

SUSTAINABLE HEALTHY FOOD CHOICES: DIETARY GUIDELINES AND INTERNATIONAL ECONOMIC LAW

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Building on the companion piece by Christine Parker and Hope Johnson on international instruments supporting holistic dietary guidelines, this article examines potential concerns raised by such guidelines under international trade law and international investment law. Drawing lessons from the World Health Organization Framework Convention on Tobacco Control ('WHO FCTC') and its relevance to recent disputes in international economic law, this article examines the role of international instruments in supporting domestic dietary guidelines that could be challenged in the dispute settlement system of the World Trade Organization ('WTO') or under investor-state dispute settlement. The article includes an assessment of the potential impact of international economic laws on holistic dietary guidelines and related regulatory interventions, as well as a discussion of how a WHO treaty on healthy and sustainable diets could influence the interpretation and application of key trade and investment provisions. The article concludes that holistic dietary guidelines can be implemented in a manner consistent with international economic law, at least if local products are not prioritised.

I INTRODUCTION

Economic globalisation has contributed to a major shift in diets worldwide. The dietary shift has been towards resource intensive diets high in animal products, refined carbohydrates, oils and added sweeteners and low in fruit, vegetables and legumes.¹ As such diets increase the risk of non-communicable diseases ('NCDs'), governments are increasingly considering and adopting domestic regulatory mechanisms to influence dietary choices. In the last few years, over 31 countries have taxed or declared an intention to tax sugary drinks, with the purpose of reducing the prevalence of NCDs.² 'Holistic' dietary guidelines are a corresponding food policy development, explored in the companion piece to this article by Christine Parker and

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¹ See, eg, Euridice Martínez Steele et al, 'The Share of Ultra-Processed Foods and the Overall Nutritional Quality of Diets in the US: Evidence from a Nationally Representative Cross-Sectional Study' (2017) 15 *Population Health Metrics* 6; Barry M Popkin, 'The Nutrition Transition and Obesity in the Developing World' (2001) 131 *The Journal of Nutrition* 871S.

² Esther Han, 'Dozens of Countries Now Tax Sugary Drinks but Sweet-toothed Australia Isn't Interested' *The Sydney Morning Herald* (online), 7 January 2018 <<https://www.smh.com.au/healthcare/dozens-of-countries-now-tax-sugary-drinks-but-sweettoothed-australia-isnt-interested-20180103-h0cv21.html>>.



Hope Johnson.³ These guidelines act synergistically with international instruments to advise food choices based on nutritional, social and ecological sustainability considerations. For instance, the guidelines may recommend reducing the consumption of animal products on the basis of both environmental and health considerations and choosing foods that do not have more packaging than required.

Drawing on the role currently played by conventional dietary guidelines, Parker and Johnson argue that holistic dietary guidelines should adopt an integrated approach that helps guide broader policy measures in areas such as taxation, marketing, labelling, agriculture, and government procurement. However, as Parker and Johnson observe, stakeholders with commercially vested interests seek to avoid such regulatory interventions, and there is considerable potential for these measures to have a discriminatory effect on imported goods. Meanwhile, the evidential basis for holistic dietary guidelines and related measures is even more complex than measures with a sole focus on public health or environmental outcomes. Various aspects of holistic dietary guidelines, as delineated by Parker and Johnson, interact in different ways with international economic law, by which we refer specifically to international trade law (particularly WTO law) and international investment law (particularly as contained in bilateral investment treaties ('BITs') and in preferential trade agreements ('PTAs') with investment chapters).

In this article, we consider whether holistic dietary guidelines, or regulatory measures to operationalise them, may be vulnerable to challenge under WTO law or international investment law, and how best to avoid or defend such a challenge. Discriminatory guidelines and measures (eg that promote local products) are much more likely to raise concerns in international economic law, and the existence of well-established scientific evidence will be crucial in justifying any such discrimination. Simply discouraging the over-consumption of 'unhealthy' foods such as highly processed foods is unlikely to violate international economic law, as long as the targeted foods are identified on the basis of scientific evidence and the measure is properly designed to contribute to health objectives. Multilateral recognition of such evidence and of best practices for implementing dietary guidelines — for example through a treaty or other international instrument or standard — will buttress a state's defence of these kinds of measures.

