Public Health and Nutrition: The Next Frontier at the SPS Agreement

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I. Promoting Public Health through Nutrition: Trade Law Considerations

As recently as September 2015, world leaders convened at the 69th United Nations (UN) General Assembly in New York City to agree on seventeen sustainable development goals that will shape the global policy agenda for the next 15 years.[1] Although no one goal has been adopted with a priority over the other, improving nutrition and ensuring healthier lifestyles have been identified in the top-five core objectives.[2] In this regard, governments agreed to correct and prevent trade restrictions in world markets in accordance with the mandate of the Doha Development Round.[3] Already in 2011, the UN Special Rapporteur on the right to food reported that overnutrition and micro-nutrient deficiency, as the source of overweight and obesity, cause more

1 UN General Assembly, 69th Session, Draft outline document of the United Nations summit for the adoption of the post-2015 development agenda, 12 August 2015, A/69/L.85 [UN Post-2015 Development Agenda].

2 UN Post-2015 Development Agenda (fn 1), 14.

3 UN Post-2015 Development Agenda (fn 1), 16.

deaths worldwide than hunger.[4] As the international academic community has moved to recognise the serious and growing global impact of non-communicable diseases (NCDs) in general,[5] governments are increasingly attempting to strengthen their own regulatory interventions to promote public health by curving the increase in obesity, diabetes and cardiovascular diseases – particularly among the younger population –[6] through incentives to consume healthier foodstuffs. However, the legal risks associated with the adoption of measures based on inconclusive science (as it is the case with measures addressing unhealthy diets and nutritional requirements) is potentially high, and their unintended effects on market access, rather difficult to foresee. Despite the available regulatory space for domestic legislation and the undeniable extension of sovereignty with which the protection of public health is afforded under the law of the World Trade Organization (WTO law), these efforts often result in a dichotomy, whereby international trade obligations are at odds with the pursue of legitimate objectives such as a reduction in the death toll caused by unhealthy diets. As such, differing public health standards of protection arising out of different regulatory approaches among WTO members may impose important non-tariff barriers to trade.

Admittedly, this issue could be addressed from many different legal angles, even within the realm of WTO law. For the purposes of this article however and albeit its non-exhaustive character, this analysis will focus on the role played by the WTO Agreement on Sanitary and Phytosanitary Measures (SPS Agreement)[7] in promoting or preventing the adoption of domestic public health measures that aim at reducing the impact of NCDs by means of nutritional composition requirements that address saturated fats, sugars and salt. In doing so, this article is structured as follows: Section II will examine whether the SPS Agreement finds application in cases where domestic measures addressing nutritional requirements are challenged in the WTO dispute settle-

4 UN General Assembly, Report Submitted by the Special Rapporteur on the Right to Food, Oliver De Schutter, Human Rights Council, 19th Session, 21 December 2011, A/HRC/19/59.

5 For pioneering work see generally: BENN MCGRADY, Trade and Public Health: The WTO, Tobacco, Alcohol and Diet, New York 2011.

6 BELINDA REEVE, Setting the Scene: Advertising Unhealthy Food and Childhood Obesity – The Food Pyramid Meets the Regulatory Pyramid: Responsive Regulation to Food Advertising to Children, Sydney Law School Legal Studies Research Paper Nr. 15/33, May 2015, www.papers.ssrn.com/sol3/papers.cfm?abstract_id=2601213, visited 15 September 2015.

7 Agreement on Sanitary and Phytosanitary Measures, 1 January 1995, Marrakesh Agreement Establishing the World Trade Organization, 1867 UNTS 493 [SPS Agreement].

ment system. In order to determine SPS applicability, the treaty text will be examined in conjunction with available case law. Once the scope of the SPS Agreement is established, Section III will address whether and to what extent SPS measures on nutritional requirements as identified in Section II may pose non-tariff barriers to trade. While doing so, this section will also explore the role of international standards as basis for domestic regulation. Section IV will examine the triple threshold established under Article 2.2 SPS Agreement to identify the legal standard of review that domestic measures must display in order to comply with the SPS Agreement. It will further address the significance of risk assessments and their symbiotic relation with scientific principles. Section V will conclude with some legal implications by transposing the findings in the previous sections to the context of unhealthy diets and measures adopted to promote consumption of healthier foodstuffs.

