertain the effectiveness of a labelling policy and accordingly determine the risk of non-

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[69] Ministerio de Salud (Ministry of Health), *Propuesta de Modificación del Reglamento Sanitario de Alimentos, Decreto Supremo No. 977/96 (Proposed Amendment to the Chilean Food Health Regulations, Supreme Decree No. 977/96)*, G/TBT/N/CHL/219 (Aug. 22, 2020).

[70] *US — COOL*, *supra* note 3, at ¶ 7.574.

[71] MICHAEL M. DU, *Standard of Review in TBT Cases*, *in* RESEARCH HANDBOOK ON THE WTO AND TECHNICAL BARRIERS TO TRADE 164, 164 (Tracey Epps & Michael J. Trebilcock eds., 2015).

[72] *US — Tuna II*, *supra* note 2, at ¶ 318.

[73] Panel Report, *Australia — Certain Measures concerning Trademarks, Geographical Indications and other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Doc. WT/DS435/R (adopted Aug. 27, 2018).

fulfilment.[74] Generally, without an effective FoP label, consumers are neither likely to spend time ascertaining the nutrition value of a food product nor calculate it based on its ingredient list. The Chilean FoP policy, which entailed stop sign warning labels for packaged foods beyond a certain calorie threshold, was highly effective in influencing consumer purchasing decisions.[75]

However, in negotiations pertaining to all interpretive labelling and FoP policy regulations, the majority of member states allege inadequate proof of effectiveness exists to "necessitate" the restraints and impact on trade in packaged food products.[76] In any FoP labelling measure, the causal link between specific food products regulated by the FoP measure and obesity is tenuous, and such food products are to be classified as unhealthy on the basis of insufficient data.

The flaw that lingers in all labelling measures that seek to classify packaged food is that they may be read out of context. For instance, the 2019 draft provides for 'RED' warning labels based on the presence of certain amounts of fat and energy. However, people who run marathons have different sugar and carbohydrate requirements than those who do not undertake physical activity. In fact, most FoP measures do not prescribe separate limits for children, teenagers, and adults (or any further classification based on gender), all of whom would have different energy and nutritional requirements.[77] No food is inherently unhealthy; classifying certain packaged food as healthy would tantamount to creating a halo effect. This would only mislead, rather than inform consumers, a fact that makes the measure trade restrictive.[78]

This refers to the creation of the illusion that certain foods are healthier as a result of on-pack nutrition information, whereby consumers consume large quantities of food that is labelled as healthy.[79] Therefore, the trade restrictiveness of the measure is high compared to its contribution.

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[74]Appellate Body Report, *Australia — Certain Measures concerning Trademarks, Geographical Indications and other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, ¶ 7.1724, WTO Doc. WT/DS435/AB/R (adopted June 06, 2020).

[75] Lindsey Smith Taillie et al., *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*, 17(2) PLOS MED. (2020).

[76] WTO, REGULATORY COOPERATION BETWEEN MEMBERS: FOOD LABELLING (2016).

[77] WORLD HEALTH ORG., GUIDELINES ON SODIUM INTAKE FOR ADULTS AND CHILDREN (2012).

[78] *US — COOL*, *supra* note 3, Exhibits US-42 and at ¶ 149.

[79] Beatriz Franco et al., *Influence of Front-of-pack Labelling and Regulated Nutrition Claims on Consumers' Perceptions of Product Healthfulness and Purchase Intentions: A Randomized Controlled Trial*, 149 APPETITE 104629 (June 1, 2020).

The Chilean FoP labelling legislation faced similar criticism that deceptive information would be provided to the consumer, particularly if the mean quantity of the food consumed is frequently much greater or smaller than 100g (ml) or if the product also contained other essential nutrients.[80] In response, WTO member countries recommended the use of a product or category method. Therefore, the HSR system, if implemented in India would satisfy the necessity test and the trade restrictiveness would not outweigh its contribution.