II HOLISTIC DIETARY GUIDELINES AND INTERNATIONAL ECONOMIC LAW: OVERARCHING CONSIDERATIONS

A *Formulating Legal Challenges under International Economic Law*

1 *Challenges to WTO Members' Measures*

A WTO member could challenge another member's holistic dietary guidelines and associated measures in two main ways. First, a WTO member could express concerns about the guidelines or measures in relevant WTO committees, such as the TBT Committee, which considers

³ Christine Parker and Hope Johnson, 'Sustainable Healthy Food Choices: the Promise of 'Holistic' Dietary Guidelines as a National and International Policy Springboard' (2018) 18(1) *QUT Law Review* Page one ('companion piece').

measures covered by the *Agreement on Technical Barriers to Trade* ('TBT Agreement').⁴ WTO members need to notify relevant measures to the TBT Committee, but the TBT Committee does not make binding decisions. For example, the most recent meetings of the TBT Committee included concerns raised by many countries (including Australia, Canada, the European Union ('EU'), Mexico and the United States) about food-related public health measures introduced by Chile, Indonesia, and Peru.⁵ The Chilean regulation entered into force on 27 June 2016 and specifies additional information labelling and warning requirements for foods deemed high in added sodium, sugar, or saturated fat.⁶ The Indonesian measure imposes requirements for processed and fast food information labelling regarding sugar, salt and fat content and health messages, with implementation postponed to September 2019.⁷ The Peruvian measure creates a 'multi-sectoral commission' to promote physical activity and healthy eating, through measures related to education, advertising and labelling, targeting processed foods containing 'excess' sodium, free sugar or saturated fat.⁸

Second, a WTO member could request consultations with the other WTO member regarding its proposed guidelines or measures, as the first step in bringing a dispute under the WTO's well-established dispute settlement system pursuant to the WTO's *Understanding on Rules and Procedures Governing the Settlement of Disputes* ('DSU').⁹ A complaint under the DSU could be brought with respect to: (i) the respondent member's holistic dietary guidelines as such; (ii) the implementation of those guidelines through a particular regulatory measure as such; and/or (iii) the application of the measure to a particular product in a particular instance. In any of these cases, the most common complaint would be that the guidelines or measures are

⁴ *Agreement on Technical Barriers to Trade* ('TBT Agreement'), opened for signature on 15 April 1994, 1868 UNTS 120 (entered into force 1 January 1995) art 13 (annex 1A of *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3).

⁵ See, eg, WTO, TBT Committee, *Minutes of the Meeting of 10–11 November 2016: Note by the Secretariat*, WTO Doc G/TBT/M/70 (17 February 2017) items 2.2.3.10 (Chile), 2.2.3.12 (Peru), 2.2.3.14 (Indonesia); WTO, TBT Committee, *Minutes of the Meeting of 15–16 June 2016: Note by the Secretariat*, WTO Doc G/TBT/M/69 (22 September 2016) items 3.2.3.10 (Chile), 3.2.3.12 (Peru), 3.2.3.14 (Indonesia). See also WTO, TBT Committee, *Chile – Proposed Amendment to the Food Health Regulations – Supreme Decree No 977/96: Statement by Mexico to the Committee on Technical Barriers to Trade 4–6 November 2015*, WTO Doc G/TBT/W/428 (19 January 2016); WTO, TBT Committee, *Peru – Law to Promote Healthy Eating Among Children and Adolescents: Statement by Mexico to the Committee on Technical Barriers to Trade 4–6 November 2015*, WTO Doc G/TBT/W/429 (19 January 2016).

⁶ See *Notification*, WTO Doc G/TBT/N/CHL/282 (22 August 2014) and Add 1 (6 July 2015), referring to Amendment to the Chilean Food Health Regulations, Supreme Decree No 977/96 on the Nutrition Labelling of Food (final version, 26 June 2015) <http://web.minsal.cl/sites/default/files/decreto_etiquetado_alimentos_2015.pdf> [in Spanish].

