

## Interpreters of International Economic Law: Corporations and Bureaucrats in Contest over Chile's Nutrition Label

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This article analyzes the everyday interpretive practices of corporations and bureaucrats that shape the meaning and force of international economic law. To understand how common practices such as public consultation submissions, corporate threat letters, and external legal assistance influence regulators' understanding of their "legally available" policy space, we study the contested introduction of a pioneering nutrition labeling regulation in Chile. The transnational food industry powerfully challenged the regulation's legality under World Trade Organization law. But Chilean health bureaucrats, in coordination with segments of the country's legally highly competent economic bureaucracy, effectively defended the legality of their proposed regulatory measure. Drawing on data from freedom-of-information requests and in-depth interviews, the article argues that the outcomes of such interpretive contests are substantially shaped by participants' knowledge of the entitlements created by international economic law and thus by the international legal expertise they have access to. This often but not always puts transnational corporations at an advantage over national regulators in the strategic interpretation of international economic law.

**I**n 2015, Chile's health ministry introduced a pioneering nutrition labeling scheme, requiring foods and drinks high in calories, sugar, salt, and certain fats to carry front-of-pack warning labels (Figure 1) and to comply with substantial sales and marketing restrictions. This made Chile a global leader in the fight against unhealthy diets, obesity, and associated noncommunicable diseases (NCDs) such as cancer and heart disease (Jacobs 2018). NCDs are considered "one of the major challenges for development in the 21st century" (United Nations 2012). In 2016, they were responsible for no less than 41 million deaths worldwide, including 15 million deaths between the ages of 30 and

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**Figure 1. Chile’s Nutrition Warning Labels.**

69 (WHO 2018). To tackle this global health crisis, governments around the world have started to follow the Chilean model. Peru, Uruguay, Israel, and Mexico have already passed Chile-style nutrition labeling regulations, while many other countries are considering a similar path.

Chile’s innovative regulation could, however, only be introduced after an intense contest between Chilean health bureaucrats and the transnational food industry over the legality of the regulatory measure under the agreements of the World Trade Organization (WTO). The food industry persistently claimed that WTO law did not allow Chile to mandate warning labels, nor to prohibit the use of trademarked cartoon characters in advertising. But despite industry’s opposition, Chile ultimately introduced its landmark nutrition labeling regulation.

Chile’s achievement is theoretically significant because transnational corporations often overpower national social regulators with self-interested interpretations of international economic law.<sup>1</sup> This happened, for instance, in Indonesia, where the health ministry started working on a mandatory nutrition label similar to Chile’s in 2010. Upon demands from the transnational food industry, notice of the 2013 draft regulation was formally given to the WTO and its member countries in 2014 (Source 1).<sup>2</sup> The food industry then sent its concerns to European Union trade bureaucrats, criticizing “the lack of scientific evidence that the MOH [Ministry of Health] Decree will help address non-communicable diseases (NCD) in Indonesia”, and noting that they “would appreciate if the issue could also be raised at the next [Technical Barriers to Trade (TBT)] Committee meeting” in Geneva (Source 2). Indonesia’s label was consequently discussed for eleven consecutive committee meetings over a period of more than three years. In the Committee, foreign trade bureaucrats criticized Indonesia for not considering less trade restrictive measures as WTO law

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<sup>1</sup>Two similar setbacks for corporations’ legal allegations, both on tobacco packaging regulations, are Uruguay’s 2016 victory over Philipp Morris in an investor-state arbitration and Australia’s 2018 acquittal in a WTO dispute (see Buzard and Voon 2019; Crosbie et al. 2018). As we will show, Australia’s WTO case on tobacco packaging emboldened Chilean regulators’ commitment to introduce food packaging regulation.

<sup>2</sup>All sources can be found in the online Appendix S1.

allegedly demanded. In 2015, at least in part because of uncertainty within the Indonesian health ministry about how to respond to industry's claims of WTO law transgression,<sup>3</sup> which had also been voiced to the Indonesian President's office, Indonesia postponed the regulation's implementation (Source 3). The perception among senior officials that international economic law restricts national policy space for nutrition labeling contributed to the collapse of this initiative.

Transnational corporations' strategic use of international economic law in their fight against unwanted regulations presents a challenge to effective state action not only in developing countries (Crosbie and Thomson 2018; Tavernise 2013). As a case in point, Canadian health regulators failed in their attempt to introduce tobacco plain packaging and warning labels in the mid-1990s. The question of whether such regulations would violate WTO law was highly contested (Crosbie and Glantz 2014). The transnational tobacco industry aggressively asserted that a plain packaging requirement would violate Canada's obligations for trademark protection under the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) by limiting brand recognition and distinctions. Internally, however, the industry's legal experts had come to the conclusion that "the ultimate usefulness" of TRIPS claims in a formal legal challenge "might well be limited" (Source 4). Still, Canada's health regulators, disquieted by the tobacco industry's public interpretation of international trade law, abandoned the plain packaging initiative. The Canadian health minister explicitly justified this move with the statement that Canada's plain packaging plans "would be in violation [...] of trademark" (Source 5).

Drawing on a thick analysis of the interpretive contest over Chile's nutrition labeling regulation, we develop a novel approach to study the "missing middle" (Merry 2006a) between international economic law and the policy space de facto available to social regulators in fields such as public health and environmental protection. Expanding on recent advances in legal realism (see Shaffer 2015b) and constructivist political economy (see Abdelal et al. 2010), we call attention to the everyday interpretive practices, such as corporate threat letters or public consultation submissions, that make and remake the meaning of international economic law *in the minds* of social regulators. These practices occur in the context of "regulatory conversations" (Black 2002) between transnational corporations and national bureaucrats that often practically resolve, without formal litigation, how

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<sup>3</sup>Interviews with WHO official, 15 August 2017; and Indonesian Ministry of Health official, Jakarta, 11 August 2017.

international economic law applies to proposed regulatory measures and if these fall within states' "legally available" policy space. These interpretive practices thus contribute to the social construction of nothing less than the "international legality" of autonomous state action. We will demonstrate that the "bark" of law users' interpretive practices matters just as much as the "bite" of international economic law's formal obligations (see Amsden and Hikino 2000). To explain the outcomes of interpretive contests between bureaucrats and corporations, we emphasize the roles of social regulators' own legal expertise and of coordination across government agencies involving legal assistance from economic bureaucrats.

We first introduce our analytical framework of everyday interpretive practices in international economic law (Section 1). Then we present our sociolegal methodological approach (Section 2) and provide background on Chile's nutrition labeling regulation (Section 3). The following empirical analysis first shows how the transnational food industry put forward extremely restrictive interpretations of WTO law in order to challenge Chile's proposed regulation (Section 4). It then demonstrates how Chile's health ministry, in coordination with the country's trade and intellectual property (IP) bureaucracies, successfully defended the legality of its nutrition label (Section 5). The final section considers the practical implications of our findings and outlines how our analytical approach can be applied to studying the effects of international economic law in other policy areas (Section 6).

## **1. The Social Construction of "Legally Available" Policy Space**

How does international economic law shape the world we live in? Legal scholarship about interstate trade and investment rules often rests on positivist analysis. This mode of inquiry aims to establish what the law "is" with reference to textual provisions in economic treaties, an established canon for interpreting international law, and relevant rulings of adjudicative bodies (e.g., the WTO Appellate Body). But positivists too often proceed on the assumption that real-world disagreements about the extent of rights and obligations under international economic law are in fact being resolved by such formal and balanced legal analysis. Legal realists argue that, instead, scholars need to ask "how actors use and apply law in order to understand how law obtains meaning, is practiced, and changes over time" (Shaffer 2015b: 189; see also Dezalay and Garth 1996; Merry 2006b).

## 1.1 Adjudicatory and Everyday Interpretive Practices

Focusing on the social practices that give meaning and force to international law (Lamp 2018), we identify two distinct spaces of interpretation in the domain of WTO law, resembling intersecting fields as theorized by Bourdieusian sociologists (Dezalay and Madsen 2012: 436). The first is a space of *adjudicatory interpretive practices*, centered around the formal state-to-state adjudication mechanisms of the WTO's Dispute Settlement Body (Conti 2010). Its core participants constitute a comparatively small and cohesive "interpretive community" (Waibel 2015), made up of Appellate Body members, panelists, the WTO Secretariat staff, trade lawyers working for states or private law firms, and scholars of WTO law. The core activities of this community are the formal litigation and adjudication of actual disputes,<sup>4</sup> attempts to "predict" how the Appellate Body would decide a particular case, and the use of normatively motivated reconstructions of WTO law to justify general principles for the resolution of recurring interpretive questions (Howse 2016; Shaffer et al. 2017). Legal positivist analysis holds substantial authority in this interpretive community, and WTO law is widely perceived as ideal-typical "hard law" (Abbott and Snidal 2000). And yet, "many of the [WTO system's] legal restrictions are open-ended and remain in flux through constant interpretation" (Santos 2012: 553). The Appellate Body also resolves only a small fraction of disagreements, has a dynamic jurisprudence, and its rulings do not bind as precedents. WTO law therefore carries a wide "fringe of vagueness" (Hart 1961: 123), contributing to substantial uncertainty about the meaning of WTO law even within this community.

