REGULATING A HEALTHY LIFESTYLE:

The Agreement on Technical Barriers to Trade and health warning labels on tobacco, alcohol and food products.

WAIANA MULLIGAN

A dissertation submitted in partial fulfilment of the requirements for the degree of Bachelor of Laws (Honours) at the University of Otago, Dunedin, New Zealand.

October 2016.

ACKNOWLEDGEMENTS

To Dr Tracey Epps, for sparking my interest in international trade law; for agreeing to long-distance supervision; and for your patience, guidance, commitment and mentorship.

To my parents, Louise and Wayne, for instilling in me the confidence in myself and my capabilities and for your limitless love and support.

To my brother, Kahu, for nearly 22 years of unshakeable friendship.

To my Wellington friends, for always giving me something to look forward to.

Special mentions to:

Lexi Mills, for your constant availability, your willingness to read everything I write, and your ability to always make me smile – you are a good friend.

Isobelle Thomson, for your infinite wisdom, honesty and openness, and for being my go-to every time.

Laura Tangaere, for your endless tolerance and understanding and your dedication to our friendship no matter what the distance.

To my Dunedin friends, for making the past few years full of rich memories and giving me something to miss when I leave.

Special mentions to:

Amy Corkery, for helping me balance staying focussed with ample breaks for adventure planning.

Second-year squad, for adopting me, for all of your friendships, individually and collectively – I could not have picked a better group of people to go through law school with.

The Tutors' Office crew, for the encouraging environment, the friendships made, and the mutual love of free function food.

To the University of Otago Faculty of Law, for the opportunity to learn from inspiring people, for the sense of collegiality, for allowing me to flourish.

Thank you all.

TABLE OF CONTENTS

TABLE OF WTO CASES

Short Title	Full Dispute Title
Brazil – Retreaded Tyres	*Brazil – Measures Affecting Imports of Retreaded Tyres*
China – Publications	*China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*
EC – Asbestos	*European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*
EC – Sardines	*European Communities – Trade Description of Sardines*
US – COOL	*United States – Certain Country of Origin Labelling (COOL) Requirements*
US – Clove Cigarettes	*United States – Measures Affecting the Production and Sale of Clove Cigarettes*
US – Tuna (Mexico)	*United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*

LIST OF ABBREVIATIONS

FCTC	Framework Convention on Tobacco Control
FOP	Front-of-pack
GAP	Global Action Plan
GATT	General Agreement on Tariffs and Trade
MFN	Most Favoured Nation
NCD	Noncommunicable Disease
SPS	Sanitary and Phytosanitary Measures
TBT	Technical Barriers to Trade
UNGA	United Nations General Assembly
WHO	World Health Organization
WTO	World Trade Organization

INTRODUCTION

A tension has emerged between the international public health community and the international trade community. The former, largely directed by the World Health Organization (WHO), advocates for a greater implementation of policy measures to address the growing epidemic of noncommunicable diseases (NCDs).[1] The latter, largely directed by the World Trade Organization (WTO), advocates for increased trade-liberalisation.[2] Since 1994, the sophistication and scope of the WTO's trade-liberalisation agenda has expanded, with significant focus now on non-tariff measures.[3] One particular expansion into addressing the trade issues caused by non-tariff measures is the Agreement on Technical Barriers to Trade (the TBT Agreement).[4]

The 21st century has seen an escalation of this tension, as the international public health community promotes the adoption of health warning labels on tobacco, alcohol and unhealthy food products which contribute to the prevalence of NCDs. Such measures raise a red flag in the international trade community as to whether such measures constitute the creation of technical barriers to trade, thereby violating obligations under the TBT Agreement. It is at the forum for raising and debating such compliance concerns that this tension really materialises. The Committee on Technical Barriers to Trade has in recent years hosted numerous discussions between Members as to whether such measures comply with the TBT Agreement.

This tense interface between public health and trade highlights the significance of the issues at stake here. First, from the health perspective, the severity of the burden posed by NCDs and the complex response that is required, and second, the economic significance of trade. The purpose of this piece is to explore and attempt to reconcile that tension in the specific context of whether health warning labels create unnecessary obstacles to trade, thereby violating Article 2.2 of the TBT Agreement. This will occur in four phases.

---

[1] NCDs are defined as non-infectious chronic illnesses; see: Noncommunicable diseases: fact sheet" (January 2015) World Health Organization <www.who.int>.

[2] Trade-liberalisation is defined as the removal or reduction of restrictions or barriers on the free exchange of goods between nations; see: "Trade liberalization" Investopedia <www.investopedia.com>.

[3] Non-tariff measures are defined as barriers to trade that do not take the form of at-the-border taxes, and include *inter alia* quotas, import licensing systems, sanitary regulations, prohibitions; see: "Glossary" World Trade Organization <www.wto.org>.

[4] Agreement on Technical Barriers to Trade (World Trade Organization [WTO]) 1868 UNTS 120 (signed 15 April 1994, entered into force 1 January 1995).

Chapter I will introduce the health perspective, highlighting the burden of NCDs, the approaches recommended by the international public health community, and the specific labelling measures adopted as a result.

Chapter II will introduce the trade perspective, exploring the history of the modern WTO and looking at the purpose of the TBT Agreement.

Chapter III will critically analyse the elements of Article 2.2 of the TBT Agreement, and touch upon its interaction with international standards.

Chapter IV will apply the analysis of chapter III to the specific labelling measures introduced in chapter I to determine whether such measures constitute unnecessary obstacles to trade.

The ultimate aim of this piece is to diffuse the current tension that exists by advocating that it is possible to reconcile both the health and trade agendas at play. In doing so, this piece aims to provide a persuasive argument that the promotion of public health interests need not undermine the objectives, nor the authority, of the international trade system.

CHAPTER I – THE HEALTH PERSPECTIVE

I NONCOMMUNICABLE DISEASES

In 2013 the WHO released a *Global Action Plan (GAP)* to address the critical public health issue of NCDs,[5] which are responsible for an estimated 36 million[6] deaths annually.[7] Statistics have shown that 84.5% of those deaths can be attributed to four main NCDs, namely cardiovascular diseases,[8] cancers,[9] chronic respiratory diseases,[10] and diabetes.[11] [12] The importance of the issue is revealed when one considers that at least 14 million of these deaths are classified as premature.[13] This indicates that a substantial proportion of these deaths and the health consequences prior to them are preventable or at least capable of manageable reduction. This sentiment has been echoed through the commitments of the international public health community to reduce the burden of this health epidemic.

In September 2011, the United Nations General Assembly (UNGA) issued a Political Declaration which outlines the understanding that NCDs pose a threat to development with a particular emphasis on the social and economic consequences of these diseases.[14] The Declaration reaffirmed that all people have the right to the highest attainable standard of health,[15] and that in order to realise the full extent of that right, there is an "urgent need for greater measures at the global, regional and national levels to prevent and control [NCDs]".[16] The Declaration also identified that the primary responsibility lies with governments to respond to the challenges posed by NCDs.[17]

---

[5] NCD fact sheet, above n 1.

[6] This constitutes 63% of annual deaths.

[7] World Health Organization *Global Action Plan for the Prevention and Control of Non-Communicable Diseases 2013-2020* (WHO Press, 2013) at 7.

[8] Accounting for 48% of the annual deaths caused by NCDs.

[9] Accounting for 21% of the annual deaths caused by NCDs.

[10] Accounting for 12% of the annual deaths caused by NCDs.

[11] Accounting for 3.5% of the annual deaths caused by NCDs.

[12] *Global Action Plan* above n 7, at 7.

[13] At 1; this is defined as between the ages of 30 and 70.

[14] *Political Declaration of the High-level Meeting of the General Assembly on the Prevention and Control of Non-Communicable Diseases* GA Res 66/2, A/Res/66/2 (2012) at [1].

[15] At [5].

[16] At [6].

[17] At [3].

The 2013 *GAP* sought to capitalise on UNGA's Declaration by providing a framework of objectives and targets to address this serious public health issue. The goal of the *GAP* is:[18]

> To reduce the preventable and avoidable burden of morbidity, mortality and disability due to [NCDs] by means of multisectoral collaboration and cooperation at national, regional and global levels, so that populations reach the highest attainable standards of health …

The WHO has quantified this goal as "a 25% relative reduction in risk of premature mortality from cardiovascular diseases, cancer, diabetes, or chronic respiratory diseases".[19] This is a voluntary global target and is intended to be supported and advanced by six objectives.[20] For present purposes, the focus will be on the third objective: "[t]o reduce modifiable risk factors for [NCDs] and underlying social determinants through creation of health-promoting environments" (referred to from here as the 'third objective').[21]

II RISK FACTORS

The international public health community has accepted that four common risk factors contribute to the severity and prevalence of NCDs: tobacco use, harmful use of alcohol, an unhealthy diet and a lack of physical activity.[22] In reference to the third objective, the *GAP* outlines possible policy options to reduce the consequences of these modifiable risk factors. This paper will explore issues relating to the three risk factors that involve tradeable products,

---

[18] *Global Action Plan*, above n 7, at 3.

[19] At 5.

[20] At 4. The six objectives are:

(1) To raise the priority accorded to the prevention and control of noncommunicable diseases in global, regional and national agendas and internationally agreed development goals, through strengthened international cooperation and advocacy.

(2) To strengthen national capacity, leadership, governance, multisectoral action and partnerships to accelerate country response for the prevention and control of noncommunicable diseases.

(3) To reduce modifiable risk factors for noncommunicable diseases and underlying social determinants through creation of health-promoting environments.

(4) To strengthen and orient health systems to address the prevention and control of noncommunicable diseases and the underlying social determinants through people-centred primary health care and universal health coverage.

(5) To promote and support national capacity for high-quality research and development for the prevention and control of noncommunicable diseases.

(6) To monitor the trends and determinants of noncommunicable diseases and evaluate progress in their prevention and control.

[21] At 4.

[22] *UN General Assembly Political Declaration*, above n 14, at [20].

namely, tobacco, alcohol, and diet. The next section outlines the health issues and the advice of international public health community for each of these risk factors.

A TOBACCO

"Tobacco is the only legal product that, when used as intended, will kill you."[23] This provides a harrowing reality check on tobacco consumption. Furthermore, the WHO estimates that at least 1 billion people worldwide smoke tobacco products, and also that tobacco kills approximately 50% of its users.[24]

In 2005, the WHO concluded its first treaty, the Framework Convention on Tobacco Control (FCTC).[25] The foreword frames the FCTC as "an evidence-based treaty… [for] developing a regulatory strategy to address addictive substances".[26] The first recital of the preamble to the treaty affirms that "[t]he Parties to [the] Convention [are] *determined* to give priority to their right to protect public health"[27] whilst the foreword describes the purpose of the FCTC as the reaffirmation of the "right of all people to the highest standard of health",[28] and that signatories "will show a political commitment not to undermine [its] objectives".[29]

Article 3 outlines the objective of the FCTC as:[30]

> … to protect present and future generations from the devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke by providing a framework for tobacco control measures to be implemented by the Parties at the national, regional and international levels in order to reduce continually and substantially the prevalence of tobacco use and exposure to tobacco smoke.

---

[23] Ed Yong "Will we ever have safe cigarettes?" BBC (online ed, London, 16 November 2012).

[24] "Tobacco: fact sheet" (June 2016) World Health Organization <www.who.int>.

[25] WHO Framework Convention on Tobacco Control 2302 UNTS 167 (opened for signature 21 May 2003, entered into force 27 February 2005).

[26] At v.

[27] Preamble.

[28] At v.

[29] At vi.

[30] Article 3.

The FCTC seeks to provide a comprehensive response to a multidimensional issue with diverse ramifications. As noted in the foreword, the key element of its model is the focus on demand restriction as well as issues surrounding supply.[31] The supply side is addressed in Articles 15-17 and includes guidance on illicit trade[32] and sale to minors.[33] The demand side is addressed in Articles 6-14 and addresses taxation measures[34] and non-price measures[35] including exposure to tobacco smoke[36] and content regulation[37].

Article 4 outlines seven guiding principles in the implementation of the FCTC in order to achieve its objectives.[38] The first two principles are of most relevance to the present discussion. First, to ensure that "[e]very person … [is] informed of the health consequences, addictive nature and mortal threat posed by tobacco consumption and exposure to tobacco smoke".[39] Second, that implementation should be advanced so as to "protect all persons from exposure to tobacco smoke"[40] and in a holistic way that seeks to "prevent the initiation, … promote and support cessation, and to decrease the consumption of tobacco products".[41]

Paragraph [8] of the 2011 UNGA Political Declaration "notes with appreciation" the FCTC,[42] and actively encourages states to accede to the Convention, and to "accelerate [its] implementation" as a means to reduce consumption of tobacco thereby decreasing the health burden of NCDs on individuals and national health systems.[43] The *GAP* builds upon this encouragement by providing policy options that states can voluntarily adopt to implement effective tobacco control.[44] The *GAP* sets the goal of a 30% relative reduction of tobacco use and recommends the full implementation of the FCTC.[45]

---

[31] At v.

[32] Article 15.

[33] Article 16.

[34] Article 6.

[35] Article 7.

[36] Article 8.

[37] Article 9.

[38] Article 4.

[39] Article 4.1.

[40] Article 4.2(a).

[41] Article 4.2(b).

[42] *UN General Assembly Political Declaration*, above n 14, at [8].

[43] At [43(c)].

[44] See Part IV of this chapter for discussion on the limitations of this voluntary adoption scheme and the legal force of the Global Action Plan, at 17-19.

[45] *Global Action Plan*, above n 7, at 30 at [36].

One specific provision endorsed for implementation by the *GAP* is Article 11.[46] Article 11.1 addresses the packaging and labelling of tobacco products and prescribes two key requirements designed to warn consumers of the dangers of tobacco use.[47] The first requirement stipulates some criteria for the effective use of health warning labels.[48] In the *FCTC Implementation Guidelines*,[49] the WHO points to empirical evidence that the effectiveness of health warnings increases with prominence.[50] The second requirement obliges Parties to implement measures which ensure that:[51]

> tobacco product packaging and labelling do not promote a tobacco product by any means *that are false, misleading, deceptive or likely to create an erroneous impression about its characteristics, health effects, hazards or emissions*, including any term, descriptor, *trademark*, figurative or *any other sign* that directly or indirectly creates the false impression that a particular tobacco product is less harmful than other tobacco products. (Emphasis added).

Taking these two requirements together, the *Implementation Guidelines* recommend to Parties the adoption of "plain packaging".[52] Such measures seek to restrict or prohibit the use of logos, colours and brand images, instead requiring brand and product names to be displayed in a generic font, and the packaging to be of a prescribed generic colour.[53]

---

[46] At 30.

[47] At 30.

[48] FCTC, above n 25, art 11.1(b); warnings and messages:

(i) shall be approved by the competent national authority;

(ii) shall be rotating;

(iii) shall be large, clear, visible and legible;

(iv) should be 50% or more of the principal display areas but shall be no less than 30% of the principal display areas; and

(v) may be in the form of or include pictures or pictograms.

[49] World Health Organization *WHO Framework Convention on Tobacco Control: Guidelines for Implementation, 2013* (WHO Press, 2013).

[50] At 56; the Guidelines state that "larger warnings with pictures are *more likely to be noticed, better communicate health risks, provoke a greater emotional response and increase the motivation of tobacco users to quit and to decrease their tobacco consumption*. Larger picture warnings are also more likely to retain their effectiveness over time and are particularly effective in communicating health effects to low-literacy populations, children and young people." (Emphasis added).

[51] FCTC, above n 25, at art 11.1(a).

[52] *FCTC Implementation Guidelines*, above n 49, at 63.

[53] At 63.

Article 11 does not explicitly require Parties to adopt plain packaging; however, a reading of Article 11.1(a) provides a plausible rationale that those features constitute trademarks or any other sign that promote tobacco products in a manner which is likely to create an erroneous impression. It is suggested that plain packaging can be utilised as a tool to address these design techniques which may imply that certain products have different qualities, exposing consumers to a possible interpretation that the health effects may vary between brands.[54]

A second justification for plain packaging may devolve from Article 11.1(b) in that the standardisation may "increase the noticeability and effectiveness of health warnings and messages, [and] prevent the package from detracting attention from them".[55] It is therefore possible, without assessing the strength of that possibility, to interpret Article 11.1 as implicitly recommending the implementation of plain packaging measures as a means of better advancing the objectives of the overall clause.

This decade has seen increased attention being drawn to plain packaging as several states consider adopting these measures.[56] In 2011, Australia enacted legislation[57] and regulations[58] which prescribe a plain packaging design for all tobacco products.[59] In the five years following, the Australian government has been subjected to various legal challenges.[60] The most significant challenge for present purposes is the challenge that was brought in the WTO by Cuba[61], Indonesia,[62] Dominican Republic,[63] Ukraine,[64] and Honduras,[65] claiming that the

[54] At 63.

[55] At 63; World Health Organization *Plain Packaging of Tobacco Products: Evidence, Design and Implementation* (WHO Press, 2016) at 8.

[56] For example, New Zealand passed legislation authorising the creation of regulations to implement plain packaging in September 2016: see Smoke-free Environments (Tobacco Standardised Packaging) Amendment Act 2016.