⁷ See *Notification*, WTO Doc G/TBT/N/IDN/84 and Add 1 (5 January 2017), referring to Decree of Minister of Health No 30 (2013) <https://members.wto.org/crnattachments/2014/tbt/IDN/14_0140_00_x.pdf> [in Indonesian].

⁸ See *Notification*, WTO Doc G/TBT/N/PER/89 (20 September 2016) and Corr 1 (20 October 2016), referring to Regulations Implementing Law No 30021, <https://members.wto.org/crnattachments/2016/TBT/PER/16_3770_00_s.pdf> [in Spanish].

⁹ *Understanding on Rules and Procedures Governing the Settlement of Disputes* ('DSU') art 4 (annex 2 of *Marrakesh Agreement Establishing the World Trade Organization*).

inconsistent with the respondent WTO member's obligations under one or more WTO agreements.¹⁰

The Appellate Body has explained that 'a claim that a measure is inconsistent "as such" challenges a measure of a member that has general and prospective application, whereas a claim that a measure is inconsistent "as applied" challenges one or more specific instances of the application of such a measure'.¹¹ The distinction between an 'as such' and an 'as applied' claim is more pronounced in the trade remedies context (for example in relation to a challenge against anti-dumping regulations themselves or the application of those regulations in a particular anti-dumping investigation).¹² An 'as such' claim has 'more far-reaching' implications.¹³ An 'as such' claim might also be more difficult to establish than an 'as applied' claim because of a traditional distinction between 'mandatory' and 'discretionary' laws, which suggests that a law that mandates WTO-inconsistent action is itself WTO-inconsistent, whereas a law that leaves discretion to the relevant government actor to act in a manner consistent with WTO law cannot be WTO-inconsistent as such.¹⁴

The Appellate Body has described the mandatory/discretionary distinction as a 'concept ... developed by a number of GATT panels'¹⁵ (ie before the creation of the WTO) and has not yet ruled explicitly on the 'continuing relevance of the distinction between mandatory and discretionary legislation'.¹⁶ The Appellate Body has, nevertheless, 'caution[ed] against the application of this distinction in a mechanistic fashion'.¹⁷ The Appellate Body has made clear that the mandatory or discretionary nature of a challenged measure does not affect jurisdiction (or whether the measure may be challenged as such or as applied)¹⁸ and is relevant, if at all, to

¹⁰ *General Agreement on Tariffs and Trade 1994* ('GATT 1994') signed 30 October 1947, LT/UR/A-1A/1/GATT/2 (entered into force 1 January 1995) art XXIII:1(a) (annex 1A of *Marrakesh Agreement Establishing the World Trade Organization*).

¹¹ WTO Appellate Body Report, *European Union – Anti-Dumping Measures on Biodiesel from Argentina* ('EU – Biodiesel (Argentina)'), WTO Doc WT/DS473/AB/R (circulated 6 October 2016, adopted 26 October 2016) [6.154] (footnotes omitted).

¹² See, eg, WTO Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany* ('US – Carbon Steel'), WTO Doc WT/DS213/AB/R (circulated 28 November 2002, adopted 19 December 2002) [52(a)], [177(a)]. See also WTO Appellate Body Report, *United States – Anti-Dumping Act of 1916* ('US – 1916 Act'), WTO Docs WT/DS136/AB/R, WT/DS162/AB/R (28 August 2000, adopted 26 September 2000) [60] [83].

¹³ Appellate Body Report, *EU – Biodiesel (Argentina)*, above n 11 [6.226].

¹⁴ See, eg, GATT Panel Report, *United States Measures Affecting the Importation, Internal Sale and Use of Tobacco*, GATT Doc DS44/R, BISD 41S/131 (adopted 4 October 1994) [118]. See also Simon Lester, 'A Framework for Thinking About the "Discretion" in the Mandatory/Discretionary Distinction' (2011) 14 *Journal of International Economic Law* 369; Nicolas Lockhart and Elizabeth Sheargold, 'In Search of Relevant Discretion: The Role of the Mandatory/Discretionary Distinction in WTO Law' (2010) 13 *Journal of International Economic Law* 379; Sharif Bhuiyan, 'Mandatory and Discretionary Legislation: The Continued Relevance of the Distinction under the WTO' (2002) 5 *Journal of International Economic Law* 571.