While the adjudicatory interpretive practices by the WTO's recognized interpretive community are undoubtedly important, we call attention to a second space of interpretation—the *everyday interpretive practices* that make and remake the meaning of international economic law *in the minds* of domestic regulators. These practices often take place in the context of relatively fluid "regulatory conversations" (Black 2002) between the bureaucrats tasked with designing and implementing regulatory measures and the stakeholders of a given policy field, in particular industry groups. Examples of such everyday interpretive practices include the formal raising of legal "concerns" about a regulatory measure by foreign trade bureaucrats in the "administrative hinterland" of the WTO's committees (Lang and Scott 2009: 576), critical or supportive stakeholder submissions during public consultations, the

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<sup>4</sup>The authority of the WTO Appellate Body, which is at the core of this interpretive community, has recently become increasingly contested (see Creamer 2019).

sending of “threat letters” by global law firms about a state’s potential legal transgressions, as well as legal assistance provided by bureaucrats from other government agencies. These common social practices are crucial in shaping how law users—a term we use to capture not only “court users” (Nader 1984) but also participants in preadjudication legal practices—understand international economic law and thus constitute and reconstitute international “legality” (see Ewick and Silbey 1998: 33–53).

Significantly, WTO law requires the notification of proposed regulatory measures and subsequent public consultations. This creates institutionalized venues in which regulatory conversations about environmental and health policy frequently turn into long and intense *interpretive contests* among law users about whether a specific regulatory measure is within a state’s “legally available” policy space under international trade law. Compared to the practices of the WTO’s adjudicatory interpretive community, these interpretive contests among law users tend to be more concrete, informal, and instrumental, and follow cruder patterns of legal argumentation. In fact, many participants have little to no legal training. One bureaucrat working in the WTO’s TBT Committee characterized the interpretive practices at the WTO Appellate Body as “another world.”<sup>5</sup> Yet, the large majority of conflicts over the meaning of international economic law take place in such everyday interpretive contests among law users, without the “possibility of continuous supervision through judicial decision-making” (Provost 2015: 291). Since the inception of the WTO in 1995, only fifty-four formal disputes touching on the TBT Agreement were initiated, even though there have been over 560 Specific Trade Concerns in the TBT Committee, and over 30,000 notified regulatory measures.

## **1.2 The Structure of Interpretive Contests**

In outlining our theoretical expectations about the structure and functioning of these everyday interpretive contests, we draw on scholarship in law and the social sciences as well as on our own comparative research. We focus on the central roles of social regulators, transnational corporations, and economic bureaucrats in interpreting international economic law and applying it to particular regulatory measures. Broadly speaking, corporations tend to advance interpretations of international economic law that challenge unwanted regulations, while social regulators—in policy areas such as public health, environmental, and consumer protection—tend to defend the legality of their policies. The role

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<sup>5</sup>Personal communication with Chilean trade bureaucrat, Geneva, March 2019.

of economic bureaucrats in the interpretive practices of international law is both theoretically and empirically more ambiguous.

Interpretive contests are structured by both international and national institutions. Regulators are especially exposed to the interpretive practices of corporations due to the procedural (as opposed to substantive) requirements of international economic law (Mertenskötter and Stewart 2018). Such requirements often empower private actors to participate in domestic policymaking by providing access to national regulators. Article 10 of the WTO's Agreement on Technical Barriers to Trade (TBT), for example, requires all member states to create "enquiry points" where "interested parties in other Member States" can make "all reasonable enquiries" regarding adopted or proposed technical regulations. In practice, these procedural requirements enable transnational corporations to inject their self-interested interpretations of international economic law into regulatory conversations. Likewise, domestic administrative rules, such as the one setting up Chile's interagency committee on TBT measures, can require regulators to coordinate internally with economic bureaucrats. In these ways, international and national institutions shape how regulatory conversations about the meaning of WTO law play out.

National regulators are at the center of these everyday interpretive contests. National regulatory agencies have long played a central role in implementing policies that contribute to social and economic development (Carpenter 2001; Evans 1995). Since the 1990s, they have increasingly come within the purview of international economic law. Regulators now do not only have to make sure that they have the necessary political support for a proposed regulatory measure, or that it would withstand domestic judicial review. They now also have to concern themselves with the question if their proposed measure falls within the "policy space" that is available under international economic law (Gallagher 2005; Santos 2012). Given the large number of disputes that will never be resolved by the WTO's formal dispute settlement mechanism, domestic regulators' *perceptions* of the legally available policy space under international economic law become crucial. Erlanger et al. (1987: 600) made a similar point in their research on divorce law, arguing that "parties who feel constrained, will act as if they are, whether or not they in fact are."

Transnational corporations have proven to be the main opponents of national regulators in the interpretive contests over the "legality" of proposed regulatory measures. Over the past century, corporations have grown enormously and have functionally integrated across borders (Bartley 2018: 147–148). Together with their significant resources and effective organization, this has left

transnational corporations with substantial power in global regulatory politics. Corporations have long been recognized as major players in the negotiation of international economic agreements and thus in the making of international economic law (Sell 2003; see also Block-Lieb 2019; Durkee 2017). But corporations also actively use existing international economic law, for example, by lobbying governments to challenge other governments' unfavorable regulations through formal WTO dispute settlement (Curran and Eckhardt 2017; Shaffer 2003). And even more often, we argue, corporations challenge unwanted regulations by telling regulators directly that their proposed regulations would violate international economic law, thus acting as government "informers" in contexts of "rule and institutional confusion" (Alter and Meunier 2009: 18; see also Quark 2016). While corporations' legal concerns may frequently be well founded, we argue that corporations often advance extremely restrictive interpretations of WTO law in order to prevent legitimate government action that threatens their commercial interests.

Corporations' instrumentalization of WTO law creates risks of *interpretive capture*, especially when engaging with more resource-constrained regulators. Scholarship on regulatory capture, which describes situations where industry interests influence regulators so as to change regulations at the expense of the public interest (Carpenter 2013: 60–61), has found that industry may abuse administrative law provisions in order to "overload" regulators with information (Wagner 2010; Yackee and Yackee 2006). In such cases of ideational, rather than material, capture, industry groups attempt "to influence frames, assumptions, and world-views of regulators" (Carpenter 2013: 62). We suggest that social regulators risk a specific form of ideational regulatory capture, namely interpretive capture, when the regulated industry succeeds in influencing regulators' interpretation of the law and thus achieves more favorable regulations. In emphasizing corporations' ideational power, we do not question the importance of their material power. In fact, we will show that corporations' material resources underpin their ideational influence strategies.

### **1.3 Who Comes Out Ahead?**

Who should we expect to come out ahead in the contested interpretation of international economic law? When do corporations succeed in capturing regulators' understanding of the law? And when can national bureaucrats prevail and assert their national policy space?

Despite our emphasis on the social construction of international economic law, its users' everyday interpretations and their



chances of success are certainly not decoupled from legal texts and the broad consensus about their meaning in the WTO's formal interpretive community. The entitlements created by WTO law and clarified by formal interpretation represent "bargaining endowments" (Mnookin and Kornhauser 1979: 968) that structure the informal regulatory conversations between law users and establish limits for what can reasonably be asserted. For instance, it clearly matters for the policy space of national governments that the WTO TRIPS Agreement guarantees pharmaceuticals 20 years of patent protection, and this legal entitlement has structured and limited "interpretive conflicts over TRIPS" (Kapczynski 2009: 1643). This is true even if legal entitlements are inherently uncertain or if participants' understanding of their entitlements is incomplete or mediated by other actors, such as lawyers (see Erlanger et al. 1987: 598–599).

Given this "shadow" of international economic law (Mnookin and Kornhauser 1979; see also Quark 2016; Shaffer 2015a), legal expertise becomes a critical resource in the interpretive contests about the law's meaning among its users (Black 1997; Quack 2013). Knowledge not only of the texts and standard canons of interpretation, but also insights into the practices of the WTO's recognized interpretive community can be immensely beneficial (Lamp 2018). Importantly, legal expertise is often not about deep and accurate knowledge of the law, but about the ability to credibly "enact" (Carr 2010) expertise. Corporate threat letters, for instance, seek to convince social regulators—through markers of legal authority and competence—that they are about to violate their legal obligations. Similarly, regulators' responses to public consultation submissions need to outline a legally credible defense of their regulatory measure by referring to relevant articles and clauses.

