

AS MAKESHIFT AS WE ARE: HONG KONG'S PRAGMATIC APPROACH TO NUTRITION CLAIMS

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ABSTRACT

Hong Kong's regulatory framework on food safety standards is strict yet pragmatic. The laws address the problem of information contained on the labels of pre-packaged food that do not comply with Hong Kong standards, taking into account the small size of the market and low level of locally produced food products. However, enforcement of these measures, which rely on supermarkets and other retailers to manually delete or "blackout" information from labels that contravenes Hong Kong Rules, is flawed. Enforcement is inconsistently applied, and perhaps evidences discrimination against imported products. More specifically, our findings indicate that nutrition claims which appear on the packaging of some imported products that are in full compliance with Hong Kong's regulations are often nevertheless blacked out, while similar nutrition claims on competitor products remain visible to the public. Such measures may constitute a breach of Hong Kong's international obligations under the World Trade Organization.

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I. INTRODUCTION

Consumers around the world are now well accustomed to seeing nutrition labelling on pre-packaged food products. The purpose of nutritional labelling is to provide information in a manner that allows consumers to make informed decisions regarding the products they purchase. By making consumers more informed about the nutritional value of food products, the nutritional information can therefore help promote a balanced diet and improve public health.¹ This function is particularly important in countries where the occurrence of food-related chronic degenerative diseases, such as coronary heart disease, diabetes and certain types of cancer, are rapidly increasing.² The addition of nutritional information—such as claims which promote a food’s nutritional properties—can assist manufacturers and brand owners to market and sell their products.³ Thus, if done properly, the addition

¹ See Public Health and Municipal Services Ordinance, (2008) Cap. 132, ¶ 2 (H.K.) [hereinafter Ordinance], https://www.cfs.gov.hk/english/food_leg/files/legco_brief.pdf.

² BUS. FACILITATION ADVISORY COMM., FOOD AND HEALTH BUREAU, PROPOSED NUTRITION LABELLING SCHEME FOR PREPACKAGED FOOD ¶ 2 (2018) (H.K.) [hereinafter *RTF PAPER 39*], <https://www.gov.hk/en/theme/bf/pdf/RTFPaper39.pdf>.

³ See Vincent J. van Buul & Fred Brouns, *Nutrition and Health Claims as Marketing Tools*, 55 CRIT. REV. FOOD SCI. & NUTRITION 1552 (2015).

of nutritional information on food packaging can benefit both producers and consumers.

On the other hand, if the information used on packaging is not well-regulated or well-managed, nutritional claims and other information can become inaccurate, misleading and deceptive. The highly influential role that packaging and nutritional information claims have on consumer decision-making is well-known. Therefore, the adoption of a legal regime regulating the content and presentation of nutritional information that must appear on food packaging is important to serve the interests of consumers and to ensure fair competition in the market.

Due to the rising awareness of the significance of regulating nutrition labelling and claims on food packaging over the past few decades, countries in all parts of the world began updating or reviewing their regulations on such issues. Hong Kong, a relatively wealthy jurisdiction with a heavy reliance on imported foods, amended the Food and Drugs (Composition and Labelling) Regulations (“Regulations”)⁴ more than ten years ago to introduce its own “nutrition labelling scheme” to regulate nutrition labelling and claims.⁵

The focus of this article is primarily on the governance of the nutrition claim regime in Hong Kong. Part II of this article first introduces the background for adopting the nutrition labelling scheme, while Part III discusses international practice in this regard. Although the scheme covers both nutrition labelling and nutrition claims, Part IV of this article limits its focus and analysis to the regulatory measures on nutrition claims and their application, and also critically examines the rules of the regime in comparison to best-practices and international standards. Finally, Part V of this article considers enforcement aspects of the regime. Part VI identifies the enforcement aspects as a potentially problematic part of the Regulations since they may be inconsistent with Hong Kong’s obligations under the World Trade Organization (“WTO”).

II. REGULATORY BACKGROUND

In Hong Kong, Section 61 of the Public Health and Municipal Service Ordinance serves to protect consumers and maintain a fair and equitable market by prohibiting labelling which “falsely describes the food or drugs” or “is calculated to mislead as to its nature, substance or quality.” However, this provision is rather general in nature. Considering it necessary to introduce a more specific nutrition labelling scheme, the Legislative

⁴ See Food and Drugs (Composition and Labelling) Regulations, (1960) Cap. 132, § 55 (H.K.) [hereinafter Regulations].

⁵ See Food and Drugs (Composition and Labelling) Amendment: Requirements for Nutrition Labelling and Nutrition Claim) Regulation, (2008) (sub leg, Cap 132) (H.K.) [hereinafter Amended Regulations].

Council enacted the Food and Drugs (Composition and Labelling) (Amendment: Requirements for Nutrition Labelling and Nutrition Claim) Regulation 2008 (“Amendment Regulation”) on May 28, 2008. It came into force as an integration of the Regulations on July 1, 2010, and serves to:⁶

- (a) assist consumers to make healthy food choices;
- (b) encourage food manufacturers to apply sound nutrition principles in the formulation of foods which would benefit public health; and
- (c) regulate misleading or deceptive labels and claims.

Coming into force as Schedule 5 of the Regulations, the nutrition labelling scheme is divided into two parts: Part 1 concerns nutrition labelling and Part 2 concerns nutrition claims. Part 1 refers to the compulsory lists of nutrients and quantitative information, namely information on energy and seven specified nutrients (“1+7”): protein, carbohydrates, total fat, saturated fatty acids, trans fatty acids, sodium and sugars.⁷

Part 2, the nutrition claim, is any representation which states, suggests or implies that a food has particular nutritional properties.⁸ Unlike nutrition labelling, the making and inclusion of nutrition claims is voluntary in the sense that manufacturers can decide whether or not to make the claim. However, a nutrition claim can only be made on a product if certain conditions for making the claim are met. Moreover, the Regulations regarding nutrition labelling and those of nutrition claim are interconnected. For example, the nutrition labelling on food packaging must list information on all claimed nutrients, even if such nutrients are neither energy nor any one of the seven specified nutrients.

From the outset, the Food and Health Bureau of Food and Environmental Hygiene (“Bureau”) stressed the importance of taking a holistic approach to the labelling regime in order to take an appropriate regulatory approach, stating:

In formulating the nutrition labelling scheme, we have taken into consideration various factors, including the principles adopted by the Codex Alimentarius Commission (“CAC”), local health and disease patterns, overseas regimes, impact on the food trade, implications on food choice, views collected during the consultation exercise and the results of the Regulatory Impact Assessment (“RIA”), so as to come up with a scheme appropriate for our local situation.⁹

⁶ BUS. FACILITATION ADVISORY COMM., FOOD AND HEALTH BUREAU, PROPOSED LABELLING SCHEME ON NUTRITION INFORMATION para. 3 (2007) (H.K.) [hereinafter RTF PAPER 36], <https://www.gov.hk/en/theme/bf/pdf/RTFPaper36.pdf>.

⁷ Regulations, *supra* note 4, sched. 5, pt. 1, § 1(1).

⁸ *See id.* § 2(1).

⁹ Ordinance, *supra* note 1, para. 5.

The Bureau was also mindful of, and placed great weight on, the fact that a nutrition labelling scheme could have significant impact on food imports and consumer choice. This is a significant concern in Hong Kong, since domestic production of food is relatively small, and the jurisdiction relies on imports for its sustainability. In this regard, the Bureau noted:

Hong Kong imports some 60% of pre-packaged food from overseas. We are mindful that our nutrition labelling scheme should be a balanced one so that we can, on the one hand, provide useful nutrition information to assist consumers in making informed food choices and regulate misleading or deceptive labels and nutrition claims, and on the other hand minimize the effect on food choice for our consumers.¹⁰

When introducing the nutrition labelling scheme, the Bureau therefore “adjusted the scope of the relevant system in the light of the opinions of the industry and implemented relaxation and expediency”¹¹ by adopting the “1+7” program for nutrition labelling instead of a more stringent and rigid scheme.¹² The scheme includes facilitation measures such as flexibility concerning labelling format,¹³ exemptions,¹⁴ small volume exception,¹⁵ and a grace period.¹⁶ Such an approach was wise, as a stringent scheme would have heavily burdened—including, most notably, cost—manufacturers and resulted in fewer choices of products as producers and/or importers may not have felt that it was feasible, economically or otherwise, to adopt special and complex labels for a market of only 7.5 million people.

III. THE INTERNATIONAL STANDARD: CODEX

International standards often play a vital role when jurisdictions establish or review domestic regulatory regimes. As illustrated in Part II, the

¹⁰ Ordinance, *supra* note 1, para. 3.

¹¹ Ordinance, *supra* note 1, para. 25; see BUS. FACILITATION ADVISORY COMM., FOOD AND HEALTH BUREAU, NUTRITION LABELLING SCHEME FOR PREPACKAGED FOOD (2006) (H.K.), <https://www.gov.hk/en/theme/bf/pdf/RTFPaperIN7.pdf> (example of the relaxation) [hereinafter RTF PAPER IN7].

¹² RTF PAPER 39, *supra* note 2, ¶ 11. The more stringent scheme proposed in 2005 consisted of “energy plus nine types of core nutrients.” *Id.* The current scheme does not include cholesterol, calcium and dietary fibre from the list of core nutrients but added trans-fat to the list. *Id.* The Retail Task Force explains: “Cholesterol is taken out because we consider saturated fat and trans fat are more important risk factors for cardiovascular disease. *Id.* As for calcium and dietary fibre, they only exist in a small range of prepackaged food and food products with substantial amounts of these two nutrients, in some cases may be due to fortification, usually come with claims, meaning that the nutrient value has to be listed.” *Id.*

¹³ See Regulations, *supra* note 4, sched. 5, pt. 1, § 4.

¹⁴ See Regulations, *supra* note 4, sched. 6, pt. 1.

¹⁵ See Regulations, *supra* note 4, sched. 6, pt. 2.

¹⁶ See Ordinance, *supra* note 1, ¶ 6. To allow the trade to make necessary adjustments, the Amendment Regulation came into operation on July 1, 2010 after a grace period of two years.

Codex Alimentarius (“Food Code”) for food labelling developed by the CAC served as a significant reference for the Bureau when formulating the nutrition labelling scheme in Hong Kong.¹⁷ For this reason, it is necessary to briefly examine the international standard developed by the CAC before proceeding to more detailed analysis of Schedule 5 of the Regulations.