II. Nutritional Measures Addressing Unhealthy Food Consumption: An SPS Case?

The SPS Agreement applies to all SPS measures that may affect, directly or indirectly, international trade.[8] The first step in determining whether the SPS Agreement will serve as a backdrop to assess compliance with WTO obligations is to identify the nature of measures addressing the consumption of unhealthy foodstuffs. That is, the scope of application of the SPS Agreement will be established only after a domestic measure is identified as an SPS measure.

The SPS Agreement defines SPS measures in its Annex A as any measure applied:

- to protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment, or spread of pests, diseases, disease-carrying organisms, or disease-causing organisms;
- to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs;
- to protect human life or health within the territory of the Member from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; or

8 Art. 1 SPS Agreement.

– to prevent or limit any other damage within the territory of the Member from entry, establishment or spread of pests. [9]

Measures requiring the disclosure of nutritional information on packing, such as labelling measures, may not fall *prima facie* within the scope of application of the SPS Agreement. Rather, these types of measures are likely to constitute a technical regulation related to a product and thus, the TBT Agreement and its less stringent requirements[10] may find application.[11] However, Annex A, second paragraph establishes that a domestic measure adopted to protect human health from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs shall be considered an SPS measure, to the exclusion of other WTO agreements. Thus, it is also arguable that product-regulation measures addressing the nutritional qualities of foodstuffs may fall within the scope of the SPS Agreement, in cases where they have been adopted with the aim of protecting human health from risks arising from repeated exposure to elements considered unhealthy in large quantities, such as saturated fats, sugars or salt.[12] In other words, the legality of measures on the nutritional composition of foodstuffs could become subject to SPS scrutiny to the extent that (1) those risk management measures are adopted with the aim of protecting human health from additives, and (2) saturated fats, sugars and salt are classified as additives.

In establishing the concept of food additive for WTO law purposes, the standard adopted by the Codex Alimentarius Commission (CAC) is of relevance, whereby conditions under which the use of permitted food additives are set forth. It defines it as «any substance not normally consumed as food by itself and not normally used as an ingredient of the food, whether or not it has nu-

9 Annex 1.A SPS Agreement; see also: STEVEN CHARNOVITZ, Article 1 and Annex A SPS, in: Rüdiger Wolfrum/Peter-Tobias Stoll/Anja Seibert-Fohr (eds), WTO-Technical Barriers and SPS Measures, Volume III, Leiden 2007, 375 et seq.

10 JOOST PAUWELYN, The WTO Agreement on Sanitary and Phytosanitary (SPS) Measures as Applied in the First Three SPS Disputes EC-Hormones, Australia-Salmon and Japan Varietals, 1999 Journal of International Economic Law, Vol. 2, 641 et seq., 644.

11 For an analysis of food labelling measures and the TBT Agreement see: MARIELA MAIDANA-ELETTI, Food Quality, Food Labelling and Market Access: Some Comments on the WTO's TBT Applicable Rules, 2014 New Zealand Yearbook of International Law, Vol. 2 (forthcoming).

12 PHILIP JAMES/NIPA ROJOONGWASKINKUL/TASHMAI RIKSHASUTA/EMORN WASANTWISUT, Food Imports and Dietary Change: A Perspective from Thailand, in: Corinna Hawkes/Chantal Blouin/Spencer Henson/Nick Drager, Laurette Dobe (eds), Trade, Food, Diet and Health: Perspectives and Policy Options, Oxford 2010, 169 et seq., 184.

tritional value, […] the intentional addition of which […] may be reasonably expected to result in it or its by-products becoming a component of or otherwise affecting the characteristics of such foods.»[13] Paradoxically, the CAC definition further specifies that the term food additive does *not* include substances added to food for *improving nutritional qualities*. A WTO Panel report has given some general indication of the manner in which the term food additive may be interpreted in accordance with WTO legal principles. In *EC – Biotech,*[14] the Panel referred to the definition provided by the CAC, and by doing this, failing to provide substantive guidance on this matter, largely limiting its interpretation to the ordinary meaning of the term «food additive»[15] This description emphasizes the role of the CAC in providing scientific advice, a matter to which I return below. However, *EC - Biotech* – with its textually-focused reading –[16] does little to clarify the meaning of food additive in the context of measures establishing nutritional composition requirements.