We would expect transnational corporations to frequently come out ahead in these everyday interpretive contests, even though they lack any formal decision-making power. Corporations are "repeat players" (Galanter 1974) in regulatory conversations about the application and meaning of international economic law. Specifically, they are repeat users of the international notice-and-comment procedures enshrined in modern trade law, and they will often have already been confronted with similar measures in other jurisdictions and fora. Social regulators of any one state, by contrast, will usually be uninitiated in trade law's interpretive practices when discussing a specific regulatory measure. Repeat participation, together with significant financial and human resources (Fuchs 2007: 2), allows corporations to "have advance intelligence" and to "develop expertise and have ready access to specialists" (Galanter 1974: 98), which provide them with a clear

understanding of the “entitlements created by law” (Mnookin and Kornhauser 1979: 997) and how they can be strategically interpreted to challenge unwanted regulations.

Transnational corporations can rely on a variety of channels to convince regulators of their legal interpretations. Corporations’ globally cohesive organization (see Fairfield 2015: 38–39), including well-funded industry associations in “national cloaks” all around the world, allows transnational industries to amplify their own voice in regulatory conversations. During notice-and-comment procedures, regulators often receive similar comments from a multitude of corporations and industry associations, creating the impression of consensus. Corporations also “have opportunities to develop facilitative informal relations with institutional incumbents” (Galanter 1974: 99), in particular with trade bureaucrats. In turn, trade bureaucrats can raise industry’s legal concerns in the committees of the WTO and directly with social regulators of their own governments. Indeed, trade bureaucrats commonly see the WTO’s purpose as “full international competition” (Howse 2012: 451) and, in principle, may often share “complementary” goals (Shaffer 2003: 4) with the private sector in their pursuit of liberalization and export promotion. To these ends, they engage in “public-private cooperation” to share information about potential impediments to business activities and to “challenge foreign trade barriers before the WTO legal system and within its shadow” (Shaffer 2003: 8). To further enhance the effect of their legal claims, corporations regularly invite purportedly independent experts to testify, preferably in the media, about the international legal problems of a proposed regulation. These channels often enable transnational corporations to establish the credibility of their interpretations of international economic law as applied to specific regulatory proposals.

In regulatory conversations with transnational corporations, social regulators are often at a disadvantage. They tend to have fewer financial and human resources and less experience with using WTO law. Yet, as our case study demonstrates, regulators have the potential to uphold their own interpretations, defending the legality of their proposed regulatory measures. While social regulators’ encounters with international economic law are often sporadic, they tend to have more substantial experience with the international standards and scientific research material for WTO law’s substantive obligations (Howse 2000). Yet, social regulators often depend on legal assistance for defending their proposed regulatory measures under international economic law. Economic bureaucrats of the same—“disaggregated” (Slaughter 2002)—government are a major potential source of such assistance, as the economic bureaucracy, in particular trade and IP agencies, often

is where international legal expertise is developed (Conti 2010; Drahos 2010; Shaffer et al. 2008). Social regulators' ability to benefit from economic bureaucrats' expertise is, however, contingent on the degree of intrastate coordination and cooperation, and thus on bureaucratic coherence *across* government agencies (see Evans 1995; Freeman and Rossi 2012). Social regulators' chances of success in interpretive contests thus rise and fall with their own expertise and the legal assistance they can access.

## 2. Methods and Data

In this article, we conduct a detailed case study of the interpretive contest over the legality of Chile's pioneering nutrition label. It illustrates the merits of analyzing the everyday interpretive practices of international economic law and how these practices shape national regulators' perception of their available policy space. Such an approach is without alternative if we want to better understand the effects of international economic law on national politics. But it also creates distinct methodological challenges. As Lamp (2018: 275) points out, "a focus on practices forces the researcher to reconstruct the practical knowledge that the actors engaged in those practices themselves possess – the researcher first needs to learn what his or her subjects already know. This is complicated by the fact that practical knowledge is often tacit, and even those who routinely participate in a practice may struggle to articulate what it entails."

To address this challenge, our analysis draws on the toolkit of discourse analysis (see Black 2002), which allows us to identify and reconstruct the varied interpretive practices, in text and talk, of the transnational food industry, Chilean health regulators, and Chilean as well as foreign states' economic bureaucrats in their "regulatory conversations" over the legality of Chile's proposed nutrition label. Employing process-tracing methods (see Jacobs 2014), we focus on the sequencing of major interpretive acts and changes in health regulators' interpretation of international economic law. This allows us to identify potential causal links between interpretive practices and regulators' perception of their "legally available" policy space. Specifically, we need to identify Chilean health bureaucrats' interpretations of international economic law to establish that and how bureaucrats' interpretations mattered for the content of Chile's nutrition labeling regulation, and to show how health bureaucrats' interpretation of international law was influenced by the interpretive acts of transnational corporations and economic bureaucrats.

In view of regulatory policy's transnational nature (Farrell and Newman 2014), we conducted multisited field research by "following the conflict" (Marcus 1995: 110; see also Merry 2006b) over nutrition labeling from Santiago (involving Chile's health ministry, as the locus of decisionmaking, and Chile's trade policy and IP agencies), to Geneva (site of the WTO and its committees), Brussels and Washington (home to the largest associations of the transnational food industry and of EU and US trade policy agencies), as well as Jakarta and Quito (capital cities of countries with comparable attempts to introduce nutrition labels).

At all these sites, we collected extensive document and interview data. Submissions made during the public consultation on Chile's draft regulation, internal communications between the food industry and foreign states' trade policy agencies about the regulation, and internal reports by the Chilean bureaucracy are key sources for our reconstruction of the interpretive contest over the legality of Chile's nutrition label. These documents were gathered informally, after building rapport with key informants, and formally through freedom-of-information (FOI) requests, a tool particularly useful for studying corporate influence (see Steele et al. 2019). In addition, more than thirty in-depth interviews with participants in the regulatory conversations over Chile's nutrition label were crucial in triangulating the interpretive practices of different participants and tracing their effects on the policy process. We contacted several food industry executives and representatives for interviews, often multiple times, but our requests were generally ignored or declined. In one instance, an employee of a transnational food corporation wanted to speak to us about nutrition labeling but did not receive the necessary internal clearance. To make crucial pieces of our data accessible and our inferences more verifiable (see Moravcsik 2014), we present detailed data source excerpts in the Appendix S1.

### **3. Chile's Nutrition Labeling Regulation**

The core of this article is an empirical analysis of the intense interpretive contest over the legality of Chile's 2015 nutrition labeling regulation.<sup>6</sup> This section provides necessary background on the design and political origins of this landmark regulation.

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<sup>6</sup>Chile's 2015 nutrition labeling regulation comprises the labeling requirements and linked sales and marketing restrictions as defined by Law 20,606 (2012), implemented by MINSAL Decree 13 (2015), and Law 20,869 (2015), implemented by MINSAL Decree 24 (2017), with MINSAL's Decree 13 being the crucial step of implementation.

### 3.1 Regulatory Design

Chile's nutrition labeling regulation defines high levels of added sugar, saturated fat, sodium, and calories that are considered unhealthy for the human diet, and requires all prepackaged foods and drinks that exceed these levels to be marked with front-of-pack warning labels (see *supra* Figure 1). Similar to other interpretive front-of-pack nutrition labeling (FOPNL) schemes, Chile's warning labels seek to make complex nutrition information more intelligible and to nudge consumers toward healthier food choices (see Jones et al. 2019; Scrinis and Parker 2016).<sup>7</sup> But the Chilean labeling regulation stands out as the world's strictest and most comprehensive nutrition labeling scheme. The UK's traffic-light system (introduced in 2007), Australia's Health Star Rating (2014), and France's Nutri-Score (2017) all remain voluntary schemes, while Ecuador's mandatory traffic light label (2014) does not have to be front-of-pack. The Chilean regulation also features unprecedentedly low nutrient thresholds. For example, solid foods get labeled "high in sugar" in Chile if they contain more than 10 g of sugar per 100 g, whereas the threshold for the red ("high") traffic light is 12.5 g in the United Kingdom and 15 g in Ecuador.