Established in 1963 by the United Nations Food and Agriculture Organization (“FAO”) and the World Health Organization (“WHO”) in order to implement their joint food standards programme,¹⁸ the CAC now has over 180 member countries and plays an important role in developing and collecting “standards, codes of practice, guidelines and other recommendations related to food.”¹⁹ It aims to protect consumers’ health and ensure fair practices in the food trade by means of elaborating, establishing, and harmonizing the definitions and requirements for foods.²⁰

The importance of CAC is also tied to its relationship with the WTO, most notably with the Agreement on Sanitary and Phytosanitary Measures (“SPS Agreement”)²¹ and the Agreement on Technical Barriers to Trade (“TBT Agreement”).²² Both Agreements aim to promote fair trading conditions and to reduce barriers to trade. More importantly, both Agreements encourage Members to base their domestic SPS and TBT measures on international standards as a means to facilitate trade and encourage the international harmonization of food and product standards.²³ In particular, according to paragraph 3(a) of Annex A of the SPS Agreement, CAC is named as the relevant standard-setting organization for food safety. The link is not merely theoretical, and the standards developed by the CAC have proven to be an important reference point for the WTO’s dispute settlement mechanism in the application of the two Agreements in several high-profile disputes.²⁴

¹⁷ See BUS. FACILITATION ADVISORY COMM., FOOD AND HEALTH BUREAU, PROPOSED NUTRITION LABELLING SCHEME FOR PREPACKAGED FOOD para. 7 (2008) (H.K.) [hereinafter RTF PAPER IN4], <https://www.gov.hk/en/theme/bf/pdf/RTFPaperIN4-final.pdf>; RTF PAPER 36, *supra* note 6, ¶ 6; RTF PAPER 39, *supra* note 2, para. 6; Ordinance, *supra* note 1, para. 5.

¹⁸ In 2001, 2008, 2009, 2010, 2011, 2012, and 2013 respectively.

¹⁹ FAO, UNDERSTANDING CODEX (2018), <http://www.fao.org/3/CA1176EN/ca1176en.pdf>.

²⁰ See *About Codex Alimentarius*, FAO, <http://www.fao.org/fao-who-codexalimentarius/about-codex/en/#c453333> (last visited Sept. 29, 2020).

²¹ Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 493 [hereinafter SPS].

²² Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 120 [hereinafter TBT Agreement].

²³ See *Understanding the WTO Agreement on Sanitary and Phytosanitary Measures*, WTO, https://www.wto.org/english/tratop_e/sps_e/spsund_e.htm (last visited Sept. 29, 2020); *Technical Barriers to Trade*, WTO, https://www.wto.org/english/tratop_e/tbt_e/tbt_e.htm (last visited Sept. 29, 2020).

²⁴ See Appellate Body Report, *European Communities—Trade Description of Sardines*, ¶¶ 217–33, WTO Doc. WT/DS231/AB/R (adopted Oct. 23, 2002) [hereinafter *EC—Sardines Report*], for a discussion of the TBT Agreement; see Appellate Body Report, *Canada—Continued*

Of course, it is worth pointing out that at national level, Codex itself is not directly binding and cannot be a substitute for, or alternative to, national legislation. While many jurisdictions take guidance from and/or directly reference Codex when developing or amending their regulatory schemes relating to food, it is not self-executing and therefore it is the jurisdiction's laws and administrative procedures which are directly relevant and must be complied with.²⁵

With regard to nutrition claims, the Codex Guidelines for Use of Nutrition Claims ("Pre-2004 Codex Guidelines") were adopted by the CAC at its 22nd Session in 1997. At the 17th Session in 2004, the Guidelines were revised to include health claims and renamed as Guidelines for Use of Nutrition and Health Claims ("Guidelines"). The Guidelines have been amended seven times since their adoption,²⁶ with the addition of an Annex entitled "Recommendations on the Scientific Substantiation of Health Claims" in 2009. According to the Guidelines, nutrition claims are divided into three categories: nutrient content claims,²⁷ nutrition comparative claims,²⁸ and non-addition claims,²⁹ while a health claim³⁰ includes nutrient function claims,³¹ other function claims,³² and reduction of disease risk claims.³³ In addition, Section 9 of the Guidelines sets up conditions to make

Suspension of Obligations in the EC—Hormones Dispute, ¶ 693, WTO Doc. WT/DS321/AB/R (adopted Nov. 14, 2008), for a discussion of the SPS Agreement; see also Panel Report, *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, ¶¶ 8.56-8.57, WTO Doc. WT/DS26/R/U.S. (Aug. 18, 1997), for a discussion of the SPS Agreement.

²⁵ See *About Codex Alimentarius*, *supra* note 20.

²⁶ See FAO, GUIDELINES FOR USE OF NUTRITION AND HEALTH CLAIMS (1997), <http://www.fao.org/ag/humannutrition/32444-09f5545b8abe9a0c3baf01a4502ac36e4.pdf>.

²⁷ *Id.* § 2.1.1 (defining a nutrient content claim as a "nutrition claim that describes the level of a nutrient contained in a food", such as "source of calcium", "high in fibre" and "low in fat").

²⁸ *Id.* § 2.1.2 (defining a nutrient comparative claim as "a claim that compares the nutrient levels and/or energy value of two or more foods", such as "reduced", "less than", "fewer", "increased" and "more than").

²⁹ *Id.* § 2.1.3 (defining a non-addition claim as "any claim that an ingredient has not been added to a food, either directly or indirectly [and] the ingredient is one whose presence or addition is permitted in the food and which consumers would normally expect to find in the food").

³⁰ *Id.* § 2.2 (defining a health claim as "any representation that states, suggests, or implies that a relationship exists between a food or a constituent of that food and health").

³¹ *Id.* § 2.2.1 (defining a nutrient function claims as "a nutrition claim that describes the physiological role of the nutrient in growth, development and normal functions of the body").

³² *Id.* § 2.2.2. Other function claims "concern specific beneficial effects of the consumption of foods or their constituents, in the context of the total diet on normal functions or biological activities of the body. *Id.* Such claims relate to a positive contribution to health or to the improvement of a function or to modifying or preserving health." *Id.*

³³ *Id.* § 2.2.3. Reduction of disease risk claims relate to "the consumption of a food or food constituent, in the context of the total diet, to the reduced risk of developing a disease or health-related condition." *Id.* The Guidelines go on to explain that "[r]isk reduction means significantly altering a major risk factor(s) for a disease or health-related condition. *Id.* Diseases have multiple risk factors and altering one of these risk factors may or may not have a beneficial effect. The presentation of risk reduction claims must ensure, for example, by use of appropriate language

claims related to dietary guidelines or healthy diets. The Guidelines are relatively brief, spanning only a mere eight pages, but jurisdictions use them as a basis from which to develop their own regulatory regime regarding nutrition claims, which stipulate the requirements in a more detailed and thorough manner. To date, this style of regulatory approach has been adopted in numerous jurisdictions, including Singapore,³⁴ the United States (“U.S.”),³⁵ European Union (“E.U.”),³⁶ Australia, and New Zealand.³⁷

Hong Kong is fairly unique in that its nutrition claim scheme includes only nutrient content claims, nutrient comparative claims, and nutrient function claims, but not health claims. Hong Kong’s regulatory regime is closer akin to those included in the Pre-2004 Codex Guidelines, except that the Hong Kong regime excludes claims related to dietary guidelines or health diets. For ease of reference, however, this article will analyze the nutrition claim regime in Hong Kong by referencing the Guidelines rather than the Pre-2004 Codex Guidelines for three reasons. First, the nutrition claim regime in Hong Kong is rather similar to the Pre-2004 Codex Guidelines. Second, such an approach will reveal the difference between Hong Kong’s approach and the current approach adopted by several developed jurisdictions considered as best practice internationally. Third, the Guidelines will likely serve as a template in any future development of the scheme in Hong Kong.

As for nutrient content claims and nutrient comparative claims, the regulatory regime in Hong Kong largely complies with the Guidelines, with several exceptions. For example, the Hong Kong regime allows flexibility in the expression of the two claims by permitting the use of “any other word or words of similar meaning or symbol denoting a similar meaning” in describing nutrition content claims.³⁸ What is more, some non-Codex nutrition claims such as “low sugar” and “trans fat free” are also covered by the nutrition claim regime of Hong Kong.

While nutrient function claims are regulated as nutrition claims in Hong Kong, the Guidelines classify them as health claims, along with other function claims and reduction of disease risk claims. Moreover, the Guidelines provide both substantial and procedural regulatory rules for health claims. The former can be found in Section 8 of the Guidelines, which lists

and reference to other risk factors, that consumers do not interpret them as prevention claims.”
Id.

³⁴ See Sale of Food Act, (2005) Cap. 283, § 56(1) (Sing.).

³⁵ See 21 C.F.R. § 101 (2016).

³⁶ See Council Regulation 1924/2006, 2006 O.J. (L 404) 9 (EC); Commission Regulation 353/2008, 2008 O.J. (L 109) 11 (EC); Commission Regulation 1169/2009, amending Regulation 353/2008, 2009 O.J. (L 314) 34 (EC).

³⁷ See *Australia New Zealand Food Standards Code 2018* s 1.2.7 (Austl.) [hereinafter *Austrl. N.Z. Food Code*].

³⁸ See Regulations, *supra* note 4, sched. 8, col. 3.

fundamental conditions for making nutrient function claims, while the latter are included in the Annex of Recommendations on the Scientific Substantiation of Health Claims (“Recommendations”). These Recommendations aim to “assist competent national authorities in their evaluation of health claims in order to determine their acceptability for use by the industry,” and “focus on the criteria for substantiating a health claim and the general principles for the systematic review of the scientific evidence.”³⁹ Other jurisdictions with a health claim regime, such as the E.U., the U.S.,⁴⁰ Singapore,⁴¹ Australia, and New Zealand,⁴² have adopted a scheme for health claims evaluation based on the Guidelines. Using the E.U. as an example, the European Food Safety Authority (“EFSA”) evaluates the validity of health claims made on food in the E.U.⁴³ and has issued several guidance documents to facilitate the submission and evaluation claims.⁴⁴ In comparison, Section 8 of Schedule 5 of the Hong Kong Regulations does not regulate substantial conditions for making nutrient function claims in any detailed and comprehensive way, with no national authority appointed to take carriage of the issue and no evaluation procedures established to supervise the making of nutrient function claims.

Thus, Hong Kong’s nutrition claim regime more closely follows the pre-2004 Codex Guidelines rather than the latest Guidelines which regulates both nutrition claims and health claims. Nevertheless, as has been mentioned above, when formulating the nutrition labelling scheme in Hong Kong, the international standard did serve as an important reference, but there were still other factors which affected the final shape of the Regulations. Namely, a decision that a less restrictive approach with lower enforcement costs would be a better choice for Hong Kong.

³⁹ GUIDELINES FOR USE OF NUTRITION AND HEALTH CLAIMS, *supra* note 26, at Annex 3.

⁴⁰ See U.S. FOOD AND DRUG ADMIN., GUIDANCE FOR INDUSTRY: A FOOD LABELING GUIDE (2013), <https://www.fda.gov/media/81606/download>.

⁴¹ See HEALTH PROMOTION BD., A HANDBOOK ON NUTRITION LABELLING (SINGAPORE) (2015) (Sing.), <https://www.hpb.gov.sg/docs/default-source/default-document-library/handbook-on-nutrition-labelling.pdf?sfvrsn=0>.