¹⁵ Appellate Body Report, *US – 1916 Act*, above n 12 [88].

¹⁶ *Ibid* [99]. See similarly WTO Appellate Body Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities*, WTO Doc WT/DS212/AB/R (circulated 9 December 2002, adopted 8 January 2003) n 334. But see Appellate Body Report, *US – Carbon Steel*, above n 12 [162].

¹⁷ Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan* ('US – Corrosion-Resistant Steel Sunset Review'), WTO Doc WT/DS244/AB/R (circulated 15 December 2003, adopted 9 January 2004) [93].

¹⁸ See, eg, Appellate Body Report, *EU – Biodiesel (Argentina)*, above n 11 [6.228].

the WTO-consistency of the measure,¹⁹ which will depend on the relevant WTO provision.²⁰ The ‘discretionary nature of a measure is no barrier to an “as such” challenge, and measures involving some discretionary aspects “may violate certain WTO obligations”’.²¹ For example, a WTO Panel (confirmed by the Appellate Body in this respect) found that the *Agreement on Sanitary and Phytosanitary Measures* (‘SPS Agreement’)²² required Japan to publish certain guidelines developed by the Japanese Ministry of Agriculture and Forestry and Fisheries, even though the guidelines were neither mandatory nor legally enforceable.²³

The relevance of the mandatory or discretionary nature of a challenged measure to its WTO-consistency may also depend on which government agency has the alleged discretion. In particular, the WTO Appellate Body has suggested that the mandatory/discretionary distinction may excuse only measures that leave discretion with the executive branch of government to implement the measure consistently with WTO law.²⁴ The Appellate Body appears to have applied the mandatory/discretionary distinction in concluding, for example, that a US measure challenged under the *Agreement on Subsidies and Countervailing Measures* (‘SCM Agreement’)²⁵ did not, ‘on its face, requir[e] the [US] investigating authority [in a countervailing measures investigation] to act inconsistently with Article 12.7’.²⁶ Similarly, the Appellate Body has held that Argentina failed to satisfy its burden of proving that a challenged EU measure ‘restricts, in a material way, the discretion of the EU authorities to construct the costs of production in a manner consistent with’ the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (‘Anti-Dumping Agreement’)²⁷ and the *General Agreement on Tariffs and Trade 1994* (‘GATT 1994’).²⁸

What does the mandatory/discretionary distinction mean for holistic dietary guidelines and measures to implement them? To begin with, the fact that guidelines do not mandate any particular behaviour by consumers does not render them immune from challenge as such or as applied in a WTO dispute. The discretion of consumers in complying with the guidelines is not

¹⁹ See, eg, Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, above n 17 [88]–[89].

²⁰ See, eg, Appellate Body Report, *EU – Biodiesel (Argentina)*, above n 11 [6.271].

²¹ *Ibid* [6.271] (footnote omitted).

²² *Agreement on the Application of Sanitary and Phytosanitary Measures* 1867 UNTS 493 (‘SPS Agreement’) art 7, annex B [1] (annex 1A of *Marrakesh Agreement Establishing the World Trade Organization*).

²³ WTO Panel Report, *Japan – Measures Affecting Agricultural Products*, WTO Doc WT/DS76/R (circulated 27 October 1998, adopted 19 March 1999) [8.111]–[8.114]; Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, WTO Doc WT/DS76/AB/R (circulated 22 February 1999, adopted 19 March 1999) [106]–[108].

²⁴ See, eg, WTO Appellate Body Report, *United States – Section 211 Omnibus Appropriations Act of 1998*, WTO Doc WT/DS176/AB/R (circulated 2 January 2002, adopted 1 February 2002) [259]. But see also [264], [268], and Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, above n 17.

²⁵ *Agreement on Subsidies and Countervailing Measures* (‘SCM Agreement’), (annex 1A of *Marrakesh Agreement Establishing the World Trade Organization*).

²⁶ WTO Appellate Body Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WTO Doc WT/DS436/AB/R (circulated 8 December 2014, adopted 19 December 2014) [4.470] (emphasis added). See also Appellate Body Report, *EU – Biodiesel (Argentina)*, above n 11 [6.281]–[6.282].