This backdrop suggests that saturated fats, sugars and salt will be considered «food additives» in cases where the following requirements are subsequently fulfilled:

1. the substance is not normally consumed as food by itself;
2. the substance is not normally used as an ingredient of the food;
3. intentionally adding the substance results in its incorporation to the foodstuff or otherwise affects the characteristics of such foodstuff; and
4. the substance does not improve the nutritional quality of the foodstuff.

A literal, dictionary-based interpretation of this threshold, as favored by the Appellate Body,[17] will undoubtedly lead to an unsatisfactory result with high evidentiary challenges. First, what constitutes normal consumption in country

13 General Standard for Food Additives, Codex Stan 192-1995, 2, www.codexalimentarius.net/gsfaonline/docs/CXS_192e.pdf, visited 15 September 2015) [CAC Food Additive Standard].

14 WTO Panel Report, *European Communities-Measures Affecting the Approval and Marketing of Biotech Products*, 29 June 2006, WT/DS291/R, WT/DS292/R, WT/DS293/R [*EC-Biotech*].

15 *EC-Biotech* (fn 14), para. 7.301.

16 JACQUELINE PEEL, A GMO by Any Other Name…Might Be An SPS Risk! Implications of Expanding the Scope of the WTO Sanitary and Phytosanitary Measures Agreement, 2007 European Journal of International Law, Vol. 17, Iss. 5, 1009 et seq., 1031.

17 As in the WTO Appellate Body Report, *Australia-Measures Affecting the Importation of Salmon,* 20 October 1998, WT/DS18/AB/R [*Australia-Salmon*]; *Japan-Measures Affecting Agricultural Products*, 22 February 1999, WT/DS76/AB/R [*Japan-Varietals*].

A is likely to differ from the *normality* standard in country B. This wording suggests that no clear-cut interpretation is possible and thus, a case-by-case analysis – despite its lack of contribution towards legal certainty – appears to be the necessary. The notion of normality, which by definition excludes perceived risks, is strongly related to the right of Members to adopt an appropriate level of protection (ALOP), as established in Article 5.3 SPS Agreement. This provision which will be touched upon below with reference to the latest Appellate Body report, *India - Agricultural Products*.[18]

Building on the previous argument, the second tier requires a food additive not to be normally used as an ingredient of the food to which is intentionally added. This indicates a double-threshold: the *normality test*, as established in the first tier, needs to be applied to later determine whether the substance at hand can be identified as an ingredient of the foodstuff. Arguably, saturated fats, sugar and salt may constitute an ingredient to food, depending on their normal use in a particular context. In addition, these substances can also be found naturally in many products.

The determination of whether the intentional addition of a substance to a foodstuff results in its complete incorporation, or whether it alters the characteristics of such foodstuff, will only be successful in cases where a scientific assessment has been carried out. The additional burden of proof significantly increases the scientific evidentiary threshold offered in SPS fora. The rigidity of the SPS regime slowly becomes apparent.

The last requirement is unproblematic, since it is very unlikely that the addition of saturated fats, sugars and salt will improve the nutritional value of a foodstuff. However, it does impose an important caveat: substances aimed at improving the nutritional quality of foodstuffs will not be considered additives and hence, are unlikely to trigger the application of the SPS Agreement.

The analysis suggests that the SPS Agreement will require the execution of a two-tier test to determine whether it will find application in cases where measures addressing nutritional requirements are challenged: the measure has to be adopted with the aim of protecting human health, and has to address the risks posed by additives (Annex 1.A SPS Agreement). In turn, saturated fats, sugars and salt will be considered additives in the sense of the SPS applicability test as elaborated above only in cases where it can be established that (1) they are not normally consumed or used as an ingredient of foodstuffs; (2) they are added with the intention to become part or alter the characteristics

18 WTO Appellate Body Report, *India - Measures Concerning the Importation of Certain Agricultural Products*, 4 June 2015, WT/DS430/AB/R [*India - Agricultural Products*].

of foodstuffs; and (3) they do not improve the nutritional qualities of those foodstuffs (CAC food additive standard). In cases where all these requirements are fulfilled, the SPS Agreement will find application to determine the legality of the challenged measure with WTO obligations.

III. Nutritional Measures vs. Non-Tariff Barriers to Trade

Once the application of the SPS Agreement has been established for measures addressing saturated fats, sugars and salt, we now turn to consider the cases in which SPS measures may disguise potential non-tariff barriers to trade.