⁴² See *Nutrition Content Claims and Health Claims*, FOOD STANDARDS AUSTL. & N. Z., <http://www.foodstandards.govt.nz/consumer/labelling/nutrition/Pages/default.aspx> (last visited Oct. 14, 2020).

⁴³ See *Nutrition*, EUROPEAN FOOD SAFETY AUTH., <https://www.efsa.europa.eu/en/topics/topic/nutrition-and-health-claims> (last visited Oct. 14, 2020).

⁴⁴ See *Nutrition Applications: Regulations and Guidance*, EUROPEAN FOOD SAFETY AUTH., <https://www.efsa.europa.eu/en/applications/nutrition/regulationsandguidance> (last visited Oct. 14, 2020).

IV. NUTRITION CLAIM SCHEME IN HONG KONG

In order to understand the legal regime concerning nutrition claims in Hong Kong, the first step should be to interpret its application scope; that is, the definition of a nutrition claim. A nutrition claim—⁴⁵

(a) means any representation which states, suggests or implies that a food has particular nutritional properties including—

(i) the energy value;

(ii) the content of protein, available carbohydrates, total fat, saturated fatty acids, trans fatty acids, sodium and sugars; or

(iii) the content of vitamins and minerals; and

(b) includes nutrition content claim, nutrition comparative claim, and nutrition function claim.

The same Section also provides the definition of the three types of nutrition claims. A nutrient content claim is defined as “a nutrition claim that describes the energy value or the content level of a nutrient contained in a food,” such as “high fibre,” “low fat,” or “sugar free.”⁴⁶ A nutrient comparative claim “compares the energy value or the content level of a nutrient in different versions of the same food or similar foods.”⁴⁷ Examples of nutrient comparative claims include, “Reduced fat - 25% less than the regular product of the same brand,” “reduced in fat,” and “extra dietary fibre.” Finally, a nutrient function claim is “a nutrition claim that describes the physiological role of a nutrient in growth, development, and normal functions of the body.”⁴⁸ For example, the expressions that “protein helps build and repair body tissues,” “fat supplies energy,” and “aids in the absorption of fat-soluble vitamins,” all fall within the scope of nutrient function claims.

Once a claim is made on a nutrient, regardless of the type of claim—whether a content claim, a comparative claim, or a function claim—it shall comply with the relevant legal requirements included in the Regulations. Compliance is mandatory and the making of a claim not in compliance with the Regulations is illegal. In other words, a nutrition claim can be made only if all the following three conditions are met:⁴⁹

(a) the substance is a nutrient;

(b) claim conditions have been established for the nutrient;

and (c) the relevant claim conditions are fulfilled.

⁴⁵ Regulations, *supra* note 4, § 2.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Nutrition Labelling Information for Trade*, CENTRE FOR FOOD SAFETY (May 3, 2018), https://www.cfs.gov.hk/english/programme/programme_nifl/programme_nifl_faqs.html# [hereinafter *Nutrition Labelling Information for Trade*].

Therefore, claims which regularly appear on pre-packaged food containers in other jurisdictions, such as those related to omega-3 fatty acids, monounsaturated fat, polyunsaturated fat and unsaturated fat,⁵⁰ are not allowed in Hong Kong. The reason, again, is simple—the Regulations do not provide conditions for making claims on these nutrients.

On the other hand, if a claim appearing on food packaging is not made on a nutrient and thus not considered as a nutrition claim, it is not regulated by the legal regime concerning nutrition claims. That said, the information provided must nevertheless be correct and not misleading. For example, the labelling of “100% Natural” or “100% Oats” is not considered as nutrition claims because they do not refer to any nutrient, and in turn, these claims do not need to comply with the new legislation on nutrition claims. They will therefore be allowed so long as they are not deceptive or misleading.

The Regulations set out penalties for making illegal nutrition claims, with the most notable being that any person who advertises for sale, or sells or manufactures for sale any pre-packaged food product that has on its label any nutrition claim which does not comply with the nutrition claim scheme, is committing an offense, with liability of a fine of HK\$50,000 and imprisonment for six months. In addition, any person who advertises any pre-packaged food product containing any illegal nutrition claim for sale is subject to the same penalties.⁵¹

A. *Nutrient Content Claims*

The conditions for making a nutrient content claim are included in Section 6 of Schedule 5. Simply put, the claim shall comply with the conditions set out in Schedule 8. There are two requirements. First, the claim shall be made for energy, or a nutrient specified in column 2 of Schedule 8. The list in column 2 of Schedule 8 is exhaustive, and includes only fat, saturated fat, cholesterol, trans fatty acids, sugars, sodium, protein, dietary fiber, or vitamins and minerals provided with nutrition reference values (except sodium). Schedule 7 of the Regulations provides the nutrition reference values for different nutrients for purpose of nutrition labelling. With regard to vitamins and minerals, the Schedule includes calcium, phosphorus, potassium, Sodium, Iron, Zinc, Copper, Iodine, Selenium, Magnesium, Manganese, Chromium, Molybdenum, Fluoride, Vitamin A, Vitamin C, Vitamin D, Vitamin E, Vitamin K, Vitamin B1, Vitamin B2, Vitamin B6, Vitamin B12, Niacin, Folic acid, Pantothenic acid, Biotin, and Choline.⁵² Second, claims must use any of the descriptions specified in column 3 of

⁵⁰ See, e.g., *Nutrition Claims*, EUROPEAN COMM'N, https://ec.europa.eu/food/safety/labelling_nutrition/claims/nutrition_claims_en (last visited Oct. 14, 2020); *Austrl. N.Z. Food Code*, *supra* note 37, at sched. 4.

⁵¹ See Regulations, *supra* note 1, § 5(1).

⁵² See Regulations, *supra* note 1, at sched 7.

Schedule 8 that applies to energy or to that nutrient. In other words, descriptions other than the ones included in the Schedule are not allowed. Moreover, the content of the targeted nutrient food shall satisfy the applicable condition set out in Column 4 of Schedule 8 for the use of the relevant description.

The table below, which forms part of Schedule 8, is used as an example. Column 2 indicates the target of nutrient content claims, which in this example is energy. Column 3 shows that only two kinds of descriptions can be used for nutrient content claims regarding energy. Thus, other claims, such as “source of energy,” “rich in energy,” and “very low energy” are not allowed. Conditions to the use of the allowable description are listed in Column 4. Only when the food product satisfies the requirements contained in Column 4, can it use the corresponding description in Column 3 of the corresponding energy or nutrient contained in Column 2.

SCHEDULE 8			
CONDITIONS FOR NUTRIENT CONTENT CLAIM			
Item	Energy / Nutrient	Description of the claim	Condition
1	Energy	(1) The word or words “Low” or “低”, “Little” or “少”, “Low Source” or “提供少量” or “Contains a small amount of” or “含量低” or any other word or words of similar meaning or symbol denoting a similar meaning	(a) The food is solid food and contains not more than 40 kcal (170 kJ) of energy per 100 g or food; OR (b) The food is liquid food and contains not more than 20 kcal (80 kJ) of energy per 100 mL of food.
		(2) The word or words “Free” or “不含”, “Zero” or “零”, “No” or “无” or “Without” or “没有” or any other word or words of similar meaning or symbol denoting a similar meaning	The food is liquid food and contains not more than 4 kcal (17 kJ) of energy per 100 mL of food.

Moreover, according to Section 5 of the Schedule 5, the food industry is free to tabulate the content of any nutrient per package, per serving, or per 100g/mL in specific numbers on food labelling for the reference of consumers. Such expression will be regarded as an allowable quantitative declaration rather than nutrient content claim, as long as it does not emphasize the high content, low content, presence or absence of the targeted energy or nutrient. On the contrary, statements such as “0g trans fat,” which on its own does not refer the nutrient content to either per package, preserving, or per 100g/mL, would be regarded as a nutrient content claim, that is, “trans fat free.”⁵³ Thus, the expression of allowable quantitative declaration can be very

⁵³ See *Nutrition Labelling Information for Trade*, *supra* note 49.

similar to that of nutrition content claims, but they are not pursuant to the same regulatory regime and thus must be distinguished.

B. *Nutrient Comparative Claims*

According to Section 7 of Schedule 5, a nutrient comparative claim shall compare the energy value or the content level of a nutrient specified in Column 2 of Schedule 8; shall compare different versions of the same food or similar food; shall compare foods of the same quantity; and a description of the foods being compared and the difference in the energy value or the content level of a nutrient between the foods being compared (expressed as an absolute value, or as a percentage or fraction) shall appear in close proximity to it.⁵⁴ In addition, Sections 7(3)–(9) regulate the required relative and absolute value of the difference in the energy value or nutrient content between compared foods.⁵⁵ Taking Section 7(4) as an example, it provides the specific conditions for making nutrient comparative claims on total fat, sugars, or sodium.⁵⁶ With regard to relative value of the difference in the nutrient content between the foods being compared, 25 percent is the minimum, and as for the absolute value of the difference, the provision makes references to Schedule 8, and specifies the difference cannot be less than the maximum amount in Column 4, which corresponds to the description of “Low” content of the targeted nutrient.⁵⁷

C. *Nutrient Function Claims*

The conditions for making nutrient function claims are provided in Section 8 of Schedule 5. To comply with the conditions, the targeted nutrient shall be specified in Column 2 of Schedule 8; the nutrient function claim shall be based on scientific substantiation and scientific consensus; and the claim shall contain information on the physiological role of the nutrient concerned.⁵⁸ In addition, if the claim is made on protein, dietary fiber, vitamins, or minerals, the content of the claimed nutrient in the product shall not be less than the minimum amount set out in column 4 of Schedule 8 regarding the description of the “source.”⁵⁹ Actually, nutrient function claims are regulated in a rather ambiguous way in this section.

On July 24, 2008, the Hong Kong Centre for Food Safety (“CFS”), an authority under the Food and Environmental Hygiene Department (“FEHD”), published *Acceptable Nutrient Function claims under the Nutrition Labelling Scheme in Hong Kong*, which includes a list of examples

⁵⁴ See Regulations, *supra* note 1, at sched. 5, § 7.

⁵⁵ See Regulations, *supra* note 1, at sched. 5, § 7(3)–(9).

⁵⁶ See Regulations, *supra* note 1, at sched. 5, § 7(4).

⁵⁷ See *id.*

⁵⁸ See Regulations, *supra* note 1, at sched. 5, § 8.

