WORLD TRADE ORGANIZATION

G/TBT/W/361

21 March 2013

(13-1570)

Page: 1/4

Committee on Technical Barriers to Trade

Original: Spanish

CHILE - DRAFT TECHNICAL REGULATION RELATING TO THE FOOD HEALTH REGULATIONS, SUPREME DECREE NO. 977/96 (G/TBT/N/CHL/221)

STATEMENT BY MEXICO AT THE MEETING OF THE COMMITTEE ON TECHNICAL BARRIERS TO TRADE OF 6-7 MARCH 2013

The following communication, dated 20 March 2013, is being circulated at the request of the delegation of Mexico.

_____

1 INTRODUCTION

1.1. Mexico has a trade concern regarding the implications of implementing Law 20.606 "on the nutritional composition of food and on food advertising" through various regulatory instruments. This relates in particular to the amendments to the Food Health Regulations and the Draft Technical Regulation defining the size of reference amounts customarily consumed, published by the Government of Chile through its Ministry of Health and recently notified to WTO Members (G/TBT/N/CHL/221).

1.2. In our view, the provisions contained in these instruments could be inconsistent with some of the guiding principles of the multilateral trading system – as we shall explain in full further on – since they complicate the transit of goods by imposing unnecessary barriers to trade, and affect both industry and consumers inside and outside of Chile.

2 BACKGROUND

2.1. On 6 July 2012, the Ministry of Health of Chile published in its Official Journal Law 20.606 "on the nutritional composition of food and on food advertising" in which it establishes categories of foods, with the classification "high in". According to the Chilean Government, the purpose of these amendments is to reduce the consumption of such foods among the Chilean population as a means of addressing a health problem, obesity.

2.2. Among other things, these amendments provide the authority to determine which foods are high in calories, fat, sugars, salt and other ingredients, and those foods must be labelled accordingly as "high in calories", "high in salt", and so on. The amendments prohibit these foods from being sold, promoted or advertised in primary, basic or secondary educational institutions. The Ministry of Health is also given the power to set limits on energy content and "critical nutrients", requiring food manufacturers, producers, distributors and importers to provide information on the packaging and labelling of the products in question concerning the ingredients, including "critical nutrients".

2.3. The Government of Chile published three implementing regulations to the mentioned Law:

a. On 16 January 2013, it notified WTO Members of the "Amendment to the Food Health Regulations" (G/TBT/N/CHL/219) by which the health authority establishes limits for what it calls "critical nutrients" in certain products such as milk, biscuits, soft drinks, etc.

b. On 17 January of this year, it notified the "Amendment to the Food Health Regulations" with regard to advertising (G/TBT/N/CHL/219/Add.1), which defines the concept of advertising and regulates the promotion, marketing and advertising of products considered to be "high in" owing to the quantity of "critical nutrients".

c. Finally, on 21 February, it notified the Draft Technical Regulation on "the size of reference amounts customarily consumed" (G/TBT/N/CHL/221) in which it defines the size of such servings.

2.4. To begin with, one of the problems we see in these technical regulations is the lack of technical, scientific and legal support for the term "critical nutrient", which is not based on any international standards as required by the WTO; nor is any justification provided for concluding that international standards do not appropriately address the objective pursued by Chile, in particular the protection of health, within the meaning of Article 2.3 of the TBT Agreement.

2.5. Article 106 of the Food Health Regulations defines a "critical nutrient" as "fat, saturated fat, and trans-fat, sodium (salt), sugars and energy present in a food". This definition may not be consistent with Articles 2.2 and 2.4 of the WTO TBT Agreement, since the relevant international regulations provide no technical or scientific support that would enable the Chilean authorities to establish a definition of "critical nutrient" or to apply a definition corresponding to that term.

2.6. Moreover, the *Codex Alimentarius* (CAC/GL 2-1985) does not mention the term "critical nutrient", but merely refers to a "nutrient" as "any substance normally consumed as a constituent of food which provides energy; or which is needed for growth, development and maintenance of life; or a deficit of which will cause characteristic biochemical or physiological changes to occur."

2.7. Consequently, the definition put forward by Chile for "critical nutrient" not only does not correspond, in substance, to international regulations, but it also suffers from a formal problem, since the use of the word "critical" causes unnecessary alarm for the consumer, who could confuse the goods or be compelled to take decisions on the basis of a misconception.

2.8. To identify a nutrient as "critical" violates the international principle of the *Codex Alimentarius* according to which food "shall not be described or presented on any label or in any labelling by words, pictorial or other devices … in such a manner as to lead … the consumer" to fear consuming the food in question.