A joint reading of Annex 1.A and Article 1.1 SPS Agreement suggests the possible existence of a wide array of SPS measures. Due to the extensive variety of measures being potentially imposed as non-tariff trade barriers, SYKES identified four distinct categories:

1. SPS measures that ban the sale of an imported product on health grounds;[19]
2. SPS measures establishing positive requirements for imported products that discriminate against foreign ones;
3. SPS measures that exclude imported products from pre-market approval schemes; and
4. SPS measures that impose compliance with voluntary standards.[20]

Juxtaposing SYKES' scale to measures addressing nutritional requirements results in a reduction of possible SPS measures being considered potential non-tariff barriers to trade. In the context of promoting consumption of healthier foodstuffs while reducing the intake of saturated fats, sugar and salt, it has been argued that domestic regulation may take two different forms: a total ban or prohibition of a particular foodstuff, and a ban or prohibition of a particular foodstuffs *in its most harmful form*.[21]

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19 See also: WTO Appellate Body Report, Japan - Measures Affecting the Importation of Apples, 23 November 2003, WT/DS245/AB/R [*Japan - Apples*].

20 ALAIN SYKES, Product Standards for Internationally Integrated Goods Market, Washington D.C. 1995, 17. This category was later expanded by TRACEY EPPS in: International Trade and Health Protection: A Critical Assessment of the WTO's SPS Agreement, Cheltenham UK 2008, 12.

21 MCGRADY (fn 5), 170.

The first alternative implies that a foodstuff considered harmful to human consumption is barred from entering a market, corresponding with Category 1 in the SYKES' scale. An example of a total ban of foodstuffs high in saturated fats on public health grounds was found in some Pacific Islands, particularly Samoa, where turkey tails were prohibited from entering the domestic market.[22] Interestingly, Samoa, as one of the most obese countries in the world, decided to eliminate the ban on the importation and domestic distribution of turkey tails – which was in place since 2007 – during negotiations leading to its accession to the WTO in 2012.[23]

The second option offers the flexibility of either banning a certain nutritional component altogether or establishing minimum residue levels, so corresponding with Category 2 in the SYKES' scale. As it was the case in determining what constitutes a food additive for the purposes of the SPS Agreement, recourse to the international standards adopted by the CAC will prove useful in reducing the likelihood of a domestic measure being found incompatible with international trade obligations.

The rebuttable presumption of compliance with the SPS Agreement that is triggered when measures are based on CAC standards is established in Article 3.2 SPS Agreement. Notably however, Article 3.3 SPS Agreement stipulates that Members are not prevented from adopting higher standards of protection, provided sufficient scientific justification is available. In such cases, it is possible to opt out of compliance with international standards if the measure adopted is science-based, *i.e.* a risk assessment is carried out, and the measure in question applies only to the extent necessary to protect human health, that is, it constitutes the least trade-restrictive means available.

Furthermore, Article 3.3 SPS Agreement imposes on Members the duty to notify prior to implementation any deviation from international standards reflected in new adopted measures. This is translated in the notification procedure put in place by the SPS Agreement. The growing number of notifications indicating a deviation from existing international standards contributes to an increase in legal uncertainty that may only be remedied through science, that is, by means of further, science-based food standards.

To put it into perspective, the Committee on Sanitary and Phytosanitary Measures received between January 2009 and March 2011 a total of 1,861 regular notifications of SPS measures. Measures based on a relevant interna-

22 DEBORAH GEWERTZ/FREDERICK ERRINGTON, Cheap Meat: Flap Food Nations and the Pacific Islands, Berkeley 2010.

23 WTO Working Party Report on the Accession of Samoa, 1 November 2011, WT/ACC/SAM/30WT/MIN(11)/1.

tional standard amounted to 40 per cent of the total, half of which were based on CAC standards.[24] Remarkably, the use of international food safety standards increases in emergency situations, with Members showing a tendency to adopt emergency SPS measures primarily based on existing science. During the same period of time as identified above, the SPS Committee received a total of 399 emergency notifications. The existence of a relevant international standard was indicated in 333 cases of the total.[25] The rationale behind the divergent number of measures based on international standards that are adopted in cases of emergency, as opposed to those adopted in the ordinary course of legislative business may be explained by referring to the intricacies of domestic decision-making processes. While a lengthy legislative process tends to delay the modification of domestic to the latest scientific standards, emergency situations lend themselves well as a catalyst to level the regulatory level playing field.