Critically, food products carrying one or more warning labels are subject to a series of sales and marketing restrictions, which health regulators considered as crucial for the intervention to be effective. Going beyond the mere nudging of consumers, these linked regulatory measures include the prohibition of selling labeled products in schools. Labeled products can, with some exceptions, also no longer be advertised on television or in cinemas between 6:00 and 22:00, or directly to children. The latter resulted in the prohibition of cartoon characters in the advertisement of labeled food products, including most breakfast cereals. Similarly, labeled products cannot be sold anymore with toys or other "commercial hooks," forcing Ferrero to pull Kinder Surprise out of the Chilean market.

Early evaluation results suggest that the Chilean regulation is effective. For instance, the regulation has led to a 24 percent drop in purchases of beverages high in sugar (Taillie et al. 2020). It has also led to a substantial reduction of child-directed marketing for unhealthy food products (Mediano Stoltze et al. 2019). While these early results do not yet capture the regulation's long-term effects on the prevalence of obesity and diet-related NCDs, public health experts agree that the Chilean regulation is a major step toward healthier "food environments" (e.g., Ralston 2018).

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<sup>7</sup>For research on the effectiveness of different nutrition labeling schemes in altering consumer understanding and purchasing decisions, see Ares et al. (2018) and Egnell et al. (2018).

### 3.2 Political Origins

The unprecedented stringency of Chile's nutrition label raises the question of how this policy could emerge in the face of strong opposition from the food industry. This is even more puzzling given that Chile is known for powerful business actors and a strong legacy of neoliberal ideas (see Bril-Mascarenhas and Madariaga 2019; Fairfield 2015). It is interesting to note in this context that Chile's large food sector and its long-standing sectoral association, *Chilealimentos*, have been dominated by exporters of primary food products (especially fruits, vegetables, wine, and seafood). Despite this dominance of export interests, transnational food and beverage corporations have long been active in Chile and have used the country as a hub for regional expansion (USDA 2013). In April 2014, at the height of the conflict over the implementation of Chile's nutrition labeling regulation, transnational food corporations, led by Chile's Carozzi as well as Coca-Cola, Mars, and Nestlé, left *Chilealimentos* and established *Alimentos y Bebidas de Chile* (ABChile). The explicit purpose of this new industry association was to better defend the interests of producers focused on Chile's internal market and more effectively oppose the looming introduction of nutrition warning labels and other obesity prevention policies (Tapia 2014). This initially weaker representation of transnational food industry interests in Chile appears to have helped the emergence of strict nutrition labeling as a policy idea.

While a full account of the political history of Chile's nutrition labeling regulation is beyond the scope of this article, we sketch the main phases of its introduction: the initial agenda-setting for nutrition labeling, the formulation and adoption of the labeling law in parliament, and its implementation by ministerial decree.

The history of Chile's nutrition label goes back to at least 2002, when the World Health Organization (WHO) and the Food and Agriculture Organization (FAO) convened an "Expert Consultation on Diet, Nutrition and the Prevention of Chronic Diseases" and appointed as chairperson the Chilean nutrition expert Ricardo Uauy. The consultation produced a report, widely known as TRS 916 (WHO and FAO 2003), that was fiercely contested by the food and beverage industry, not least because it recommended that a healthy diet should limit sugar intake to 10 percent of total calories (Nishida et al. 2004).<sup>8</sup> Uauy's key role in writing the report motivated him, together with other Chilean nutrition experts, to discuss with Chilean policymakers "the potential policy

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<sup>8</sup>This is in line with several recent studies that empirically show that the transnational food and beverage industry has sought to prevent stricter regulations by influencing the underlying nutrition and obesity research (e.g., Greenhalgh 2019; Steele et al. 2019).

actions that could be implemented to address the ongoing obesity and NCD epidemic” (Corvalán et al. 2013: 80). In March 2008, the Chilean Ministry of Health (MINSAL) and the Senate Health Committee organized a major conference on nutrition and health, featuring presentations from Uauy and other international nutrition experts.<sup>9</sup> These activities helped sharpen Chilean politicians’ recognition of obesity and NCDs as policy problems and placed the idea of regulatory interventions on the political agenda.

These transnational ideas fell on fertile ground in Chile, where Guido Girardi, a trained pediatrician, health policy expert, and influential progressive lawmaker, had been pushing a similar policy agenda for some time. In 2007, Girardi, the president of the Senate’s health committee at the time, submitted a bill to the Senate that proposed a traffic-light labeling scheme (Biblioteca del Congreso Nacional 2011: 5–11), triggering a five-year legislative battle. Important for our analysis of bureaucratic politics was the decision to remove key details, including label design and nutrient thresholds, from the bill and to leave them to a future (ministerial) implementing regulation, thereby partially delegating policy formulation to MINSAL. Pushback from the transnational food industry and the conservative opposition stalled the approval of the bill during Michelle Bachelet’s first presidency (2006–2010). This allowed her successor, the conservative Sebastian Piñera, to veto the law in May 2011, denouncing the proposed sales and marketing restrictions. However, Girardi’s shrewd use of his new role as Senate president from 2011 to 2012, together with favorable public opinion and media coverage of the bill, ultimately forced Piñera to cease opposition.<sup>10</sup> The nutrition labeling law was passed in July 2012.

The law’s implementation through a ministerial decree then fell to the health ministry. Reshuffled under a conservative government, MINSAL had little interest in moving ahead, but was legally required to do so. The result was a 2013 implementing regulation (Decree 12) that was substantially watered down. For example, it proposed for the labels to be red, blue, or green, depending not on the food’s nutrient profile (as in the traffic light) but on the package’s background color. With Bachelet’s return to the presidency in March 2014, progressive, pronutrition labeling bureaucrats were reinstalled at MINSAL, in particular those heading the Division of Public Policy and the Department of Nutrition and Food. They revoked Decree 12 two weeks before it could enter into force and began working on a new, much stricter

<sup>9</sup>Interviews with Ricardo Uauy, Santiago, 24 November 2016 and 13 November 2017.

<sup>10</sup>Interview with Guido Girardi, Santiago, 14 December 2016.

implementing regulation (see Reyes et al. 2019). This process lasted from March 2014 to June 2015 and included a public consultation (as required by Chile's international economic law obligations), interministerial consultations, and exchanges with the *Contraloría General*, an agency in charge of reviewing the legality of administrative action. MINSAL ultimately published the final decree in June 2015 and it entered into force one year later.

We focus on this crucial fifteen-month period of the implementing regulation's development from March 2014 to June 2015. The central strategy of the transnational food industry in opposing the regulation was to contest the legality of several of its key provisions under WTO law. Industry associations thus targeted bureaucrats' understanding of the legally available policy space for nutrition labeling by advancing extremely restrictive interpretations of Chile's international legal obligations. But MINSAL, in coordination with specialized units of Chile's economic bureaucracy, resisted these interpretations and successfully defended the legality of its nutrition labeling regulation. Chile's regulation has been vindicated by the fact that, after its implementation, no formal WTO complaint was filed. The following two sections examine this interpretive contest over the meaning of international economic law in detail.

#### **4. How the Transnational Food Industry Contested the Legality of Chile's Nutrition Labeling Regulation**

The transnational food industry attempted to achieve a weak or postponed implementation of Chile's nutrition labeling law by claiming that several elements of MINSAL's draft regulation violated international economic agreements. MINSAL's public consultation on the draft regulation was the main channel through which transnational industry sought to influence health bureaucrats' perception of the available policy space for nutrition labeling. In accordance with the procedural requirements of the WTO TBT Agreement and other treaties to which it is party, Chile published and notified its revised draft regulation to the WTO in August 2014 and thereafter had to receive concerns from interested stakeholders, and respond with reasons.<sup>11</sup> Analogous to the "bias toward business" of domestic notice-and-comment procedures (Yackee and Yackee 2006), we find that MINSAL's

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<sup>11</sup>This obligation resulted from a conjunction of at least Article 2.9 TBT Agreement (notification), Article 10.1 TBT Agreement (responding to interested parties' concerns about regulation), Article 7.7 of the US-Chile FTA (giving a right to US stakeholders "to participate in the development of [technical regulations] on terms no less favorable than those accorded to its own"), and Chile's national laws on public consultations.



international public consultation procedure was used most intensely by transnational industry actors. Excluding submissions by private persons, MINSAL received 111 comments. Of these, ninety-two were from the food industry,<sup>12</sup> six from trade policy agencies of foreign governments, six from NGOs (all Chilean), five from universities (all Chilean), and two from other Chilean government agencies. The predominant use of treaty-based procedural entitlements by industry groups provides evidence of how global administrative law's principles can in practice benefit business interests (Mertenskötter and Stewart 2018).