[57] Tobacco Plain Packaging Act 2011 (Cth).

[58] Tobacco Plain Packaging Regulations 2011 (Cth).

[59] See Appendix 1 for the design of Australia's cigarette plain packaging.

[60] For more information, see: "Australia: Challenging Legislation" (16 June 2016) Tobacco Tactics <www.tobaccotactics.org>.

[61] *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging* WT/DS458/1, G/L/1026, IP/D/33, G/TBT/D/43, 7 May 2013 (Request for Consultations by Cuba).

[62] *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging* WT/DS467/1, G/L/1041, IP/D/34, G/TBT/D/46, 25 September 2013 (Request for Consultations by Indonesia).

[63] *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging* WT/DS441/1, G/L/992, IP/D/32, G/TBT/D/41, 23 July 2012 (Request for Consultations by the Dominican Republic).

[64] *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging* WT/DS434/1, IP/D/30, G/TBT/D/39, G/L/985,

provisions violate Australia's obligations under three international trade Agreements including the TBT Agreement.[66] A panel was established in May 2014,[67] with the Report on its findings expected in 2017.[68] This particular challenge has garnered substantial attention, with 30 states and the European Union adjoining as third parties with a vested interest in the outcome.[69]

The response by the tobacco industry has drawn attention to the trade and investment issues related to plain packaging measures being implemented to enhance the effectiveness of health warnings. One substantial consequence of these challenges has been a chilling effect around the uptake of plain packaging, as other nations await the outcomes.[70]

Part II of Chapter IV will assess Australia's compliance with its obligations under the TBT Agreement as to whether plain packaging measures aimed at enhancing health warning labels are compliant with international trade rules.

---

15 March 2012 (Request for Consultations by Ukraine); however, Ukraine suspended their challenge; see: *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging* WT/DS434/16, 3 June 2015 (Suspension of Proceedings by Ukraine).

[65] *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging* WT/DS435/1, IP/D/31, G/TBT/D/40, G/L/986, 10 April 2012 (Request for Consultations by Honduras).

[66] TBT Agreement, above n 4.

[67] *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging* WT/DS441/18, 14 October 2014 (Establishment and Composing of Panel).

[68] *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging* WT/DS458/19, 30 June 2016 (Delay in Final Report).

[69] *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging* WT/DS435/18/Rev.1, 12 June 2015 (Constitution of the Panel Established at the Request of Honduras) at [5].

[70] For example, in New Zealand, Associate Minister for Health said:

> "In making this decision, the Government acknowledges that it will need to manage some legal risks. As we have seen in Australia, there is a possibility of legal proceedings. To manage this, Cabinet has decided that the Government will wait and see what happens with Australia's legal cases, making it a possibility that if necessary, enactment of New Zealand legislation and/or regulations could be delayed pending those outcomes."

See: Tariana Turia "Government moves forward with plain packaging of tobacco products" (press release, 19 February 2013).

B ALCOHOL

Policies aimed at reducing the harmful use of alcohol have traditionally not received the same degree of normalisation as tobacco policy[71]; however, the international public health community has attempted to pivot towards addressing the serious health issues posed by alcohol.[72] It is estimated that alcohol contributed to 3.3 million deaths in 2012,[73] with 66.1% of those deaths being attributable to NCDs.[74] Furthermore, 5.1% of the global burden of disease can be attributable to alcohol consumption,[75] of which 62.3% derives from NCDs.[76] Research has emphasised that the effects of harmful use of alcohol extends beyond these health burdens into serious socio-economic consequences for the individual and society overall.[77] It is also accepted that the cause of harmful alcohol use is subject to a variety of environmental factors as well as two key behavioural factors: the volume consumed and the pattern of drinking.[78] These particular behaviours must be addressed in order to reduce the substantial burden of alcohol on the individual and society at large.[79]

The WHO has promoted the adoption of policies aimed to reduce harmful use of alcohol through resolutions of its decision-making Assembly.[80] In 2010, the WHO produced a *Global Strategy* with the view to improve "health and social outcomes for individuals, families and communities" through the reduction of "morbidity and mortality due to harmful use of alcohol".[81] The strategy has been endorsed by the UNGA, encouraging member states to implement the comprehensive measures it outlined.[82] The *GAP* further builds upon the 2010 Strategy, recommending ten multisectoral policy options for states to adopt.[83]

---

[71] World Health Organization *Global Status Report on Alcohol and Health, 2014* (WHO Press, 2014) at 2.

[72] At 2-3.

[73] At vii and 46.

[74] At 48 fig 15.

[75] At vii and 50.

[76] At 50 fig 18.

[77] At 2.

[78] At 4.

[79] At 5, 11-12 and 16-18.

[80] *Public-Health Problems Caused by Harmful Use of Alcohol* WHA58.26 (2005); *Strategies to Reduce the Harmful Use of Alcohol* WHA61.4 (2008); *Global Strategy to Reduce the Harmful Use of Alcohol* WHA63.13 (2010).

[81] World Health Organization *Global Strategy to Reduce the Harmful Use of Alcohol* (WHO Press, 2010) at [8].

[82] *UN General Assembly Political Declaration*, above n 14, at [43(e)].

[83] *Global Action Plan*, above n 7, at 34.

Policy target area 8 is of particular importance for present purposes, as it seeks to "reduc[e] the negative consequences of drinking and alcohol intoxication".[84] The objective of this policy area is to reduce associated harms without addressing the underlying consumption but in a manner that does not appear to promote drinking behaviour.[85] There are six suggested policy options, with five aimed at managing the drinking environment including reducing the strength of alcohol,[86] and around responsible serving of beverages.[87] The sixth policy option is to "provid[e] consumer information about, and labelling alcoholic beverages to indicate, the harm related to alcohol."[88]

The WHO issued a *Status Report* in 2014, which provided an update on the implementation of these policy proposals.[89] The uptake of policies mandating health labels on containers has been low and the policies adopted often mild. Only 31 of 167 reporting countries require mandatory health and safety labelling on containers,[90] the majority of which consist exclusively of messages to the effect of "[e]xcessive consumption of alcohol is harmful to health".[91] Compared to the aggressive agenda adopted in response to tobacco, the alcohol health warnings, whilst accurate, appear inadequate in light of the risks identified.

In 2010, Thailand notified the TBT Committee of its intention to amend its alcohol control regulations to prescribe requirements for the labelling and packaging of alcoholic beverages.[92] The intention was to introduce pictorial health warnings similar to contemporary tobacco warnings.[93] Thailand proposed six labels[94] as well as mandatory dimensions.[95] The proposed regulations received expressions of concern from trading

---

[84] WHO *Alcohol Global Strategy*, above n 90, at 17.

[85] At 17.

[86] At [36(d)].

[87] At [36(c)].

[88] At [36(f)].

[89] WHO *Alcohol Global Status Report*, above n 71.

[90] At 82 fig 41.

[91] At 82.

[92] *Thailand – Notification* G/TBT/N/THA/332, 21 January 2010.

[93] At [6.3].

[94] See Appendix 2 for the design of the six Thai pictorial warnings.

[95] Sukanya Sirikeratikul *Global Agricultural Information Network Report: Thailand – Draft Regulation on Alcohol Graphic Warning Labelling* (Unitedss Department of Agriculture, TH0015, January 2010) at 3; the specified dimensions are:

(1) ≤50% of the space of each of the sides with the maximum space (or the front and the back) for a cuboid shape; or,

(2) ≤30% of the total surface area for a cylindrical shape; or,

partners, claiming that the proposed measures were trade-restrictive and inconsistent with Thailand's obligations under the TBT Agreement.[96] Ultimately, Thailand did not implement the warning labels when effecting their regulations, however they are continuing to undertake consultations on future implementation to address the health issue posed by harmful alcohol use.[97]

Part III of Chapter IV will assess Thailand's compliance with its obligations under the TBT Agreement in light of its proposed health warning labels as a measure aimed to reduce the burden of NCDs.

C UNHEALTHY DIET

Creating and implementing effective policy around diets has an additional complexity to tobacco and alcohol due to the nature of the risk factor being regulated. Humans cannot abstain from food consumption, and therefore the entire policy has to be based on fostering moderation.[98] Furthermore, diets are inherently complex, they have a number of energy providing sources and compositional factors to consider and balance. Dietary variation is based on a number of factors, and the impact of wider socio-economic and environmental factors may be less nuanced than with alcohol and tobacco consumption.[99]

The importance of scientific understanding is fundamental to shaping policy related to promoting healthy diets.[100] The WHO in its *Global Strategy on Diet, Physical Activity and Health* gave recognition to the role nutrition plays in the total burden of NCDs and suggested four key dietary recommendations for policy development:[101]

---

(3) ≤30% of the total surface area for any other shape.

[96] *Thailand – Draft Notification of the Alcoholic Beverages Control, RE: Rules, Procedures and Conditions for Labels of Alcoholic Beverages* G/TBT/W/408, 11 May 2015 (Statement by Mexico to the Committee on Technical Barriers to Trade); *Thailand – Draft Notification of the Alcoholic Beverages Control, RE: Rules, Procedures and Conditions for Labels of Alcoholic Beverages* G/TBT/W/431, 19 January 2016 (Statement by Mexico to the Committee on Technical Barriers to Trade).

[97] *Thailand – Draft Notification of the Alcoholic Beverages Control Rules, Procedures and Conditions for Labels of Alcoholic Beverages* G/TBT/W/422, 24 August 2015 (Statement by Thailand to the Committee on Technical Barriers to Trade).

[98] In contrast, it is best practice to promote total abstinence of tobacco consumption, and it is possible to promote abstinence of alcohol consumption, even though the concern is about harmful use, and therefore moderation policies are also appropriate.

[99] World Health Organization *Diet, Nutrition and the Prevention of Chronic Disease* (WHO Press, WHO Technical Report Series 916, 2003) at 30.

[100] World Health Organization *Interventions on Diet and Physical Activity*: *What Works – Summary Report* (WHO Press, 2009) at 3.

[101] World Health Organization *Global Strategy on Diet Physical Activity and Health* (WHO Press, 2004) at [22].

(1) Achieve energy balance …;

(2) Limit energy intake from total fats and shift fat consumption away from saturated fats …;

(3) Limit the intake of free sugars[102]; and

(4) Limit salt (sodium) consumption ….

The first recommendation focuses on calorie consumption and involves a dimension of increasing physical activity as well as a reduction in energy-dense and micronutrient-poor foods that are associated with weight gain.[103] The second recommendation promotes the reduction of fats, in particular saturated fats.[104] The third recommendation recognises that high sugar consumption has a negative impact on the nutrient quality of a diet.[105] The fourth recommendation recognises the role high levels of sodium consumption has on the development of NCDs.[106]

The UNGA Political Declaration has endorsed the *Global Strategy on Diet, Physical Activity and Health*[107] which outlines policy options that states could implement to help achieve these objectives.[108] The WHO has elaborated upon this further in its *GAP*, recommending the development of nutritional guidelines,[109] changing the composition of food,[110] and providing accurate information to consumers.[111] The focus of providing consumer information is

[102] "Free sugar" is is any sugar that is added to foods by the manufacturer, plus that naturally present in honey, syrups, and fruit juices. It does not include sugar naturally present in milk or whole fruit and vegetables. See: Edward Malnick "New sugar advice: what does it all mean?" The Telegraph (online ed, London, 6 March 2014).

[103] WHO *Diet, Nutrition and the Prevention of Chronic Disease*, above n 99, at 63 table 7.

[104] At 56 table 6; the WHO and FAO have recommended fats constitute <30% of total nutrient intake, and saturated fats constituting <10%.

[105] At 56 table 6; see also: World Health Organization *Guideline: Sugar Intake for Adults and Children* (WHO Press, 2015) at 16; the WHO and FAO have recommended that sugars should constitute <10% of total nutrient intake, and even as low as <5%.

[106] At 56 table 6; see also: World Health Organization *Guideline: Sodium Intake for Adults and Children* (WHO Press, 2014); *Global Action Plan*, above n 7, at 31; the WHO recommends a relative reduction of sodium intake by 30%, constituting consumption of <2g per day.

[107] *UN General Assembly Political Declaration*, above n 14, at [43(d)].

[108] WHO *Global Strategy on Diet Physical Activity and Health*, above n 101, at [35]-[48].

[109] At [39(2)].

[110] *UN General Assembly Political Declaration*, above n 14, at [44(b)].

[111] WHO *Global Strategy on Diet Physical Activity and Health*, above n 101, at [40(4)].

predominantly centred on mass media promotions of healthy lifestyles[112] and education programmes to enable informed decision making.[113]

Whilst the *Global Strategy* has suggested nutritional labelling on pre-packaged food,[114] emphasis on its effectiveness has generally not been strongly advanced by the WHO.[115] The traditional approach to labelling has focused on compliance with international standards[116] under the *Codex Alimentarius Guidelines*.[117] The main objective of these standards is to provide accurate compositional information to guide consumers to make wise health decisions around their diet. The issue, however, is whether the consumer possesses a sufficient degree of knowledge to interpret that material. A key policy objective in health labelling is that it is "comprehensible"[118] and "legible"[119], and the *GAP* affirms that labelling should be promoted in a way that is not limited to current international standards including the *Codex*.[120] However, section 5 of the *Codex* expressly provides that states may adopt "Supplementary Information" in addition to the Nutrient Declaration labels as a means to aid the consumer in interpreting whether the food is a good health choice.[121]

Despite explicit and implicit encouragement to adopt supplementary nutritional information, there has been hesitation as to whether this should be interpreted to promote front-of-pack (FOP) labelling. FOP labels are a relatively recent concept, with concerns raised in 2014 about new approaches to presenting nutritional information,[122] prompting calls for further examination.[123] In December 2015, the WHO hosted a Technical Meeting on Nutrition Labelling for Promoting Healthy Diets to review, assess and develop guiding principles on

---

[112] *Global Action Plan*, above n 7, at 32-33.

[113] At 33.

[114] WHO *Global Strategy on Diet Physical Activity and Health*, above n 101, at [40(4)].

[115] The WHO *What Works* report does not include nutrition labelling in its proposed interventions; see: WHO *What Works*, above n 100, at 10-25.

[116] The role of international standards in creating measures is discussed in part II of chapter II, at 25-26, and part II of chapter III, at 39-40.

[117] *Codex Alimentarius Guidelines on Nutrition Labelling* CAC/GL 2-1985 (Adopted in 1985, Revised 2011).

[118] WHO *Global Strategy on Diet Physical Activity and Health*, above n 101, at [40(4)].

[119] *Codex*, above n 117, s 4.2.1.

[120] *Global Action Plan*, above n 7, at 33.

[121] *Codex*, above n 117, s 5.

[122] Codex Committee on Food Labelling *Proposal for New Work on Front of Pack Nutrition Labelling* (Codex Alimentarius Commission, FL/43 CRD/20, May 2016) at [2].

[123] Codex Committee on Food Labelling *Report of the Forty-Third Session* (Codex Alimentarius Commission, REP16/FL, May 2016) at [64]-[70].

FOP labelling.[124] At the most recent Codex Commission meeting, it was reported that Costa Rica and New Zealand would co-chair an electronic Working Group on FOP labelling.[125]

The final discussion paper is due in July 2017;[126] however, it is likely that the international community has already experienced a paradigm shift in favour of FOP labelling that will continue to unfold prior to the completion of comprehensive studies. The European Food Information Council estimates that at least 12 countries have proposed implementing FOP labelling, covering 1.5 billion of the world's population.[127] Following the Technical Meeting, the WHO regional European office issued a *Food and Nutrition Action Plan* which recommended the "use of easy-to-understand or interpretative, consumer-friendly labelling on the front of packages".[128] The report suggests that such a policy option can advance the creation of healthy food and drink environments by:[129]

> … facilitat[ing] consumer understanding of the nutritional content of many foods, especially complex processed foods … [and it] can limit consumption of foods high in energy, saturated fats, trans fats, sugar or salt in the context of overall improvements to the nutritional quality of diets.

There has been some controversy as to whether FOP labels are compliant with section 5 of the *Codex*. Further issues have been raised as to what form supplementary nutritional information on FOPs should take,[130] with calls to develop an international standard.[131] The

---

[124] "Technical meeting on nutrition labelling for promoting healthy diets" (2015) World Health Organization <www.who.int>.

[125] Codex Committee *Report of Forty-Third Session*, above n 123, at [70]; The mandate of the Working Group is to:

(1) Take stock of the current [FOP] nutrition labelling schemes existing in different countries;

(2) Consider the need for development of global principles to underpin [FOP] nutrition labelling.

(3) Prepare a discussion paper, taking into account the WHO work on this matter and a draft project document for consideration at the next session of the Committee.

See: Electronic Working Group *Consideration of Issues Regarding Front-of-Pack Nutrition Labelling* (Codex Committee on Food Labelling, First Draft Discussion Paper, August 2016) at [2].

[126] Electronic Working Group *Consideration of Issues*, above n 125, at [3].

[127] Codex Committee on Food Labelling *Proposal for New Work Concerning a Global Standard for Front of Pack Interpretive Nutrition Labelling* (Codex Alimentarius Commission, FL/43 CRD/17, May 2016) at 1.