⁵⁹ See *id.*

of acceptable nutrient function claims.⁶⁰ For example, “PROTEIN helps build and repair body tissues,” “FAT supplies energy,” and “CARBOHYDRATE supplies energy” are now allowable claims.⁶¹ While the list is “closed” in that only those claims identified in the document are allowable, the preamble to the document states (using somewhat confusing language) that “(t)he list is not an exhaustive one, and will be reviewed from time to time based on new relevant scientific evidence.”⁶²

D. *New Development*

Following the amendment of the Regulations which introduced the nutrition labelling scheme in 2008, a second amendment, the Food and Drugs (Composition and Labelling) (Amendment) (No. 2) Regulations, was adopted by the Legislative Council in October 2014. This includes regulations regarding nutritional composition and nutrition labelling of infant formulae and nutrition labelling of follow-up formulae and food intended for Infants and Young Children (“IYC foods”),⁶³

Moreover, taking into consideration the lack of specific legislation regarding nutrition and health claims on infant formula, follow-up formula and IYC foods, the Government proposed to establish a regulatory framework on this issue and has published a consultation document to invite public views on the proposed framework on January 6, 2015.⁶⁴ The purpose of the proposal is to “better protect the health of infants and young children under the age of thirty-six months and to facilitate effective regulatory control over nutrition and health claims in Hong Kong.”⁶⁵ Moreover, the Government also mentioned that in deciding the five overarching principles of the proposed

⁶⁰ *Acceptable Nutrient Function claims under the Nutrition Labelling Scheme in Hong Kong*, CENTRE FOR FOOD SAFETY (July 24, 2008), https://www.cfs.gov.hk/english/food_leg/files/Acceptable_Nutrient_Function_Claims_bilingual.pdf.

⁶¹ *Id.*

⁶² *Id.*

⁶³ See *Food Legislation/Guidelines*, CENTRE FOR FOOD SAFETY (May 25, 2017), https://www.cfs.gov.hk/english/food_leg/food_leg_Formula_Products_for_Infants.html#reg. Regulations regarding nutritional composition and nutritional composition and nutrition labelling of infant formulae came into force on December 13, 2015. *Id.* Nutrition labelling of follow-up formulae and IYC foods came into force on June 13, 2016. *Id.*

⁶⁴ See *Proposed Regulatory Framework on Nutrition and Health Claims on Infant Formula, Follow-up Formula, and Prepackaged Foods for Infants and Young Children Under the Age of 36 Months*, CENTRE FOR FOOD SAFETY (Aug. 18, 2017), https://www.cfs.gov.hk/english/whatsnew/whatsnew_fstr/whatsnew_fstr_Health_claim_consultation.html.

⁶⁵ See LEGISLATIVE COUNCIL SECRETARIAT, PROPOSED REGULATORY FRAMEWORK ON NUTRITION AND HEALTH CLAIMS ON FORMULA PRODUCTS AND FOOD INTENDED FOR INFANTS AND YOUNG CHILDREN UNDER THE AGE OF 36 MONTHS (LC PAPER NO. CB(2)1068/15-16) ¶ 4 (2016) (H.K.), https://www.legco.gov.hk/yr15-16/english/panels/fseh/duty_v/fsehcb2-1068-e.pdf [hereinafter IYC FOOD PROPOSAL].

regulatory framework,⁶⁶ various factors were considered, among which were the Codex principles, practices of other jurisdictions, and opinions of the Expert Committee on Food Safety.⁶⁷ This is worth mentioning, as it again demonstrates Hong Kong's approach in seeking to codify existing law with international best practices.

V. ENFORCEMENT: THE "BLACKOUT" SCHEME

In Hong Kong, the CFS is the food safety authority responsible for enforcing food-related legislation, including overseeing the implementation of the nutrition labelling scheme included in the Amendment Regulation. In order to supervise the implementation of the scheme, the CFS has adopted "a risk-based enforcement approach, targeting high-risk retail outlets in law enforcement"⁶⁸ and has "built up a database of 12,000 retail outlets to facilitate its inspection, surveillance, enforcement, risk management, and public education work."⁶⁹ The CFS uses various methods to identify non-compliance with the statutory labelling requirements, including through a simple visual check as well as more elaborate chemical analysis, searching for discrepancies between the nutrient contents and the claims made on the nutrition label. After the Amendment Regulation came into effect on July 1, 2010 until December 31, 2016, the CFS checked the nutrition labels of 45,281 prepackaged food products, finding 543 labels to be inconsistent with the nutrition labelling scheme. Among the cases of inconsistency, forty-one related to inappropriate nutrition claims.⁷⁰

Before going into the details of the Hong Kong scheme, we must again emphasize that the market size for food in Hong Kong is relatively small

⁶⁶ *Id.* ¶ 5. The five principles are as follows: "(a) nutrition claims (i.e. nutrient content claims and nutrient comparative claims) should be prohibited in infant formula; (b) reduction of disease risk claims should be prohibited in infant formula, follow-up formula and IYC foods; (c) nutrition claims and nutrient function claims should be permitted in IYC foods; (d) nutrients or constituents permitted to be subjects of claims should be of high importance to the health of infants and young children; and (e) nutrition and health claims should meet specific content conditions and health claims must be scientifically substantiated and have undergone credible evaluation process." *Id.*

⁶⁷ *See id.* ¶ 10.

⁶⁸ *See* FOOD AND HEALTH BUREAU, LEGCO PANEL ON FOOD SAFETY AND ENVIRONMENTAL HYGIENE IMPLEMENTATION OF NUTRITION LABELLING SCHEME (LC PAPER NO. CB(2)768/16-17(07)) ¶ 6 (2017) (H.K.) [hereinafter LEGCO PANEL BRIEF], <https://www.legco.gov.hk/yr16-17/english/panels/fseh/papers/fseh20170214cb2-768-7-e.pdf>. The Centre for Food Safety also states: "High-risk retail outlets include those poorly managed outlets, often of a small scale, selling mainly prepackaged food with nutrition claims or with unsatisfactory past records (e.g. premises with labelling irregularities detected previously)" at n. 8. *Id.*

⁶⁹ *Id.* ¶ 6.

⁷⁰ *Id.* Since 2012, the monthly reports on the compliance test results can be found on the CFS website. *See Monthly Report on Results of Compliance Test*, CENTRE FOR FOOD SAFETY, https://www.cfs.gov.hk/english/whatsnew/whatsnew_act/List_of_Samples_with_Discrepancy_for_NL.html (last visited Oct. 14, 2020).

and lacking in many locally produced pre-packaged products, with the vast majority of such items imported from a number of jurisdictions (including but not limited to mainland China, Australia, United Kingdom (“U.K.”), France, Germany, Canada, and the U.S.). Thus, when designing and implementing the nutrition claim regime, the Government understood that some flexibility was needed. Simply stated, Hong Kong could not have prescribed every package to be individually produced for the local market without seriously affecting the volume of imports of pre-packaged food and the choices of consumers. With approximately 7.5 million people, many companies would have simply chosen to abandon the market rather than to specially design packages for the territory.

In order to apply the regime but limit the negative impact on food trade and competition, Hong Kong has adopted the “blackout” scheme in order to enforce the Regulations. Thus, when nutrition claims on food packaging do not meet certain specific criteria as required by the Regulations, traders or retailers simply blackout or cover the relevant wordings on the packages. If this is done properly, then it will be regarded that no nutrition claims have been made.⁷¹ In this regard, the government itself does not enforce the scheme, but instead has outsourced enforcement to traders and retailers. While the CFS has found few cases of inappropriate labelling, it is our contention that the “blackout” scheme is routinely and systematically not in compliance with the regime. More specifically, although the “blackout” scheme eases the burden of eliminating nutrition claims which do not meet certain criteria included in the Regulations, the application of the scheme is inconsistent and potentially discriminatory. Thus, by “contracting out” enforcement, the Government has saved the cost of enforcement at the expense of regime accuracy and consistency.

Since September 2017, the authors have made repeated visits to more than ten supermarkets throughout Hong Kong representing six different trade names (ParknShop, Fusion, International, City Super, Wellcome and Market Place by Jasons) in order to gather evidence, check, and cross-check enforcement of the “blackout” scheme.⁷² The findings of inconsistency, including excessive blackout of English language text and under-enforcement in Chinese language text, is consistent across all shops and throughout the entire period of the surveys. In every case, approximately half of the imported pre-packaged cereal products contain blackouts which are inconsistent with the nutrition claims scheme. At the same time, a large percentage of packaged products with Chinese language labelling—most often refrigerated soy-based products—make nutrition claims in contravention of the scheme but such

⁷¹ See *Frequently Asked Questions*, CENTRE FOR FOOD SAFETY, https://www.cfs.gov.hk/english/faq/faq_14.html (last visited Oct. 14, 2020).

⁷² The supermarkets visited are located in Shatin, Tai Po, Tai Wai, Kowloon Tong and Hong Kong Island.

claims are not blacked out. This is not to say that retailers misapply the scheme in all cases—in many cases, claims which are inconsistent with the scheme have been properly blacked out—only that they consistently blackout a number of nutrition claims which are consistent with the scheme. What is more, while statements and claims that do not fall within the category of nutrition claims often appear on the packages of certain food products, similar claims are regularly blacked out on other products even though there is no inconsistency with the law. This latter situation appears most notably when comparing Chinese language products to those written exclusively in English. Under these two types of circumstances, the inconsistent and improper application of the “blackout” scheme has put those products at a disadvantage compared to similar products whose packages contain similar claims.

The best way to illustrate the inconsistent nature of the regime is through examples. We start with a package of Rogers 5 Grain Granola (Cranberry Almond), a ready-to-eat cereal containing five different whole grains, with Canada as its country of origin. When it is sold in the Hong Kong market, the claims “zero trans fat” and “low sodium” on its packaging are blacked out. With regard to the first claim, according to Schedule 8, conditions to make such a claim on solid food are that the food contains:

- (a) not more than 0.3g of trans fatty acid per 100 g of food;
- (b) not more than 1.5g of saturated fatty acids combined per 100g of food; and
- (c) saturated fatty acids and trans fatty acids, the sum of which contributed nor more than 10 percent of energy.

As for the product in this case, although it contains 0g trans fatty acid per 100g, it still has 1.5g saturated fatty acids per 55g, which is equal to 2.73g per 100g. Thus, since the food contains more than more than 1.5g of saturated fatty acids combined per 100g of food, the “zero trans fat” claim cannot be made on it. With regard to the second claim “low sodium,” conditions to make the claim on solid food are that the food contains not more than 0.12g of sodium per 100g. However, in this case, the food contains 75mg per 55g, which is equal to 0.136mg per 100g. Thus, blacking out the two claims are justified according to the applicable provisions of the nutrition claim scheme. This example illustrates the “blackout” scheme being effectively put into practice.