The dominant theme in the ninety-two industry submissions was that Chile's notified nutrition labeling regulation would violate international economic law.<sup>13</sup> Even though industry made arguments under multiple trade agreements,<sup>14</sup> our analysis focuses on interpretations of WTO law, as these were most frequently invoked and taken most seriously by MINSAL. In total, industry made 39, often repetitious, allegations of Chile violating WTO law: seventeen concerned the TRIPS Agreement and twenty-two the TBT Agreement. Legally evaluating these claims in depth would require facts not in the public domain, and any conclusions would necessarily be uncertain. Ultimately, questions of WTO legality could only be authoritatively resolved by a formal process according to the rules of the WTO's Dispute Settlement Understanding. Still, given the information available and the Appellate Body's jurisprudence concerning the applicable treaty provisions, we contend that the food industry's interpretations of WTO law with regard to Chile's draft regulation were at odds with the dominant views in the WTO's adjudication-focused, interpretive community. This suggests that Chile's nutrition label would most likely survive a formal challenge at the WTO.

In the following, we trace industry's three major arguments—about TRIPS, and articles 2.2 and 2.4 TBT—in challenging the legality of Chile's labeling regulation. For MINSAL, taking any of these interpretations at face value would have entailed the need to make significant changes to the draft regulation and some

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<sup>12</sup>The transnational food industry made submissions through individual corporations and through the cloaks of various national industry associations, including *Alimentos y Bebidas de Chile* (ABChile), the *Consejo Mexicano de la Industria de Productos de Consumo* (ConMexico), FoodDrinkEurope, and the US Grocery Manufacturers Association (GMA). Their legal interpretations often mirrored each other, which effectively amplified the voice of the transnational food industry.

<sup>13</sup>Apart from industry and foreign governments, only the business-affiliated Chilean think tank *Libertad y Desarrollo* made arguments regarding international economic law.

<sup>14</sup>For instance, GMA made arguments under the US-Chile FTA (Source 6), FoodDrinkEurope under the EU-Chile Association Agreement (Source 7), and two Brazilian industry groups alleged provisions of the Chile-Mercosur Agreement (Source 8).

would have prohibited aspects of it altogether. Table 1 provides a summary of these interpretations and their implications.

First, transnational industry advanced an interpretation that the TRIPS Agreement grants a property right in trademarks. Chile's proposed prohibition of, for example, cartoon characters on sugary breakfast cereals would, so industry's argument, effectively expropriate trademark holders and therefore violate TRIPS. The US Grocery Manufacturers Association's (GMA) comments on Chile's draft regulation illustrate this type of claim. In a section entitled "Violations of Chile's International Commitments" (Source 9), the industry association argued that Chile's regulation "would effectively destroy the value of producers' registered trademarks and therefore violate at least one of the TRIPS provisions". Specifically, GMA asserted that Chile's restrictions were "special requirements" for purposes of Article 20 TRIPS that "unjustifiably encumbered" the use of its trademarks. GMA further argued that because TRIPS establishes rights to freely register trademarks it also "confers an implied right of its use." By banning the use of some trademarks, GMA argued, Chile was "effectively render[ing] registration itself ineffective" hence violating this implied right. Under this interpretation, Chile would have to retract its restrictions of cartoon characters or else violate WTO law. In contrast with these arguments made by industry, the WTO's interpretive community has long concluded that TRIPS does not grant a positive property right and that proportional public health measures may limit their use (see Davison and Emerton 2014). This interpretation was confirmed by the WTO Panel in *Australia—Tobacco Plain Packaging*, which, in 2018, ruled that Australia's regulation was not in violation of the TRIPS Agreement (see Buzard and Voon 2019).

A second set of industry's legal arguments centered on the indeterminate means-ends rationality provision in the TBT Agreement (Article 2.2) and the associated need for scientific evidence in regulatory policy. This provision is particularly well suited for attempts of interpretive capture, because its plain wording is relatively strict, requiring detailed knowledge of how it is applied in practice by WTO law's interpretive community to understand its real "bite." A Brazilian food industry association, for example, implied that Chile had the burden of proof to show that "voluntary agreements to gradually reduce certain nutrients" would not be "less expensive measures" to "achieve the intended legitimate objective" (Source 10). Furthermore, in a memorandum containing "legal arguments speaking against the approach adopted by Chile" (Source 11), FoodDrinkEurope asserted that Chile violated international economic law because "the same objective to provide food information" was being pursued "in

**Table 1.** Industry's WTO Law Interpretations and their Potential Implications

Substantive Concern (Treaty Provision)	Interpretive Community's Interpretation	Food Industry's (Restrictive) Interpretation	Implication of Industry's Interpretation
Trademark Exclusivity (TRIPS Arts. 15, 16, and 20)	TRIPS guarantees a negative right of trademark exclusivity, <sup>a</sup> not a right to use. <sup>b</sup> Restrictions on trademarks for health policy are allowed, but subject to means-ends rationality review. <sup>c</sup>	TRIPS grants a property right in trademarks (e.g., cartoon characters), which makes it illegal for Chile to effectively ban them on some products.	Chile could not restrict the use of cartoon characters in advertising if they are registered trademarks.
Means-Ends Rationality (TBT Art. 2.2)	The TBT Agreement requires technical regulations to be "not more trade restrictive than necessary to fulfill a legitimate government objective," such as public health. <sup>d</sup> Members are free to choose their own level of protection. <sup>e</sup> The Appellate Body's legal analysis centers on a rational link between the criticized measure's objective and its actual contribution to it, as estimated by scientific studies. <sup>f</sup> This contribution must further not be achievable by alternative regulatory means, that are reasonably available, <sup>g</sup> and less trade restrictive at the chosen level of protection. <sup>h</sup>	(1) Chile has the burden of proof to show that its regulatory design is the least trade restrictive means to achieve a reduction in obesity rates. (2) Chile has to defend each aspect of its regulatory design with detailed and country-specific scientific studies.	(1) Chile would need to present a detailed technical justification of its regulatory design in comparison to all relevant alternatives, presenting scientific evidence of their respective effectiveness and trade-restrictiveness. (2) Chile would have to commission more scientific studies to support its regulation against all of industry's criticisms.
International Standards (TBT Art. 2.4)	Demands that "relevant international standards" should be "the basis for [...] technical regulations," unless they are "ineffective or inappropriate." As a result, in the absence of standards that would be considered relevant, effective, and appropriate by the Appellate Body, regulators can act freely. <sup>i</sup>	(1) Requires members to strictly follow all international standards in the measure's general domain. (2) The Codex Alimentarius standards do not envision an "Excess of" or "High in" label, and the TBT Agreement therefore prohibits them.	(1) Chile's label has to be changed so as not to "evoke fear," as prohibited in one international standard. (2) Chile cannot use "Excess of" or "High in" wording in its label.

<sup>a</sup>WTO Appellate Body Report, *US—Section 211 Appropriations Act*, para. 186.<sup>b</sup>WTO Panel Report, *Australia—Tobacco Plain Packaging (Cuba)*, paras. 7.1885–1887.<sup>c</sup>WTO Panel Report, *Australia—Tobacco Plain Packaging (Cuba)*, paras. 7.2429–7.2431, 7.2442.<sup>d</sup>WTO Appellate Body Report, *US—Tuna II (Mexico)*, para. 322.<sup>e</sup>WTO Appellate Body Report, *EC—Measures Affecting Asbestos and Asbestos-Containing Products*, para. 168.<sup>f</sup>WTO Appellate Body Report, *US—COOL (Article 21.5—Canada and Mexico)*, para. 5.208–5.211; WTO Panel Report, *Australia—Tobacco Plain Packaging (Cuba)*, para. 7.509–7.517.<sup>g</sup>WTO Appellate Body Report, *US—COOL (Article 21.5—Canada and Mexico)*, para. 5.330.<sup>h</sup>WTO Appellate Body Report, *US—COOL*, para. 379.<sup>i</sup>WTO Appellate Body Report, *EC—Sardines*, paras. 229–230, 285, 289.

Europe and some other countries with highly advanced food legislation” in a manner that was much less “trade restrictive.” These arguments, however, are at odds with the common interpretation of Article 2.2 as not requiring regulators to affirmatively disqualify all existing alternatives. It is an established principle of WTO law that the party alleging a violation has the burden of proof to provide prima facie evidence of an alternative regulatory measure that is similarly contributory to legitimate objectives, but less trade restrictive.<sup>15</sup>

With reference to the demand for scientific evidence under Article 2.2, GMA interpreted WTO law in a way that would have left Chile violating it twofold (Source 12). First, Chile did not show “direct, causal links [...] between the marketing and advertising of food and beverages and rising rates of obesity.” Second, Chile’s nutrient thresholds “far exceeded science-based standards established by similar measures.” The industry association thereby advanced an interpretation of the TBT Agreement that required an extremely solid evidentiary basis and predictive certainty, and specific studies to justify deviations from other countries’ regulations. Had MINSAL accepted these interpretations of the TBT Agreement advanced by transnational industry, it would have had to take the implementing regulation back to the drawing board. But the industry’s interpretations disregarded that the final arbiter of any actual dispute, the WTO’s Appellate Body, had by that time developed a deferential test of means-ends rationality, in which scientific inquiry is only to show that a defensible attempt was made to connect the regulatory instrument to the pursued objective (Howse 2016: 56–57).