[128] World Health Organization Regional Office for Europe *European Food and Nutrition Action Plan 2015-2020* (WHO Press, 2015) at 13.

[129] At 13.

[130] Codex Committee FL/43 CRD/17, above n 127, at 1.

[131] At 2.

concern is that certain kinds of FOPs will constitute non-tariff barriers to trade, thereby violating WTO rules under the TBT Agreement.[132] In 2016, Chile implemented FOP labels[133] that show octagonal "stop signs" declaring that the food product is "high in" sugars, saturated fats, sodium or calories[134] if they exceed certain established thresholds.[135] This measure has faced criticism in the TBT Committee by Chile's trading partners, who claim that this form of FOP labelling violates obligations under the TBT Agreement.[136] Chile contends that these FOP labels operate as health warnings to inform consumers around healthy dietary choices, consistent with international public health policy objectives.

Part IV of Chapter IV will assess Chile's compliance with its obligations under the TBT Agreement in light of these FOP labels as a measure aimed to reduce the burden of NCDs.

III LABELLING AS A RESPONSE

A consistent message has been advanced in all of the WHO reports, the UNGA Political Declaration, and the *GAP*: that the reduction of the burden of NCDs requires a multisectoral response which addresses the diversity of the contributory environmental influences and effects of the associated risk factors. [137] The recommendations of the international public health community emphasise the need for comprehensive policy implementation.

This is important context when considering the trade compliance of health warning labelling as a response to addressing the health crisis posed by NCDs, because that analysis in turn requires consideration of the *effectiveness* of such an approach. No single policy measure is touted as *the* solution; rather, each policy operates best within an expansive framework

---

[132] Codex Committee on Food Labelling *Discussion Paper on Codex Harmonisation Principles and Labelling* (Codex Alimentarius Commission, FL/43 CRD/6, May 2016) at [2(a)].

[133] Law 20.606 on the Nutrient Composition of Food and its Advertising 2015, art 5.

[134] See Appendix 3 for the design of Chile's FOP labels.

[135] Rodrigo Ramírez et al. *Chile's Law on Food Labelling and Advertising: A Replicable Model for Latin America?* (Llorente & Cuenca, Santiago, 2016) at 4 fig 2.

[136] Minutes plus other documents.

[137] The UNGA Political Declaration articulated the breadth of this issue, giving recognition that:

> … the conditions in which people live and their lifestyles influence their health and quality of life and that poverty, uneven distribution of wealth, lack of education, rapid urbanization, population ageing and the economic social, gender, political, behavioural and environmental determinants of health are among the contributing factors to the rising incidence and prevalence of [NCDs].

See: *UN General Assembly Political Declaration*, above n 14, at [21].

targeting a variety of factors that influence access and consumption of tobacco, alcohol and unhealthy food products. The purpose of this study is not to analyse the efficacy of labelling in contributing to the reduction of the burden of NCDs. Rather, it is based on the premise that the WHO has identified that including health warning labels on tobacco, alcohol and food products has some benefit in addressing this public health crisis, but should not be relied upon in isolation, but rather as one tool in a comprehensive strategy.

The purpose of mandatory health warning labelling is to inform the consumer about the adverse effects of consuming these goods. In doing so, the ultimate objective is to shape consumer behaviour in order to reduce consumption rates, thereby reducing the harmful effects on the individual and society. Health labelling achieves this in a number of ways. It fosters education about health in a digestible way by using images and simplistic wording, so that the consumer need not possess high literacy levels to understand the consequences of consumption.[138] The content may also create negative emotional associations, which can impact on consumer habits, as well as stripping away the effect of branding techniques used to foster goodwill and characteristic associations with products.[139] Overall, it is not expected that every consumer will cease to purchase tobacco, alcohol, and unhealthy food because of labelling, but it will help inform consumer choice, see consumption rates drop, and limit uptake by new consumers.[140]

IV LIMITATIONS

The key limitation that influences the efficacy of universal uptake of the policy recommendations made by the international public health community is legal force at international law. The two principal sources of binding authority international law are treaties and customary international law.[141] Treaties create binding obligations upon signatory Parties, but do not act as a general source of law which binds the international community generally. Customary international law operates a source of law with application to the international community overall without the express consent of individual states. Instead, consent is implied from the evidence of two elements: state practice and *opinio juris*. State practice is demonstrated through general consistency and conformity, though it is not necessary for uniform acceptance and application in the international community. The

[138] *FCTC Implementation Guidelines*, above n 49, at 58.

[139] At 60.

[140] At 56.

[141] Statute of the International Court of Justice 33 UNTS 993 (opened for signature 24 October 1945), art 38.1(a)-(b).

element of *opinio juris* establishes a qualification that state practice must be derived from a sense of obligation from a rule of law.[142]

The FCTC is the only treaty and is therefore binding, but only upon its signatories. Declarations by the UNGA only have legal force if they can be established as customary international law. In the present context, the inconsistency of implementation of measures endorsed by the Political Declaration by states demonstrates a lack of state practice. Even if the element of state practice could be established, the diversity of approaches adopted by states would indicate a lack of *opinio juris*. The remainder of the WHO reports and recommendations have no legal force and are dependent upon voluntary adoption.

The plethora of materials produced by the international public health community indicates a strong influence in favour of implementing recommended policy options to reduce the burden of NCDs. However, the impact of this material is limited by the deference given to national sovereignty. In its affirmations and endorsements of the WHO Reports and Global Strategies,[143] and placing the burden on governments to respond to the challenges of NCDs,[144] the UNGA recognises the rights of sovereign nations to establish their own policies.[145] The *GAP* echoes this sentiment, framing the goals as "voluntary global targets" and urging states to prioritise their response in implementing policy measures targeted at reducing the risk factors associated with NCDs.[146] Overall, it is hard to reconcile the severity of the public health issue with the passiveness of the recommendations aimed at a solution. The voluntary nature inherently causes delays to universal adoption; however, this reverence to state sovereignty is an undisputed feature of the international community. Any voluntary scheme must sacrifice efficacy in universal adoption in its deference to the sovereignty of states to advance the policy goals of their choice.

The consequence of voluntary adoption from a trade perspective is that it allows a difference of opinion between states as to the value and appropriateness of the recommended measures. The voluntary nature of the policy recommendations has created a divorce in opinion as to whether measures that implement these recommendations create unnecessary obstacles to trade. This is evident in the documents of the TBT Committee around the labelling measures implemented by Australia, Thailand and Chile, where trading partners raised concerns about

---

[142] *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* [1969] ICJ Rep 4 at 44.

[143] *UN General Assembly Political Declaration*, above n 14, at [43(a)-(e)].

[144] At [3].

[145] At [43].

[146] At [43].

whether the measures were "trade-restrictive". Chapter III will outline the legal framework for whether measures create and unnecessary obstacle to trade, followed by an application of that analysis to each of the three measures in chapter IV in an attempt to resolve the disagreement within the international trade community.

CHAPTER II – THE INTERNATIONAL TRADE SYSTEM

I HISTORICAL OVERVIEW OF THE INTERNATIONAL TRADE SYSTEM

The modern WTO was not created in a vacuum, but as the result of the complex interaction of historic legal, economic and political influences. The purpose of this section is to outline a brief timeline of the establishment of the WTO.[147]

A THE END OF PROTECTIONISM: GENERAL AGREEMENT ON TARIFFS AND TRADE

Until the conclusion of the Second World War trade protectionism[148] was the default trade policy position of governments, and trade liberalisation achieved on a small scale by agreement between individual states. Since the Peace of Westphalia in 1648, European peace-making tradition included provisions around liberalising trade by either restoring commercial freedoms to pre-conflict levels or expanding openness to promote better relations.[149] Following the First World War, United States (US) President Woodrow Wilson outlined his post-war vision in the Fourteen Points, the third of which called for:[150]

> [t]he removal, as far as possible, of *all economic barriers* and the establishment of an *equality of trade conditions* among all the nations consenting to the peace and associating themselves for its maintenance. (Emphasis added.)

When the Allies imposed a series of strict sanctions upon Germany under the Treaty of Versailles, they had the opportunity to follow in that Westphalian tradition and promote Wilson's objective; however, the result was woefully inadequate on trade.[151] Instead, the sanctions saw a dramatic shift in the global economy, ultimately resulting in The Great Depression.

---

[147] It should be noted that the intricacies of this history have been simplified for present purposes, however there exists some literature which explores in depth the complex relationships and tensions of law, economics and politics in the emergence of the modern trade system; see: Craig VanGrasstek *The History and Future of the World Trade Organization* (World Trade Organization, Geneva, 2013).

[148] Defined as: government actions and policies that restrict or restrain international trade, often done with the intent of protecting local businesses and jobs from foreign competition. See: "Protectionism" Investopedia <www.investopedia.com>.

[149] VanGrasstek, above n 147, at 7-8.

[150] At 42.

[151] At 42.

The Great Depression heralded in a deliberate reversion to protectionism: the US implemented the Smoot-Hawley tariffs, leading to retaliatory increases in Europe,[152] and effectively bringing international commerce to a standstill.[153] This economic climate had far-reaching implications, fostering an environment for dangerous nationalism and fascism and culminating in the Second World War.[154]

Following the Second World War, the Allied forces sought to learn from the errors of Versailles to avoid creating another tenuous economic climate. In July of 1944, delegates from the Allied forces met in New Hampshire for the Bretton Woods Conference, promoting the creation of three international financial institutes.[155] Two of the three bodies were established: the International Monetary Fund and the International Bank for Reconstruction and Development.[156] The final institution, the International Trade Organization, was proposed to create a multilateral trade system. International discussion on its formation continued following the Conference and in 1948 negotiations by the UN resulted in the Havana Charter providing for its establishment.[157]

The International Trade Organization was never established due to a lack of support from the US Congress in ratifying the Havana Charter.[158] Despite this setback towards a multilateral trade system, 23 nations agreed to pursue trade liberalisation under the General Agreement on Tariffs and Trade 1947 (GATT).[159] The core aim of GATT was to impose upon the Contracting Parties an obligation to reduce import tariffs and restrict the ability to raise them at a later time. Though it did not create an institution like the International Trade Organization was designed to be, it did establish a Secretariat with some administrative capacity.[160]

---

[152] Chad P. Brown *Self-Enforcing Trade: Developing Countries and WTO Dispute Settlement* (Brookings Institution Press, Washington D.C., 2009) at 12 table 1-1.

[153] At 11.

[154] At 11.

[155] "The GATT Years: from Havana to Marrakesh" World Trade Organization <www.wto.org>.

[156] "The GATT Years", above n 155.

[157] "The GATT Years", above n 155.

[158] "The GATT Years", above n 155.

[159] General Agreement on Tariffs and Trade 55 UNTS 187 (signed 30 October 1947, entered into force 1 January 1948); Meredith Crowley "An introduction to the WTO and GATT" (2003) 27(4) Economic Perspectives 42 at 42-43.

[160] At 43.

The two core principles of the GATT are non-discrimination and reciprocity. Non-discrimination is advanced by two key provisions. First, the National Treatment provision requires that Parties treat foreign imported and domestically produced goods equally once they have entered the market.[161] Secondly, the Most Favoured Nation (MFN) provision requires that all foreign imported products are afforded the same level of treatment by Parties.[162] These two provisions protect the integrity of the trade system by ensuring that the rights and obligations surrounding market access are effected with universal application and are not undermined by the political whim of individual states.

Reciprocity is achieved through consensus that by incurring an obligation to other Parties to grant greater market access, Parties receive a corresponding right to greater market access.[163] This facilitates the reduction of trade barriers as it incentivises Parties to make concessions in the knowledge that other Parties are also making significant and valuable concessions. This was demonstrated in the six subsequent negotiating rounds following GATT. The primary focus of each being a further reduction of tariffs;[164] however, from the mid-1960s, the inclusion of non-tariff measures in negotiations signalled a development of the multilateral trade system's scope and the attitude towards its enforcement and implementation.

By the 1980s, the number of Parties to GATT exceeded 100 and calls for reform increased following the expansion of agreements on non-tariff issues at the Tokyo Round.[165] For 39 years, the GATT operated as the core multilateral trade instrument, promoting liberalisation through the reduction of tariffs; however this shift towards addressing non-tariff measures created complexities outside the capabilities of the small GATT Secretariat and prompted the foundation of a more sophisticated institution.

B THE URUGUAY ROUND AND THE WORLD TRADE ORGANIZATION

The eighth round of negotiations, the Uruguay Round commenced in 1986 in Punta Del Este and concluded in Marrakesh, Morocco in 1994.[166] The Uruguay Round delivered substantial reform to the international trade system by reaching comprehensive agreements on a diverse range of non-tariff trade issues including services, intellectual property and technical barriers to trade. Furthermore, a more sophisticated dispute resolution process was agreed upon, as

[161] WTO Glossary, above n 3.

[162] WTO Glossary, above n 3.

[163] Crowley, above n 159, at 44.

[164] "The GATT Years", above n 155.

[165] "The GATT Years", above n 155.

[166] "The GATT Years", above n 155.

well as the creation of the WTO. Fifty years after the initial proposal for the International Trade Organization at Bretton Woods, a body fit to oversee and regulate the multilateral trade system came to exist.

The key principles of GATT were retained through the creation of the WTO,[167] however there has been an expansion of the principles which govern the international trade system. Non-discrimination has remained the core principle of the trade system, with National Treatment and MFN provisions being incorporated into other agreements. However, as the scope of trade rules expanded, there emerged new principles to facilitate these new rules. Reciprocity provides the foundation for two of the modern principles: freer trade and more competitive trade. Freer trade focuses on the removal of trade barriers, whilst the promotion of fair competition revolves around ensuring states do not engage in unfair practices, particularly around subsidies and dumping products at low prices to gain market share.[168] Transparency and predictability are also core principles, and reflects this understanding that states are bound to their obligations and will not arbitrarily create trade barriers.[169]

Arguably, the expansion of the principles that underpin the trade system, as well as the scope of the trade system, results in increased complexity for states when regulating to ensure compliance with their international trade obligations. In the case of labelling, the emphasis is less on non-discrimination, but rather on ensuring that implementation is consistent with freer and more competitive trade.

II TECHNICAL BARRIERS TO TRADE

In a special lecture on the ramifications of a potential "Brexit"[170], EU Single Market law expert Professor Michael Dougan from the University of Liverpool said "[n]o one really cares about tariffs … you either have taxes or you abolish them … The holy grail of international trade is how you deal with regulatory barriers.[171] During the Uruguay Round, Parties negotiated the Agreement on Technical Barriers to Trade to address such regulatory barriers to trade.

---

[167] Furthermore, whilst the WTO Agreements included the introduction of GATT 1994, GATT 1947 continues to exist; see: General Agreement on Tariffs and Trade 1994 (World Trade Organization [WTO]) 1867 UNTS 190 (signed 15 April 1994, entered into force 1 January 1995), art 1.

[168] World Trade Organization *Understanding the WTO* (World Trade Organization, Geneva, 2007) at 10-12.

[169] At 10-12.

[170] The referendum held in June 2016 on whether the United Kingdom would remain a part of the European Single Market.

[171] Michael Dougan "EU Referendum" (Special lecture, University of Liverpool Law School, 14 June 2016).

Prior to GATT, the core mechanism for governments to protect domestic producers of goods was to levy high tariffs on imported products. With the implementation of the National Treatment provision in GATT, and the commitments made at each negotiating round to reduce tariffs, protectionism more frequently began to take the form of non-tariff measures. What causes complications in this move from "at the border" measures to measures "within the border" is the diversity of domestic regulations between Members.[172] [173] The challenge this poses for exporters is establishing production lines to comply with each market's requirements, incurring substantial associated costs.[174] From the other perspective, the liberalisation through GATT saw a rapid increase in trade, and importing nations have been faced with challenges around addressing concerns around safety and quality of incoming goods.[175] This ability to regulate incoming goods is an imperative right that the TBT Agreement recognises in its attempt to strike a balance with the concern of those exporters that the measures concerned do not constitute non-tariff barriers to trade.

The TBT Agreement was not the first instrument surrounding regulations that may operate as technical barriers to trade. In GATT, the national treatment and most favoured nation provisions were applicable to technical measures that operated as barriers to trade, as well as the articles addressing transparency, quantitative restrictions and general exceptions. In 1979, an Agreement on Technical Barriers was reached in the Tokyo Round, with ~40% of Contracting Parties adopting the plurilateral[176] Tokyo Round Standards Code which prescribed non-discrimination obligations to 'technical specifications'.[177] Furthermore it prescribed obligations around transparency and notification to other Contracting Parties, to not create unnecessary obstacles to trade and rules encouraging harmonisation of technical specifications based upon international standards.[178] The impetus for concluding a specific and multilateral agreement on technical barriers came from the consensus that these devices

[172] NB: states that were signatories to GATT were referred to as "Contracting Parties", whereas the phrase "Members" is used following the establishment of the WTO to connote that states have membership to the multilateral trade system and are Parties to all the Agreements it administers.

[173] Michael J. Treblicock "Foreword" in Tracey Epps and Michael J. Trebilcock (eds) *Research Handbook on the WTO and Technical Barriers to Trade* (Edward Elgar Publishing Ltd, Cheltenham, 2014) at ix.

