Global Health Advocacy Incubator

Last updated: February 2020

Front-of-package labeling – preparing for and responding to international trade law arguments

The food and beverage industries (either directly or through governments) regularly use legal arguments, including trade threats, to oppose or delay country efforts to advance front-of-package labeling (FOPL) measures, in particular, mandatory "high-in" style labels. To date, many of arguments against FOPL have been tied to obligations contained in international trade agreements. However, often these arguments may not be framed in legal or trade terms or raised in those fora, even though the intention is to threaten governments who are considering FOPL measures.

The table below provides the most common arguments that have arisen to date, along with potential responses to help non-lawyer advocates recognize and be ready to respond. The far-right column includes key supporting evidence, noting what evidence already exists and what countries may need to develop. For more information on existing research and how to use this information, please contact GHAI.

Following the table, the Appendix provides examples of how such arguments have been raised in relation to Mexico's FOPL measure in late 2019 and early 2020.

Argument	What does it mean?	Analysis / potential response	Supporting evidence
The objective of the measure does not align with the public health goal; or **There is no/insufficient scientific evidence on FOPL's effectiveness to achieve the objective;** or **What is the rationale behind the nutrient profile**	These arguments question the link between the objective of the measure and the public health goal it is trying to address. For example, if the public health problem is described as high rates of obesity and NCDs, then industry could argue that there is no evidence showing that FOPL reduces obesity. The policy objective is important as it informs what evidence is required to establish key principles such as "necessity". Many international trade agreements require a measure to be necessary for achieving the goal or objective outlined in the measure. Each country has sovereign authority to determine its own risk tolerance in its health goals, which is then used to determine whether this necessity requirement is satisfied. Note that the arguments are often very detailed, and question the scientific evidence behind the particular nutrient profile model / thresholds chosen, the shape of the warning label, the types of	It is important to ensure that clear, measurable objectives are set, are defined in relation to how the measure will impact the specific health problem being addressed, and backed up by scientific evidence. The objectives should be layered, including general and more specific objectives. For example, the broad objective could broadly relate to addressing high rates of diet-related chronic disease, while the specific objective could be to provide easy to understand information to help consumers make healthier food choices. This should be supported by evidence showing how FOPL helps consumers make better choices, which contributes to lower sugar/salt/fat intake, which is one cause of obesity and chronic disease. There should be evidence to address each part of the measure, including evidence of health harms, the particular nutrient profile model or thresholds used, and why a particular FOPL design was selected.	*Existing evidence* Data from Chile and other countries show that "high-in style" FOPL measures are linked to decreased purchasing intent of unhealthy products, such as "junk food" and ultra-processed products, which in turn, leads to decreased risk of developing NCDs. Other data show that nutrient profile models, such as the PAHO model and the Chilean FOPL model – which provide negative evaluation of products – is an effective way to support consumers in making healthier decisions. *Additional evidence*

model/thresholds chosen?	consumer behavior studies that have been conducted, the impact of the measure on the overall diet of the population as well as on individual dietary patterns.	Remember that trade law allows governments to set their own risk tolerance in relation to their health goals, and can only question the measures the country takes to address the problem.	It is important for each government to document why a particular FOPL was chosen, and evidence that the details of the measure (such as the thresholds, nutrient profile model, label design and wording) are appropriate for the country context.
The FOPL measure is more trade-restrictive than necessary; **or** **The measure is overly burdensome or will make it difficult for industry to comply**	This comes from a key concept in many trade agreements that requires governments not to introduce policies that could make it more difficult for products to be traded freely across borders. That is, the argument raised is that the measure is more trade-restrictive than it needed to be, and a lesser measure could have sufficed. For FOPL, the burden could be printing new labels for all products, and/or the process of having to verify all products in accordance with the new criteria.	Although this argument is commonly made by industry, it assumes that printing different labels creates an undue burden. This can be countered by: • Demonstrating that there are many other requirements requiring companies to reprint labels for different markets; • Showing that the costs of printing new labels are generally low and not overly burdensome; • Allowing the use of stickers for imported products (thus lowering the potential costs for reprinting labels). However, a complex process of verification/assessment could potentially be burdensome, and should be anticipated and made as least costly and difficult as possible. Ultimately, it is important to show why the measure was necessary in the form chosen to achieve the objective – not that it won't impact trade.	*Additional evidence* It is helpful to have evidence to show why the proposed measure will not be overly burdensome for trade, such as existing country-specific requirements for labels. It could also be helpful to show how verifying or assessing foods according to the new requirements is not overly burdensome, or how the government may help to make the process as efficient as possible.
Other, less trade-restrictive measures were not adequately considered; **or**	This argument is a sub-set of showing that the measure is not trade restrictive, and requires governments to consider a range of measures or policy options that could meet the objective and to then pick the one that has the least impact on trade.	It is important that the government considers and documents the alternatives that were considered, and why they were not appropriate. This needs to cover both alternative policy options, and alternative FOPL systems.	*Existing evidence* Evidence shows that "high-in" style FOPL systems reduce consumer intention to purchase unhealthy products, and are simpler and easier to understand than industry-endorsed Traffic