The international standards provision in Article 2.4 TBT was the third WTO rule regularly invoked by transnational industry. At the basis of industry’s legal claims under this provision were the Codex Alimentarius Commission’s standards and guidelines on food labeling (see Büthe and Harris 2011). FoodDrinkEurope, for example, asserted that because Codex standards did not explicitly provide for an “excess of ...” label, “the warning message set forth in the draft regulation would therefore constitute a violation of article 2.4 of the TBT agreement” (Source 13). Indeed, Codex Alimentarius did at the time not contain any explicit guidance on front-of-pack nutrition labeling (but see Thow et al. 2019) and internal e-mails from the US Food and Drug Administration show that US health bureaucrats thought that “there is nothing in the Codex guidance that prohibits [Chile] from adopting such a regime” (Source 14). But the food

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<sup>15</sup>WTO Appellate Body Report, *US – COOL*, para. 379.

industry's argument implied that TBT Article 2.4 preempts Chile's proposed type of nutrition label as long as Codex' general standards on food labeling do not affirmatively permit it. ConMexico, a Mexican industry organization, argued that Chile's proposed label "violates the provisions of the Codex Alimentarius, by using words and graphics that could induce fear" (Source 15). This argument implied that Chile must use less direct wording and a more benign symbol. But legally, Article 2.4 only says that "relevant standards" should be the "basis" of regulations, unless they are "ineffective or inappropriate". Industry's simple assertions of incongruence with international standards, even if accepted as true, were therefore incomplete to make out a WTO law challenge.

These illustrative examples from public consultation submissions demonstrate how the transnational food industry contested MINSAL's proposed nutrition labeling regulation through allegations of WTO law violations. But MINSAL's public consultation was not industry's only channel to advance its interpretations. Industry representatives also paid many personal visits to MINSAL and other Chilean regulatory officials, during which they would put forward their "legal concerns," together with the more well-known lobbying tactic of emphasizing how the regulation could lead to lower investments by the food industry in Chile.

In its contestation of Chile's nutrition label, the transnational food industry was supported by "public-private partnerships" (Shaffer 2003) with the trade policy agencies of foreign governments, such as the United States Trade Representative (USTR) or Brazil's Chamber of Foreign Trade (CAMEX). Trade bureaucrats tend to have a "particular conception of national interest" (Slaughter 2002: 28), shaped in important part by their role as their countries' commercial diplomats, and have thus long tended to support interpretations of WTO law that favor export promotion and the elimination of supposed trade barriers. In our case, foreign trade policy agencies were lobbied by the food industry about Chile's proposed regulation as a "high priority" issue (Sources 14), and facilitated industry's contestation of the regulation's legality by providing information and by echoing industry's interpretations in government-to-government exchanges.

Information sharing between transnational industry and trade policy agencies is substantially institutionalized in the routine operation of international economic law. For instance, both Section 301 of the United States Trade Act and the European Union's Trade Barriers Regulation formally empower business to "request the initiation of interstate negotiations intended to reduce foreign trade barriers" (Sherman and Eliasson 2006: 473) and the US system of Industry Trade Advisory Committees

establishes venues for exchanges between trade officials and company representatives about half a dozen times each year. Our case shows evidence of information exchange by more informal public-private cooperation. Illustrative of information flowing both ways is a September 2012 e-mail from the EU's DG Trade to FoodDrinkEurope asking, two months after Chile's labeling law had passed Congress, whether the industry association had any comments on "this Chilean legislation, which establishes labelling and marketing requirements for foodstuffs" (Source 16). FoodDrinkEurope responded that it had "not been alerted" by its members, thanked DG Trade for asking, and signaled interest in providing input (Source 17). From then on, FoodDrinkEurope communicated regularly with DG Trade and the European External Action Service in Santiago, on multiple occasions pushing them to echo their legal concerns with the government. E-mails from USTR show the official representing the US government on this issue at the WTO reaching out to GMA to "pass on what I heard [...] in my bilateral with" Chile's trade official in charge of this issue (Source 18), and the GMA responding with information from their "Chilean industry counterparts" (Source 19).

Beyond providing information, foreign trade bureaucrats also bolstered the credibility of the food industry's legal claims by making similar submissions in the government-to-government exchanges characteristic of traditional commercial diplomacy (see Lee and Hocking 2011).<sup>16</sup> At least six foreign governments (Argentina, Canada, EU, Mexico, Switzerland, and the United States) made submissions to Chile's public consultation on the proposed nutrition labeling regulation, of which two made TRIPS-related arguments, and five made TBT and Codex-related arguments. For instance, the EU's Directorate-General for Enterprise argued with reference to Article 2.2 TBT that the label is "disproportionate," asked for "scientific studies" and took the view that "the proposed measure does not fulfil its objective of adequately informing the consumer" (Source 21).

Foreign trade bureaucrats also used the TBT Committee's Specific Trade Concerns mechanism. Through this mechanism, trade bureaucrats can formally seek information about other states' regulatory measures and raise concerns about their conformity with the TBT Agreement. The TBT Committee is the natural venue for intergovernmental interpretive contests, prior to formal disputes, regarding TBT articles 2.2 and 2.4 as well as the related Codex Alimentarius standards. The Committee has become an important forum for international debates over health

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<sup>16</sup>Interview with DIRECON bureaucrat B, Santiago, 27 April 2017 (Source 20).

policy (Source 22). Chile's warning labels were first raised as a Specific Trade Concern in September 2013 and remained on the agenda for ten consecutive meetings until November 2016 (see Boza et al. 2019). Officials from eleven member countries repeatedly voiced concerns over Chile's label. While foreign governments' interpretations were rarely fully developed as arguments, and generally more cautious and measured, they shared the legal basis and critical tone of the transnational industry's contestation. The US delegation, for example, "noted the existence of alternate approaches, grounded in international standards, which could provide similar information to consumers in a less trade restrictive manner". The US representative further alleged that "Chile's regulation was not based on science and its labelling requirements could be misleading and stigmatize foods" (Source 23).

This section has illustrated the interpretive practices that the transnational food industry used to influence MINSAL's implementation of Chile's pioneering nutrition labeling law. In the following section, we examine how Chilean bureaucrats responded to these interpretations.

## 5. How Chilean Bureaucrats Defended the Legality of their Nutrition Labeling Regulation

Chile ultimately did not adopt the food industry's interpretations of WTO law. Internally, and in their responses to public consultation comments, MINSAL bureaucrats adopted interpretations that emphasize national regulatory autonomy and the priority of public health over economic concerns. How then was MINSAL able to defend the legality of its proposed regulation against the powerfully voiced legal claims of the transnational food industry?

Two factors were crucial to MINSAL's ability to resist interpretive capture by the food industry. First, experience in nutrition science and the Codex Alimentarius standards enabled MINSAL to refute several of industry's TBT-related claims. Second, MINSAL also coordinated its responses to industry's legal claims with two specialized and relatively independent units of the economic bureaucracy, namely Chile's trade policy agency (*Dirección General de Relaciones Económicas Internacionales*, DIRECON), which is part of the foreign affairs ministry, and Chile's IP agency (*Instituto Nacional de Propiedad Industrial*, INAPI), formally part of the economy ministry. By doing so, MINSAL benefitted from these agencies' high legal expertise—in particular in responding to industry's TRIPS-related claims—despite the fact that Chile's economy and finance ministries were strong opponents of the regulation on commercial grounds (Rodríguez 2014).

Significantly, MINSAL could not rely on its own lawyers in assessing and defending its regulatory autonomy. By standard procedure, MINSAL's legal department only assessed the draft regulation's compliance with national law.<sup>17</sup> The remainder of this section examines how different segments of Chile's bureaucracy jointly processed the food industry's extremely restrictive interpretations of WTO law and ultimately asserted Chile's regulatory autonomy on the issue of nutrition labeling.<sup>18</sup>

### **5.1 Interpreting TBT**

As demonstrated in the previous section, industry advanced extremely restrictive interpretations of the TBT Agreement's provisions on international standards and means-ends rationality. MINSAL bureaucrats were able to refute these interpretations because they could draw on significant experience in nutrition science and relevant international standards. MINSAL also gained confidence in the regulation's compatibility with TBT commitments, as it had debated arguments for its legality with DIRECON.