[174] At x.

[175] At ix.

[176] In the WTO, plurilateral means "involving some members" *cf.* multilateral, which means "involving all members"; see: WTO Glossary, above n 3.

[177] Arkady Kudryavtsev "The TBT Agreement in Context" in Tracey Epps and Michael J. Trebilcock (eds) *Research Handbook on the WTO and Technical Barriers to Trade* (Edward Elgar Publishing Ltd, Cheltenham, 2014) at 23-24.

[178] At 24.

were insufficient in addressing the increasingly problematic issue of domestic regulation creating obstacles to trade.[179]

The TBT Agreement addresses three separate and distinct forms of potential regulatory barriers. Firstly, technical regulations, which are defined as measures that prescribe mandatory product characteristics or related processes and production methods.[180] Secondly, standards, which are voluntary guidelines on product characteristics or related processes and production methods approved by a recognised body.[181] Finally, conformity assessment procedures, which are used to determine that the requirements of technical regulations and standards are fulfilled, including the prescription of processes for inspection, verification and accreditation.[182] Each type of technical barrier is dealt with separately within the Agreement, however generally the same principles apply consistently to each form.

There are three core principles that underpin the TBT Agreement: non-discrimination, not creating unnecessary barriers to trade, and transparency.[183] Non-discrimination takes the same form as in other WTO Agreements as National Treatment and MFN provisions, ensuring that imported goods are treated equally with both domestically produced goods and goods imported from other states.[184] The principle against creating unnecessary barriers to trade is recognition that non-discriminatory measures may still operate to obstruct trade. This is a novel addition to traditional WTO principles, however overall it is consistent with the principles of fair competition and freer trade. Transparency is promoted by three means: the requirement for notification of draft measures,[185] the establishment of enquiry points to answer questions of other Members,[186] and publication of intent to regulate as well as final regulations.[187]

The references to international standards within the TBT Agreement demonstrates how the Agreement advances these principles. The third recital of the preamble recognises the

[179] At 24.

[180] TBT Agreement, above n 4, Annex 1.1.

[181] At Annex 1.2.

[182] At Annex 1.3.

[183] World Trade Organization *The WTO Agreements Series: Technical Barriers to Trade* (World Trade Organization, revised in 2014), at 15.

[184] TBT Agreement, above n 4, arts 2.1 and 5.1.1, and Annex 3.D.

[185] Articles 2.9, 2.19, 3.2, 5.6, 5.7 and 7.2.

[186] Article 10.1.

[187] Articles 2.9 and 2.11.

"important contribution that international standards … can make … by improving efficiency of production and facilitating the conduct of international trade", and the fourth recital is a consequential desire "to encourage the development of such international standards".[188] The promotion of harmonisation with international standards aims to reduce the risk that regulations will constitute discriminatory or unnecessary barriers to trade. For importing states this reduces the risk of exposure to WTO challenges, whilst for exporters this reduces the associated costs with establishing production lines to comply with numerous market requirements.

The encouragement of harmonisation with international standards raises a question as to what the objective of the TBT Agreement is within the overall WTO framework. There are two schools of thought about the TBT Agreement's objective. First, with emphasis on the promotion of harmonisation, is an interpretation that sees TBT move beyond the classic GATT model's focus on non-discrimination to positive integration.[189] Under this approach, TBT is seen as prescribing parameters which limit a state's sovereign right to regulate within their jurisdiction, limiting the diversity of regulation in favour of efficacy of international trade.[190] That it imposes disciplines on non-discriminatory measures has been presented as evidence supporting this construction of the TBT Agreement.

The alternative approach interprets the TBT Agreement as directed towards prohibiting regulatory protectionism and emphasising continuity with GATT, albeit with certain refinements and additions to address the specifics of the technical barriers trade issue.[191] Though the tests may appear different to those found in GATT, this analysis suggests that truly non-protectionist provisions will be compliant with the obligations. The preamble seemingly endorses this interpretation: the second recital is a desire "to further the objectives of GATT".[192] Whilst the fourth recital introduces the extended discipline beyond non-discriminatory measures, the fifth recital states:[193]

> that no country should be prevented from taking measures necessary … for the protection of human … life or health … or for the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that they are not

[188] TBT Agreement, above n 4, preamble.

[189] Robert Howse "Introduction" in Tracey Epps and Michael J. Trebilcock (eds) *Research Handbook on the WTO and Technical Barriers to Trade* (Edward Elgar Publishing Ltd, Cheltenham, 2014) at 1.

[190] At 1.

[191] At 1.

[192] TBT Agreement, above n 4, preamble.

[193] Preamble.

> applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination … or a disguised restriction on international trade …

This reflects the balance between national sovereignty and trade liberalisation that the TBT Agreement attempts to strike.

The two different approaches provide contrasting ideas about what the overall objective of the TBT Agreement is. Positive integration focuses on putting a positive impetus upon Members to harmonise regulations to internationally accepted standards, whilst the GATT-plus approach focuses on the negative obligations of Members to not engage in trade protectionist practices. Whilst the latter GATT-plus approach appears to be predominantly accepted and endorsed in WTO case law, it is possible to reconcile both interpretations and conclude that the TBT Agreement performs both functions. The two functions are not mutually exclusive: neither function undermines the other, and the efficacy of the TBT Agreement in addressing technical barriers is advanced by the conjunction of both.

In the present context, a positive integration approach would focus on the development of international standards for health labelling. In challenges where no international standards exist, it is possible that Panels would err on the side of trade-liberalisation, curtailing the regulatory freedom of states. A GATT-plus approach would see a higher degree of diversity in regulation, which may lead to a greater number of disputes. The combination of both interpretations sees the international public health community develop international standards to guide regulation-making, whilst contemporaneously preserving regulatory autonomy by allowing states to implement health labelling insofar as they do not create unnecessary obstacles to trade.

CHAPTER III – THE LEGAL FRAMEWORK OF ARTICLE 2.2.

I ARTICLE 2.2

Since 2010, Australia,[194] Thailand[195] and Chile[196] have each notified the TBT Committee of their intention to implement health warning labels, with other Members raising concerns about the draft measures.[197] The common complaint was that the measures constituted a violation of Article 2.2 of the TBT Agreement in that they are technical regulations that have the effect of creating an unnecessary obstacle to international trade by being more trade-restrictive than necessary to fulfil a legitimate objective.[198] This section will provide an overview of the key elements of the obligation under Article 2.2.

A TECHNICAL REGULATION

Article 2.2 applies exclusively to technical regulations, as opposed to standards and conformity assessment procedures. "Technical regulation" is defined in Annex 1.1 as a:[199]

> [d]ocument which lays down product characteristics … 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 … (Emphasis added).

In *EC – Sardines* and *EC – Asbestos* the Appellate Body[200] interpreted this definition as establishing a three-limb test:[201]

---

[194] *Australia – Notification* G/TBT/N/AUS/67, 8 April 2011.

[195] *Thailand – Notification*, above n 92.

[196] *Chile – Notification* G/TBT/N/CHL/221, 21 February 2013; *Chile – Notification* G/TBT/N/CHL/282, 22 August 2014.

[197] See, for example: *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging* G/TBT/W/339, 8 June 2011 (Statement by Indonesia to the Committee on Technical Barriers to Trade); *Chile – Draft Technical Regulation Relating to the Food Health Regulations, Supreme Decree No. 977/96* G/TBT/W/361, 21 March 2013 (Statement by Mexico to the Committee on Technical Barriers to Trade); *Thailand – Draft Notification* G/TBT/W/408, above n 96.

[198] TBT Agreement, above n 4, art 2.2.

[199] Annex 1.1.

[200] The Appellate Body is an independent seven-person body that considers appeals in WTO disputes. When one or more parties to the dispute appeals, the Appellate Body reviews the findings in panel reports; see: WTO Glossary, above n 3.

(1) The requirements must apply to an identifiable product or group of products;
(2) The requirements must specify one or more characteristics of the product; and
(3) Compliance with the product characteristics must be mandatory.

The third limb on mandatory compliance is straightforward, however case law has provided some discussion on ambiguities in the other two limbs. On the first limb, the Appellate Body in *EC – Asbestos* elaborated that the requirement for products to be "identifiable" relates to the ability for the regulation to be practicably enforceable, but distinguishes it from the need to have the regulation expressly specify the product.[202]

As to the second limb, the Appellate Body in *EC – Asbestos* explained that "product characteristics" should have its ordinary meaning, including "any objectively definable 'features', 'qualities', 'attributes', or other 'distinguishing mark' of a product."[203] It also referred to the fact that the definition of "technical regulation" gives certain examples which indicate that it is not limited to 'intrinsic qualities' but also characteristics that are a means of identification, presentation and the appearance of the product.[204]

A measure must meet the definition of 'technical regulation' before it can be said to violate the substantive obligation of not creating an unnecessary obstacle to trade.

B LEGITIMATE OBJECTIVE

Once it is established that a measure is a "technical regulation", the test for determining whether it constitutes an unnecessary obstacle to trade is whether it is not more trade-restrictive than necessary to achieve a legitimate objective. In *US – Clove Cigarettes*, the Panel stated that this is a two-stage analysis:[205]

(i) the technical regulation must pursue a 'legitimate objective'; and
(ii) not be more trade restrictive than necessary to fulfil that legitimate objective.

---

[201] *European Communities – Trade Description of Sardines* WT/DS231/AB/R, 29 May 2002 (Report of the Appellate Body) at [176]; *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* WT/DS135/AB/R, 12 March 2001 (Report of the Appellate Body) at [66]-[70].

[202] *EC – Asbestos* (Appellate Body), above n 201, at [70].

[203] At [67]. Furthermore, at [69], the Appellate Body determined that "product characteristics" may be prescribed either positively, mandating that products must possess certain characteristics, or negatively, that products must not possess certain characteristics.

[204] At [67].

[205] *United States – Measures Affecting the Production and Sale of Clove Cigarettes* WT/DS406/R, 2 September 2011(Report of the Panel), at [7.333].

The Panel indicated that it is both factually and legally possible that technical regulations can have multiple objectives;[206] however, it is unclear whether the legitimate objective must also be the dominant objective of the technical regulation. Whilst this issue remains ambiguous, and this piece makes no moves to resolve that ambiguity, what is clear is that the objective, once identified, must be regarded as "legitimate".

Article 2.2 provides a non-exhaustive list of objectives that are deemed to be "legitimate" and expressly includes the protection of human health.[207] In *Brazil – Retreaded Tyres*, the Appellate Body asserted that "few interests are more "vital" and "important" than protecting human beings from health risks."[208] The technical regulation can be aimed at a specific, narrow objective under the umbrella of the broad objective of protecting human health, for example, in *US – Clove Cigarettes* it was accepted that the objective of the technical regulation was to reduce youth smoking and self-evidently fell within the ambit of protecting human health.[209] This provides Members with the policy space to create regulations targeted at specific demographics insofar as they have the character of protecting human health. It can be presumed with a significant degree of certainty that if the objective of a technical regulation is the protection of human health it will be classified as "legitimate" and then the analysis will turn to the second limb of assessing whether it is "more trade-restrictive than necessary".

C TRADE-RESTRICTIVE

The their submissions for the *US – COOL* dispute, Canada and Mexico accepted that Article 2.2 does not require an interpretation that technical regulations are *prima facie* trade-restrictive.[210] The element of mandatory compliance indicates that all technical regulations create a hurdle to market entry for products. Therefore, "trade-restrictive" must operate at a higher threshold to be established prior to assessing its necessity for the fulfilment of a legitimate objective. If a measure is not "trade-restrictive", then it will not violate Article 2.2.

---

[206] At [7.342]; for example, in *US – Tuna (Mexico)*, the Panel determined that the measures in that issue had two objectives – consumer information and dolphin protection; see: *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* WT/DS381/R, 15 September 2012 (Report of the Panel) at [7.407].

[207] TBT Agreement, above n 4, art 2.2.

[208] *Brazil – Measures Affecting Imports of Retreaded Tyres* WT/DS332/AB/R, 3 December 2007 (Report of the Appellate Body) at [144].

[209] *US – Clove Cigarettes* (Panel), above n 205, at [7.347].

[210] *United States – Certain Country of Origin Labelling (COOL) Requirements* WT/DS384/R, WT/DS386/R, 18 November 2011 (Report of the Panel) at [7.559] and [7.561].

The definition of "trade-restrictive" is contentious due to the scarce WTO jurisprudence on Article 2.2. In *US – COOL*, the Panel examined the ordinary meaning of the word 'restrictive' as:[211]

> '[i]mplying, conveying, or expressing restriction or limitation' … [and] 'restriction' in turn is defined as '[a] thing which restricts someone or something, a limitation on action, a limiting condition or regulation'.

Speaking to the scope of the restriction, the Panel said:[212]

> There are no specific thresholds to be met in order to characterize a certain measure as a "restriction" … Furthermore, … a measure "having the *nature or effect* of a restriction" can be considered as a "restrictive" measure. (Emphasis from original).

This broad approach has been consistent with WTO jurisprudence from GATT disputes.[213] It has been accepted that jurisprudence relating to the General Exceptions to GATT under Article XX is relevant to analysis of whether a measure violates Article 2.2 of the TBT Agreement.[214] [215] This is consistent with the GATT-plus approach introduced in the previous chapter, interpreting the TBT Agreement as an extension of GATT's aims of trade-liberalisation.

The *US – COOL* Panel concluded that the definition of "trade-restrictive" is broad,[216] whilst the Appellate Body in *US – Tuna (Mexico)* emphasised that a measure must have a "limiting

---

[211] *The Shorter Oxford English Dictionary* (6th ed, Oxford University Press,2007), at 2553 as cited in *US – COOL (Panel)*, above n 210, at [7.567].

[212] At [7.568].

[213] See, for example: *Colombia – Indicative Prices and Restrictions on Port of Entry* WT/DS366/R, 27 April 2009 (Report of the Panel) at [7.241]; *India – Measures Affecting the Automotive Sector* WT/DS146/R, WT/DS175/R, 21 December 2001 (Report of the Panel) at [7.269]-[7.270]; *India – Quantitative Restriction on Imports of Agricultural, Textile and Industrial Products* WT/DS90/R, 6 April 1999 (Report of the Panel) at [5.128].

[214] *US – Clove Cigarettes* (Panel), above n 205, at [7.353]-[7.368].

[215] NB: for clarity, when this piece refers to jurisprudence from GATT disputes in text, the dispute name will be followed by "(GATT)".

[216] *US – COOL* (Panel), above n 211, at [7.572].

effect on trade".[217] Trade in this context is the "exchange of goods … between countries"[218] and as such the restriction should be qualified by its effect on that process.

This was expounded upon in the Panel Report in *US – Tuna (Mexico)*:[219]

> … we note that Mexico argues that measures that are 'trade-restrictive' include those that impose any form of limitation of imports, discriminate against imports or deny competitive opportunities to imports and that the [US] agrees with Mexico that a measure that imposes limits on imports or discriminates against them would meet the definition of a measure that is 'trade-restrictive'.

The next two sections will provide analysis on two suggested categories of trade-restrictiveness: limitation of imports and denial of competitive opportunities to imports.[220]

1 LIMITATION OF IMPORTS

The *US – Tuna* Panel accepted that measures which constitute a limitation of imports are "trade-restrictive".[221] The two primary mechanisms by which imports may be limited are import bans – full prohibitions on product imports, or quantitative restrictions – quota limits on the volume or value of imported goods.[222] In the context of the TBT Agreement, the former is more applicable than the latter, so for present purposes only import bans will be analysed.

In *EC – Asbestos*, the Appellate Body determined that France's ban on asbestos and asbestos-containing products for the protection of human health constituted a technical regulation.[223] Though there was no substantive assessment of Canada's Article 2.2 claim,[224] had analysis

---

[217] *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* WT/DS381/AB/R, 16 May 2012 (Report of the Appellate Body) at [319].

[218] "What is International Trade?" (16 December 2015) Investopedia <www.investopedia.com>.

[219] *US – Tuna (Mexico)* (Panel), above n 206, at [7.455].

[220] The exclusion of measures which discriminate against imports is purely for relevance to the health labelling context that will be explored in chapter IV; however, it is important to note that measures that are found to be discriminatory under Article 2.1of the TBT Agreement may also violate Article 2.2 by creating an unnecessary obstacle to trade.

[221] *US – Tuna (Mexico)* (Panel), above n 206, at [7.455].

[222] WTO Glossary, above n 3.

[223] *EC – Asbestos* (Appellate Body), above n 201, at [75].

[224] At [81]-[83].

occurred it is almost certain that the import ban would have been determined to be trade-restrictive and compliance would have turned on necessity. In *US – Clove Cigarettes*, the Panel proceeded from the premise that a ban on clove cigarettes was trade-restrictive.[225] Although these product bans also applied equally to foreign and domestic producers, the impact on Members that are traditional exporters of those goods was a substantial loss of market access. It is this loss of market access that constitutes a limitation on trade.