Has the government considered other measures such as education campaigns, voluntary schemes or self-regulation? **or** **Why were high-in labels chosen instead of other types of FOPL systems?**	In the context of FOPL, opponents will commonly argue that other measures such as public education about healthy food, or voluntary labeling systems could be used. They may also argue that alternative FOPL systems – such as GDA – are less trade-restrictive and could also have achieved the desired outcome.	There is a growing body of evidence to show that many other measures do not effectively address the problem, or at least not by themselves. It is also important to note that some other measures (such as education campaigns) are also being used as *complementary*, not alternative measures. Demonstrating that FOPL is not a standalone policy, but rather part of a comprehensive strategy to address diet-related NCDs would also be helpful.	Light Labels (TLL) and Guidelines for Daily Amounts (GDA). Research shows that GDAs do not reduce consumption of unhealthy products, and are actually shown to confuse consumers. Research shows that "high-in" style FOPL is more effective at influencing consumer perceptions than TLL. Voluntary labeling systems can lead to multiple types of logos and labels, which increase confusion and decrease the usefulness of the logo. Voluntary labels are also often used in combination with other claims on food packaging, such as nutrient or health claims, further confusing consumers. Evidence shows that "high-in" FOPL is the most effective measure in influencing purchasing intention. Other measures, such as education campaigns, may be *complementary,* but not an alternative measure.
A particular FOPL scheme does not align with the Codex Alimentarius;	The Codex Alimentarius (Codex) is a set of international food standards, guidelines, and codes. The Codex Commission has two core mandates: to	There are no existing Codex guidelines on FOPL, so it is not possible to be inconsistent with these.	*Additional evidence* It could be helpful to show the extent to which the country is already complying with existing