Trade restrictiveness is also linked to the potential availability of alternative measures, which are further explored below.

D. Alternative Measures

In *US — Tuna II*, it was established that alternative measures would be given serious consideration. A complainant cannot maintain a breach of Article 2.2 by merely raising a theoretical alternative that the respondent could have chosen. Panels and/or the AB will evaluate the complainant's claim to ascertain whether "the alternative is readily accessible and less trade restrictive than the contested measure, and evaluate the extent to which the alternative would contribute to the respondent's legitimate goals" (in comparison to the contribution made by the contested measure) while accounting for the risks of non-fulfilment.[81]

Obesity is the result of a complex interplay of habits and lifestyles. One of the alternatives emphasised by most countries and policymakers is the promotion of physical activity. However, such measures are reliant on individual behaviour change, and research has proven that such techniques are unlikely to accomplish their goals. Society-wide changes that reduce the attractiveness of energy-dense foods have proven to be more successful. Additionally, switching to a more active lifestyle is more of a personal choice, and no Government can force lifestyle changes.

In response, there are two alternative measures that can be undertaken:

1. DIP Calculation

A measure that fosters international trade as well as addresses obesity concerns is the Daily Intake Percentage (DIP) calculations. As noted above, coupled with the fact that humans cannot abstain from food consumption, trade policies have to foster moderation. For example, it has been suggested that calculating the daily intake percentage is a less trade-restrictive technique that accomplishes the same

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[80] TBT Committee, *Note by the Secretariat: Minutes of the Meeting of 5-6 November 2014*, ¶ 2.135, G/TBT/M/64 (Feb. 10, 2015).
[81] *US — Tuna II*, *supra* note 2, at ¶ 321.

dietary purpose.[82] DIP is based on suggested intake guidelines and indicates the proportion of intake that a particular packaged product contributes. This is more of an optimal solution to tackling obesity, as there is not enough scientific data to support any nutrient threshold introduced by FOP labelling.

DIP calculations are likely more effective since the nutrition content that a consumer is looking for in a snack is different from what they are looking for in a meal replacement. Classifying food as 'free', 'high', or 'low' content might deprive the consumer of making an informed decision based on their specific needs.[83] As mentioned above, consumers have different nutritional requirements depending on their age, lifestyle, and health conditions. Hence, depriving the consumers of their freedom of choice by imposing labels that are based on strict thresholds will have a detrimental impact on public health.

Through DIP computations, the labels inform consumers regarding the suggested intake guidelines and the contribution of a particular food product towards such a suggested intake. This enables consumers to make dietary choices based on personal needs: consumers seeking healthier low-calorie products can choose foods with low contents of fat, sodium, and sugars, whereas persons in need of higher carbohydrates, such as people who indulge in heavy physical activities or people who are underweight, will accordingly choose products with a higher contribution towards DIP. This would contribute towards tackling obesity in moderation, and the absence of warning labels would make it less trade-restrictive than FOP labelling.

However, a frequent concern is that a majority of buyers expend less than ten seconds choosing a packaged product, which is insufficient for evaluating the nutritional levels and calculating the intake percentage.[84] Time aside, the calculations may be too complex for most consumers to undertake, making them ineffective for most consumers.[85] Further DIP labels also cause a lot of confusion among consumers, as serving sizes are sometimes incorrectly deciphered as full package contents or non-uniform serving sizes and nutrition content make it challenging for consumers to undertake a comparative evaluation of goods within the same category.[86] Therefore, properly interpreting a DIP label is excessively time-

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[82] Sang Dol Kim, *Relationship Between Awareness and Use of Nutrition Labels and Obesity*, 29(11) BIOMEDICAL RES. 2238 (2018).
[83] Tali Sharot et al., *How Unrealistic Optimism is Maintained in the Face of Reality*, 14(11) NATURE NEUROSCIENCE 1475-1479 (2011).
[84] Russel L Rothman et al., *Patient Understanding of Food Labels: The Role of Literacy and Numeracy*, 31(5) AM. J. PREVENTIVE MED. 391 (2006) [hereinafter Rothman et al.].
[85] Giuliana Tórtora et al., *Influence of Nutritional Warnings and Other Label Features on Consumers' Choice: Results from an Eye-tracking Study,* 119 FOOD RES. INT'L 605 (2019).
[86] Rothman et al., *supra* note 84.

consuming and requires a high level of nutrition knowledge and mathematical skills, which the general public does not possess.