The next example is Linwoods’ Milled Flaxseed & Goji Berries, imported from the U.K. When sold in supermarkets in Hong Kong, many claims made on the packaging are blacked out, with or without any legal basis. On the packaging, three claims concerning Omega-3 are blacked out, including: “Naturally high in omega 3 Fatty Acids,” “Flaxseed is one of nature’s richest sources of the essential fatty acid Omega 3 (ALA) which we must get from our food,” and “OMEGA-3 (ALA): Essential fatty acid which contributes to the maintenance of normal blood cholesterol levels.” The first two claims can be regarded as nutrient content claims, while the last one is a

nutrient function claim. However, Schedule 8 of the Regulations does not cover omega-3; thus, the industry shall not make any nutrition claims on it. While it is right to blackout these three claims, it might not be the same for other claims on the product. On the front packaging, two of the blacked-out claims are “Source of IRON” and “Source of ZINC”. According to Schedule 8 of the Regulations, the condition to claim that a solid food is the source of a mineral provided with nutrient reference values (except sodium) is that the food contains no less than fifteen percent of the nutrient reference value of the mineral concerned per 100g. In this case, the nutrient reference value of iron and that of zinc are both 15mg, while the food contains 7.16mg of iron and 5.03mg of zinc per 100g, which implies that it is legal to make the two blacked out claims. Moreover, the claim “FIBRE per 30g 8.79g” is also blacked out. However, as mentioned above, since the statement refers the nutrient content to per 30g, it should not be considered as a nutrient content claim but an acceptable quantitative declaration. Thus, there is no legal basis to blackout the statement, as long as it is not false, misleading, or deceptive. Unlike the case of Rogers 5 Grain Granola (Cranberry Almond), the present case shows that in practice the “blackout” regime may be applied in error and without legislative basis.

The third illustration is Go Natural Breakfast Bars (mixed berries), imported from Australia. The packaging makes two claims that are blacked out: “the goodness of flaxseed” and “high in antioxidant Vitamin E”. Since the former claim does not refer to any nutrient, it is not a nutrition claim, and therefore shall be allowed as long as it is not false, misleading, or deceptive. The latter claim can be regarded as a combination of a nutrient content claim of “high in vitamin E” and a nutrient function claim that “Vitamin E is antioxidant.” The statement “VITAMIN E protects the fat in body tissues from oxidation” is listed in the abovementioned CFS-issued “Acceptable Function Claims under the Nutrition Labelling Scheme in Hong Kong.” Moreover, in order to make a nutrient content claim that a solid food is high in any vitamin is that the food contains no less than thirty percent of the nutrient reference value of the relevant vitamin per 100g. In this case, the nutrient reference value of Vitamin E is 14mg and thirty percent of it is 4.2mg, while the food contains 1.9mg Vitamin E per 40g which is equal to 4.75mg per 100g, so that the condition is met. In short, there is no factual evidence or legal basis showing that the claim of “High in Antioxidant vit E” is illegal and it should not have been blacked out.

Although claims such as “Source of IRON,” “Source of ZINC,” “The goodness of flaxseed,” “High in Antioxidant vit E,” and “FIBRE per 30g 8.79g,” have been blacked out, similar claims can be found on the packaging in other food products. This appears to particularly be the case of Chinese language products. For example, on the packaging of Quaker Instant Nourishing Oatmeal (both the Wolfberry & White Fungus Flavor and Red Date Flavor), imported from mainland China, statements concerning the

goodness of its ingredients have been made but not blacked out: “杞子有助益精明目 Wolfberry helps replenish vital essences and improve vision;” “促進心臟健康 Promote Heart Health 有助體重管理 Support Weight-Management;” and “紅棗有助養血安神 Red date helps nourish the blood and calm the mind,” these claims do not refer to any specific nutrients—they simply make statements on the special health functions of the food products to attract consumers—and are therefore not nutrition claims as defined under the regime. Another example is Cheer Natural Almonds, whose country of origin is the U.S., but is packed and labelled in Hong Kong. Chinese and English language claims such as “calcium aids in the development of strong bones and teeth,” “Vitamin E protects the fat in body tissues from oxidation,” and “High Dietary Fibre”⁷³ appear on its packaging and are not blacked out.

While it is unnecessary to detail the results of every survey, it is perhaps instructive to provide a typical example of a store inspection. The following inspection took place in November 2019 at the City Super located at New Town Plaza in Shatin. For special considerations, we limit the example to cereal products as this product contains more nutrition claims than most other packaged food products (such as canned food and snack food). On the shelves of the City Super were sixty-seven types of cereal products, eleven out of which contained nutrition claims which had been blacked out. Of those eleven packages, five contained errors with sentences/claims blacked out when there was no inconsistency with the nutrition claim scheme.

Name of the product and country of origin	Sentences blacked out	Compliance with HK nutrition claim scheme
GrandyOats Grain Free Granola (US)	It's made by hand in small batched at our solar-powered bakery and just like the sun, Coconolo provides you with the sustained energy you need to power your adventures.	The substance of the “sustained energy” claim is energy, but conditions for such a claim are not stipulated in the law, thus, the claim is not allowed. There is no legitimate reason to blackout the first part of the sentence regarding “made by hand” at a “solar-powered bakery”.
Calbee Frugra (Japan)	Delicious, pleasant, and appropriate amount of sugar Use a small amount of sugar Reduced sugar, delicious and crispy taste	This product is exempted from nutrition labelling; thus, no nutrition claims can be made since there is no indication of the nutrient

⁷³ The original language of the Hong Kong packed product is Chinese.

	25% less sugar, full of dietary fiber and iron content, containing 1/3 of 8 vitamins required per day (calculated based on 50g per meal)	content. ⁷⁴ However, the general claims on taste have been incorrectly blacked out.
Kofuku Beikoku Amazake Granola (Japan)	Rich in fibre	This product is exempted from nutrition labelling; thus, no nutrition claims can be made.
I HEART KEENWAH Hot Cereal (Bolivia)	No grassy or bitter aftertaste; just protein-packed breakfast nutrition. We blend our quinoa flakes with oats for heartiness and add lucuma fruit powder for a touch of sweetness.	The product contains 5g protein per 45g, thus, it is the source of protein but not high in protein. The term “protein-packed” implies the product is high in protein and thus is illegal. Other statements are not nutrition claims and should not have been blacked out.
Kellogg’s All-Bran Original Cereal (US)	8g protein: 4g this product + 4g milk	The claim refers to protein, but the law does not set up conditions for such a claim, thus, it is not allowed.
Multi Grain Cheerios (US)	While many factors affect heart disease, diets low in saturated fat and cholesterol may reduce the risk of this disease. Multi Grain Cheerios cereal is low in fat (1.5 g), saturated fat free and cholesterol free. Gluten Free	The production contains 1.5g fat per 26g and does not meet the requirement for “low in fat” Other claims on saturated fat and cholesterol meet the standards under the regime and have been incorrectly blacked out. Many other cereal products also make the “gluten free” claim and it should not be blacked out here.
Nairn’s Gluten Free Oat Muesli (UK)	vitamins and minerals – manganese, phosphorus, magnesium, zinc, iron, folate, vitamin B6 and thiamin ⁷⁵	The package does not include the amount of the vitamins and minerals, thus no claims can be made on these nutrients.
Fifty50 Hearty Cut Oatmeal (US)	Steady carbs – Lasting Energy Going Low glycemic is easy with Fifty50 Foods! Stabilize your blood sugar	The “Steady carbs – Lasting Energy” claims are on carbohydrate and energy, but conditions for such claims are not stipulated in

⁷⁴ See Regulations, *supra* note 1, at sched. 6, pt. 1, for discussion on the nutrition labeling exemption.

⁷⁵ The full sentence (part of which was blacked out) states: “Wholegrains are a rich source of fibre, vitamins and minerals—oats are high in soluble fibre and also naturally contain manganese, phosphorus, magnesium, zinc, iron, folate, vitamin B6 and thiamin.”

	<p>and keep your metabolism and energy levels even so you can do more throughout your day. Fifty50 products are certified Low Glycemic and contain the right kind of carbs to help you eat well and feel good. Since Low Glycemic foods are digested slower, you won't see a dramatic spike in blood sugar levels and you should feel less hungry and more satisfied.</p>	<p>the law. Thus, the claims are not allowed. Glycemic is not a nutrition, thus such claims are not nutrition claims.</p>
<p>Bakery on Main Instant Oatmeal (US)</p>	<p>Good Source of ALA Contains 320 mg ALA per 50 mg Serving which is 20% of the 1.6g Daily Value for ALA</p>	<p>ALA is omega-3 fatty acids Nutrition claims on omega-3 fatty acids are not allowed in HK. Stating the mg of ALA per 50 mg is a fact-based statement which is not in contravention under the regime and thus should not have been blacked out.</p>
<p>Lowan Whole Foods Cocoa Bombs (Australia)</p>	<p>Source of Fibre</p>	<p>The content of fibre in this product is 0.7g per 35 g, which does not meet the requirement for “source of fibre”.</p>
<p>One Degree Cereal (US)</p>	<p>We then soak and sprout our grains and legumes to enhance vitamins and minerals naturally.</p>	<p>The claim of “enhance vitamins and minerals” may perhaps fall into the category of nutrition comparative claim and if so it does not comply with the relevant requirements.</p>

To summarize, although the “blackout” scheme can mitigate the negative impact of introducing the nutrition claim regime on Hong Kong’s food imports, its inconsistent application is problematic and detracts from the usefulness of the scheme. Several checks at multiple locations (none of which would be deemed a high-risk outlet by the CFS) confirmed the inconsistency of the regime and the improper blacking out of legal claims on certain products which causes disadvantages to those products. The risk that the inconsistent enforcement of the scheme is inconsistent with Hong Kong’s obligations of non-discrimination under WTO Agreements, is examined in the next section.

VI. POTENTIAL WTO DISPUTES

Hong Kong is a founding Member of the WTO, and as a separate customs territory, a Member in its own right separate to that of mainland China.⁷⁶ Hong Kong is well-known as a liberal laissez-faire economy and free port without tariffs and other trade barriers. Hong Kong's trade measures have never been challenged in front of the WTO Dispute Settlement Body,⁷⁷ and its reputation is of a non-discriminatory jurisdiction which welcomes foreign labor, investment and products. As will be illustrated below, however, the inconsistent and perhaps even discriminatory application of the nutrition claim regime in Hong Kong, casts a shadow on the legality of the regime under the legal framework of the multilateral trading system.

A. *Applicable Legal Standards*

The first step in evaluating whether the nutrition claim regime complies with Hong Kong's obligations under the multilateral trading system is to determine which of the WTO's covered agreements are applicable in the present case. As an internal regulatory measure, which is applicable to both domestic and imported pre-packaged food products, the nutrition claim regime falls within the scope of at least two WTO Agreements and several provisions.

1. General Agreement on Tariffs and Trade (GATT)

Like any WTO Member, Hong Kong is bound by obligations under the General Agreement on Tariffs and Trade ("GATT"), which regulates international trade in goods. Considering the nature of the nutrition claim regime and its enforcement, the two most relevant fundamental principles of the WTO are most-favored-nation treatment ("MFN") and national treatment ("NT"), as embodied in GATT Article I:1⁷⁸ and Article III:4⁷⁹ of the GATT,

⁷⁶ *Hong Kong, China and the WTO*, WTO, https://www.wto.org/english/thewto_e/countries_e/hong_kong_china_e.htm (last visited Nov. 15, 2020).

⁷⁷ *See id.*

⁷⁸ General Agreement on Tariffs and Trade art. 1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 190 ("With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Art III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.") [hereinafter *GATT*].