or **Countries should wait until Codex develops FOPL guidelines;** or **FOPL is inconsistent with existing Codex instruments.**	protect the public health and to ensure fair international trade practices. Currently, Codex standards allow for countries to provide "supplementary nutrition information", but do not specifically address FOPL. However, a Codex committee is in the process of developing FOPL guidelines. While these guidelines will not strictly bind governments, they can still constrain regulatory efforts by providing an avenue for the industry to challenge national measures that differ from the guidelines. One reason is that Codex guidelines are referenced in various trade agreements, which the industry has already been using to make threats about breaches of international trade law.	If guidelines are developed in the future, it is unlikely that they would be so specific as to allow or not allow particular FOPL systems to be used. Rather, they will likely contain broader principles and encourage evidence-based policy. It is also not necessary to wait until such guidelines are developed. Even if Codex did develop prescriptive guidelines, it is not mandatory to comply with them under trade law if they are considered ineffective or inappropriate for a national context. However, this must be clearly articulated and backed up with scientific evidence. However, it is important to note that current guidelines on nutrition labeling (CAC/GL-1985) and health claims (CAC/GL 1979) exist, and to consider and how the country has implemented them.	Codex instruments, such as standards on nutrition labeling (having back-of-pack labels), guidelines on health claims, food supplements, infant formula etc. However, if a country has not complied with all existing instruments, that does not necessarily mean that they cannot pursue FOPL – just that it is important to document the decisions made.
FOP 'high-in' labels arouse fear in the consumer, which is prohibited by Codex; **or** **The labels will scare consumers away from certain foods**	This argument comes from the Codex *General Guidelines on Claims* which prohibit "claims which could give rise to doubt about the safety of similar food or which could arouse or exploit fear in the consumer". Various countries and industry have argued that "high-in" style FOPL (unlike other types of FOPL systems) are claims that arouse fear in the consumer.	Generally, FOPL should not be considered "claims", though there is debate about this currently within Codex committees. It should also be noted that FOP warning labels provide evidence-based information that enables the consumer to make a healthier choice, not to arouse fear. As noted above, it is important to establish clear objectives for the measure. Referencing such objectives is one way to clarify the measure's goals – and demonstrate that they do not include arousing fear in consumers.	*Existing evidence* Evidence shows that the majority of consumers that reviewed various "high-in" FOP labels found them to be "about right" or "not harsh enough".
The effect of a FOPL scheme is discriminatory or protectionist; **or**	This argument suggests that a measure affects foreign and domestic products differently – which is generally prohibited by international trade law. For example, a measure that aims to target all sugary drinks but excludes juices may be challenged	Indirect and direct discrimination should be avoided if possible. However, even discriminatory measures can be justified if there is a good public health reason which is clearly set out. In the case of juices, they could be excluded for enforcement reasons, for example, if they are sold by small vendors or without packaging.	*Additional evidence* The strongest evidence here is to emphasize the scientific basis behind the thresholds chosen to determine which products are subject to the measure. If there is

The impact will be much greater on foreign products/companies	if the majority of juices are locally-made, while the majority of sodas are foreign-owned/imported. In that case, the effect of the measure will fall predominantly on imported goods, while both juices and sodas contain high levels of sugar and may have similar health effects. The argument has also been made simply where the majority of the products/producers affected will be foreign, and they will have to adjust their production and labeling practices to comply.	In general, it is crucial to document and articulate any distinctions drawn between different products, product sources, or production methods. For example, explaining why certain products are targeted by the measure, but similar ones are not and the public health rationale for each decision. In the case where the measure covers many more foreign-owned products, a strong public health case can be made that these products are in fact the key contributors to diet-related chronic disease (if such evidence exists).	a strong public health basis for this, then even if the effect is stronger for foreign products, it can be justified. If the distinction is made for other legitimate public health reasons, it can also be justified if this has been carefully considered and documented.
Infringement on trademarks due to the removal of graphics or logos on packaging.	This argument concerns measures that restrict the use of cartoon characters, logos or other forms of advertising on packaging. As these are almost always trademarked, the argument alleges that not allowing their use interferes with the trademarks held by the companies.	Similar arguments were made in relation to tobacco packaging, and courts have consistently ruled against this argument: trademark law protects the owner from infringement (others using their trademark), but does not give them a right to use the trademark in any context. Particularly where there is a health justification, it is appropriate to limit the use of trademarks.	*Existing evidence* Research from Chile shows that measures restricting the use of child-directed marketing, such as the use of children's characters, on packages of products that are "high in" certain nutrients, have resulted in a reduced prevalence of unhealthy products targeting children.

Appendix: comments made in response to Mexico's FOPL measure

In October 2019, Mexico notified its proposed FOPL measure in accordance with the WTO Agreement on Technical Barriers to Trade (TBT Agreement). This allows other countries to consider how this policy may impact trade, and to raise any concerns in the TBT committee to resolve any potential issues that could rise to the level of a dispute.

As of 4 February 2020, Switzerland, the United States, and the European Union have made comments in the TBT committee in response to the notification. The table below provides examples of some of the arguments made. Please contact GHAI for more information about potential responses to these types of arguments and available research.