2. HSR System

A measure that perfectly balances the effectiveness of interpretative labels and the trade restrictiveness of warning labels is Australia's health star rating system. Positive star signposts not only promote consumers to make healthy food choices but also do not mislead them into believing that food products exceeding a certain calorie level cannot be consumed. The measure lacked effectiveness in Australia because of its non-mandatory nature. Manufactures had the discretion to add the star rating label, and hence the Indian FSSAI can deviate and introduce mandatory health star ratings on all packaged foods.

- **The Australian measure:** The HSR system was implemented in Australia and New Zealand in June 2014, and is jointly funded by Australian and New Zealand governments. It was also introduced through a voluntary agreement between the government, industry, and public health organizations. The HSR is a voluntary FoP labelling system that rates the overall nutritional profile of packaged food and assigns it a rating from ½ a star to 5 stars; the more stars, the healthier the choice.[87] It was designed to help consumers make informed food choices by providing a simple and easily understood score for the overall nutritional quality of packaged foods. The star rating takes into account the levels of energy, saturated fat, total sugar, sodium, and protein, as well as the presence of positive nutrients such as fibre, protein, fruit, vegetable, nut, and legume content.[88] The thresholds for each nutrient were determined based on scientific evidence and dietary guidelines, and were designed to reflect the overall nutritional quality of foods.

- **Implementing HSR in India:** Studies have shown that the HSR system is generally well understood by consumers, and that it can have a positive impact on food choices.[89] The Australian government, during the five-year review of the HSR system, was positive about the uptake of the HSR system since its inception and affirmed its continued implementation, *albeit* as a

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[87] HEALTH STAR RATING WEBSITE, http://www.healthstarrating.gov.au/internet/healthstarrating/publishing.nsf/Content/Home.

[88] *Id.*

[89] Robert Hamlin et al., *The Impact of the Australasian 'Health Star Rating', Front-of-Pack Nutritional Label, on Consumer Choice: A Longitudinal Study*, 10(7) NUTRIENTS. (2018).

voluntary measure.[90] The significant advantage of the HSR policy is that the star rating is determined based on both positive and negative characteristics of a product. This can be best demonstrated through the previous example of breakfast cereal, where Product A contained nutritional value in the form of whey protein and oats. Under the 2019 Regulations with warning FoP labels, Product A would receive a 'RED' warning label due to the sugar contents. However, under the HSR system, Product A would get a more moderate star rating (say, 3 out of 5 stars) if both the nutritional value and high sugar content were weighed and balanced against each other. This communicates a more accurate nutritional analysis to end-consumers instead of outright deeming a product unhealthy despite the presence of healthy substances. Therefore, the HSR system would be more effective in addressing obesity and related concerns. Additionally, since the policy envisages positive signs rather than warning labels, it would also be less trade-restrictive and does not create false (negative) product perception amongst consumers.

- **Making the HSR mandatory:** When the HSR was implemented, only 20% of Australians and 16% of New Zealanders recognised the HSR label unprompted.[91] Research concluded that when participants could not use the HSR label to make a comparison (because one product did not have the label), the participants used less than optimal decision-making strategies, thereby disabling them from making informed decisions due to lack of comparison.[92] It is also plausible that manufacturers will volunteer to implement the label only on their healthier products. This is unfavourable since consumers do not interpret missing information as a negative signal;[93] they are either unresponsive to the lack of labelling or do not presume the worst.[94] Therefore, India should preferably deviate from the Australian system and implement a mandatory HSR labelling. In this regard, it is important to acknowledge that making the system mandatory entails a variety of operational costs for companies in the food industry, including calculating the HSR and printing of labels, which is a relatively high cost for small

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[90] Five Year Review Report Health Star Rating System, MPCONSULTING (May 2019), http://www.healthstarrating.gov.au/internet/healthstarrating/publishing.nsf/Content/D1562AA78A574853CA2581BD00828751/$File/Health-Star-Rating-System-Five-Year-Review-Report.pdf [hereinafter HSR System: Five Year Review Report].