In the context of the TBT Agreement, it is also important to note that technical regulations may act as a *de facto* limitation on imports, even in the absence of prohibition or quota. Where character specifications amount to an effective ban on imports, that too would be "trade-restrictive".[226]

2 DENIAL OF COMPETITIVE OPPORTUNITIES

The US and Mexico appear to have disagreed on whether a measure that denies "competitive opportunities to imports" is "trade-restrictive.[227] Traditional trade theory is concerned with facilitating market access through the reduction of barriers, enabling imported products to enter the market. This is in contrast to market share, which focuses on the competitiveness of products once inside the market. From this traditional perspective, a "denial of competitive opportunities to imports" would not have a trade-limiting effect in a literal way as it would not prevent market access. However, the expanded principles of freer and more competitive trade can support a conclusion that measures that affect market share by denying competitive opportunities to imports can have a trade-limiting effect.

The Panel in *US – COOL* highlighted that GATT disputes[228] have determined "a measure's restrictiveness based on the impact of the measure on the competitive opportunities available to imported products",[229] Their interpretation holds that analysis of "trade-restrictiveness" is not about demonstrating the trade effects of the measure but the effect on the competitive

---

[225] *US – Clove Cigarettes* (Panel), above n 205, at [7.418]-[7.428].

[226] For example, in 2014 attention was drawn to "Moon Melons" from Japan, which were blue rather than red inside. If a country put a regulation that all watermelons must be a "moon melon", that in effect would create an import ban on standard watermelons, and would therefore be trade-restrictive.

[227] *US – Tuna (Mexico)* (Panel), above n 206, at [7.455].

[228] See: *Colombia – Ports of Entry*, above n 213, at [7.236]; *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather* WT/DS155/R 19 December 2000 (Report of the Panel) at [11.20].

[229] *US – COOL* (Panel), above n 211, at [7.571].

opportunities for imports.[230] This approach has also been adopted in the context of assessing whether a measure is "trade-restrictive" for the purposes of Article 2.2.

In *US – Tuna (Mexico)*, Mexico complained that the US measures which determined whether tuna products could carry a "dolphin-safe" label violated Article 2.2. In its assessment of the "trade-restrictiveness" of the measure, the Panel states:[231]

> the US dolphin-safe provisions do not formally restrict the importation or sale of tuna or tuna products that are not labelled dolphin-safe. However, … the US public has a preference for tuna products that are dolphin-safe, and access to the label is therefore a valuable advantage on the US market.

Tuna imported from Mexico was denied the competitive opportunity to carry the label on the basis that their traditional fishing method was considered by the US legislation to not be dolphin-friendly; however, other methods that caused comparable harm to dolphins could use the label. Because of known consumer preference, it was held that the substantial impact on Mexican tuna products from the arbitrary inability to access the "dolphin-safe" label constituted a limitation on trade.

In *EC – Sardines*,[232] Peru complained about an EC regulation that established common marketing standards, including a specification that only one species of sardine[233] could be labelled as preserved sardines. The Panel exercised judicial economy after establishing that the measure was inconsistent with Article 2.4 and did not assess whether they were inconsistent with Article 2.2.[234] However, it is possible to infer that because the international standard permitted other species of sardines to use the term so long as there was a geographical qualifier,[235] the measures constituted an arbitrary distinction that created a denial of competitive opportunities for imports and would therefore be a limitation on trade.

---

[230] *US – COOL* (Panel), above n 211, at [5.572].

[231] *US – Tuna (Mexico)* (Panel), above n 206, at [7.568].

[232] *European Communities – Trade Description of Sardines* WT/DS231/R, 29 May 2002 (Report of the Panel).

[233] *Sardina pilchardus Walbaum*, mainly found in Eastern North Atlantic, in the Mediterranean Sea and the Black Sea; as opposed to *Sardinops sagax sagax* mainly in the Eastern Pacific along coasts of Peru and Chile.

[234] *EC – Sardines* (Panel), above n 232, at [7.152].

[235] At [2.9].

In *US – COOL*,[236] Mexico and Canada complained that the US's country of origin labelling (COOL) for meat products were designed to protect their domestic agricultural industry by creating a complicated labelling scheme that required livestock to be born, raised and slaughtered in the US in order for the subsequent meat products to be considered a "product of the US".[237] The issue arose because the North American livestock trade is highly integrated, with different phases occurring in different countries.[238] Canada and Mexico's complaints centre on the segregation consequences of the US measures and the disadvantage suffered in contrast with domestic products. The Panel accepted evidence that as a result of these measures raising the cost of compliance, that some plants refused to process imported livestock.[239] The COOL measures effectively caused a reduction of competitive opportunities within the meat product supply chain by virtue of the fact that they were imports.

From these three cases, a conclusion can be drawn that in order to constitute a "denial of competitive opportunities to imports" the technical regulation must limit trade by disadvantaging the ability of imports to compete for market share. The scope of this disadvantage, however, remains unclear. In the context of health warning labels, it is arguable that the measures do not disadvantage the capacity of imports to be competitive, thus restricting market share. Rather, they seek to reduce the overall size of the market, by informing consumers of the health risks associated with consumption of products. Arguably, the capacity of an import to compete for market share is unchanged, though the overall market size may be restricted.

Whilst the departure from traditional trade theory for measures that demonstrably distort market share can be justified, as it was in the Panel reports of *US – Tuna (Mexico)*, *EC – Sardines* and *US – COOL*, it is difficult to reconcile an extension to measures aimed at the restriction of market size. Traditional trade theory is not concerned with guaranteeing that consumers will purchase imports once inside the market. To conclude that measures designed to reduce market size could run contrary to the understanding that technical regulations are not *prima facie* trade-restrictive.

However, trade-restrictiveness should be determined on a fact-specific sliding scale. At one extreme, technical regulations that prescribe contact information for the producers of food

[236] *US – COOL* (Panel), above n 211.

[237] At [7.89].

[238] At [7.140]-[7.142].

[239] At [7.357].

products on packaging would not be considered "trade-restrictive", because it does not limit trade. At the other extreme, import bans would have a high degree of "trade-restrictiveness" because they deny market access. Measures which deny competitive opportunities to imports would fall within that scale depending on the specifics of the measure. By contrast to the contact information labels, it is possible that health warnings which aim to reduce market size could be said to have a low level of "trade-restrictiveness".[240] Where the Australian, Thai and Chilean measures fall on this scale will be explored in Chapter IV.

D NECESSITY

Where there is a technical regulation, that advances a legitimate objective, but is also trade-restrictive, the question turns to the necessity of that measure. A "trade-restrictive" measure is not *ipso facto* a violation of Article 2.2; the language of the Article infers that some degree of trade-restrictiveness is allowed.[241] To constitute a violation, a measure must be "more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create."[242] This qualification is consistent with the statement in the preamble that "no country should be prevented from taking measures necessary … for the protection of human … health at the levels it considers appropriate".[243] As such, the burden of proof rests with the complainant to establish that Article 2.2 has been violated by demonstrating that the measure is excessively trade-restrictive in achieving a legitimate objective at the level determined by the implementing state.[244]

A number of Panel decisions have provided guidance on how to determine if a measure is more trade-restrictive than necessary by reference to similar provisions in the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) and GATT. Article 5.6 of the SPS Agreement uses the terminology of "not more trade-restrictive than required".[245] Its similarity to Article 2.2 led the Panel in *US – Tuna (Mexico)* to state that:[246]

---

[240] It is important to note here that GATT jurisprudence has determined that it is not necessary to demonstrate actual trade-effects; see: *Argentina – Hides and Leather*, above n 228, at [11.20]; this approach was adopted in the context of Article 2.2 of the TBT Agreement in *US – COOL (Panel)*, above n 211, at [7.571].

[241] *United States – Certain Country of Origin Labelling (COOL) Requirements* WT/DS384/AB/R, WT/DS386/AB/R, 26 September 2012 (Report of the Appellate Body) at [375].

[242] TBT Agreement, above n 4, art 2.2.

[243] Preamble.

[244] *US – Tuna (Mexico)* (Panel), above n 206, at [7.460].

[245] Agreement on the Application of Sanitary and Phytosanitary Measures (World Trade Organization [WTO]) 1867 UNTS 493 (signed 15 April 1994, entered into force 1 January 1995), art 5.6.

[246] *US – Tuna (Mexico)* (Panel), above n 206, at [7.464].

> each provision must be interpreted in its proper context and … a similarly worded provision in a distinct covered agreement should not be assumed to have the same meaning as in another context.

The Panel considered, however, that the footnote attached to Article 5.6 provides guidance in determining the similar terms in Article 2.2.[247] The footnote states that a measure is not more trade-restrictive than required unless there is another reasonably available measure that is significantly less restrictive to trade.[248] Article 2.2 prescribes no such explicit qualification,[249] so the guidance must be limited to the context of Article 2.2. To that effect, a technical regulation would be classified as more trade-restrictive than necessary where an alternative measure that is significantly less restrictive to trade can be demonstrated to fulfil the legitimate objective at the level sought by the state.

As to GATT, the Panel in *US – Clove Cigarettes* indicated that "some aspects of Article XX(b) jurisprudence … may be taken into account in the context of interpreting Article 2.2" though it would not be appropriate for it to be "transposed in its entirety".[250] Article XX(b) of GATT provides the general exception for measures necessary to protect human health.[251] The Panel in *US – Tuna* drew some comparisons between the GATT and TBT provisions in an attempt to determine the appropriate scope of utilising GATT jurisprudence. As an exception, Article XX(b) asks whether the measure, as a violation of GATT, was necessary; whereas, Article 2.2 sets out a positive obligation not to create unnecessary obstacles to trade, and therefore it is the degree of trade-restrictiveness that must be necessary.[252] However, in *US – Clove Cigarettes*, the Panel determined that "functional" distinction is relevant only to the burden of proof and has an insignificant impact on how Article 2.2 should be interpreted.[253]

The jurisprudence indicates that "necessity" can be assessed with a high degree of consistency between GATT, and the SPS and TBT Agreements, factoring in the context of each Agreement. Regarding the context of Article 2.2, the Panel in *US – Tuna* stated that:[254]

---

[247] At [7.464].

[248] SPS Agreement, above n 245, at footnote 3 on art 5.6.

[249] *US – Tuna (Mexico)* (Panel), above n 206, at [7.464].

[250] *US – Clove Cigarettes* (Panel), above n 205, at [7.369].

[251] GATT, above n 167, art XX(b).

[252] *US – Tuna (Mexico)* (Panel), above n 206, at [7.458].

[253] *US – Clove Cigarettes* (Panel), above n 205, at [7.363].

[254] *US – Tuna (Mexico)* (Panel), above n 206, at [7.456].

> trade-restrictiveness is only permissible *to the extent that* it is necessary to the achievement of the objective. *A contrario*, where it would be possible to achieve the same objective through a *less* trade restrictive measure, then the measure at issue would be in violation of Article 2.2, because it would then be more trade restrictive than necessary to achieve the said objective. (Emphasis in original.)

The Appellate Body in *China – Publications* (GATT) endorsed the approach adopted in *Brazil – Retreaded Tyres* (GATT)[255] that:[256]

> a panel must consider the relevant factors, particularly the importance of the interests or values at stake, the extent of the contribution made by the measure to the achievement of the relevant objective, and the measure's trade restrictiveness. … [I]f such an analysis 'yields a preliminary conclusion' that a measure is necessary, then the necessity of the measure must be 'confirmed' by comparing the measure with possible alternatives, in the light of the importance of the interests or values at stake.

Necessity is therefore assessed as a two-step process:

(1) An exercise of balancing factors to determine preliminary necessity; and
(2) A comparison with alternative measures.

As to the first, the extent of the contribution made by the measure to achieving the objective is a factor for consideration. The Panel in *US – Clove Cigarettes* affirmed the approach from the Appellate Body in *Brazil – Retreaded Tyres* applied to Article 2.2 analysis:[257] that "a contribution exists when there is a genuine relationship of ends and means between the objective pursued and the measure at issue."[258] As to the second step, the *US – Tuna* panel reasoned from this that the necessity of a measure "can be measured against possible alternative measures that would achieve the same result with a lesser degree of trade-restrictiveness" for Article 2.2.[259] Therefore, the trade-restrictiveness of a measure will not be necessary if there is a less trade-restrictive alternative which matches the level of contribution in achieving the objective. The quantification of contribution appears to be

[255] *Brazil – Retreaded Tyres* (Appellate Body), above n 208, at [178].

[256] *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* WT/DS363/AB/R, 21 December 2009 (Report of the Appellate Body) at [241]-[242].

[257] *US – Clove Cigarettes* (Panel), above n 205, at [7.379].

[258] *Brazil – Retreaded Tyres* (Appellate Body), above n 208, at [145].

[259] *US – Tuna (Mexico)* (Panel), above n 206, at [7.458].

equivalent to quantifying the level of protection sought by a state, per the sixth recital of the preamble.

Consideration also must be given to the risks that non-fulfilment creates.[260] Article 2.2 provides that "[i]n assessing such risks, relevant elements of consideration are, *inter alia*: available scientific and technical information, related processing technology or intended end-uses of products".[261] The Panel in *US – Tuna* interpreted this to mean that this analysis required consideration of:[262]

> both the likelihood and the gravity of potential risks (and any associated adverse consequences) that might arise in the event that the legitimate objective being pursued would not be fulfilled.

The Panel then elaborated on the comparison with alternative measures, that "an alternative means of achieving the objective that would entail greater 'risks of non-fulfilment' would not be a valid alternative, even if it were less trade-restrictive".[263]

Necessity in the context of Article 2.2 means that "trade-restrictiveness" must be required for the fulfilment of the legitimate objective, at the level of protection desired by the Member, insofar as the complainant cannot point to an alternative measure that achieves the same level of protection in a less trade-restrictive manner. In the context of health warning labels, the availability of alternative measures and the risks of non-fulfilment are of particular significance when assessing compliance with Article 2.2. This will be explored further in Chapter IV.

II THE INTERFACE WITH INTERNATIONAL STANDARDS

There are two key paragraphs on to international standards that are ancillary to interpreting Article 2.2. Article 2.4 is seeks to harmonise regulation, by requiring that where relevant international standards exist, that Member use them as the basis for creating technical regulations.[264] Article 2.5 then establishes a rebuttable presumption where technical regulations accord with relevant international standards, that they will not constitute an

[260] TBT Agreement, above n 4, art 2.2.

[261] Article 2.2.

[262] *US – Tuna (Mexico)* (Panel), above n 206, at [7.466]-[7.467].

[263] At [7.466]-[7.467].

[264] TBT Agreement, above n 4, art 2.4.

unnecessary obstacle to international trade.[265] These positive integration paragraphs can operate as a shield from challenges where Members create technical regulations consistent with international standards. The development of international standards, and subsequent international harmonisation with them, could therefore streamline international trade by reducing exposure to litigation following regulation.

In relation to health warning labels on tobacco, alcohol, and food products, the development of international standards could act as a solution to the increasing disagreement over compliance with Article 2.2.

[265] TBT Agreement, above n 4, art 2.5.

CHAPTER IV – CASE STUDIES

This chapter will assess the compliance of the measures outlined in Chapter I against the legal framework of Article 2.2. For expediency, the analysis of whether each measure constitutes a technical regulation and has a legitimate objective will be addressed together before assessing the "trade-restrictiveness" and necessity of each measure individually.

I PRELIMINARY ISSUES

A TECHNICAL REGULATIONS

Each measure must meet the definition of "technical regulation" as outlined in Chapter III.I.A.[266] Each measure applies to identifiable products: Australia to tobacco;[267] Thailand to alcoholic beverages,[268] and Chile to pre-packaged foods that exceed the prescribed limits of critical nutrients.[269] Annex 1.1 expressly states that measures may "include or deal exclusively with … packaging … or labelling requirements".[270] Each measure prescribes labelling requirements: Australia prescribes the colour and font used on cigarette packaging[271]; Thailand prescribes the content and dimension of health warning labels;[272] and Chile prescribes octagonal health warnings declaring that the product is "high in" calories, sodium, sugar or saturated fats.[273] Finally, these measures all require mandatory compliance, therefore, they all constitute technical regulations per Annex 1.1.

B LEGITIMATE OBJECTIVE

Each measure has been designed in reference to policy recommendations advancing the third objective of the *GAP*. Reducing modifiable risk factors, and thus reducing the burden of NCDs will almost certainly constitute the protection of human health and is therefore a legitimate objective. The objective of the Australian measures is to reduce rates of

---

[266] Refer back to pages 28-29.

[267] Tobacco Plain Packaging Act 2011 (Cth), s 12; although the measures refer and apply to all tobacco products, for simplicity, the focus will exclusively be on cigarettes.

[268] Alcoholic Beverage Control Act BE 2551 (2008 AD), s 26.

[269] Law 20.606 on the Nutrient Composition of Food and its Advertising 2015, art 5.

[270] TBT Agreement, above n 4, Annex 1.1.

[271] Tobacco Plain Packaging Regulations 2011 (Cth), regs 2.2.1 and 2.4.2; Competition and Consumer (Tobacco) Information Standard 2011 (Cth), cl 9.13.

[272] *Thailand – Notification*, above n 92, at [6].

[273] Ramírez, above n 135, at 5.

smoking;[274] the objective of the Thai measures is to reduce the harmful use of alcohol;[275] and Chile's objective is to reduce the prevalence of unhealthy diets by informing consumers of the nutrient quality of pre-packaged food.[276] These objectives are all consistent with the third objective of the *GAP*, and therefore constitute legitimate objectives.