²⁷ *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade* (‘Anti-Dumping Agreement’) art 2.2, (annex 1A of *Marrakesh Agreement Establishing the World Trade Organization*).

²⁸ GATT 1994, above n 10, art VI:1(b)(ii).

the kind of discretion addressed by the mandatory/discretionary distinction. To the extent that the distinction survives, it relates to discretion by agencies or actors within the executive branch of government. Discretion may be more relevant as regards the question of whether holistic dietary guidelines require government bodies to act in any particular way in implementing them. Guidelines that suggest implementation through regulatory measures that may or may not be consistent with WTO law may still be challenged as such. Whether the guidelines or measures implementing them are WTO-consistent will depend on the particular circumstances and relevant WTO provision, although the existence of discretion may be relevant.

A related question in assessing the potential for WTO dispute settlement claims against holistic dietary guidelines and related measures is whether such guidelines and measures constitute ‘measures taken by another [WTO] Member’²⁹ of the kind that may be challenged in such a dispute. The DSU does not define a ‘measure’. However, the WTO Appellate Body has described a measure broadly as ‘any act or omission attributable to a WTO Member’³⁰ (which would usually be those of ‘the organs of the state, including those of the executive branch’),³¹ including ‘acts setting forth rules or norms that are intended to have general and prospective application’.³²

Holistic dietary guidelines created by a domestic government body within a WTO member would generally be attributable to that member and challengeable in the WTO on that basis. Holistic dietary guidelines created by an international organisation or body (eg the WHO, or the Food and Agriculture Organization of the United Nations (‘FAO’) as mentioned in the Parker and Johnson companion piece to this article) or treaty (eg modelled on the *WHO FCTC*)³³ would generally *not* be attributable to a WTO member, although domestic regulations or measures implementing international guidelines would be.³⁴ Holistic dietary guidelines created solely by the private sector or non-governmental organisations, without involvement of government or government agencies, such as Barilla’s Double Food Pyramid (see Parker and Johnson), are also unlikely to be attributable to a WTO member and therefore unlikely to be subject to challenge in a WTO dispute.³⁵

²⁹ DSU, above n 9, art 3.3. See also arts 4.2, 4.4.

³⁰ Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, above n 17 [81].

³¹ *Ibid* [81].

³² *Ibid* [82].

³³ *WHO Framework Convention on Tobacco Control*, opened for signature 21 May 2003, 2302 UNTS 116 (entered into force 27 February 2005) (‘*WHO FCTC*’).

³⁴ See WTO Panel Report, *Turkey – Restrictions on Imports of Textile and Clothing Products*, WTO Doc WT/DS34/R (circulated 31 May 1999, adopted 19 November 1999) [9.33]–[9.44] (these findings not appealed).

³⁵ But see, eg, WTO Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper* (‘*Japan – Film*’), WTO Doc WT/DS44/R (circulated 31 March 1998, adopted 22 April 1998) [10.52], [10.56], [10.32] (Panel Report not appealed); WTO Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products* (‘*Canada – Dairy*’), WTO Docs WT/DS103/AB/R, WT/DS113/AB/R (circulated 13 October 1999, adopted 27 October 1999) [10], [99]–[102]; WTO Panel Report, *Canada – Certain Measures Affecting the Automotive Industry*, WTO Docs WT/DS139/R, WT/DS142/R (circulated 11 February 2000, adopted 19 June 2000) [2.3], [10.109], [10.111], [10.115], [10.122], [10.123], [10.130] (these findings not appealed). See also eg, WTO Appellate Body Report, *India – Certain Measures Relating to Solar Cells and Solar Modules* (‘*India – Solar Cells*’), WTO Doc WT/DS456/AB/R (circulated 16 September 2016, adopted 14 October 2016) [1.3], [7.88]. Cf WTO Panel Report, *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, WTO Doc WT/DS155/R (circulated 19 December 2000, adopted 16 February 2001) [11.19] [11.51], [11.52], [11.55] (Panel Report not appealed).

2 *Challenges Under International Investment Law*

Four key differences arise between dispute settlement under international investment agreements ('IIAs') and WTO dispute settlement. These four differences all increase concerns regarding the impact of international investment law on sovereign regulatory autonomy, including with respect to dietary guidelines.