Type of argument	Example from comments
General statements summarizing complaints	"Switzerland supports the goals of the Mexican authorities regarding the promotion of public health and consumer information. In fact, Switzerland's "Nutrition Strategy 2017-2024" seeks to improve public health awareness through a variety of measures, including by engaging foodstuff producers and suppliers, raising awareness among consumers about these issues, and promoting a varied and balanced diet. Switzerland would like to better understand whether the proposed amendment of the Mexican Official Standard NOM-051-SCFI/SSA1- 2010 is based on scientific and technical information or relevant international standards, and whether alternative measures have been taken into account, thereby contributing to the relevant legitimate objectives." "The United States supports efforts to reduce obesity and diet-related non-communicable diseases (NCDs). The United States is concerned, however, that the proposed regulation intended to address public health may be more trade restrictive than necessary to meet Mexico's legitimate objective, may not be based on robust scientific evidence, does not appear to consider the relevant international standards, and may contribute to consumer confusion."
Rationale behind the risk assessment and choice of thresholds used	"Recalling Article 2.2 of the TBT Agreement, which states that "*technical regulations shall not be more trade restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create*", Switzerland asks the Mexican authorities to provide the risk assessment that led to the proposed amendments to Norma Oficial Mexicana NOM-051-SCFI/SSA1-2010. Information on the scientific evidence used to perform the before mentioned risk assessment is also welcomed. Furthermore, we are particularly interested in understanding the rationale behind setting the thresholds in table 6 of draft amendment, including the scientific and technical evidence, and how they contribute to achieving the legitimate objective pursued by the measure." (Switzerland) "Certain products either do not contain meaningful amounts of added sugar, saturated fat, and sodium or do not contribute meaningfully to overall intake. Has Mexico considered total dietary patterns when drafting this measure? Did Mexico consider

	exemptions for foods that do not contribute meaningfully to dietary intake of the nutrients of concern to Mexico, such as sugars, saturated fats and sodium? We are concerned that Mexico's chosen thresholds appear to be more stringent than other countries. We note for example, that the threshold for sodium is particularly low, lower than those set by other countries such as Uruguay and Chile. Such low thresholds will likely trigger at least one warning label on many processed foods." (USA)
Considering alternative measures to FOPL	"Switzerland shares Mexico's view on the relationship between diet and health. The Swiss Food Safety and Veterinary Office (FSVO) issues recommendations on daily nutrient in-take and sets nutrient thresholds for different food categories, but on a voluntary basis only. Major food producers and importers have agreed to introduce the label "Nutri-Score" on packaged food on a purely voluntary basis in order to provide better and more targeted information to consumers. Switzerland would kindly ask Mexico if less trade restrictive alternative measures have been taken into account, contributing to the relevant legitimate objectives." "Given that restaurant/street foods and home-cooked foods can also be significant sources of calories, added sugar, fat, and sodium, can Mexico provide more information about the consumer education and other programs it has in place or has under consideration to encourage healthier dietary choices?" (USA) "…the EU has taken a different approach to empower consumers to make informed choices when adopting Regulation (EU) No 1169/2011 on the provision of food information to consumers, which came fully into application at the end of 2016. This Regulation imposes an obligation to provide nutrition information. However, its placing on the front-of-pack is not prescribed. In order not to confuse consumers, Regulation (EU) No 1169/2011 clarifies which particulars of the nutrition declaration may be repeated on the front-of-pack (on a voluntary basis), either the energy value alone or the energy value together with the amounts of fat, saturates, sugars and the sodium content expressed as salt."
Choice of 'high-in' labels	"Switzerland would also be interested in better understanding the motivation behind choosing a label with negative warning such as "*exceso en*". By using such a warning, consumers may come to believe that these foods should be avoided altogether, while they can be part of a balanced diet." "Furthermore, industry has estimated that the proposed front-of-package labeling scheme would affect over 80 percent of food products on store shelves in Mexico bearing one or more stop sign warning labels. Can Mexico please explain how the new labeling scheme will effectively address consumer diet patterns if the majority of products have warning labels? Can Mexico speak to any consumer behavior studies that were conducted prior to the development of this proposal? Are consumers reading the text on the warning label closely or do they base purchasing decisions on the total number of warning labels?" (USA)
Choice of shape	"Did Mexico study the effectiveness of an octagon as opposed to circular or rectangular shapes? Were any other labeling schemes considered? Further, has Mexico studied the effectiveness of using more neutral messaging to inform consumers of nutritional