⁷⁹ *Id.* art. 3 ("The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to

respectively. These provisions establish the internal regulatory rules for evaluating Hong Kong's nutrition claim regime.

Article I:1 of the GATT covers a wide range of trade-related measures by any contracting party regarding like products imported from or exported to different other contracting parties. In the case of imported products, the provision requires any contracting party taking such measures to treat like products equally irrespective of their origin.⁸⁰ Moreover, if any advantage related to a product is granted to any other contracting party via such measures, it shall be accorded *immediately and unconditionally* to like products originating in all other contracting states.⁸¹ Thus, under Article I:1, the focus is on how a Member treats imports from other WTO Members and prohibits treatment of products imported from one Member more favourably than the like products imported from any other Member.

In contrast, Article III:4 of the GATT focuses on the treatment of imported products as against like domestic products once those goods have entered the border. According to Article III:4 and WTO jurisprudence, the following four conditions must be satisfied in order to establish a violation:⁸²

- (a) the imported products and the domestic products at issue are like products;
- (b) there exists any regulatory measure in the form of “law,” “regulation,” or “requirement” which reveals a certain degree of formal governmental involvement;
- (c) the regulatory measure affects the internal sale, offering for sale, purchase, transportation, distribution or use of the products at issue;
- (d) the imported products at issue are accorded less favorable treatment than that accorded to the domestic products at issue.

Article III:4 therefore covers almost any trade-related measure which is not tax-related (such measures are covered under GATT Article III:2). In addition, both Article I:1 and Article III:4 are applicable only when the products affected by the trade-related measures at issue are like products. Pursuant to a long and well-established line of panel and Appellate Body reports, the determination of “like products” depends on four factors including physical characteristic, end-use, consumers' tastes and habits, and tariff clarification.⁸³ To be clear, MFN and NT (Article I:1 and Article III:4 of the

like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use . . .”).

⁸⁰ See SIMON LESTER ET AL., *WORLD TRADE LAW: TEXT, MATERIALS AND COMMENTARY* 315-24 (3d ed. 2018).

⁸¹ See *id.* at 324-27.

⁸² See *id.* at 285-305.

⁸³ See Report of the Panel, *Spain–Tariff Treatment of Unroasted Coffee* ¶¶ 4.5-4.9, L/5135 (adopted June 11, 1981), GATT BISD 28S/102; Panel Report, *European Union and its Member*

GATT, respectively) are the core non-discrimination principles of international trading regime, but they operate differently as the former applies to the treatment of imported like products being compared against each other, whereas the latter applies to the treatment of imported products as compared with domestic like products once the goods have entered the border.

Another GATT provision which might be relevant here is in GATT Article X “Publication and Administration of Trade Regulations.” Paragraph 3(a) of the Article includes an obligation of uniform, impartial and reasonable administration, and therefore can also be relevant to the “blackout” scheme in Hong Kong. Article X:3(a) reads:⁸⁴

1. Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use, shall be published promptly in such a manner as to enable governments and traders to become acquainted with them. Agreements affecting international trade policy which are in force between the government or a governmental agency of any contracting party and the government or governmental agency of any other contracting party shall also be published.

3. (a) Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article.

The term “administer” in this provision refers to “‘putting into practical effect or applying’ a legal instrument of the kind described in Article X:1.”⁸⁵ According to its wording and a series of previous WTO panel and Appellate Body reports interpreting the provision, Article X:3(a) only applies to the administration of the laws, regulations, decisions and rulings, rather

States—Certain Measures Relating to the Energy Sector, ¶ 7.576, WTO Doc. WT/DS476/R (circulated Aug. 10, 2018), for a discussion of Article I; Panel Report, *United States—Certain Measures Affecting Imports of Poultry from China*, ¶ 7.425, WTO Doc. WT/DS392/R (adopted Oct. 25, 2010); see Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Product* para. 101-102, WTO Doc. WT/DS135/AB/R (adopted Apr. 5, 2001) [hereinafter *EC—Asbestos*], for a discussion of Article III:4.

⁸⁴ GATT, *supra* note 78, art. X:3(a).

⁸⁵ Panel Report, *United States—Certain Country of Origin Labelling (COOL) Requirements*, ¶ 7.821, WTO Doc. WT/DS384/R, WT/DS386/R (adopted July 23, 2012) [hereinafter *U.S.—COOL Report*].

than those laws, regulations, decisions and rulings themselves.⁸⁶ Moreover, with regard to the application and scope of the provision, the Panel in *Thailand–Cigarettes (Philippines)* followed the precedent from earlier disputes and concluded:⁸⁷

The scope of administration that is subject to a challenge under Article X:3(a) includes both the manner in which the legal instruments of the kind falling under Article X:1 are applied or implemented in particular cases as well as a legal instrument that regulates such application or implementation. Further, administrative processes leading to administrative decisions may also be included in the scope of the term "administer" and hence Article X:3(a).

Having regard to this jurisprudence, the “blackout” scheme in Hong Kong falls into the category of “the manner in which the legal instruments of the kind falling under Article X:1 are applied or implemented in particular cases.”⁸⁸ Simply stated, the “blackout” scheme represents the major way in which the nutrition claim regime in Hong Kong is applied in practice. Thus, the “blackout” scheme shall be uniform, impartial, and reasonable. A WTO Member can justify a violation of its GATT obligations under the general exception clause contained in Article XX. The general exception clause contains an introductory clause (referred to as the chapeau) and an enumerated list of ten possible exceptions. The introductory clause serves as a ‘good faith’ safeguard against abuse by stating:⁸⁹

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures.

The provision then sets out an enumerated list of possible exceptions, with the most important being (a) necessary to protect public morals; (b) necessary to protect human, animal or plant life or health; (d) necessary to secure compliance with laws or regulations which are not

⁸⁶ See Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, ¶ 200, WTO Doc. WT/DS27/AB/R (adopted Sep. 25, 1997); Panel Report, *United States—Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, ¶ 7.289, WTO Doc. WT/DS244/R (adopted Jan. 9, 2004) [hereinafter *U.S.—Corrosion-Resistant Steel Sunset Review*].

⁸⁷ Panel Report, *Thailand—Customs and Fiscal Measures on Cigarettes from the Philippines*, ¶ 7.873, WTO Doc. WT/DS371/R (adopted July 15, 2011) [hereinafter *Thailand–Cigarettes (Philippines) Report*].

⁸⁸ *Id.*

⁸⁹ GATT, *supra* note 78, art. XX.

inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trademarks and copyrights, and the prevention of deceptive practices; and (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.⁹⁰

Taking into consideration the objectives of the nutrition claim scheme in Hong Kong, the most relevant term is “(d) *necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to ... the prevention of deceptive practices.*”⁹¹ This is the case as Hong Kong is trying to use the scheme to improve consumer information and prevent fraudulent and deceptive marketing practices.

The Appellate Body has established a high standard for a respondent to satisfy the “necessity” requirement. More specifically, the Appellate Body established a three-part “weighing and balancing” test that takes into consideration the contribution made by the measure to the ends pursued; the importance of the common interests or values protected that law or regulations; and the accompanying impact of the law or regulation on imports or exports.⁹² Once the measure has been deemed to provisionally pass this requirement, “this result must be confirmed by comparing the measure with possible alternatives, which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective.”⁹³ Only then can the measures at issue be necessary within the meaning of Article XX (d).

The final step to the Article XX(d) analysis is to ascertain whether the measure meets the requirements of the chapeau. That is, the respondent must demonstrate that the *application* of the measure at issue does not “constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.”⁹⁴ In *US–Shrimp*, the Appellate Body has made it clear that:⁹⁵

⁹⁰ *See id.*

⁹¹ GATT, *supra* note 78, art. XX(d).

⁹² *See* Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef* ¶ 152-85, WTO Doc. WT/DS161/AB/R, WT/DS169/AB/R (adopted Jan. 10, 2001) [hereinafter *Korea–Beef Report*]; *Brazil–Retreaded Tyres*, ¶¶ 133-83; *EC–Asbestos Report*, *supra* note 83, ¶¶ 170-74; LESTER ET AL., *supra* note 80, at 379-84.

⁹³ Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, ¶ 178, WTO Doc. WT/DS332/AB/R (adopted Dec. 17, 2007) [hereinafter *Brazil–Retreaded Tyres Report*].

⁹⁴ GATT, *supra* note 78, art. XX.

⁹⁵ Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 150, WTO Doc. WT/DS58/AB/R (adopted Nov. 6, 1998) [hereinafter *US–Shrimp Report*].

In order for a measure to be applied in a manner which would constitute "arbitrary or unjustifiable discrimination between countries where the same conditions prevail," three elements must exist. First, the application of the measure must result in *discrimination*. As we stated in *United States–Gasoline*, the nature and quality of this discrimination is different from the discrimination in the treatment of products which was already found to be inconsistent with one of the substantive obligations of the GATT 1994, such as Articles I, III or XI. Second, the discrimination must be *arbitrary or unjustifiable* in character. We will examine this element of *arbitrariness or unjustifiability* in detail below. Third, this discrimination must occur *between countries where the same conditions prevail*.

In essence, the chapeau serves as a good faith clause and an extra guard against discrimination.⁹⁶

2. Agreement on The Technical Barriers to Trade

The other WTO agreement, which is possibly applicable to the nutrition claim regime, is the Agreement on Technical Barriers to Trade ("TBT Agreement"). Like the GATT, the TBT Agreement also regulates domestic regulatory measures for goods, but this Agreement is limited in scope to three kinds of measures: mandatory technical regulations, non-mandatory standards, and procedures related to the assessment of conformity with technical regulations and standards.⁹⁷ In regards to technical regulations, the TBT Agreement contains strict and detailed substantive rules as such product standards can have a substantial effect on cross-border trade.⁹⁸ Thus, the first step in any TBT-related analysis is to determine if the product standard—in this case, the nutrition claim regime in Hong Kong—falls within the definition of a technical regulation, as per Annex 1 ("Terms and their Definitions for the Purpose of this Agreement") of the Agreement. A technical regulation is defined as being:⁹⁹

Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking

⁹⁶ See also *Brazil–Retreaded Tyres Report*, *supra* note 93, ¶ 213-52; *US–Shrimp Report*, *supra* note 95, ¶¶ 146-58; Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, ¶¶ 22-29, WTO Doc. WT/DS2/AB/R (adopted May 20, 1996).

⁹⁷ See LESTER ET AL., *supra* note 80, at 648.

⁹⁸ See *id.*

⁹⁹ TBT Agreement, *supra* note 22, at Annex 1.

or labelling requirements as they apply to a product, process or production method.

The jurisprudence of the WTO has established and applied a three-tier test for determining whether a measure constitutes a “technical regulation” under the TBT Agreement. For instance, the Appellate Body in *EC–Sardines* stated:¹⁰⁰

[W]e set out three criteria that a document must meet to fall within the definition of “technical regulation” in the TBT Agreement. *First*, the document must apply to an identifiable product or group of products. The identifiable product or group of products need not, however, be expressly identified in the document. *Second*, the document must lay down one or more characteristics of the product. These product characteristics may be intrinsic, or they may be related to the product. They may be prescribed or imposed in either a positive or a negative form. *Third*, compliance with the product characteristics must be mandatory. As we stressed in *EC–Asbestos*, these three criteria are derived from the wording of the definition in Annex 1.1.