II AUSTRALIA TOBACCO PLAIN PACKAGING

Having established that Australia's tobacco plain packaging measures are a technical regulation with a legitimate objective, the analysis now turns to whether it is more trade-restrictive than necessary to fulfil a legitimate objective.

A TRADE-RESTRICTIVE

The Australian measures must have a limiting effect on trade to be "trade-restrictive". Following the analysis in chapter III.C.1,[277] the measures can be distinguished from those in *EC – Asbestos* and *US – Clove Cigarettes* as they do not create a limitation on imports, *de jure* or *de facto*. The regulations merely specify the characteristics of cigarette packaging for retail in Australia; they do not ban imports of tobacco or prohibit the retailing of tobacco altogether.

If the analysis in chapter III.C.2 is accepted,[278] a measure must have market share implications for imported products to constitute a denial of competitive opportunities. The Australian government could utilise the distinction between impacting market share and market size to argue that the measures advance the latter, which is not a denial of competitive opportunities. The implementation of measures aimed to reduce the appeal of cigarettes to consumers, effecting reductions in smoking rates, does not deny competitive opportunities in the way the measures in *US – Tuna (Mexico)*, *EC – Sardines*, and *US – COOL*.

---

[274] Tobacco Plain Packaging Act 2011, above n 267, s 3; see also: *US – Clove Cigarettes* (Panel), above n 205, at [7.347] where the Panel determined that the US's objective of reducing rates of youth smokers was legitimate.

[275] *Thailand – Draft Notification* (Statement), above n 97, at [2]; in their statement to the TBT Committee Thailand explained their agenda:

> controlling alcohol-related problems is our national health priority, taking into account many serious health and social problems … From the latest survey, 9.3 million Thais … are facing major alcohol-related problems.

[276] *Chile – Notification* 282, above n 196, at [6]-[7]; these measures were also implemented in response to Chile's obesity statistics, which say 65.3% of their population in 2007 classified as "unhealthy" i.e. a BMI of 25 or higher; see: Lauren Streib "World's Fattest Countries" Forbes (online ed, New York, 2 August 2007).

[277] Refer back to pages 32-33.

[278] Refer back to pages 33-36.

However, a complaining Party could point to the design of the measures, in particular to the requirement for standardised fonts, colours and the inability to use trademarks and logos,[279] to suggest that the measures deny competitive opportunities. The inability to distinguish brands of products may have market share consequences and thus constitute a limitation on trade.

If the measures do not constitute denial of competitive opportunities, the nature of the measures may constitute a limitation on trade. The packaging requirements are quite stringent, particularly in contrast to a technical regulation that has no trade-restrictiveness, such as the contact information label from chapter III.C.2.[280] It is therefore arguable that the Australian plain packaging measures have a low-degree of trade-restrictiveness.

B NECESSITY

The trade-restrictiveness of the Australian measures must be necessary for the fulfilment of the legitimate objective, per the two-step analysis adopted from *Brazil – Retreaded Tyres* (GATT).

1 BALANCING FACTORS

Brazil – Retreaded Tyres (GATT) set out three criteria to balance in the first stage of analysis:[281]

(1) The trade-restrictiveness of the measure
(2) The importance of the interests at or values at stake
(3) The extent of the contribution of the measure to the achievement of the objective

As to the first, Part II.A above established that the Australian measures have a low degree of trade-restrictiveness. As to the second, an examination of the interests and values at stake should consider both sides: for Australia in what the measures seek to achieve; and the reciprocating consequences on affected tobacco producers seeking to import into the Australian market.

[279] Tobacco Plain Packaging Act 2011, above n 267, s 20.

[280] Refer back to pages 35-36.

[281] *Brazil – Retreaded Tyres* (Appellate Body), above n 208, at [178].

From the Australian perspective, the public health interests are immense. The health consequences of tobacco are substantial, and tobacco control measures are seen as crucial for improving the burden upon individuals as well as upon national health systems. The immense amount of research produced by the WHO supports the gravity of the interests the Australian measures seek to address.[282] Furthermore, as a Party to the FCTC, Australia is meeting its treaty obligations by implementing plain packaging.

From the perspective of tobacco producers, plain packaging prevents the display of branding on packaging, including the use of trademarks. As a result, there are severe intellectual property implications that arise for tobacco producers.[283] Instead, producers must use standardised colour schemes and fonts, reducing the ability for consumers to distinguish between different brands. Particularly in markets where marketing of tobacco products is restricted, plain packaging removes the last means of brands to differentiate themselves and to appeal to adults who already smoke to switch brands. Moreover, there are costs of compliance in establishing new production lines for the Australian market.

The fact that producers will still be able to sell their products into the Australian market, albeit without the intangible benefits of unique branding, mitigates the claim of significant commercial injury. Overall, it is unlikely that a conclusion can be made that the commercial interests outweigh or even neutralise the public health interests sought to be advanced by the Australian government.

Whilst there is limited empirical evidence on the effect of plain packaging measures in reducing smoking rates,[284] the *Chantler Report* indicated that plain packaging could result in a reduction of tobacco consumption.[285] This conclusion was reached through the identification of three elements. First, plain packaging reduces the appeal associated with packaging, stripping brands of the ability to target consumer groups and creating negative associations to denormalise smoking.[286] In particular, this may reduce the likelihood of children and young adults from starting smoking by preventing tobacco companies from

[282] Refer back to part II.A of chapter I, at 5-9.

[283] However, most redress for this will need to be sought under the Agreement on Trade-Related Aspects of Intellectual Property Rights. This is mentioned here purely for completeness of an obvious effect of the measures.

[284] The concept is rather novel and there are ethical issues around conducting human trials; see: Cyril Chantler *Standardised Packaging of Tobacco* (Department of Health, April 2014) at [10].

[285] At [18].

[286] At [4.20].

being able to use their packaging as marketing.[287] The second element is that it promotes the salience of the health warnings, in that the ability for tobacco companies to use their branding undermines the health warnings.[288] The final element is the elimination of the perception that harmful effects may vary between brands by removing the ability for tobacco companies to utilise their packaging to that effect.[289]

From these three elements, it is possible to conclude that there is a genuine relationship of ends and means for the reduction of smoking as the objective pursued and plain packaging as the measure implemented.[290] In weighing up the low level of trade-restrictiveness, the high importance of the interests at stake, and a reasonable contribution to achieving the objective, it is strongly arguable that the plain packaging measures are necessary.

2 ALTERNATIVE MEASURES

Where the preliminary conclusion is reached that plain packaging is necessary, the onus lies with the complaining party to show that there is a less trade-restrictive measure available that achieves the same level of protection.

In March 2006, Australia implemented pictorial health warning labels covering 30% of the front and 90% of the back of packages.[291] In December 2012, when the plain packaging measures also came into force, the size of these warning labels increased to 75% of the front and 90% of the back of packaged.[292] A complaining party could argue that this increase in health warning pictorial labels by itself would be a less trade-restrictive alternative that still achieves the desired level of protection sought by Australia. Whilst the pictorial labels would constitute a substantial portion of the display on the packages, they would not cause the same severity of commercial ramifications for tobacco companies by stripping them of their branding and trademarks.

However, the *Chantler Report* emphasises the role of branding on packages as mobile "billboards",[293] operating as marketing for brands for the purpose of attracting adult smokers

[287] At [3.22].

[288] At [4.20].

[289] At [4.20].

[290] *Brazil – Retreaded Tyres* (Appellate Body), above n 208, at [145].

[291] "Australia" (2013) Tobacco Labelling Resource Centre <http://www.tobaccolabels.ca>.

[292] "Australia" Tobacco Labelling, above n 291.

[293] Chantler, above n 284, at [7].

to switch brands.[294] The plain packaging measures actively seek to eliminate these design techniques, and in doing so, emphasise the health warnings. To just create larger health warnings would have minimal effect on consumers, if the effectiveness of those health warnings are still capable of being undermined by the design techniques of tobacco branding. This therefore, would not meet the level of protection desired by Australia, as is their right under the preamble. As a nation that has committed to effective tobacco control since 1973,[295] it is unlikely that any of the other policy recommendations from the *GAP* will reach the desired level of protection. Effective tobacco control measures do not work in isolation, but rather build upon the existing frameworks, and Australia has implemented fairly comprehensive tobacco control, with plain packing being the next logical step.

This is relevant to the consideration that must be given to the risks non-fulfilment would create. The risks of ineffective tobacco control are significant: the WHO estimates that 1 billion people will die prematurely from smoking cigarettes this century.[296] Measures that reduce the rates of smoking, and prevent uptake of smoking by children and young adults will mitigate the severity of this public health crisis.

Therefore, as the less trade-restrictive alternative does not meet the same level of protection desired by Australia, it can be concluded that the "trade-restrictiveness" of plain packaging is necessary. Further, the severe consequences of non-fulfilment of reducing rates of smoking for the protection of public health, support the conclusion that plain packaging measures are *not* more trade-restrictive than necessary.

C CONCLUSION

Despite a conclusion that plain packaging is "trade-restrictive", Australia's measures do not violate Article 2.2 as they are not "more trade-restrictive than necessary to fulfil a legitimate objective".

III THAILAND ALCOHOL LABELS

Having established that Thailand's alcohol control measures are a technical regulation with a legitimate objective, the analysis now turns to whether it is more trade-restrictive than necessary to fulfil a legitimate objective.

---

[294] At [3.22].

[295] "Tobacco control: key facts and figures" (29 June 2016) The Department of Health <www.health.gov.au>.

[296] Jared Meyer "Government puts tobacco interests above a million lives" Forbes (online ed, New York, 2 October 2016).

A TRADE-RESTRICTIVE

The Thai measures must have a limiting effect on trade to be "trade-restrictive". Per the analysis in chapter III.C.1,[297] and part II.A above,[298] the same conclusion can be drawn as with the Australian measures that Thailand's alcohol control measures do not create a limitation on imports, *de jure* or *de facto*. The regulations merely specify the that for retail in Thailand, alcohol containers must display pictorial health warnings at specified dimensions; they do not ban imports of alcohol or prohibit the retailing of alcohol altogether.

Per the analysis in chapter III.C.2,[299] and the reasoning in part II.A above,[300] the Thai government may utilise the same argument advanced by Australia distinguishing market share and market size to support a conclusion that the measures do not constitute a denial of competitive opportunities to imports. On this analysis, the implementation of measures aimed to reduce the harmful consumption of alcohol does not have consequences on market share in the manner of the measures in *US – Tuna (Mexico)*, *EC – Sardines*, and *US – COOL*.

Furthermore, the Thai measures are different from the Australian measures in that they do not prevent the use of branding and trademarks like plain packaging. Therefore, concerns around market share impact are less as consumers can still distinguish between brands of alcoholic beverages. When compared to a non-trade restrictive technical regulation, such as a contact information label, it is difficult to assert that the nature or the effect of the alcohol control measures creates a higher level of limitation. Therefore, it is arguable that Thailand's alcohol control measures are not trade-restrictive.

B NECESSITY

Despite the conclusion that the Thai measures are not "trade-restrictive", the analysis of this segment will operate from the basis that a Panel would find the measures "trade-restrictive" and apply the *Brazil – Retreaded Tyres* (GATT) two-step test to determine if the "trade-restrictiveness" is necessary.

[297] Refer back to pages 32-33.

[298] Refer back to pages 42-43.

[299] Refer back to pages 33-36.

[300] Refer back to pages 42-43.

1 *BALANCING FACTORS*

It can be assumed that if the plain packaging measures have a low level of trade-restrictiveness, that the trade-restrictiveness of the Thai alcohol control measures will also be determined to be of a low level. Similarly, the public health interests at stake are of a high threshold, as evidenced by the contribution harmful use of alcohol has on the burden of NCDs.[301] As already highlighted, the effect on commercial interests are substantially less than tobacco since trademarks, brands and names are still able to be used to distinguish products.[302]

The key factor in this case is the extent of the contribution of the measure in achieving the objective. This requires establishing a genuine relationship between ends and means. For the Thai measures, this issue will be the content of the pictorial warnings. The initial designs that were proposed are problematic – only one speaks to a legitimate health issue.[303] The remaining five are either too loosely framed to constitute genuine health warnings,[304] or too focused on the social consequences of alcohol consumption.[305] In their current form, it would be difficult to conclude that a genuine nexus exists.

Despite the low level of trade-restrictiveness and the significance of the public health issues at stake, the lack of a genuine contribution of the measure in achieving the objective makes it unlikely that a preliminary conclusion can be reached that the Thai measures are necessary. However, the analysis will proceed on the basis that a Panel may consider the nexus, albeit weak, sufficient to find the measures necessary.

2 *ALTERNATIVE MEASURES*

A complaining Party could argue that the inclusion of a general large written warning on the front of alcohol containers stating "[e]xcessive consumption of alcohol is harmful to health", without pictorial warnings, would be less trade-restrictive and still achieve the same level of protection desired by the Thai government. Because there is in all likelihood a low-to-non-existent level of contribution, it would be difficult for Thailand to rebut the argument that an accurate written warning would have a lower level of contribution than off-point pictorial warnings simply because picture warnings can convey messages to low literacy demographics. In considering the effects non-fulfilment would create, the WHO studies

[301] Refer back to part II.B of chapter I, at 10-12.

[302] *Thailand – Draft Notification* (Statement), above n 97, at [5].

[303] See Type 1 in Appendix 2.

[304] See Types 3-5 in Appendix 2.

[305] See Types 2 and 6 in Appendix 2.

reiterate the severity of the health issues posed by not reducing harmful use of alcohol. However, this is mitigated by the conclusion that there is a very low level of protection achieved by the current Thai measures.

Therefore, it is likely that the measures are more trade-restrictive than necessary to achieve a legitimate objective, as there is a less trade-restrictive measure available that would achieve the same level of protection desired by the Thai government.

C CONCLUSION

If Thailand's measures were found not to be trade-restrictive, as suggested above, then Thailand would not be in violation of Article 2.2, despite the likelihood that their measures are not necessary. However, if trade-restrictiveness was found to exist, then it is arguable that the measures in their current format are more trade-restrictive than necessary.

IV CHILE FOP LABELS ON PRE-PACKAGED FOOD

Having established that Chile's FOP labelling measures are a technical regulation with a legitimate objective, the analysis now turns to whether it is more trade-restrictive than necessary to fulfil a legitimate objective.

A TRADE-RESTRICTIVE

The Chilean measures must have a limiting effect on trade to be "trade-restrictive". Per the analysis in chapter III.C.1,[306] and part II.A above,[307] the same conclusion can be drawn as with the Australian and Thai measures that Chile's FOP labelling measures do not create a limitation on imports, *de jure* or *de facto*. The regulations merely specify the that for retail in Chile, pre-packaged food must display octagonal health warnings where they exceed the established levels of critical nutrients; they do not operate as product or import bans.

Per the analysis in chapter III.C.2,[308] and the reasoning in parts II.A above,[309] the Chilean government may utilise the same argument advanced by both Australia and Thailand, distinguishing market share and market size to support a conclusion that the measures do not constitute a denial of competitive opportunities to imports. On this analysis, the

[306] Refer back to pages 32-33.

[307] Refer back to pages 42-43.

[308] Refer back to pages 33-26.

[309] Refer back to pages 42-43.

implementation of measures aimed to reduce the consumption of food products that exceed the levels of critical nutrients does not have consequences on market share in the manner of the measures in *US – Tuna (Mexico)*, *EC – Sardines*, and *US – COOL*.

The Chilean measures, like the Thai measures, can be distinguished from the Australian measures in that they do not prevent the use of branding and trademarks like plain packaging, meaning consumers can still distinguish between brands. However, there is also a plausible argument that the label requirements may impact the ability for products to be competitive, as consumers will opt for food products without warnings, reducing the market share of products with excessive critical nutrients. This shift towards consumers making healthier dietary choices is the objective of the measures, and whilst it seeks to reduce the size of the excessive critical nutrients product market, ultimately, it denies competitive opportunities of these products by seeking to reduce their market share in the general food product market.

Whilst the warnings themselves appear more benign than the tobacco and alcohol measures, when compared to a non-trade restrictive technical regulation, such as a contact information label, it is evident that the measure limits trade by denying competitive opportunities. Therefore, it is strongly arguable that Chile's FOP labelling measures are trade-restrictive.

B NECESSITY

Prior to assessing the necessity of the Chilean measure's trade-restrictiveness, it is important to highlight the role of Article 2.5.[310]

Article 2.5 creates a rebuttable presumption that measures created consistently with appropriate international standards do not constitute unnecessary obstacles to trade.[311] The international standard for nutritional labelling is the *Codex Alimentarius Guidelines*, which prescribes the nutrient declaration table on found on the back of pre-packaged goods. Section 5 of the *Codex* states that supplementary nutrition labels to increase consumer understanding may be utilised in addition to the nutrient declaration table.[312] Paragraph 2 of section 5 states that "the use … on food labels should be optional."[313]

[310] TBT Agreement, above n 4, art 2.5.

[311] Article 2.5.

[312] *Codex*, above n 117, s 5.1.

[313] Section 5.2.