[91] *Id.* at 26.

[92] Catherine L. Anderson & Erin L. O'Connor, *The Effect of the Health Star Rating on Consumer Decision-Making*, 73 FOOD QUALITY & PREFERENCE 215, 223 (2019).

[93] Sunita Sah & Daniel Read, *Research: Missing Product Information Doesn't Bother Consumers as Much as It Should*, HARV. BUS. REV. (Sept. 28, 2017), https://hbr.org/2017/09/research-missing-product-information-doesnt-bother-consumers-as-much-as-it-should.

[94] *See* HSR System: Five Year Review Report, *supra* note 90, at 34 & 37.

businesses. From the government perspective, it also means more work in policy making, enforcement, ensuring compliance, and potential litigation costs. In light of the stakes involved, and given the interest governments should have in improving citizens' health, greater government funding and relaxed timelines for initial implementation is crucial.

VI. CONSONANCE WITH INTERNATIONAL STANDARDS

Technical regulations will not constitute unnecessary trade barriers if they have been formed in conformity with the appropriate international standards. As provided under Article 2.4 of the TBT Agreement, it stipulates that WTO member states have to employ appropriate international standards or parts thereof as the premise for their policy measures unless doing so would be "ineffective or unsuitable for achieving the legitimate objectives sought."[95] Moreover, under Article 2.5, whenever a technical regulation is prepared and implemented in furtherance of a legitimate goal listed in Article 2.2, such as the conservation of human health or safety, and is in conformity with applicable international standards, there shall be a presumption that it does not constitute unnecessary barriers to trade. This is referred to as the "harmonization" doctrine of international law.[96]

The TBT Agreement does not recognise a specific international standardising body (or bodies) as relevant. Rather, the Codex Alimentarius Guidelines (Codex) have been deemed the appropriate international standard for nutritional labelling.

A. Overview of the Codex Guidelines

In addition to mandating labelling standards for goods and the nutritional assertions made by producers on food packages with terms like 'low fat', 'low sugar', etc., the Codex offers guidelines on the configurational needs of foods so that they are safe for consumption. The ultimate aim is to ensure that consumers are aware of the products they purchase and consume.

With regards to FOP labels, Codex prescribes the nutrient thresholds that are published on the back of pre-packaged goods. The objective of the guidelines is to promote consumer health and ensure fair trade practises in the packaged food market. As per the *EC — Sardines*, in order to determine whether an alleged

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[95] Panel Report, *European Communities — Trade Description of Sardines*, ¶¶ 271-290, WTO Doc. WT/DS231/AB/R (adopted Oct. 23, 2002) [hereinafter EC — Sardines].

[96] TBT Committee, *Second Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade*, Annex 2, G/TBT/9 (Nov. 13, 2000).

international standard has been applied according to the principles of WTO, a three-factor analysis is followed:[97]

I. whether the alleged international standard is a "relevant international standard";
II. whether the technical regulation is predicated on such international standards; and
III. lack of effectiveness or unsuitability of the applicable standard for achieving the legitimate purpose.

Codex guidelines have been cited by the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)[98] to be an appropriate international standard and many TBT disputes have relied on Codex guidelines to establish if the regulation is more trade restricting than required. For instance, the AB found that the policy prohibiting imports of particular sardines was in breach of the TBT[99] because it was not supported by the applicable Codex.[100] Therefore, despite its original voluntary nature, the WTO Panels and AB have referred to the Codex in TBT disputes, granting it a pseudo recognition as the relevant international standard.