2.9. Secondly, the proposed amendments to the Food Health Regulations provide that goods classified as "high in" must bear a warning message. This message consists of the words "high in" calories, salt, sugar and/or saturated fat, identifying the nutrient in capital letters. The full message must be placed in the centre of an octagonal icon which takes up at least 20% of the front of the packaging, and must be located in the top right-hand corner. On top of these requirements, the icon must in no case be smaller than 4 cm^2, regardless of the size of the product and its packaging. Moreover, the letters of the message must be in black and white in order to highlight the warning. The industry has carried out trials using labelling as specified by Chile, and has found the warning message to be out of proportion with the product. In the case of small products, for example, the labelling can be considerably larger than the total packaging of the product.

2.10. Far from informing the consumer, this labelling arouses fear and prevents the consumer from making an objective decision on the product to be consumed, thereby violating the international guidelines of the *Codex Alimentarius* (paragraph 3.5 of CAC/GL 1-1979).

2.11. Thirdly, Law 20.606 and its regulatory legislation, i.e. the amendments to the Food Health Regulations and the Draft Technical Regulation defining the size of reference amounts customarily consumed, all of them approved by Chile, create unnecessary barriers to trade and are contrary to Article 2.2 of the TBT Agreement. Indeed, the amendments to the Regulations do not produce less burdensome measures to solve the health problems facing the Chilean authorities, and the authorites could have considered resorting to public policies that have proven more cost effective, such as outreach strategies to encourage the population to eat healthily or support for physical activity programmes, which do not affect the industry directly and the consumer indirectly.

2.12. The Chilean Government must assess the scope of implementation of its public policies bearing in mind the transfer of their costs and their potential impact. Similarly, it should consider actions to be implemented and monitored directly, such as educating its population with regard to food.

2.13. Fourthly, Mexico considers Chile to be in serious breach of Article 2.9 of the TBT Agreement, which states that parties intending to adopt a technical regulation must so notify other Members whenever that regulation is not based on an international standard or when its technical content is not in accordance with the relevant international standards, and if the technical regulation may have a significant effect on trade of other Members.

2.14. Referring to the precedent established in the tuna labelling case brought by Mexico against the United States (DS381), the WTO Appellate Body established three criteria for determining whether a measure was a "technical regulation", based on paragraph 1 of Annex 1 of the TBT Agreement, i.e.: (i) the measure must apply to an identifiable product or a group of products; (ii) it must lay down one or more characteristics of the product; (iii) compliance with the product characteristics must be mandatory. These criteria can be found in Law 20.606 on the nutritional composition of food and on food advertising, which means that it is a technical regulation. However, as mentioned earlier, this Law was never notified to WTO Members. Not only is this contrary to the TBT Agreement, but the lack of such notification would appear to indicate that with respect to this Law, the Chilean legislature also failed to comply with the substantive obligations contained in the TBT Agreement.

2.15. Since it was not notified, neither Mexico nor any other WTO Member had the opportunity to comment on the content and scope of the Law. Once again, this is inconsistent with Article 2.9 of the TBT Agreement.

2.16. At the same time, we are concerned that Chile should be publishing the implementing regulations to Law 20.606 bit by bit when they need to be observed and analysed comprehensively. Failure to publish all the regulations at the same time gives rise to uncertainty and makes it impossible for those concerned to understand, in full, their scope or the actual obligations to which they are being subjected. For example, although the first regulation, the "Food Health Regulation", ranks the "critical nutrients" in terms of servings, these were not defined until the publication of the "Draft Technical Regulation defining the amounts customarily consumed", i.e. 36 days after the first publication.

2.17. Finally, this measure could be contrary to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

2.18. Trade relations between Mexico and Chile have always been highly cooperative. We have made significant steps towards integration, not only with the Mexico-Chile FTA, but also in other forums, such as the Pacific Alliance and the Trans-Pacific Partnership Agreement.

2.19. Since the signature of the Free Trade Agreement between Chile and Mexico (Mexico-Chile FTA) in 2005, trade relations between the two countries have intensified. Trade grew to 4,367,117,445 dollars in 2011, and according to the forecasts of ProChile, the figure for 2012 should be even higher. Thus, in 2011 Mexico ranked third among Latin American exporters to Chile.

2.20. Given the enormous importance of trade relations between Mexico and Chile, Mexican industry is concerned by the implementation of measures which, rather than strengthening trade in goods, will act as a barrier to trade, such as the amendments to the Food Health Regulations under Law 20.606 on the nutritional composition of food and on food advertising.

2.21. We call upon Chile to refrain from publishing and implementing the amendments to the Food Health Regulations as long as they continue to use the term "critical nutrient". We would also ask Chile, specifically, to:

a. take account of our comments;

b. consider the applicable international regulations and examine less burdensome regulatory alternatives that are consistent with the TBT Agreement;

c. meet with the Mexican authorities before taking any further measures;

d. suspend the entry into force of the measures and publish and notify all of the additional technical regulations as soon as possible.

2.22. We further note that the Government of Mexico will be sending additional comments once all of the technical regulations provided for under the Law have been published.

_____