Whether the nutrition claim regime in Hong Kong constitutes a technical regulation can therefore only be answered by applying this three-tier test which asks: (1) does the regime apply to an identifiable product or group of products?, (2) does it lay down one or more characteristics of the product?, and (3) is it in compliance with the product characteristics mandatory?¹⁰¹ It should be clear from the analysis in the preceding section that the nutrition claim regime requires pre-packaged food products with nutrition claims on the packaging to comply with the criteria set up in the relevant parts of the Regulations. Therefore, the identifiable products at issue are pre-packaged food products (with nutrition claims on the packaging); the characteristics of the products are the conditions included in the Regulations to make the relevant claims; and manufacturers are obliged to meet the conditions of the regime in order to make the claims, that is, packaging which does not follow the regime is illegal.

Of course, a manufacturer need not make all nutrition claims and it is only when a claim is made that the regime must be followed. To some, this

¹⁰⁰ *EC–Sardines Report*, *supra* note 24, ¶ 176 (citing to *EC–Asbestos*, *supra* note 83, ¶¶ 66-70); *see also U.S.–COOL Report*, *supra* note 85, ¶¶ 7.147-7.148; *Thailand–Cigarettes (Philippines) Report*, *supra* note 87, ¶¶ 7.24-7.25; Appellate Body Report, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, ¶¶ 5.21-5.23, WTO Doc. WT/DS400/AB/R, WT/DS401/AB/R (adopted June 18, 2014); Appellate Body Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* ¶ 183, WTO Doc. WT/DS381/AB/R (adopted June 13, 2012) [hereinafter *U.S.–Tuna II (Mexico) Report*].

¹⁰¹ *See id.*

introduces an element of doubt as to whether the regime is a compulsory regulation since the manufacturers can decide whether or not to make certain claims when the food products meet the criteria to make the claims. A similar issue arose in *US–Tuna II (Mexico)*, where the U.S. allowed the use of a “dolphin-safe” label only when certain conditions (including fishing method and location) were met. In other words, while no claim regarding the safety of dolphins had to be included on a can of tuna, such a claim could only be made if the tuna were caught in a prescribed way and in accordance with U.S. regulations. The Appellate Body found the measure to be a technical regulation, holding:¹⁰²

[T]he measure at issue sets out a single and legally mandated definition of a "dolphin-safe" tuna product and disallows the use of other labels on tuna products that do not satisfy this definition. In doing so, the U.S. measure prescribes in a broad and exhaustive manner the conditions that apply for making any assertion on a tuna product as to its "dolphin-safety," regardless of the manner in which that statement is made. As a consequence, the US measure covers the entire field of what "dolphin-safe" means in relation to tuna products. For these reasons, we find that the Panel did not err in characterizing the measure at issue as a "technical regulation" within the meaning of Annex 1.1 to the TBT Agreement.

The reasoning used in determining that the “dolphin-safe” labelling scheme was mandatory is also applicable to the nutrition claim regime in Hong Kong. Similar to the American labelling scheme, the Hong Kong nutrition claim regime also “prescribes in a broad and exhaustive manner the conditions that apply for making any assertion”¹⁰³ on pre-packing food products regarding nutrition claims, and “covers the entire field” of the meaning of nutrition claims in relation to pre-packaged food products.¹⁰⁴ Consequently, we can conclude that the nutrition claim regime in Hong Kong is a technical regulation covered by the TBT Agreement, so that the regime must comply with the obligations of the Agreement, including Article 2.1, Article 2.2, and Article 2.4.¹⁰⁵

Under TBT Article 2.1, “Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favorable than that accorded to like products of national origin and to like products originating in any other

¹⁰² *U.S.–Tuna II (Mexico) Report*, *supra* note 100, ¶ 199.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ See LESTER ET AL., *supra* note 80, at ch. 6.

country.”¹⁰⁶ Article 2.1 therefore covers both the key principles of MFN and NT.

Article 2.2 requires “Members to ensure that technical regulations are not prepared, adopted, or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfillment would create. Such legitimate objectives are, *inter alia*: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, *inter alia*: available scientific and technical information, related processing technology or intended end-uses of products.”¹⁰⁷ This provision is similar to the general exception clause included in Article XX of GATT.

Finally, Article 2.4 provides that “[where] technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.”¹⁰⁸ The provision encourages the harmonization of technical regulations taken by WTO Members and requires the use of international standards as a basis for the technical regulations with one exception.

B. Potential Breach and Justification

1. Non-discrimination

The substantive rules of the nutrition claim regime in Hong Kong are based on and essentially follows the relevant international standard, with modifications taking into account the practical issues and context of Hong Kong. The rules apply equally to both locally produced and imported products. Thus, there is no *de jure* case of any breach of the applicable provisions in WTO Agreements. This is especially the case given the flexibility of the regime in not mandating custom-made packaging in order to meet the requirements of the regulations.

However, the application of the regime exposes Hong Kong to a potential *de facto* inconsistency with the WTO. As demonstrated in the preceding section, enforcement of the measures via the “blackout” scheme is inconsistent and potentially discriminatory against certain foreign

¹⁰⁶ TBT Agreement, *supra* note 22, art. 2.1.

¹⁰⁷ *Id.* art. 2.2.

¹⁰⁸ *Id.* art. 2.4.

manufactured products. Our findings indicate that packaging from local producers and mainland China—that is, packaging featuring if not emphasizing Chinese characters—are not subject to erroneous blackouts of claims whereas other foreign-manufactured food products often have nutrition claims blacked out without legal basis. Likewise, claims which should be blacked out according to the applicable rules are almost always blacked out on foreign-manufactured products but locally produced and Chinese products sometimes escape the blackout. In other words, local producers and those in mainland China benefit from lax enforcement of their illegal claims, whereas other foreign manufacturers do not receive similar treatment.

Based on the factual finding, Hong Kong may be acting inconsistently with its non-discrimination obligation under Article I:1 and Article III:4 of the GATT. With the application and enforcement of the scheme resulting in local products being treated more favorably than like products from almost all other Members, there could be a violation of Article III:4 of the GATT. In addition, with the application and enforcement of the scheme resulting in products from Mainland China receiving more favorable treatment than like products from all other WTO Members, the measures may also violate Article I:1 of the GATT. In other words, the enforcement of the nutrition claim regime can be viewed as negatively affecting the internal sale of some imported pre-packaged food products by blacking out the legal nutrition claims on the packaging, while similar domestic products and products from mainland China are not accorded with the same treatment.

Moreover, while the Government of Hong Kong has in essence contracted out enforcement of the “blackout” scheme to retailers, it nevertheless remains responsible for the enforcement of the regime it established. The fact that the retailers are responsible for the “blacking out” of illegal claims does not relieve the Government of liability or responsibility for the failings of the regime.

This situation is akin to the circumstances addressed in *Korea–Beef*, where the measure at issue also had an element of private choice but was deemed to have resulted in *de facto* discrimination. In that case, the Appellate Body found that Korea's dual retail system for the sale of beef, where retailers were forced to choose between selling local or imported beef and where large supermarkets had to store, keep, and sell imported beef in separate areas from local beef,¹⁰⁹ was inconsistent with GATT Article III:4 and could not be

¹⁰⁹ See *Korea–Beef Report*, *supra* note 92, ¶ 143 (“Korean law in effect requires the existence of two distinct retail distribution systems so far as beef is concerned: one system for the retail sale of domestic beef and another system for the retail sale of imported beef. A small retailer (that is, a non-supermarket or non-department store) which is a ‘Specialized Imported Beef Store’ may sell any meat except domestic beef; any other small retailer may sell any meat except imported beef. A large retailer (that is, a supermarket or department store) may sell both imported and domestic beef, as long as the imported beef and domestic beef are sold in separate

justified under GATT Article XX(d). When determining if the imported products at issue were accorded "less favorable" treatment than "like" domestic products under GATT Article III:4, the Appellate Body emphasized that the proper inquiry under Article III:4 was "whether a measure modifies the *conditions of competition* in the relevant market to the detriment of imported products."¹¹⁰

Accordingly, although domestic beef and imported beef under the dual retail system were expressly treated differently, different treatment does not necessarily equate to less favorable treatment against imported products.¹¹¹ Rather, the issue was that under the dual retail system, retailers were forced to choose between imported and domestic beef exclusively, and most chose domestic beef. As a result, imported beef suffered from "the sudden cutting off access to the normal, that is, the previously existing, distribution outlets through which the domestic product continued to flow to consumers,"¹¹² and the consequent "drastic reduction of commercial opportunity to reach, and hence to generate sales to, the same consumers served by the traditional retail channels for domestic beef."¹¹³

Again, the Appellate Body did not absolve the responsibility of the South Korean government for the consequences of the measure even though it was ultimately the retailers who made the decision to sell domestic beef over imported beef:¹¹⁴

We are aware that the dramatic reduction in number of retail outlets for imported beef followed from the decisions of individual retailers who could choose freely to sell the domestic product or the imported product. The legal necessity of making a choice was, however, imposed by the measure itself. The restricted nature of that choice should be noted. The choice given to the meat retailers was not an option between remaining with the pre-existing unified distribution set-up or going to a dual retail system. The choice was limited to selling domestic beef only or imported beef only. Thus, the reduction of access to normal retail channels is, in legal contemplation, the effect of that measure. In these circumstances, the intervention of some element of private choice does not relieve Korea of responsibility under the GATT 1994 for the resulting

sales areas. A retailer selling imported beef is required to display a sign reading 'Specialized Imported Beef Store'.")

¹¹⁰ *Id.* ¶ 137.

¹¹¹ *See id.* ¶ 135.

¹¹² *Id.* ¶ 143.

¹¹³ *Id.*

¹¹⁴ *Id.* ¶ 146.

establishment of competitive conditions less favorable for the imported product than for the domestic product.

The Appellate Body therefore found that the “intervention of some element of private choice” could not relieve Korea from its responsibility under the GATT Article III:4 as “the reduction of access to normal retail channels” was not the “effect” of retailer’s free choice; instead, it was the “effect” of the measure, that is, the dual retail system adopted by the Government of Korea.¹¹⁵ The “legal necessity” of having to make a choice of restricted nature between domestic beef or imported beef had been imposed by Korean law on retailers.¹¹⁶

In the case, the Appellate Body was also careful in distinguishing between governmental intervention and entrepreneurs’ own actions; while both can modify conditions of competition, only the former is covered by Article III:4 of the GATT.¹¹⁷

We are *not* holding that a dual or parallel distribution system that is not imposed directly or indirectly by law or governmental regulation, but is rather solely the result of private entrepreneurs acting on their own calculations of comparative costs and benefits of differentiated distribution systems, is unlawful under Article III:4 of the GATT 1994. What is addressed by Article III:4 is merely the *governmental* intervention that affects the conditions under which like goods, domestic and imported, compete in the market within a Member's territory.