B. Application of the Codex — FSSAI's Conformity to the International Standard

Section 4 of the Codex Rules on Nutrition Labelling stipulates that all supplemental nutritional data on food labels ought to be voluntary, and Section 3 prohibits labelling that could raise doubts about the safety of similar foods or create and/or manipulate concerns of the consumer.[101]

The 2019 draft, or for that matter any mandatory FoP nutrient labelling measure that prescribes high content warning labels, will likely be in deviation from the Codex guidelines because the Codex does not prescribe any classification of high content labels due to the lack of scientific evidence. Every individual's body composition is unique, and the impact of nutrient components is complex. Therefore, accurate determination of a nutrient level that can be made applicable to all age groups and demographics is not possible. The knowledge we have with respect to this field is changing rapidly, and therefore it would be unjustified to apply nutrient benchmarks

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[97] EC — Sardines, *supra* note 95.
[98] Agreement on the Application of Sanitary and Phytosanitary Measures art 3, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 410.
[99] *Id.*
[100] Dinah L. Shelton, *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, GWU L. STUD. RES. PAPER NO. 2013-50 (2000).
[101] TBT Committee, *Note by the Secretariat: Minutes of the Meeting of 30-31 October 2013*, ¶ 2.125, G/TBT/M/61 (Feb. 5, 2014).

without any scientific basis. The FoP measures would thus be in breach of Section 4 of the Codex, which states that any additional information over and above that prescribed by the relevant international standard should only be optional and not mandatory.[102]

Therefore, if a technical regulation is based on national food or nutrition safety laws or thresholds that are more severe than those stipulated by the applicable international guidelines, such national standards have to be backed by scientific data and other forms of risk assessments. Otherwise, it may be interpreted as a breach of WTO obligations.

In accordance with Article 2.9.2, if there is no applicable international standard or if a WTO member chooses not to observe such an appropriate international standard, and if the draft regulation could have a substantial impact on trade, the WTO member should notify other parties of the same. Therefore, if the FSSAI decides to base the FoP regulation on ICMR guidelines or other domestic standards that deviate from the applicable Codex guidelines, then India would be required to notify other countries before enforcing any interpretative labelling policy.

As a recommendation, the focus of the TBT Agreement on harmonisation and limiting restrictions on trade indicates the necessity for measures-specific guidelines. In situations where scientific evidence indicates that a tougher regulation than the existing international standards is necessary to protect human health, predicated on the precautionary principle, disputes have arisen.[103] This tension is mirrored in the evident ambiguity in TBT discussions regarding the existence of a relevant standard and reflects the need for the creation of international guidelines concerning the use of evidence and interpretive nutrition labelling.

VII. COMPARISON WITH THE CHILEAN FOP LABELLING MEASURE

As a response to obesity and related health problems, Chile introduced a FoP labelling policy with similar warning symbols which had to be used on packaged food products that exceeded the prescribed thresholds of "critical nutrients", namely: sodium, sugar, saturated fat, and energy content.[104] Since the policy establishes mandatory labelling that affects not only domestic production, but also

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[102] TBT Committee, *Note by the Secretariat: Minutes of the Meeting of 30-31 October 2013*, ¶ 2.125, G/TBT/M/61 (Feb. 5, 2014).

[103] Calum G. Turvey & Eliza M. Mojduszka, *The Precautionary Principle and the Law of Unintended Consequences*, 30 FOOD POL'Y 145 (2005).