First, unlike the WTO, which houses a multilateral treaty binding on its 164 members, international investment law operates primarily through more than 3,000 IIAs³⁶ (primarily BITs and PTAs with investment provisions). The potential for legal challenges to be brought against holistic dietary guidelines or their implementing measures under an IIA will depend largely on that IIA's specific terms, and possibly on whether the respondent state is a party to the *ICSID Convention*.³⁷ The multiplicity of treaties results in less certainty in the reasoning of awards, and the ad hoc nature of investor–state dispute settlement ('ISDS') (arbitrations) means that precedent plays a lesser role than in the WTO (even though no binding system of precedent exists in either regime).³⁸ ISDS is also beset by legitimacy problems arising from, for example, the potential for conflicts of interest where an arbitrator may also act as counsel in related disputes or disputes involving related parties.³⁹

Second, most IIAs include, in addition to state to state dispute settlement, an ISDS mechanism that allows an investor to bring a claim under the IIA against the host state of the investment, rather than relying on the investor's home state to bring such a claim.⁴⁰ In contrast, only a WTO member (being a state or a state-like entity such as the EU, Hong Kong or Chinese Taipei) may bring a dispute in the WTO dispute settlement system. This approach requires an injured industry, for example, to convince its government to bring a claim that is likely to entail significant financial and diplomatic resources. State to state dispute settlement is much less common under BITs or PTAs than ISDS⁴¹ or WTO dispute settlement. However, some disputes arise in both contexts at once. For example, Australia's plain tobacco packaging measure was challenged (unsuccessfully) by Philip Morris Asia Ltd under Australia's BIT with Hong

³⁶ See, eg, UNCTAD, 'Recent Trends in IIAs and ISDS', *IIA Issues Note No 1* (February 2015) 1. But see also Stephan W Schill, *The Multilateralization of International Investment Law* (Cambridge University Press, 2009).

³⁷ *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, opened for signature 18 March 1965, 575 UNTS 159 (entered into force 14 October 1966) ('*ICSID Convention*').

³⁸ Gilbert Guillaume, 'The Use of Precedent by International Judges and Arbitrators' (2011) 2 *Journal of International Dispute Settlement* 5.

³⁹ See, eg, Gus van Harten, 'Perceived Bias in Investment Treaty Arbitration' in Michael Waibel et al (eds), *The Backlash Against Investment Arbitration* (Kluwer Law International, 2010) 433; M Sornarajah, 'The Case Against a Regime on International Investment Law' in Leon E Trakman and Nicola W Ranieri (eds), *Regionalism in International Investment Law* (Oxford University Press, 2013) 475.

⁴⁰ Arseni Matveev, 'Investor–State Dispute Settlement: The Evolving Balance between Investor Protection and State Sovereignty' (2015) 40 *University of Western Australia Law Review* 348.

⁴¹ See, eg, UNCTAD, 'Investor–State Dispute Settlement: Review of Developments in 2015', *IIA Issues Note No 2* (June 2016).

Kong⁴² and also challenged (in claims ongoing at the time of writing) at the WTO by Cuba, the Dominican Republic, Honduras and Indonesia.⁴³

A third key difference relates to remedies. Once an adverse finding by a WTO panel or the WTO Appellate Body is adopted by the WTO's Dispute Settlement Body, it generally requires simply that the respondent bring its measure into conformity with WTO law,⁴⁴ with the respondent having significant flexibility in determining how to do so.⁴⁵ Moreover, the respondent has a 'reasonable period of time'⁴⁶ to implement the ruling (eg 15 months from the adoption of the relevant report),⁴⁷ and only after the expiry of that time may the complainant request authorisation to suspend concessions under WTO law⁴⁸ (ie retaliate by ceasing compliance with certain WTO obligations up to a certain level). WTO remedies are thus prospective and do not involve monetary compensation. In international investment law, remedies may be retrospective to reflect the injury suffered from the commencement of the breach and may include damages awards of up to billions of dollars.⁴⁹

A fourth key difference between dispute settlement in the WTO and under IIAs is in the level of transparency. When a WTO member formally requests consultations with another WTO member (the first step of a dispute), or the establishment of a panel to resolve the dispute, these documents are publicly available on the WTO website.⁵⁰ The final report of a WTO panel and