The key take-away, for our purposes, is that the “intervention of some element of private choice” does not necessarily exclude the responsibility of the WTO Member under Article III:4. Rather, the critical issue is whether the discrimination against the imported products is the effect of any measure imposed by domestic law or governmental regulation, or solely the result of actions by private entrepreneurs. Answering the question requires a case-by-case study of the relevant facts presented in each case.

It is worth also highlighting again that the imported beef in *Korea-Beef* suffered from *de facto* rather than *de jure* discrimination. Although both *de jure* and *de facto* discrimination produce conditions of competition which are less favorable for the imported products compared to the like domestic products, the former “involves discrimination that is apparent on the fact of the measure,”¹¹⁸ while on the contrary the latter “involves measures that do not explicitly differentiate between imports and domestic goods.”¹¹⁹

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* ¶ 149.

¹¹⁸ LESTER ET AL., *supra* note 80, at 263.

¹¹⁹ *Id.* at 263.

In *Korea-Beef*, “the dual retail system assure[d] perfect regulatory symmetry between imports and domestic products,”¹²⁰ in that the Korean law did explicitly differentiate between or provide for differing levels of treatment between local and imported beef. In other words, the less favorable treatment to imported beef which affected the competition conditions were not the result of *de jure* discrimination. Instead, in order to find a violation of Article III:4, the Complainant had to prove the existence of *de facto* discrimination against imported beef. In the case, they did so through the presentation of empirical studies which demonstrated that the dual retail system had the effect of reducing the access of imported beef to normal retail channels as a matter of fact in practice.¹²¹

The situation in *Korea-Beef* presents a similar scenario to that in Hong Kong with regard to the “blackout” scheme. In Hong Kong, the application of the nutrition claim regime is law; retailers are required to comply with the regime and face penalties for failing to do so. But it is not the case that retailers are only allowed to sell pre-packaged food products with proper nutrition claims printed on the packages; instead, retailers can make use of the “blackout” scheme and can continue to sell the products with illegal nutrition claims after simply blacking them out.

The problem with the scheme, however, is that retailers black out nutrition claims in an inconsistent and arbitrary way. As a result, the conditions of competition in the Hong Kong market are modified to the disadvantage of the imported products from certain countries. More specifically, the purpose of having nutrition claims on pre-packaged food products is to attract consumers by showing that the food products are more nutritious and healthier, and consequently they can become more competitive in the marketplace. Following this logic, imported pre-packaged food products, which have nutrition claims blacked out without legal basis, will find themselves disadvantaged when compared to those products produced locally and imported from mainland China with nutrition claims. Likewise, such producers will also enjoy extra advantages when their attractive, but illegal, nutrition claims have not been blacked out while imported products from other markets cannot escape the “blackout” scheme. Thus, it can be concluded that the “blackout” scheme has modified the conditions of competition to the detriment of imported products in violation of Article III:4 of the GATT. In addition, by treating products from mainland China in a different way, on a level field with domestic products but better than all other WTO Members, Hong Kong is in violation of Article I:1 of the GATT.

¹²⁰ *Korea-Beef Report*, *supra* note 92, ¶ 17. In the same paragraph, Korea further explained, “Imported beef is sold only in stores that choose to sell imported beef, and domestic beef is sold only in stores choosing to sell domestic beef. In addition, there is total freedom on the part of retailers to switch from one category of shops to the other.” *Id.*

¹²¹ *See id.* ¶ 145.

While it is true that it is the retailers, and not the Government, who have applied the scheme inconsistently, the Government nevertheless retains responsibility for enforcement of the regime. The retailers' mistakes are a direct result of the law setting out the standards for packaged food products and requiring them to "blackout" certain claims. Not only did the Government make the decision to not contract out enforcement of the regime, it also appears to have neglected its duty to oversee the regime. Despite the arbitrariness and inconsistency of the "blackout" regime on the retail shelves, it does not appear the Government has taken any action against any retailer. Had the Government maintained effective oversight or even better attempted to oversee the regime, it could perhaps be argued that the result was not governmental discrimination. However, on the present circumstances it is clear that as a direct consequence of the Government's laws and lack of oversight in enforcement, retailers in general apply the "blackout" scheme in an inconsistent and arbitrary way, which in practice has modified the conditions of competition to the detriment of pre-packaged food products imported from many other jurisdictions except mainland China. Thus, imported pre-packaged food products are treated in a less favorable manner in comparison with like products produced locally or imported from mainland China in violation of Article I:1 and Article III:4 of the GATT.

The same arguments in this section regarding the non-discriminatory principle in Article I:1 and Article III:4 can also be applied when assessing whether there is a violation of Article 2.1 of the TBT Agreement, which contains the obligations of NT and MFN as well. Consequently, it can be simply concluded that for the same reasons why Article I:1 and Article III of the GATT have been breached, Article 2.1 of the TBT Agreement has been violated too.

2. Uniform, Impartial and Reasonable Administration

In addition to the obligation of non-discriminatory treatment, GATT Article X:3(a) includes an obligation of uniform, impartial, and reasonable administration, which is applicable to the "blackout" scheme in Hong Kong.¹²² Indeed, the provision is not simply another non-discrimination clause applying to like products; rather, Article X:3(a) requires uniformity, impartiality and reasonableness in administration. The three terms have been interpreted in previous cases. In *US-COOL*, the Panel defined the terms "uniform" and "reasonable":

The term 'uniform' is defined as 'of one unchanging form, character, or kind; that is or stays the same in different places or circumstances, or at different times'. We find guidance for the meaning of 'uniform' under Article X:3(a) in the findings by panels in previous disputes. For instance, the panel in

¹²² GATT, *supra* note 78, art. X:3(a).

Argentina–Hides and Leather stated that 'uniform administration' requires that Members ensure that their laws are applied consistently and predictably. Additionally, in *US–Stainless Steel*, the panel noted that, 'the requirement of uniform administration of laws and regulations must be understood to mean uniformity of treatment in respect of persons similarly situated'.¹²³

...

The term 'reasonable' is defined as 'in accordance with reason', 'not irrational or absurd', 'proportionate', 'sensible', and 'within the limits of reason, not greatly less or more than might be thought likely or appropriate'.¹²⁴

The Panel in *Thailand–Cigarettes (Philippines)* defined the term “impartial” to be:¹²⁵

The term ‘impartial’ can be defined as ‘*adjective* 1. not favouring one party or side more than other; unprejudiced, unbiased; fair’. The word ‘partial’ means ‘*A. adjective*. I 1 a Inclined beforehand to favour one party in a cause, or one side of a question, more than the other, prejudiced, biased. Opp. Impartial’. Based on the ordinary meaning, therefore, impartial administration would appear to mean the application or implementation of the relevant laws and regulations in a fair, unbiased and unprejudiced manner.

Thus, what remains to be decided is whether the application of the nutrition claim regime via the “blackout” scheme in Hong Kong is uniform, reasonable, and impartial. Under the “blackout” scheme, while nutrition claims appearing on the pre-packaged food products imported from many countries, whether illegal or not, have been blacked out, the same has not happened to food products produced locally or imported from mainland China. It can therefore be argued that the administration of the nutrition claim regime in Hong Kong, by means of the “blackout” scheme, is not uniform, for it is not consistent or predictable. The scheme can also be said to be unreasonable, considering that it would be difficult to justify why some legal nutrition claims on certain pre-packaged food products have been blacked out, while some illegal claims appearing on other products remain visible. Similarly, the administration of the scheme may not be deemed to be impartial since the “blackout” scheme appears to be conducted in a biased and prejudiced manner and more favorable to pre-packaged food products produced locally and imported from mainland China.

¹²³ *U.S.–COOL Report*, *supra* note 85, ¶ 7.876.

¹²⁴ *Id.* ¶ 7.850.

¹²⁵ *Thailand–Cigarettes (Philippines) Report*, *supra* note 87, ¶ 7.899.

Finally, it has also been emphasized in previous WTO cases that the action by WTO Members in violation of the provision “should have a significant impact on the overall administration of that Member's law and not simply on the outcome of the single case in question.”¹²⁶ As has been mentioned in the previous section, the “blackout” scheme represents the entire means to apply the nutrition claim regime in Hong Kong, a jurisdiction which features a small internal market with heavy reliance on imported products. Moreover, it is clear through our empirical research that there is not a single case that in Hong Kong nutrition claims on pre-packaged food products are blacked out or kept in an inconsistent and arbitrary way; rather, the misapplication of the scheme is widespread among both small and large retailers and represents the failure of the entire scheme. All in all, it is probable that a panel would find the administration of the nutrition claim regime and “blackout” scheme to be inconsistent with Article X:3(a).

3. Justification

Having established a potential violation with the substantive rules of the GATT, we now briefly turn to whether Hong Kong would be able to make use of an exception under Article XX. The implementation of the nutrition claim regime and even the use of a “blackout” scheme could be deemed to fall within the scope of Article XX(d) as a legislative tool to prevent deceptive practices. As mentioned in the preceding section, panels and the Appellate Body have established a rather high standard for Members to prove that a measure is necessary to pursue certain goals within the meaning of Article XX, but the application of the standard has at times been applied rather loosely. A panel or Appellate Body would thus likely find the Hong Kong regime to fall within the scope of Article XX(d). Where the measure would fall down is under the chapeau, as the inconsistent application of the nutrition claim regime demonstrates arbitrary or unjustifiable discrimination against certain imported products and their countries of origin—the very thing the chapeau guards against.

Thus, the potential violation of the GATT caused by the inconsistent application of the “blackout” scheme in Hong Kong cannot be justified by Article XX(d). For the same reasons, it is unlikely that the potential breach of Article 2.1 of the TBT Agreement by the same measures will be justified under Article 2.2 of the TBT Agreement.

¹²⁶ Panel Report, *United States—Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* ¶ 7.268, WTO Doc. WT/DS184/R (adopted Aug. 23, 2001); see also *U.S.—Corrosion-Resistant Steel Sunset Review*, *supra* note 86, ¶ 7.27.

VII. CONCLUSION

This article demonstrates that although the nutrition claim regime in Hong Kong is well-meaning, and based on international standards and pragmatically adopted to meet the context of the jurisdiction, the enforcement of the regime is uneven and not in line with well-established principles of international trade law. By contracting out enforcement of the “blackout” scheme to retailers, the Government has allowed for an uneven, inconsistent, and possibly discriminatory application of the regime towards certain imported products. In so doing, Hong Kong is potentially acting inconsistently with provisions in the GATT and the TBT Agreement. The Government should correct this deficiency by enhancing the enforcement aspect of the regime, either through better policing retailers and others responsible for “blacking out” illegal claims with spot-checks backed by fines and other penalties or by revising the enforcement scheme to take control of the “blackouts.”