In *India - Agricultural Products*, India contended that eight out of ten challenged measures were based on an international standard. However, the Panel still found a violation of Article 3.1 SPS Agreement because the challenged measure was not "based on" an international standard, *i.e.* it was not based on a risk assessment as established in Article 5, and so it failed to benefit from the rebuttable presumption of compliance as provided for in Article 3.2 SPS Agreement.[26] The lack of sufficient scientific evidence supporting the implementation of the challenged measure was instrumental in determining its (lack of) legality with the SPS Agreement. In other words, even in cases where a domestic measure is based on an international standard, this fact alone does not preclude Members from their obligation to conduct a risk assessment.

24 Committee on Sanitary and Phytosanitary Measures, Monitoring the Use of International Standards, 30 May 2011, G/SPS/GEN/1086, para. 5 [SPS COMMITTEE, Monitoring the Use of International Standards 2011].

25 SPS COMMITTEE, Monitoring the Use of International Standards 2011, *supra* note 24, para. 11.

26 WTO Panel Report, *India - Measures Concerning the Importation of Certain Agricultural Products*, 14 October 2014, WT/DS430/R, para. 8.1.c.ii [*India - Agricultural Products,* Panel Report].

IV. Non-Tariff Barriers Disguised as SPS Measures: A Triple Threshold

The SPS Agreement provides various instruments to determine whether a domestic SPS measure has been adopted as a disguised non-tariff barrier. The umbrella provision establishing the basic obligations for members adopting SPS measures is found in Article 2.2 SPS Agreement. This provision imposes triple threshold to assess the compatibility of domestic measures with the SPS Agreement. Adopted measures shall:

1. apply only to the extent necessary to protect human health;
2. are science-based; and
3. are not maintained without sufficient scientific evidence.

As the Appellate Body recently clarified in *India - Agricultural Products,* many elements of Article 2.2 SPS Agreement are later elaborated in more detail in Article 5 SPS Agreement and the interpretation of one should informed the interpretation of the other.[27]

The first threshold demands the execution of a necessity test, whereby SPS measures must not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail. The necessity test will further require that SPS measures are not applied in a manner that restricts on international trade. In many ways, the novelty of this test is limited, since it reflects the necessity requirement in Article XX(b) of the General Agreement on Tariffs and Trade (GATT).[28] Unlike the general exceptions' clause in the GATT however, Article 2.2 SPS Agreement will always be applicable, even in cases where other violations of the SPS Agreement could not be established. Article 2.2 SPS Agreement also reflects the obligations established in Article III:4 GATT, which imposes upon Members the duty to accord nationals of other Members any treatment that it is not less favourable than that accorded to its own nationals. In other words, imported goods must be treated no less favourably than like products of national origin. The national treatment prohibition in GATT also aims at requiring equality of competitive conditions and protecting expectations of equal competitive relationships.[29]

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27 *India - Agricultural Products* (fn 18), para. 5.12.

28 General Agreement on Tariffs and Trade 1994, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 UNTS 187 [GATT].

29 WTO Appellate Body Report, *Korea - Taxes on Alcoholic Beverages*, 18 January 1999, WT/DS84/AB/R, para. 120; WTO Appellate Body Report, *Canada-Certain Measures Concerning Periodicals*, 30 June 1997, WT/DS31/AB/R, para. 464; WTO Panel Report, *Argentina - Measures Affecting the Export of Bovine*

Unlike other instruments, however, the national treatment principle in the SPS Agreement has been interpreted as to also prohibit discrimination between different products.[30] Thus, a measure will be in violation of WTO obligations in cases where there is evidence that it detrimentally affects competition in a given market.

The second threshold of Article 2 SPS Agreement requires SPS measures to be based on scientific principles. At its core, the SPS Agreement aims at guaranteeing human, animal and plant life and health in all Member States,[31] while minimizing the negative trade effect of SPS measures and promoting international trade.[32] As introduced in Section II of this paper, although Members retain their right to choose their own adequate level of SPS protection (ALOP),[33] the SPS Agreement in its Articles 2 and 5 SPS Agreement provide a legal backdrop to assess whether challenged SPS measures establishing domestic thresholds for the protection of public health are unjustifiably impeding trade. In other words, Members can still determine the level of risk that they are willing to accept, for the establishment of an ALOP is both *«a privilege and an obligation»*[34] in exercising regulatory autonomy.