[104] Ley 20.606, Sobre Composición de Los Alimentos y su Publicidad [Law 20.606 of June 6, 2012 on the Nutritional Composition of Foods and their Advertising], 2012 MINISTRY OF HEALTH, PUBLIC HEALTH UNDERSECRETARIAT (Chile).

imports, it was considered a technical regulation and subject to discussions of members' concerns before the TBT committee.[105]

Based on existing jurisprudence on Chile's FoP policy, an analysis entails consideration of three aspects: the justifiability of the measure, the level of trade restrictiveness, and the comparison with other alternatives. Regarding the first, there is no doubt that reducing obesity and NCDs is a legitimate objective. However, with regards to the degree to which the new Chilean law fulfils that objective, Chile submitted that the proposed labelling is the strategy with the highest impact on consumer purchase decisions, but the country failed to submit scientific evidence of the same before the TBT committee.[106] It is clear that Chile gives more relevance to the means, namely changing consumer behaviour, over the ultimate legitimate objective of preventing obesity, thereby merely assuming a causal relation. Similarly, for trade restrictiveness, the evidence presented by Chile does not allow for a comparison between the policy and other similar alternatives.

More importantly, member countries flagged concerns about violations of the TBT Agreement's harmonisation concept. They pointed out that Chile's food labelling law does not draw its basis from the Codex.[107] In addition to not being addressed in the Codex guidelines, the term "critical nutrient" creates unwarranted fear for consumers.[108]

Chile indicated in a 2014 public consultation study that the usage of 100g and 100ml as reference amounts complies with the Codex Guidelines and provides details on the procedure used to determine the criteria for each "critical nutrient".[109] Using the nutritional value of each item, a database on the nutritional content of foods without the addition of "critical nutrients" was created for solids. For each nutrient, the criteria were determined based on the 90th percentile. For liquid foods, the nutritional makeup of cow's milk in its natural state was used as a guide. The study, however, does not address whether the label generates doubts about the safety of a product or fear in the consumer.

While the Chilean law emphasises the warning levels of the nutritional contents, the Codex uses the 100g/100ml reference section to only reference the positive claims

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[105] TBT Committee, *Note by the Secretariat: Minutes of the Meeting of 4-6 November 2015*, ¶ 2.111, WTO Doc. G/TBT/M/67 (Feb. 3, 2016).
[106] WTO, REGULATORY COOPERATION BETWEEN MEMBERS: FOOD LABELLING (2016).
[107] *Supra* note 105, at ¶ 2.116.
[108] FOOD & AGRI. ORG., CODEX ALIMENTARIUS: INTERNATIONAL FOOD STANDARDS (2018).
[109] FOOD & AGRI. ORG., GENERAL GUIDELINES ON CLAIMS, ¶ 3.5 (1979).

of "low", "very low", and "free."[110] Overall, it is noteworthy that the FSSAI's FoP policy is drafted similar to the Chilean law and these concerns are likely to be brought up again. Therefore, the following recommendations may be considered.

VIII. INDIA'S POSITION — RECOMMENDATIONS ON FOP LABELLING POLICIES

TBT trade concerns on FoP labelling expressed over the past decade highlight the necessity of considering public health nutrition labelling efforts as trade policy actions as well. Nutrition labelling in furtherance of promoting public health has consistently been recognised as an acceptable policy objective in WTO TBT Committee deliberations.

To optimise adherence to the TBT Agreement, India must establish a clear connection between current research, the architecture of the technical regulation, and the legitimate objective that the measure is designed to accomplish. This link must demonstrate that the impact of the FoP label on consumer awareness is significantly larger than just providing nutrition tables on packaged goods; that mandatory FoP labels produce positive outcomes for consumers in terms of product confidence, a reduction of the halo effect, and a better understanding of dietary choices; that such frameworks encourage manufacturers to reformulate their products to be nutritious; and that the regulation will add value to consumers in making educated choices.

In this regard, it is important to take note of the working of the TBT Committee, which offers a framework for WTO members to learn about the ambit and enforcement of other members' regulations and use it as a forum to express trade concerns. Through this mechanism, most countries have alleged that labelling measures stand in violation of Articles 2.1 and 2.2.