It is likely that this means that FOP labels should be optional, like standards, rather than as mandatory technical regulations. "Should" however, differs from "must", and provides the possibility that mandatory measures would still be consistent with the *Codex's* international standards. If that interpretation is accepted, then Chile's FOP labels would not be considered more trade-restrictive than necessary. There is a strong argument that mandatory FOP labels will be consistent with section 5 of the *Codex*, meaning that Chile would not be violating Article 2.2. However, for present purposes, the analysis for necessity will proceed as if Chile's labelling is inconsistent with section 5 of the *Codex*, and therefore unable to rely on Article 2.5.

1 BALANCING FACTORS

From the sliding scale approach advanced in chapter III.C.2, it is possible to conclude that the level of trade-restrictiveness is low, despite the measure constituting a denial of competitive opportunities. As with the Australian and Thai analysis, the public health interests at stake are substantial, as evidenced by the contribution unhealthy diet has on the burden of NCDs.[314] As with the Thai measures, the effect on commercial interests are less than tobacco: trademarks, brands and names are still able to be used to distinguish products.

In terms of assessing the contribution of the measure in achieving the objective, it is likely that a genuine connection can be demonstrated. One factor that mitigates the strength of that contribution is the limitation on the provisions to just pre-packaged foods. The measures do not apply to bulk goods or unpackaged foods, including breads and fast foods.[315] The measures do not comprehensively address unhealthy dietary choices that contribute to high obesity rates. However, completeness is not vital, and the current measures still contribute to the objective significantly. Providing consumer information on pre-packaged goods could shape consumer behaviour towards healthier alternatives when purchasing groceries, ensuring overall improvements to the quality of day-to-day diets.

On balance, the low level of trade-restrictiveness, the high importance of the interests at stake, and the strong contribution of the measure to achieving the objective, the FOP label measures can be considered necessary.

[314] Refer back to part II.C of chapter I, at 12-16.

[315] Ramírez, above n 135, at 3.

2 *Alternative measures*

A complaining Party could argue that the use of daily intake percentage calculations would be a less trade-restrictive measure that also achieves the objective to the same standard. Daily intake percentages are based on recommended intake guidelines and indicate the percentage one serving contributes towards that intake. However, the level of protection sought by Chile incorporates the fact that the "stop-sign" warnings are easy to interpret by all literacy levels, whilst daily intake percentages may not effectively convey the message about health consequences. Taking into consideration the risks of non-fulfilment, the burden of unhealthy diet is well-documented,[316] and the rise in obesity rates which correspond with the shift in Chilean demographics away from traditional diets to Westernised diets[317] indicates a need to inform consumers of the nutrient quality and subsequent health effects of pre-packaged food.

Therefore, it is unlikely that the alternative measure would meet the same level of protection desired by Chile and thus the measures are not more trade-restrictive than necessary.

C Conclusion

Chile's FOP measures do not violate Article 2.2 as they are not "more trade-restrictive than necessary to fulfil a legitimate objective" on the basis that the FOP measure complies with section 5 of the *Codex* and is thus shielded by the Article 2.5's rebuttable presumption that it does not create unnecessary obstacles. Even so, an assessment of necessity shows that there are no alternative measures which are less trade-restrictive that also achieve the same level of protection sought by Chile.

[316] Refer back to part II.C of chapter I, at 12-16.

[317] For more analysis on how changing demographics has influenced Chile's obesity levels, see: Claudia Bambs, Jamie Cerda and Alex Escalona "Morbid Obesity in a Developing Country: The Chilean Experience" (2008) 86 Bulletin of the World Health Organization 737.

CONCLUSION

At the crux of this tension between regulating for the protection of human health and ensuring compliance with Article 2.2 of the TBT Agreement is the definition of "trade-restrictive". In the context of health warning labels, it is evident that adopting a definition of "trade-restrictive" which creates a low threshold for establishing that a measure has a limiting effect on trade is not fatal. It is strongly arguable that Australia's tobacco plain packaging measures and Chile's FOP labelling measures are "trade-restrictive". However, it is also strongly arguable to conclude that both of those measures are not "more trade restrictive than necessary to fulfil a legitimate objective." This should provide confidence to governments seeking to implement similar health warning labels with the goal to reduce the modifiable risk factors of NCDs that doing so will not violate their international trade obligations.

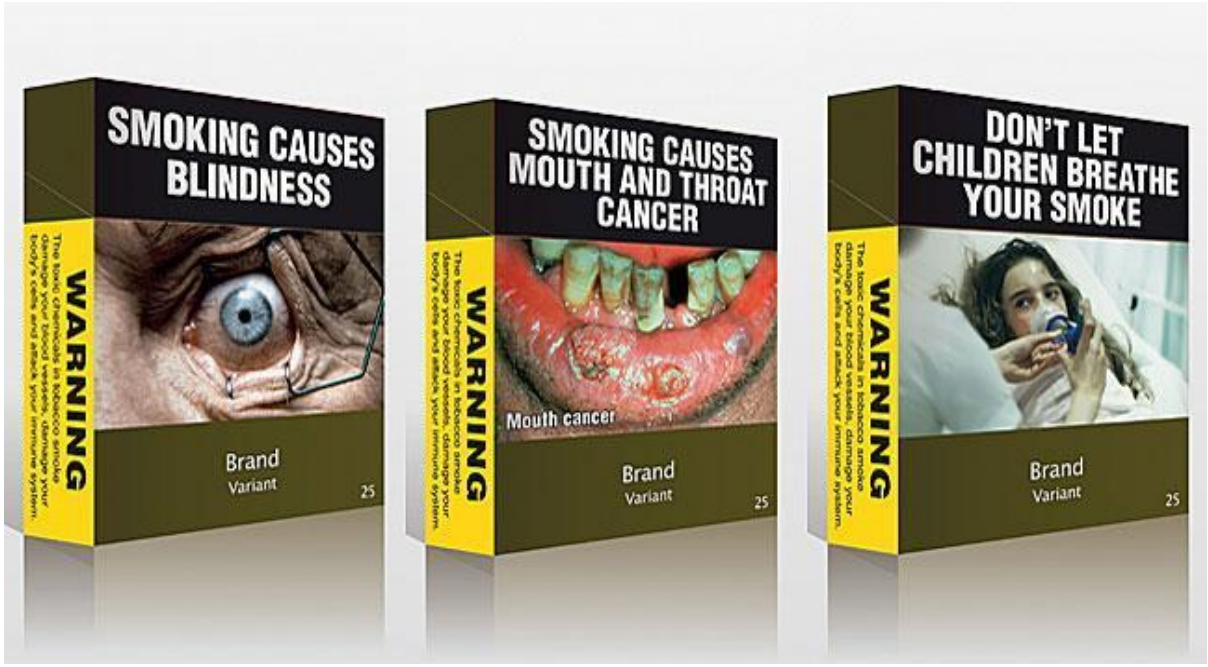
The case of Thailand's alcohol measures should serve as a warning signal to both the international public health and international trade communities. There is a plausible argument that the Thai measures are "trade-restrictive"; however, the risk that they are not is more troublesome, as it is unlikely that the measures contribute to achieving the objective. Whilst regulatory autonomy should be respected, it is also fundamental that the trade system does not permit measures that constitute unnecessary obstacles to trade to fall through the cracks. It is also fundamental that the international public health community ensures the quality of health warnings by ensuring they accurately communicate scientifically supported health risks.

Ultimately, this tension is easy to resolve. States should feel assured to implement policies advancing the third objective of the *GAP*. In the context of health label warnings on tobacco, alcohol and unhealthy food products designed to inform consumers about the risks associated with consuming products, these measures will not conflict with Article 2.2 of the TBT Agreement insofar as they pursue a legitimate objective and do not constitute an unnecessary obstacle to trade. The present analysis has demonstrated a strong case that such measures are compliant with Article 2.2. Therefore, the apprehension of a possible WTO dispute should not deter states from implementing such measures.

Whilst the recommendations of the international public health community continue to rely upon voluntary adoption, differences in opinions between states will continue to exist. The concerns raised in the TBT Committee will continue as some nations seek to protect their traditional exports in the face of other nations implementing health-focused regulations. The best recommendation is for the international public health community to work on developing

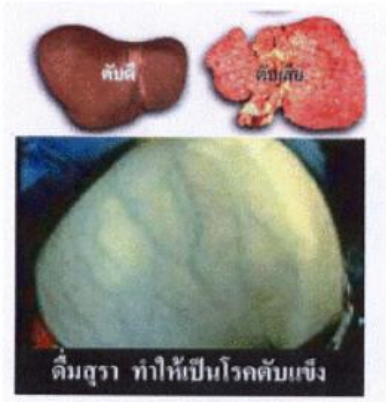
robust international standards around health warnings on tobacco, alcohol and unhealthy food products, furthering the third objective of the *GAP*. The harmonisation function of the TBT Agreement will then facilitate their implementation into normalcy in the trade arena. In the interim, however, it is possible to conclude that tobacco plain packaging, pictorial warnings for alcohol, and FOP labelling measures do not create unnecessary obstacles to trade, and as such are compliant with Article 2.2 of the TBT Agreement.

APPENDIX 1

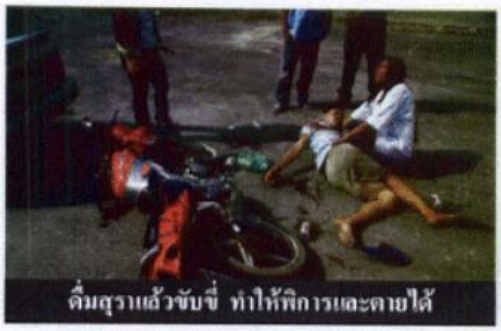


Source: http://www.tobaccotactics.org/index.php/File:Australian_packs.JPG

APPENDIX 2

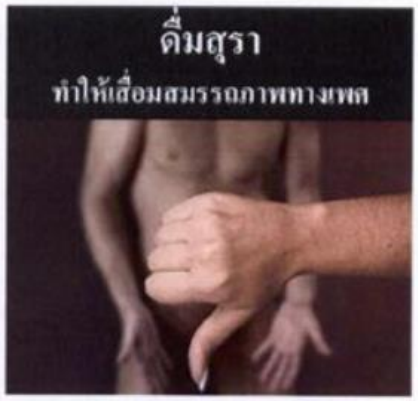


Type 1 "Drinking alcohol causes the hypertension liver cirrhosis"



Type 2 "Drunk driving causes disability or death"

Type 3 "Drinking alcohol leads to unconsciousness and even death"



Type 4 "Drinking alcohol leads to sexual impotency"

Type 5 "Drinking alcohol leads to adverse health effect and family problems

Type 6 "Drinking alcohol is a bad role model for children and young people"

Source: Sukanya Sirikeratikul *Global Agricultural Information Network Report: Thailand – Draft Regulation on Alcohol Graphic Warning Labelling* (United States Department of Agriculture, TH0015, January 2010) at 5-6.

APPENDIX 3

Source: Rodrigo Ramírez et al. *Chile's Law on Food Labelling and Advertising: A Replicable Model for Latin America?* (Llorente & Cuenca, Santiago, 2016).

APPENDIX 4

AGREEMENT ON TECHNICAL BARRIERS TO TRADE

Members,

Having regard to the Uruguay Round of Multilateral Trade Negotiations;

Desiring to further the objectives of GATT 1994;

Recognizing the important contribution that international standards and conformity assessment systems can make in this regard by improving efficiency of production and facilitating the conduct of international trade;

Desiring therefore to encourage the development of such international standards and conformity assessment systems;

Desiring however to ensure that technical regulations and standards, including packaging, marking and labelling requirements, and procedures for assessment of conformity with technical regulations and standards do not create unnecessary obstacles to international trade;

Recognizing that no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, and are otherwise in accordance with the provisions of this Agreement;

Recognizing that no country should be prevented from taking measures necessary for the protection of its essential security interest;

Recognizing the contribution which international standardization can make to the transfer of technology from developed to developing countries;

Recognizing that developing countries may encounter special difficulties in the formulation and application of technical regulations and standards and procedures for assessment of conformity with technical regulations and standards, and desiring to assist them in their endeavours in this regard;

Hereby *agree* as follows:

…

Article 2

Preparation, Adoption and Application of Technical Regulations by Central Government Bodies

…

2.2 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.

…

2.4 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.

2.5 A Member preparing, adopting or applying a technical regulation which may have a significant effect on trade of other Members shall, upon the request of another Member, explain the justification for that technical regulation in terms of the provisions of paragraphs 2 to 4. Whenever a technical regulation is prepared, adopted or applied for one of the legitimate objectives explicitly mentioned in paragraph 2, and is in accordance with relevant international standards, it shall be rebuttably presumed not to create an unnecessary obstacle to international trade.

…

BIBLIOGRAPHY

Legislation

New Zealand

Smoke-free Environments Act 1990.

Smoke-free Environments (Tobacco Standardised Packaging) Amendment Act 2016.

Australia

Tobacco Plain Packaging Act 2011 (Cth).

Chile

Law 20.606 on the Nutrient Composition of Food and its Advertising 2015.

Thailand

Alcoholic Beverage Control Act BE 2551 (2008 AD).

Delegated Legislation

Australia

Competition and Consumer (Tobacco) Information Standard 2011 (Cth).

Tobacco Plain Packaging Regulations 2011 (Cth).

Bills

New Zealand

Smoke-free Environments (Tobacco Plain Packaging) Amendment Bill (186 – 2).

Treaties

Agreement on the Application of Sanitary and Phytosanitary Measures (World Trade Organization [WTO]) 1867 UNTS 493 (signed 15 April 1994, entered into force 1 January 1995).

Agreement on Technical Barriers to Trade (World Trade Organization [WTO]) 1868 UNTS 120 (signed 15 April 1994, entered into force 1 January 1995).

Charter of the United Nations 1 UNTS XVI (signed 26 June 1945, entered into force 24 October 1945).

General Agreement on Tariffs and Trade 55 UNTS 187 (signed 30 October 1947, entered into force 1 January 1948).

General Agreement on Tariffs and Trade 1994 (World Trade Organization [WTO]) 1867 UNTS 190 (signed 15 April 1994, entered into force 1 January 1995).

Statute of the International Court of Justice 33 UNTS 993 (opened for signature 24 October 1945).

Vienna Convention on the Law of Treaties 1155 UNTS 331 (opened for signature 23 May 1969, entered into force 27 January 1980).

WHO Framework Convention on Tobacco Control 2302 UNTS 167 (opened for signature 21 May 2003, entered into force 27 February 2005).

WTO Disputes

Appellate Body Reports

Brazil – Measures Affecting Imports of Retreaded Tyres WT/DS332/AB/R, 3 December 2007 (Report of the Appellate Body).

China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products WT/DS363/AB/R, 21 December 2009 (Report of the Appellate Body).

European Communities – Measures Affecting Asbestos and Asbestos-Containing Products WT/DS135/AB/R, 12 March 2001 (Report of the Appellate Body).

European Communities – Trade Description of Sardines WT/DS231/AB/R, 29 May 2002 (Report of the Appellate Body).

United States – Certain Country of Origin Labelling (COOL) Requirements WT/DS384/AB/R, WT/DS386/AB/R, 26 September 2012 (Report of the Appellate Body).

United States – Measures Affecting the Production and Sale of Clove Cigarettes WT/DS406/AB/R, 4 April 2012 (Report of the Appellate Body).

United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products WT/DS381/AB/R, 16 May 2012 (Report of the Appellate Body).

Communication from the Chairperson of the Panel

Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging WT/DS434/16, 3 June 2015 (Suspension of Proceedings by Ukraine).

Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging WT/DS441/18, 14 October 2014 (Establishment and Composing of Panel).

Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging WT/DS458/19, 30 June 2016 (Delay in Final Report).

Note by the Secretariat

Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging WT/DS435/18/Rev.1, 12 June 2015 (Constitution of the Panel Established at the Request of Honduras).

Panel Reports

Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather WT/DS155/R 19 December 2000 (Report of the Panel).

Colombia – Indicative Prices and Restrictions on Port of Entry WT/DS366/R, 27 April 2009 (Report of the Panel).

European Communities – Measures Affecting Asbestos and Asbestos-Containing Products WT/DS135/R, 19 September 2000 (Report of the Panel).

European Communities – Trade Description of Sardines WT/DS231/R, 29 May 2002 (Report of the Panel).

India – Measures Affecting the Automotive Sector WT/DS146/R, WT/DS175/R, 21 December 2001 (Report of the Panel).

India – Quantitative Restriction on Imports of Agricultural, Textile and Industrial Products WT/DS90/R, 6 April 1999 (Report of the Panel).

United States – Certain Country of Origin Labelling (COOL) Requirements WT/DS384/R, WT/DS386/R, 18 November 2011 (Report of the Panel).

United States – Measures Affecting the Production and Sale of Clove Cigarettes WT/DS406/R, 2 September 2011(Report of the Panel).

United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products WT/DS381/R, 15 September 2012 (Report of the Panel).

Request for Consultations

Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging WT/DS434/1, IP/D/30, G/TBT/D/39, G/L/985, 15 March 2012 (Request for Consultations by Ukraine).

Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging WT/DS435/1, IP/D/31, G/TBT/D/40, G/L/986, 10 April 2012 (Request for Consultations by Honduras).

Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging WT/DS458/1, G/L/1026, IP/D/33, G/TBT/D/43, 7 May 2013 (Request for Consultations by Cuba).

Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging WT/DS441/1, G/L/992, IP/D/32, G/TBT/D/41, 23 July 2012 (Request for Consultations by the Dominican Republic).

Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging WT/DS467/1, G/L/1041, IP/D/34, G/TBT/D/46, 25 September 2013 (Request for Consultations by Indonesia).

Technical Barriers to Trade Committee Documents

Minutes

Minutes of the Meeting of 4–6 November 2015 G/TBT/M/67, 3 February 2016.

Minutes of the Meeting of 5-6 November 2014 G/TBT/M/64, 10 February 2015.

Minutes of the Meeting of 6-7 March 2013 G/TBT/M/59, 8 May 2013.

Minutes of the Meeting of 8-9 March 2016 G/TBT/M/68, 12 May 2016.

Minutes of the Meeting of 10-11 November 2011 G/TBT/M/55, 9 February 2012.

Minutes of the Meeting of 12-15 June 2012 G/TBT/M/57, 18 September 2012.

Minutes of the Meeting of 15-16 June 2011 G/TBT/M/54, 20 September 2011.

Minutes of the Meeting of 17-18 June 2015 G/TBT/M/66, 17 September 2015.

Minutes of the Meeting of 17-20 June 2013 G/TBT/M/60, 23 September 2013.

Minutes of the Meeting of 18-19 March 2015 G/TBT/M/65, 28 May 2015.

Minutes of the Meeting of 18-19 June 2014 G/TBT/M/63, 19 September 2014.

Minutes of the Meeting of 19-20 March 2014 G/TBT/M/62, 20 May 2014.

Minutes of the Meeting of 20-21 March 2012 G/TBT/M/56, 16 May 2012.

Minutes of the Meeting of 27-28 November 2012 G/TBT/M/58, 6 February 2013.

Minutes of the Meeting of 30-31 October 2013 G/TBT/M/61, 5 February 2014.

Notifications

Australia – Notification G/TBT/N/AUS/67, 8 April 2011.

Chile – Notification G/TBT/N/CHL/221, 21 February 2013.

Chile – Notification G/TBT/N/CHL/282, 22 August 2014.

Indonesia – Notification G/TBT/N/IDN/84, 13 January 2014.

New Zealand – Notification G/TBT/N/NZL/62, 24 July 2012.

Thailand – Notification G/TBT/N/THA/332, 21 January 2010.

Statements

Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging G/TBT/W/339, 8 June 2011 (Statement by Indonesia to the Committee on Technical Barriers to Trade).

Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging G/TBT/W/338, 10 June 2011 (Statement by Cuba to the Committee on Technical Barriers to Trade).

Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging G/TBT/W/339, 21 June 2011 (Statement by the Dominican Republic to the Committee on Technical Barriers to Trade).

Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging

G/TBT/W/346, 1 December 2011 (Statement by the Dominican Republic to the Committee on Technical Barriers to Trade).

Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging G/TBT/W/347, 14 December 2011 (Statement by Moldova to the Committee on Technical Barriers to Trade).

Chile – Draft Technical Regulation Relating to the Food Health Regulations, Supreme Decree No. 977/96 G/TBT/W/361, 21 March 2013 (Statement by Mexico to the Committee on Technical Barriers to Trade).

Chile – Draft Technical Regulation Relating to the Food Health Regulations, Supreme Decree No. 977/96 G/TBT/W/372, 21 March 2013 (Statement by Mexico to the Committee on Technical Barriers to Trade).

Chile – Food Health Regulations G/TBT/W/406, 26 August 2015 (Statement by Mexico to the Committee on Technical Barriers to Trade).

France – Proposal to Introduce Plain Packaging of Tobacco Products G/TBT/W/392, 28 November 2014 (Statement of Malawi to the Committee on Technical Barriers to Trade).

Hungary – Proposal for Government Decree on the Amendment of Government Decree 39/2013 (Of 14 February 2013) on the Manufacture, Placement on the Market and Control of Tobacco Products, Combined Warnings and the Detailed Rules for the Application of the Health Protection Fine (G/TBT/N/HUN/31) G/TBT/W/440, 23 March 2016 (Statement by Indonesia to the Committee on Technical Barriers to Trade).

Indonesia – Ministry of Health Regulation 30/2013 on the Inclusion of Sugar, Salt and Fat Content Information, as well as Health Messages on the Labels of Processed Foods G/TBT/W/445, 29 March 2016 (Statement by Indonesia to the Committee on Technical Barriers to Trade).

Ireland – Proposal to Introduce Standardised/Plain Packaging of Tobacco Products G/TBT/W/364, 2 July 2013 (Statement by Cuba to the Committee on Technical Barriers to Trade).

Ireland – Proposal to Introduce Standardised/Plain Packaging of Tobacco Products G/TBT/W/366, 2 July 2013 (Statement by the Dominican Republic to the Committee on Technical Barriers to Trade).

Ireland – Proposal to Introduce Standardised/Plain Packaging of Tobacco Products G/TBT/W/368, 2 July 2013 (Statement by Malawi to the Committee on Technical Barriers to Trade).

Ireland – Proposal to Introduce Standardised/Plain Packaging of Tobacco Products G/TBT/W/382, 28 March 2014 (Statement by Ukraine to the Committee on Technical Barriers to Trade).

Ireland – Proposal to Introduce Standardised/Plain Packaging of Tobacco Products G/TBT/W/401, 11 May 2015 (Statement by Malawi to the Committee on Technical Barriers to Trade).

Ireland – Proposal to Introduce Standardised/Plain Packaging of Tobacco Products in Ireland G/TBT/W/403, 11 May 2015 (Statement by Zimbabwe to the Committee on Technical Barriers to Trade).

New Zealand – Proposal to Introduce Plain Packaging of Tobacco Products G/TBT/W/355, 4 December 2012 (Statement by the Dominican Republic to the Committee on Technical Barriers to Trade).

New Zealand – Proposal to Introduce Plain Packaging of Tobacco Products G/TBT/W/359, 12 March 2013 (Statement by the Dominican Republic to the Committee on Technical Barriers to Trade).

New Zealand – Proposal to Introduce Plain Packaging of Tobacco Products G/TBT/W/381, 28 March 2014 (Statement by Ukraine to the Committee on Technical Barriers to Trade).

New Zealand – Proposal to Introduce Plain Packaging of Tobacco Products G/TBT/W/384, 28 March 2014 (Statement by Cuba to the Committee on Technical Barriers to Trade).

Norway – Standardised Tobacco Labelling Relating to Tobacco Products G/TBT/W/421, 24 August 2015 (Statement by Zimbabwe to the Committee on Technical Barriers to Trade).

Thailand – Draft Notification of the Alcoholic Beverages Control, RE: Rules, Procedures and Conditions for Labels of Alcoholic Beverages G/TBT/W/408, 11 May 2015 (Statement by Mexico to the Committee on Technical Barriers to Trade).

Thailand – Draft Notification of the Alcoholic Beverages Control, RE: Rules, Procedures and Conditions for Labels of Alcoholic Beverages G/TBT/W/431, 19 January 2016 (Statement by Mexico to the Committee on Technical Barriers to Trade).

Thailand – Draft Notification of the Alcoholic Beverages Control Rules, Procedures and Conditions for Labels of Alcoholic Beverages G/TBT/W/422, 24 August 2015 (Statement by Thailand to the Committee on Technical Barriers to Trade).

United Kingdom – Proposal to Introduce Plain Packaging of Tobacco Products G/TBT/W/379, 28 March 2014 (Statement by Cuba to the Committee on Technical Barriers to Trade).

United Kingdom – Proposal to Introduce Plain Packaging of Tobacco Products G/TBT/W/402, 11 May 2015 (Statement by Malawi to the Committee on Technical Barriers to Trade).

WHO Statement Related to Standardised Tobacco Product Packaging G/TBT/GEN/175, 4 December 2014 (Statement by the World Health Organization to the Committee on Technical Barriers to Trade).

WHO Statement Related to Nutrition Labelling G/TBT/GEN/195, 4 May 2016 (Statement by the World Health Organization to the Committee on Technical Barriers to Trade).

International Law Materials

International Court of Justice Cases

North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands) [1969] ICJ Rep 4

United Nations Declarations

Political Declaration of the High-level Meeting of the General Assembly on the Prevention and Control of Non-Communicable Diseases GA Res 66/2, A/Res/66/2 (2012).

World Health Organization Publications

World Health Organization *A Framework to Monitor and Evaluate Implementation: WHO Global Strategy on Diet, Physical Activity and Health* (WHO Press, 2008).

World Health Organization *Diet, Nutrition and the Prevention of Chronic Disease* (WHO Press, WHO Technical Report Series 916, 2003).

World Health Organization *Global Action Plan for the Prevention and Control of Non-Communicable Diseases 2013-2020* (WHO Press, 2013).

World Health Organization *Global Status Report on Alcohol and Health, 2014* (WHO Press, 2014).

World Health Organization *Global Strategy to Reduce the Harmful Use of Alcohol* (WHO Press, 2010).

World Health Organization *Global Strategy on Diet Physical Activity and Health* (WHO Press, 2004).

World Health Organization *Globalization, Diets and Noncommunicable Diseases* (WHO Press, 2002).

World Health Organization *Guideline: Sodium Intake for Adults and Children* (WHO Press, 2014).

World Health Organization *Guideline: Sugar Intake for Adults and Children* (WHO Press, 2015).

World Health Organization *Indicator Code Book: Global Information System on Alcohol and Health* (WHO Press, October 2014).

World Health Organization *Interventions on Diet and Physical Activity*: *What Works – Summary Report* (WHO Press, 2009).

World Health Organization *Plain Packaging of Tobacco Products: Evidence, Design and Implementation* (WHO Press, 2016).

World Health Organization *WHO Framework Convention on Tobacco Control: Guidelines for Implementation, 2013* (WHO Press, 2013).

World Health Organization *WHO Report on the Global Tobacco Epidemic, 2011*: *Warning about the Dangers of Tobacco* (WHO Press, 2011).

World Health Organization *WHO Report on the Global Tobacco Epidemic, 2015: Raising Taxes on Tobacco* (WHO Press, 2015).

World Health Organization Regional Office for Europe *European Food and Nutrition Action Plan 2015-2020* (WHO Press, 2015).

World Health Assembly Resolutions

Global Strategy to Reduce the Harmful Use of Alcohol WHA63.13 (2010).

Public-Health Problems Caused by Harmful Use of Alcohol WHA58.26 (2005).

Strategies to Reduce the Harmful Use of Alcohol WHA61.4 (2008).

Codex Documents

Codex Alimentarius Guidelines on Nutrition Labelling CAC/GL 2-1985 (Adopted in 1985, Revised 2011).

Codex Committee on Food Labelling *Discussion Paper on Codex Harmonisation Principles and Labelling* (Codex Alimentarius Commission, FL/43 CRD/6, May 2016).

Codex Committee on Food Labelling *Proposal for New Work Concerning a Global Standard for Front of Pack Interpretive Nutrition Labelling* (Codex Alimentarius Commission, FL/43 CRD/17, May 2016).

Codex Committee on Food Labelling *Proposal for New Work on Front of Pack Nutrition Labelling* (Codex Alimentarius Commission, FL/43 CRD/20, May 2016).

Codex Committee on Food Labelling *Report of the Forty-Third Session* (Codex Alimentarius Commission, REP16/FL, May 2016).

Electronic Working Group *Consideration of Issues Regarding Front-of-Pack Nutrition Labelling* (Codex Committee on Food Labelling, First Draft Discussion Paper, August 2016).

Government Reports

New Zealand

Ministry of Health *Regulatory Impact Statement: Plain Packaging of Tobacco Products* (24 November 2012).

Ireland

David Hammond *Standardised Packaging of Tobacco Products: Evidence Review* (Department of Health, March 2014).

United Kingdom

Cyril Chantler *Standardised Packaging of Tobacco* (Department of Health, April 2014).

United States

Nelson Ramirez *Global Agricultural Information Network Report: Chile's New Nutritional Labelling Law* (United States Department of Agriculture, CI1513, June 2015).

Sukanya Sirikeratikul *Global Agricultural Information Network Report: Thailand – Draft Regulation on Alcohol Graphic Warning Labelling* (United States Department of Agriculture, TH0015, January 2010).

Books

Benn McGrady *Trade and Public Health: The WTO, Tobacco, Alcohol, and Diet* (Cambridge University Press, New York, 2011).

Chad P. Brown *Self-Enforcing Trade: Developing Countries and WTO Dispute Settlement* (Brookings Institution Press, Washington D.C., 2009).

Craig VanGrasstek *The History and Future of the World Trade Organization* (World Trade Organization, Geneva, 2013).

Gabrielle Marceau (ed) *A History of Law and Lawyers in the GATT/WTO: the Development of the Rule of Law in the Multilateral Trade System* (Cambridge University Press, Cambridge, 2015).

James Crawford *Brownlie's Principles of Public International Law* (8th ed, Oxford University Press, Oxford, 2012).

Malcolm Shaw *International Law* (7th ed, Cambridge University Press, Cambridge, 2014).

Tania Voon et al. (eds) *Public Health and Plain Packaging of Cigarette: Legal Issues* (Edward Elgar Publishing Ltd, Cheltenahm, 2012).

Tania Voon et al. (eds) *Regulating Tobacco, Alcohol and Unhealthy Foods: The Legal Issues* (Routledge, Abingdon, Oxon and New York, 2014)

Tracey Epps and Michael J. Trebilcock (eds) *Research Handbook on the WTO and Technical Barriers to Trade* (Edward Elgar Publishing Ltd, Cheltenham, 2014).

Valentina Vadi *Public Health in International Investment Law and Arbitration* (Routledge, Abingdon, 2013).

World Trade Organization *Understanding the WTO* (World Trade Organization, Geneva, 2007).

Reports

Bloom et al. *The Global Economic Burden of Noncommunicable Diseases* (World Economic Forum, Geneva, 2011).

Rodrigo Ramírez et al. *Chile's Law on Food Labelling and Advertising: A Replicable Model for Latin America?* (Llorente & Cuenca, Santiago, 2016).

World Trade Organization *The WTO Agreements Series: Technical Barriers to Trade* (World Trade Organization, revised in 2014).

Articles

Journals

Claudia Bambs, Jamie Cerda and Alex Escalona "Morbid Obesity in a Developing Country: The Chilean Experience" (2008) 86 Bulletin of the World Health Organization 737.

Mark Davison "Plain Packaging of Tobacco Products: The new Australian laws and the legal challenges to them" (2013) 9 Anuario Andino de Derechos Intelectuales 195.

Meredith Crowley "An introduction to the WTO and GATT" (2003) 27(4) Economic Perspectives 42.

News

Ed Yong "Will we ever have safe cigarettes?" BBC (online ed, London, 16 November 2012).

Edward Malnick "New sugar advice: what does it all mean?" The Telegraph (online ed, London, 6 March 2014).

Jared Meyer "Government puts tobacco interests above a million lives" Forbes (online ed, New York, 2 October 2016).

Lauren Streib "World's Fattest Countries" Forbes (online ed, New York, 2 August 2007).

"Plain packaging could be answer to sugary drinks" Newshub (online ed, Auckland, 2 September 2016).

Tariana Turia "Government moves forward with plain packaging of tobacco products" (press release, 19 February 2013).

Speeches

Michael Dougan "EU Referendum" (Special lecture, University of Liverpool Law School, 14 June 2016).

Websites

"Alcohol: fact sheet" (January 2015) World Health Organization <www.who.int>.

"Australia" (2013) Tobacco Labelling Resource Centre <http://www.tobaccolabels.ca>.

"Australia: Challenging Legislation" (16 June 2016) Tobacco Tactics <www.tobaccotactics.org>.

"Background to the graphic warnings" (27 February 2008) Ministry of Health <www.health.govt.nz>.

"Current warnings on cigarette packets" (15 May 2014) Ministry of Health <www.health.govt.nz>.

"Glossary" World Trade Organization <www.wto.org>.

"Healthy diet: fact sheet" (September 2015) World Health Organization <www.who.int>.

"What is International Trade?" (16 December 2015) Investopedia <www.investopedia.com>.

"Introduction of Tobacco Plain Packaging in Australia" (27 May 2016) The Department of Health <www.health.gov.au>.

"Noncommunicable diseases: fact sheet" (January 2015) World Health Organization <www.who.int>.

"Ottawa Charter for Health Promotion" World Health Organization <www.who.int>.

"Pre-WTO legal texts" World Trade Organization <www.wto.org>.

"Protectionism" Investopedia <www.investopedia.com>.

"The GATT Years: from Havana to Marrakesh" World Trade Organization <www.wto.org>.

"Technical meeting on nutrition labelling for promoting healthy diets" (2015) World Health Organization <www.who.int>.

"Tobacco control: key facts and figures" (29 June 2016) The Department of Health <www.health.gov.au>.

"Tobacco: fact sheet" (June 2016) World Health Organization <www.who.int>.

"Trade liberalization" Investopedia <www.investopedia.com>.

"What is International Trade" (16 December 2015) Investopedia <www.investopedia.com>.