	content of packaged foods, or whether symbols may be interpreted by consumers as an instruction not to consume particular products or entire groups of products?" (USA)
Consumer confusion	"The proposed regulation requires a front-of-pack octagonal, "stop sign" warning on package processed foods in "excess of" nutrient thresholds for saturated fat, trans fat, sodium, sugar and calories. It is our understanding that a wide variety of foods, including many yogurts, cereals, and canned beans, will be required to have this warning label. Has Mexico considered whether the stop sign warning symbols may cause consumers to avoid foods containing important nutrients and that can be part of a balanced diet?" (USA) "The EU considers that individual warnings such as "Excess calories", "Excess sugars", "Excess saturated fats", "Excess trans fats" and "Excess sodium" do not reflect the objective of front-of-pack nutrition labelling as described in Section 5 of the Codex Guidelines on Nutrition Labelling (CAC/GL 2-1985), i.e. "to increase the consumer's understanding of the nutritional value of their food and to assist in interpreting the nutrient declaration". Indeed, such individual warnings do not allow the consumer to understand the complete nutritional status of the food product, but only to draw the consumer's attention to (a) single nutrient(s) in high quantity."
Codex	"Referring to Article 2.4 of the TBT Agreement, we note the statement in CAC/GL 2-1985 CODEX Guidelines on Nutrition Labelling whereby the information contained in the nutrient declaration "*Should not lead consumers to believe that there is exact quantitative knowledge of what individual should eat in order to maintain health, but rather to convey an understanding of the quantity of nutrients contained in the product*." Furthermore, the CAC/GL 2-1985 CODEX Guidelines on Nutrition Labelling do not foresee the use of warning labels. Consequently, the Codex Alimentarius does not set thresholds for nutrients that are subject to the notified draft." (Switzerland) "Standards and guidelines of the Codex Alimentarius Commission are frequently cited in the WTO TBT Committee as international standards that meet the WTO TBT Committee Decision on International Standards, found in G/TBT/1/Rev. 14. We note that Article 2.4 of the WTO TBT Agreement requires Members to use international standards as the basis for their regulations except when such international standards would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued. Codex is currently developing guidance on FOPNL, but can Mexico clarify how the following Codex Standards were considered in the development of these requirements: • Codex Guidelines on Nutrition Labeling (CAC/GL-1985) • Codex General Guidelines on Claims (CAC/GL 1979) • Codex Standard for Vitamin and Mineral Food Supplements (CAC/GL 55-2005) • Codex Standard for Follow-up Formula (CODEX STAN 156-1987) • Codex Guidelines on Formulated Complementary Foods for Older Infants and Young Children (CODEX CAC/GL 8-1991) • Formula Foods for Use in Very Low Energy Diets for Weight Reduction (CODEX STAN 203-1995)."