Article 5.1 SPS Agreement establishes that domestic SPS measures must be based on an assessment of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations. Risk assessments evaluate the likelihood of entry, establishment or spread of a pest or disease within the territory of an importing Member and of the associated potential biological and economic consequences.[35] It also refers to the evaluation of the potential for adverse effects on human or animal health arising from the presence of additives, contaminants, toxins or disease-causing organisms in food, beverages, or animal feed.[36] A measure is based on a risk assessment under Article 2.2 SPS Agreement in cases where there exists an objective relationship between the

Hides and the Import of Finished Leather (Argentina - Hides and Leather), 19 December 2000, WT/DS155/R, para. 11.182.

30 *Australia - Salmon* (fn 17), para. 252.

31 Preamble to the SPS Agreement, recital 1.

32 WTO Appellate Body Report, *European Communities - Hormones*, 16 January 1998, WT/DS26/AB/R, para. 177 [*EC - Hormones*].

33 Annex A, para. 5 of the SPS Agreement states that the appropriate level of sanitary or phytosanitary protection is the level of protection deemed appropriate by the Member establishing that sanitary or phytosanitary measures to protect human, animal or plant life or health within its territory.

34 *India - Agricultural Products*, Panel Report (fn 26), para. 5.221.

35 Annex A, para. 4 of the SPS Agreement.

36 Annex A, para. 4 of the SPS Agreement.

former and the later,[37] that is, the result of the risk assessment is rationally related to the measure.

The Panel found in *Australia - Salmon* that a measure which is not based on a risk assessment (as in Article 5 SPS Agreement) will suggest that it is not based on scientific principles (as in the second tier of Article 2.2 SPS Agreement), leading to a violation of both provisions.[38] The Appellate Body upheld this reasoning, stating that a violation of Articles 5.1 and 5.2 SPS Agreement will lead to an inconsistency with Article 2.2 SPS Agreement *by implication*.[39] In other words, there will be a rebuttable presumption of non-compliance with Article 2.2 SPS Agreement in cases where a violation of Articles 5.1 and 5.2 SPS Agreement is established. The same legal analysis was put forward by the Panel once again in *India - Agricultural Products*. It stated:

> «[…] where an SPS measure is not based on a risk assessment as required by Articles 5.1 and 5.2 of the SPS Agreement, this measure is presumed not to be based on scientific principles and to be maintained without sufficient scientific evidence, in contravention of Article 2.2 of the SPS Agreement.»[40]

In this case too, the Appellate Body upheld the findings of the Panel.[41] It also shed light to the manner in which the symbiotic relationship between the basic rights and obligations of Article 2.2 SPS Agreement and the more specific requirements of Article 5 SPS Agreement should be understood to determine SPS compliance. Furthermore, the Appellate Body clarified that an analysis of whether a violation of Article 5 SPS Agreement would lead to a violation of Article 2.2 SPS Agreement can only be established on a case-by-case basis,[42] and so no clear-cut interpretative guidance is available to date.

In the context of domestic measures addressing nutritional requirements, the question that arises is whether they too, need to be based on risk assessments.[43] In other words, could an objective and rational relation between the SPS measure (on nutritional composition) and the scientific evidence (on the

37 *EC - Hormones* (fn 32), para. 189.

38 WTO Panel Report, *Australia - Measures Affecting the Importation of Salmon*, 12 June 1998, WT/DS18/R, para. 8.52 [*Australia - Salmon*, Panel Report].

39 *Australia - Salmon* (fn 17), para. 138.

40 *India - Agricultural Products*, Panel Report (fn 26), para. 7.331, with further references.

41 *India - Agricultural Products* (fn 18), para. 5.15

42 *India - Agricultural Products* (fn 18), para. 5.15.

43 MCGRADY (fn 5), 184.

risks posed by saturated fats, sugar and salt to public health) be established with resort to science?