With regards to the FSSAI's 2019 draft, which contains 'RED' warning signs, India may face issues from other WTO member states over the strictness and trade restrictiveness of the measure. The Chilean FoP policy was similarly structured and was critically questioned within the TBT Committee. The 'RED' warning may excessively deter consumers from purchasing certain products by misleading them into forming a false perception that is not scientifically justified.

Based on the analysis made, it can be said that if India followed a mandatory HSR labelling measure, it is likely to be found TBT compliant. It would neither be discriminatory under Article 2.1 nor constitute an "unnecessary obstacle to international trade" contrary to Article 2.2. The measure may restrict trade to a

[110] FOOD & AGRI. ORG., GUIDELINES FOR USE OF NUTRITION AND HEALTH CLAIMS (1997).

minimal degree, i.e., imports would need to be relabelled to comply with the FOP requirements, but that would be the case with any labelling measure. At the same time, studies regarding the degree to which consumers use the information on nutrition labels suggest that such information is an important (but not decisive) factor in food purchasing decisions. In the absence of a FoP rating on food packages, consumers would not have readily available accurate information that would enable them to make purchasing decisions and therefore might not be able to express their preferences for particular types of food (for example, low fat, low salt, or high fibre). These preferences may be significant not merely for reasons of individual taste but as a matter of health, particularly for consumers suffering from food allergies or diseases such as diabetes.

As mentioned above, the HSR framework is the outcome of both positive and negative attributes of the food product, thereby achieving a two-fold objective: first, as opposed to warning labels, it does not categorise food as unhealthy based on straightjacket thresholds; and second, it aids consumers in making healthy dietary choices. It is difficult to imagine a practically available, less trade-restrictive substitute measure that would as effectively inform consumers about the nutritional content of individual food products.

However, an unavoidable potential challenge to any nutritional labelling introduced by India would be the scientific rationale underlying the choice of variables considered (the balancing of good and harmful components) and the parameters utilised by the software to establish the star rating. Currently, the algorithms are based on ICMR dietary guidelines; India should consider adopting the Codex Alimentarius thresholds to avoid TBT challenges. Alternatively, India may adopt domestic scientific guidelines after notifying the TBT committee and member states about them and answering any concerns that may be raised.

IX. CONCLUSION

The global prevalence of obesity and related health concerns is increasing. Governments across the globe are implementing FoP labelling as an alternative public health approach. Product labelling regulations of WTO Members create a substantial problem for WTO law, mandating a delicate balance between the sovereign right of member states to introduce regulations to protect their consumers' right to receive sufficient information about the goods that they purchase and ensuring that product labelling requirements do not cause discrimination against or between imported products or otherwise restrict trade.

A labelling strategy that merely informs customers of the inherent attributes of a product for a valid purpose is unlikely to be contentious, especially if it makes

distinctions that correlate to physical differences or established consumer preferences. However, a labelling policy that overtly or tacitly distinguishes between domestic and imported items is more likely to be viewed as both discriminatory and trade-restrictive, perhaps in violation of TBT Articles 2.1 and 2.2.

Whether or not a measure is discriminatory or trade-restrictive, its likelihood of enduring a WTO challenge will be vastly enhanced by the accumulation of evidence recognising the reality of the risk it is designed to address (such as the negative health effects of unhealthy dietary habits) and the contribution of the particular labelling measure to minimising or removing that risk (for instance, the relationship between the introduction of written or visual cautions on packaged goods and a decrease in the intake of unhealthy food). Such data may be adequate to support a labelling regulation that seeks to promote or discourage the purchase, usage, or consumption of selected food products for a legitimate aim in addition to informing consumers.

Despite the WTO's mandate to lower trade barriers in order to achieve more general welfare objectives like raising living standards, recent TBT jurisprudence has established that the WTO dispute settlement system can lend consideration to member states' sincere non-trade objectives when they are advanced through non-discriminatory technical regulations, including product labelling requirements.[111]

[111] Marrakesh Agreement Establishing the World Trade Organization, General Interpretative Note to Annex 1A, Apr. 15, 1994, 1867 U.N.T.S 154.