MINSAL was not swayed by industry's repeated claims that TBT Article 2.4 and Codex Alimentarius standards on nutritional claims and labeling effectively banned Chile from introducing warning labels that could "evoke fear." Instead, it interpreted Codex as a "voluntary agreement" rather than a "blood pact."<sup>19</sup> While the characterization of Codex as a "voluntary agreement" is at odds with legal interpretations that view Codex standards as rules that the WTO can enforce (Trachtman 2006: 638–640), it is in line with the observation that the "consequences of not following Codex standards have become more uncertain" after the establishment of the WTO in 1995 (Veggeland and Borgen 2005: 689). Beyond the question how binding Codex is in practice, MINSAL bureaucrats believed that their draft regulation was in full compliance with Codex standards because they clearly permit deviations for public health objectives. As one MINSAL official

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<sup>17</sup>Interview with MINSAL bureaucrat B, Santiago, 5 December 2017 (Source 24).

<sup>18</sup>The majority of direct citations in this section come from four separate in-depth interviews with the former head of MINSAL's Department of Nutrition and Food (MINSAL bureaucrat A), who was at the center of the interpretive contest over Chile's nutrition labeling regulation. While we heavily draw on these interviews, we were careful to confirm central claims through interviews with a wide range of bureaucrats from other involved government agencies, several of which preferred to remain completely anonymous.

<sup>19</sup>Interview with MINSAL bureaucrat A, Santiago, 7 December 2017 (Source 25).



exclaimed: “Sorry, but there is no treaty that stands above health reasons. And it’s not me who says this, it’s Codex.”<sup>20</sup>

In arriving at these interpretations of Codex as only suggestive and nonexhaustive for states’ food labeling regulations, MINSAL drew on its own experience with the work of the Codex Alimentarius Commission. MINSAL had acquired it over time through “repeat participation” (Conti 2010) and institutional learning. As one bureaucrat put it: “Chile has been participating in Codex for many years. The person who was in charge of Codex during a long time [...] taught me and another person in this department [...] He and I knew.”<sup>21</sup> Our comparative research in Ecuador and Indonesia suggests that MINSAL’s expertise on Codex cannot be taken for granted.<sup>22</sup> And such expertise may also be lost: Chile’s delegate at Codex has since moved to the Ministry of Agriculture.<sup>23</sup> Expanding on research on the legal capacity of developing countries’ trade bureaucrats (see Busch et al. 2009), our findings suggest that the own legal expertise of social regulators may be a key factor in explaining developing countries’ ability to introduce effective social regulations.

A second issue that came up frequently in industry’s comments with reference to TBT Article 2.2 was the alleged “lack of scientific evidence” for the nutrition label and its ostensible trade-restrictiveness. In refuting these arguments, MINSAL could rely on its solid knowledge of public health nutrition research and multiple studies it had commissioned to inform the design of the label and the underlying nutrient thresholds. In its public consultation response, MINSAL argued: “The TBT Agreement, specifically its Article 2.2, permits its Members the adoption of technical regulations which do not restrict trade more than necessary to achieve a legitimate objective [...] In the case of the regulation under consideration, Chile has adopted a Technical Regulation that aims to inform the consumer, and is not considered a technical barrier to trade, given that its objective is legitimate” (Source 26). In this response, MINSAL reviewed in detail the relevant research in the field of public health nutrition, thereby arguably satisfying the TBT Agreement’s demand for reasoned decisionmaking rooted in evidence.

While MINSAL’s expertise about international food labeling standards and nutrition science formed the basis of its refutation of industry’s interpretations, it was equipped to formulate this in

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<sup>20</sup>Interview with MINSAL bureaucrat A, Santiago, 7 December 2017 (Source 25).

<sup>21</sup>Interview with MINSAL bureaucrat A, Santiago, 7 December 2017 (Source 25).

<sup>22</sup>Interviews with Ecuadorian health bureaucrat, Quito, 22 June 2018; and with Indonesian health bureaucrat, Jakarta, 15 August 2017.

<sup>23</sup>Interview with MINSAL bureaucrat A, Santiago, 7 December 2017 (Source 25).

the legalistic language of TBT's "least trade-restrictive measures"-test and to trust that TBT compliance was not at risk thanks to interagency coordination with Chile's economic bureaucracy. In Chile, TBT-related coordination is institutionalized in the National Committee on Technical Barriers to Trade (*Comisión Nacional de Obstáculos Técnicos al Comercio*). Chaired by DIRECON, this national committee seeks "to ensure that all relevant bodies are aware of and understand their obligations under the [TBT] Agreement and know how to comply with them" (WTO 2006). Additional interagency working groups are set up during the drafting of technical regulations.

Through such formal interagency coordination mechanisms, MINSAL met almost every day with representatives of Chile's economic bureaucracy while drafting its nutrition labeling regulation (Decree 13). Echoing the kind of cautious-but-insinuating language used by foreign trade officials in the TBT committee, DIRECON bureaucrats a few times raised concerns about the regulation's compliance with TBT provisions and Codex standards. By and large, however, Chile's economic bureaucracy, led by the Ministry of Economy, primarily used commercial rather than legal arguments in trying to convince MINSAL to weaken the regulation (see Rodríguez 2014).<sup>24</sup> In fact, the technical-legal arguments that were made by Chile's economic bureaucracy seemed to have prepared MINSAL not to be swayed by industry's subsequent comments. Early exchanges in the National Committee on Technical Barriers to Trade motivated MINSAL to enhance the scientific justification of the regulation and to consider the issue of TBT compliance early on. In particular, DIRECON reminded MINSAL from the beginning that the TBT Agreement required regulations to be supported by scientific studies and to be introduced only after a sufficiently long implementation period.<sup>25</sup> DIRECON later read MINSAL's draft response to the received public consultation comments and "gave its approval".<sup>26</sup> Given that its strict draft regulation had successfully passed through an interagency process specifically designed to ensure TBT compliance, MINSAL was well prepared for industry's attempts of interpretive capture.

## 5.2 Interpreting TRIPS

The most frequent claim made by industry with regard to WTO law was that the proposed advertisement restrictions for

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<sup>24</sup>Interview with MINSAL bureaucrat A, Santiago, 7 December 2017 (Source 27).

<sup>25</sup>Interview with DIRECON bureaucrat A, 20 December 2016.

<sup>26</sup>Interview with MINSAL bureaucrat A, Santiago, 7 December 2017 (Source 27).

“high in” food products would violate the TRIPS Agreement’s protection of trademarks. In assessing and refuting these IP claims, MINSAL relied on ad hoc interagency cooperation with Chile’s IP agency, INAPI. In mid-2014, and on the initiative of INAPI itself, MINSAL and INAPI bureaucrats began to discuss how the planned regulation related to IP law. From their first interactions, INAPI bureaucrats were open to assisting MINSAL, and made clear that MINSAL could be confident, telling MINSAL that “you have a good chance that this pans out.”<sup>27</sup> After a detailed analysis of MINSAL’s draft regulation and relevant IP law, INAPI reaffirmed this position and told MINSAL that the proposed advertising restrictions “can be defended.”<sup>28</sup> It suggested that, while some form of legal challenge was likely, MINSAL should still implement them. According to MINSAL, “one of the things [INAPI] told us was that intellectual property laws, international and national, never leave public policy and public health underneath. They always put them on top, and there are articles [in laws] about this. [...] [INAPI] told us that intellectual property will have to be guaranteed, *but* public health problems are always on top. [...] This is what our intellectual property law says and what the World Trade Organization says. This was key, key, key.”<sup>29</sup>

INAPI also crafted a detailed written analysis and presented it to MINSAL in June 2014. MINSAL euphorically called this document a “wonder” and “all we wanted.”<sup>30</sup> INAPI subsequently turned this document into a formal legal analysis of the proposed publicity restrictions (Source 28). This 2016 legal brief, like the internal 2014 version, advances the argument that while the TRIPS Agreement firmly establishes the protection of IP rights, it also clearly establishes their limits, in particular when the goal is public health protection, as reaffirmed by the 2001 Doha Declaration on the TRIPS Agreement and Public Health. To partially deflect industry’s trademark-focused contestation, INAPI advised MINSAL not to target trademarks as such. The regulation instead restricts the use of publicity aimed at children under the age of 14, whether this publicity is registered as a trademark or not. The value of INAPI’s advice became apparent in MINSAL’s response to the comments received during the public consultation, where MINSAL deflected industry’s IP-related claims by making use of a legalistic distinction to argue that “no definition of trademarks is

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<sup>27</sup>Interview with MINSAL bureaucrat A, Santiago, 16 November 2017 (Source 28).