The short answer is yes. The rationality of the relation will have to be established on a case-by-case basis, taking into account the characteristics of the measure at issue and the quantity and quality of the available scientific evidence that possesses the *«necessary scientific and methodological rigor to be considered reputable science»*.[44] The risk assessment would further entail an enquiry into evidence adduced by the parties regarding the particular risks that the challenged measure is set to protect against and to whom the risk is posed.[45] Hence, the risk assessment will have to (1) identify potential effects on health, and (2) evaluate the likelihood of those potential effects to occur.

The third threshold of Article 2.2 SPS Agreement requires that SPS measures are not maintained without sufficient scientific evidence in order to avoid becoming a non-tariff barrier. A careful reading of *India - Agricultural Products*,[46] suggests that the establishment of a sufficient level of scientific evidence can be pursued by weighing the outcome of the necessity test carried out under the first threshold (A) against the scientific basis as identified in the second threshold (B). The result of this equation will determine whether an SPS measure is being maintained with or without sufficient scientific evidence (C). That is, there must be a rational relationship between A and B in order to produce C.

As a result, domestic SPS measures will be considered non-tariff barriers in cases where the requirements set out in the triple threshold as elaborated above in the light of Article 2.2 SPS Agreement are not fulfilled. This analysis allows us to identify some implications for measures addressing nutritional requirements.

V. Implications for SPS Measures on Nutritional Requirements

I began this article with reference to the recently adopted UN sustainable development goals, two of which aim at improving nutrition and ensuring healthier lifestyles. This major political development prompted me to question whether the adoption of public health measures aimed at attaining those

44 *India - Agricultural Products* (fn 18), para. 5.28.
45 *India - Agricultural Products* (fn 18), para. 5.27.
46 *India - Agricultural Products* (fn 18), para. 5.27.

two particular goals, is potentially at odds with the liberalization of global markets. And so, I focused my analysis on the impact of the SPS Agreement on measures addressing nutritional composition requirements such as saturated fats, sugar and salt. Indeed, differing public health standards of protection arising out of different regulatory approaches among WTO members may impose important non-tariff barriers to trade.

First, I had to establish whether the SPS Agreement finds application in the case at hand. The analysis conducted here suggested that the SPS Agreement will require the execution of a two-tier test to determine its applicability for measures addressing nutritional composition requirements: the measure ought to be adopted with the aim of protecting human health; and it ought to address the risks posed by additives as Annex 1.A SPS Agreement. In turn, saturated fats, sugar and salt will only be considered additives for SPS purposes only in cases where it can be established that they are not normally consumed or used as an ingredient of foodstuffs; they are added with the intention to become part or alter the characteristics of foodstuffs; and they do not improve the nutritional qualities of those foodstuffs.

Once domestic measures tackling unhealthy diets through nutritional composition requirements could be categorized as SPS measures, I turned to determine whether and to what extent they may constitute disguised non-tariff barriers to trade. In doing so, I analyzed the latest Appellate Body Report dealing with the SPS Agreement, *India - Agricultural Products*. The most important findings of the case for the analysis at hand can be summarized as follows. Firstly, the use of international standards as basis for SPS regulation does not allow Members to deviate from their obligation to conduct a risk assessment. And secondly, the risk assessment (or lack thereof) will inform the interpretation of whether a challenged measure can be considered to be based on scientific principles.

The relation between scientific principles and risk assessment was further explored in Section IV, where I identified and examined a triple threshold imposed by Article 2.2 SPS Agreement. Based on this standard of review, a domestic measure addressing the nutritional requirements (saturated fats, sugar and salt) will not be considered a non-tariff barrier if it shows that three subsequent requirements are fulfilled. First (A), the respondent party will have to show that the adopted measure is necessary to attain a legitimate aim of protecting human health (*i.e.* reducing deaths caused by non-communicable diseases). Secondly (B), the measure must be science-based in accordance with the principles set out for risk assessments in Article 5 SPS Agreement, for both provisions have a symbiotic relation that informs their interpretation, *i.e.* it will have to identify the potential effects on human health and evaluate whether they are likely to occur. Thirdly (C), the measure must not be maintained without sufficient scientific evidence. Thus, it can be pre-

sumed that, based on the equation as described above (A+ B = C), a measure is maintained with sufficient scientific evidence whereas the first and second threshold requirements are fulfilled.

It remains to be seen whether these conclusions continue to hold true in the future – the balance between safeguarding public health and guaranteeing free trade in nutritious food is a very delicate one.