	"The EU considers that it would be more appropriate for Mexico to await the outcome of further discussions in Codex before considering the mandatory front-of-pack nutrition labelling model proposed in the notified draft."
Burden of introducing new labels	"The conformity assessment requirements in Chapter 9 of the regulation appear to make the currently voluntary label approval a mandatory process, thereby requiring conformity assessment of all products with Mexican regulations and standards. The United States is concerned with the potential negative economic impact associated with such requirements becoming mandatory, such as ensuring the volume of labels required to be assessed by verification bodies are processed without delay, in addition to the costs associated with label changes and the assessment process. Can Mexico please confirm whether mandatory label approval and conformity assessment of all products subject to the regulation is intended in the revisions to this regulation? If so, what legitimate objective is being met by introducing such a burdensome process and has Mexico considered other, less restrictive methods for determining the compliance and accurate labeling of products?" (USA)
Discrimination on foreign products	"While it is the EU's understanding that the proposed measure would apply without difference to domestic and foreign producers, the impact will be particularly strong for foreign operators, which would have to adjust their production and labelling practices to comply with the draft resolution."
Questioning inconsistencies	"Industry has informed us that Mexico's sugar threshold is so low that it would trigger stop sign shaped labels on certain lower-calorie beverages, where a blend of sugar and low- and/or no calorie sweeteners are used to give consumers more options with fewer calories. For example, a reduced-sugar fruit drink beverage that contains low- and/or no-calorie sweeteners would be required to bear two or more FOP stop sign shaped labels – even though it has fewer calories and sugar than other products which may be exempted from such stop signs." (USA)
Breach of trademarks	"Removal of graphics and advertising on packaging Section 4.1.5 requires that Labels of prepackaged food and non-alcoholic beverages that include a stop sign shaped label or "stamp" should not include characters, drawings, celebrities, gifts, offers, toys or contests, price or content related offers, visual-spatial games or social networks ads that promote their consumption. Trademarks play an important role in commerce by allowing companies to distinguish their products in the market and preventing consumer confusion. Can Mexico please identify the consumer research or other behavioral change studies that are the basis for these requirements? How will Mexico account for trademarked characters when implementing these requirements?" (USA)
Other issues (Transition period, sweeteners, added sugar)	Transition period: "The draft amendment does not specify a transition period between adoption and application of the new technical regulation. Producers and businesses in and outside of Mexico will require sufficient time to adapt their internal processes to the new regulation. Switzer-land therefore calls on Mexico to engage with relevant stakeholders and provide a sufficiently long transition period in line with Article 2 (12) of the TBT Agreement." (Switzerland) "The United States requests Mexico to allow a two-year minimum implementation period to ensure a smooth transition. While the WTO TBT Committee Decisions and Recommendations set a minimum six-month implementation timeline, we recognize that this regulation is complex and far reaching so a lengthier timeline would better allow companies to comply."

	Warning label for sweeteners: "We are concerned that the stop sign shape of the label for sweeteners could convey a warning to consumers for additives that have been approved for use by Mexico. We would like to note that this proposed warning label for sweeteners in the form of a stop sign is unique in the world. Can Mexico provide more details about the objective and the scientific basis for the requirement for front of package labels stating that products "CONTAINS SWEETENERS, AVOID CONSUMPTION BY CHILDREN"? Is the concern that sweeteners are unsafe for consumption by children or is the concern that these substances will lead to later consumption of sweet foods? … Can Mexico provide more information about any consumer research it conducted regarding the proposed warning label for sweeteners? Has Mexico considered whether this label may discourage the reformulation of products to lower their sugar content? Companies are increasingly reformulating sweet products to replace sugar with sweeteners to offer less calorically dense products, while still maintaining product palatability. Using these guidelines, a product reformulated in this way may be required to carry more warning labels than a high sugar original product, potentially discouraging consumption of lower calorie products." (USA) "The EU observes that the Codex Alimentarius General Standard for Food Additives (CODEX STAN 192-1995) does not allow the use of sweeteners in food targeted at infants and young children (i.e. up to three years of age). However, sweeteners are permitted in many other food categories that are consumed, inter alia, by children older than three years. To the understanding of the EU, the use of sweeteners is technologically justified to replace sugars for the production of energy-reduced food, non-cariogenic food or food with no added sugars, or if the use of sweeteners permits an increase in the shelf-life of the food, or in food intended for particular nutritional uses. Those considerations are applicable in general and do not exclude children (above three years of age)." Added sugar definition: "Can Mexico provide additional details about the proposed definition for added sugars? Can Mexico confirm that it will exempt natural sugars present in fruits and milk/milk derivatives from its definition of added sugars as long as those sugars are not added as part of the manufacturing process? Specifically, the United States recommends ensuring that the lactose in milk and milk-derived products that are used as ingredients in foods, is exempted from the definition of "Added Sugar" so that, consistent with the guidelines of the World Health Organization, consumers are not discouraged from consuming nutrient-rich dairy products." (USA)