<sup>28</sup>Interview with MINSAL bureaucrat A, Santiago, 16 November 2017 (Source 28).

<sup>29</sup>Interview with MINSAL bureaucrat A, Santiago, 16 November 2017 (Source 28).

<sup>30</sup>Interview with MINSAL bureaucrat A, Santiago, 16 November 2017 (Source 28).

included [in this regulation], given that they do not belong in the scope of application” (Source 26).

INAPI’s expert support was crucial for MINSAL’s ability to uphold the proposed advertisement restrictions in the face of TRIPS-based critiques. Without it, “the article that prohibits advertising would be in the trash can.”<sup>31</sup> Hence, if INAPI had suggested to MINSAL that industry was correct in its assertion that advertisement restrictions were in violation of IP law, MINSAL would have likely eliminated one of the most progressive provisions of its labeling regulation. MINSAL therefore benefitted from cooperating with a highly competent IP agency. Many of INAPI’s experts previously worked in Geneva, at Chile’s Permanent Mission to the WTO and with the World Intellectual Property Organization (WIPO). In fact, the author of INAPI’s above-discussed legal analysis is a member of WTO law’s adjudication-focused, interpretive community. He was a staff member of WIPO’s legal department, a panelist in WTO Dispute Settlement cases, and most recently represented Chile as an observer in the WTO’s *Australia—Tobacco Plain Packaging* case.<sup>32</sup> According to MINSAL, his experience with tobacco regulation was vital, as he “has followed the Australian trial line by line. He knows it by heart. So he has many arguments [...] and these same arguments help in this other case [about Chile’s nutrition labels].”<sup>33</sup> INAPI thus drew on its own experience in the formal application of WTO law in providing legal assistance to MINSAL in its interpretive contest with the transnational food industry.

Importantly, MINSAL was only able to benefit from INAPI’s TRIPS expertise, because INAPI was willing to support MINSAL’s regulatory efforts. INAPI appears to have been largely autonomous from industry interests, private-sector IP lawyers, and the Ministry of Economy (to which INAPI is formally attached), all of which were in opposition to the marketing restrictions linked to Chile’s labeling regulation. Overall, INAPI bureaucrats appeared to share MINSAL’s zeal for public interest regulation and INAPI’s own bureaucratic autonomy contributed to MINSAL’s ability to defend the legality of its proposed advertisement restrictions under WTO law. This insight expands on scholarship that stresses the importance of state agencies’ “internal bureaucratic coherence” and “concentration of expertise” for “successful state involvement” (Evans 1995: 12, 30). Our analysis confirms that bureaucratic coherence and expertise remain important for

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<sup>31</sup>Interview with MINSAL bureaucrat A, Santiago, 16 November 2017 (Source 28).

<sup>32</sup>Interview with MINSAL bureaucrat A, Santiago, 16 November 2017 (Source 28).

<sup>33</sup>Interview with MINSAL bureaucrat A, Santiago, 16 November 2017 (Source 28).

effective social regulation. It also highlights how the broad reach of international trade and investment law makes the exchange of expertise *across* bureaucratic agencies crucially important.

### 5.3 Industry's Illegality Claims: All Bark and No Bite?

Given industry's intense concerns over the legality of Chile's nutrition label, it is perhaps telling that little has come of them. Chile's regulation disappeared from the TBT Committee's agenda after November 2016. In the WTO's state-to-state dispute system, the food industry would need to partner with a government of a WTO member state to initiate a formal claim against Chile (see Curran and Eckhardt 2017), but no such complaint has yet been registered. The transnational food industry, however, has continued to oppose the adoption of Chile-style nutrition warning labels by alleging their incompatibility with WTO law (see Ares et al. 2020; Dorlach 2019). Several cases against Chile's nutrition labeling regulation based primarily on domestic IP law have been litigated in Chilean courts, with claimants including transnational food corporations such as Carozzi and Pepsico (see Tulli 2018: 85–96). In these cases, Chile's State Defense Council based its defense on the legal brief authored by INAPI in 2016. So far, all court rulings have confirmed the Chilean state's right to regulate the food industry in this manner.

## 6. Conclusion

This article has argued that the meaning and force of international economic law, and consequently the policy space left to national governments, is strongly shaped by interpretive contests between bureaucrats and corporations over the international legality of specific regulatory measures. We started with the proposition that much of the interpretation and construction of international economic law does not occur in its formal institutions, such as the WTO's Dispute Settlement Panels or the Appellate Body, which have long been the dominant focus of international economic law scholarship. Drawing on insights from legal realism and constructivist political economy, we have shown that the meaning of international economic law in the minds of domestic regulators is made and remade through everyday interpretive practices in local, relatively informal, and highly contested regulatory conversations. In these conversations, bureaucrats, corporations, and other stakeholders strategically debate, and often practically resolve, how international economic law applies to actually proposed regulatory measures and if these fall within the "legally available" policy space. These interpretive contests thus

contribute to the social construction of nothing less than the “legality” of autonomous state action in vital policy fields such as environmental protection and public health. In the words of Amsden and Hikino (2000), the “bark” of interpretive practices matters just as much as the “bite” of the concrete legal obligations of the WTO Agreements and other international economic treaties.

Recognizing the centrality of everyday interpretive contests between law users in the construction of international economic law raises questions about the determinants of their outcomes. In particular, when are which participants able to prevail with their preferred interpretations of the law and thus narrow or widen national policy space? While our case study can only be a first step toward answering this question, it reveals multiple central factors. For one, knowledge of the entitlements created by international economic law empowers participants in interpretive contests. This turns expertise in international economic law and relevant international standards into a central resource for corporations and social regulators alike. The expertise of corporations is enhanced by their repeat participation in similar regulatory conversations around the world. Transnational organization, with nationally cloaked industry associations all around the world, allows corporations to amplify their self-interested interpretations, while support from trade bureaucrats can provide a veneer of official legitimization. Social regulators, in contrast, are often at a disadvantage due to more limited financial and human resources and less experience with using WTO law. But their chances of countering corporations’ interpretive practices and defending the “legality” of their regulatory measures increases with their own legal capacity and their effective coordination, or even active cooperation, with economic bureaucrats.

Regarding the practical implications of our research, we recognize that voluntary intragovernment support from economic bureaucrats for ambitious social regulation, as provided by Chile’s IP agency, may be the exception rather than the rule. Some health and environmental agencies in rich countries, such as the US Department for Health and Human Services, have reduced their dependence by hiring their own international law experts. More resource-constrained regulators in low- and middle-income countries could be supported by outside actors in better understanding the flexibilities left by international economic law. Global civil society and international organizations with an interest in promoting effective health or environmental policies should consider providing more accessible legal assistance (see Gottwald 2007). The Bloomberg Philanthropies’ Global Health Advocacy Incubator (2019), for example, has organized legal

workshops to train health policy advocates to “preempt and counter potential legal challenges from the food and beverage industry.” The TradeLab network organizes university law clinics to provide pro bono legal assistance to developing countries, while a small team of international lawyers at the WHO advises national health ministries. Enhancing the legal capacity of the everyday users of international economic law could also become a stronger area of activity for the Advisory Center on WTO Law. It was originally conceived for providing legal advice and training in formal WTO litigation to the trade bureaucrats of governments with less capacity and fewer resources. But as this paper shows, training social regulators in the everyday practices of international economic law is crucial to increasing states’ regulatory autonomy.

We believe that our analytical and methodological approach can help scholars better understand the operation of international economic law well beyond the legal architecture of the WTO. For example, our approach could help to assess the popular argument that the proliferation of international investment treaties and the consequent rise of investor-state-dispute-settlement (ISDS) has caused a “regulatory chill,” understood as “governments [failing] to regulate in the public interest in a timely and effective manner because of concerns about ISDS” (Tienhaara 2018: 232; see also Crosbie and Thomson 2018; Moehlecke 2020; Thow and McGrady 2013). In one potential case of regulatory chill, lawyers for the pharmaceutical corporation Novartis sent a series of letters to the Colombian government in 2016, asserting that the health ministry’s administrative process for issuing compulsory licenses for the cancer drug Glivec was in violation of Colombia’s fair and equitable treatment obligations in the Colombia-Switzerland Bilateral Investment Treaty (Source 30). Our approach suggests that we can answer the question if a regulatory chill did in fact occur only by examining if interpretive practices, such as these threat letters, actually changed Colombian policymakers’ understanding of their available policy space. This type of analysis clearly requires field research and the collection of data that allows scholars to robustly trace how law users advance and perceive different interpretations of international economic law. As such, the approach developed in this article, albeit labor- and time-intensive, is without alternative if we want to better understand how international economic law shapes national politics.

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