⁴² *Philip Morris Asia Ltd v Australia* ('*Philip Morris v Australia*'), UNCITRAL, PCA Case No 2012-12, Award on Jurisdiction and Admissibility (17 December 2015). See also Tania Voon and Andrew Mitchell, 'Time to Quit? Assessing International Investment Claims Against Plain Tobacco Packaging in Australia' (2011) 14 *Journal of International Economic Law* 515; Jarrod Hepburn and Luke Nottage, 'A Procedural Win for Public Health Measures' (2017) 18 *Journal of World Investment & Trade* 307; Hope Johnson, 'Investor-State Dispute Settlement and Tobacco Control: Implications for Noncommunicable Diseases Prevention and Consumption-Control Measures' (2017) 17(2) *QUT Law Review* 102-130.

⁴³ See, eg, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging: Communication from the Chairperson of the Panel*, WTO Doc WT/DS435/21 (6 December 2016); *Australia – Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging: Communication from the Chairperson of the Panel*, WTO Doc WT/DS434/16 (3 June 2015) (regarding lapse of Ukraine's claim). See also Tania Voon and Andrew Mitchell, 'Face Off: Assessing WTO Challenges to Australia's Scheme for Plain Tobacco Packaging' (2011) 22 *Public Law Review* 218; Tania Voon, 'Acquisition of Intellectual Property Rights: Australia's Plain Tobacco Packaging Dispute' [2013] 2 *European Intellectual Property Review* 213.

⁴⁴ DSU, above n 9, arts 19.1, 22.1.

⁴⁵ Most requests by a complainant that a Panel or the Appellate Body make a suggestion as to how the respondent should implement an adverse ruling (pursuant to DSU art 19.1) are declined. In arbitrations on the 'reasonable period of time' under DSU art 21.3(c), arbitrators have also emphasised the respondent's discretion in determining how to implement the ruling.

⁴⁶ DSU, above n 9, art 21.3.

⁴⁷ *Ibid* art 21.3(c).

⁴⁸ *Ibid* art 22.2.

⁴⁹ See, eg, *Yukos Universal Limited (Isle of Man) v Russian Federation*, Permanent Court of Arbitration Case No AA 227, Final Award (18 July 2014) [1827] (damages award of approximately USD50 billion). But see the Hague District Court judgment of 20 April 2016 reversing the award (case no C/09/477162 / HA ZA 15-2).

⁵⁰ For more information, see, eg, Rahul Singh, 'The World Trade Organization and Legitimacy: Evolving a Framework for Bridging the Democratic Deficit' (2008) 42 *Journal of World Trade* 347; Elizabeth Smythe and Peter J Smith, 'Legitimacy, Transparency, and Information Technology: The World Trade Organization in an Era of Contentious Trade Politics' (2006) 12 *Global Governance: A Review of Multilateralism and International Organizations* 31.

of the Appellate Body are also made publicly available when they are circulated to WTO members. Some members also make their own WTO submissions public on their own websites. Panel and Appellate Body hearings have also been partially open to the public where the disputing parties agree. In contrast, the very existence of an ISDS claim may not be known publicly, or if known the decisions of the tribunal may not be made public. This characteristic of secrecy makes it harder to understand and monitor investment treaty decisions to evaluate their impact on domestic regulations and potentially harder for tribunals to develop a predictable and defensible basis for decision-making. Some recent developments may improve transparency in the context of ISDS, for example as a result of the UNCITRAL Transparency Rules⁵¹ and the recent entry into force of the *United Nations Convention on Transparency in Treaty-based Investor–State Arbitration*.⁵²

IAs typically define an investment broadly, widening the scope of potential claims against holistic dietary guidelines. Investment usually extends to any asset, including property, shares and intellectual property rights.⁵³ To bring a claim under a given IIA, an investor from one state party to the IIA (the home state) would need to show it has an investment in the other state party to the IIA (the host state), which is the state imposing the challenged measure. Again, the possibility of such a scenario increases because a multinational company, having determined the host state’s most protective IIA, under which it wants to bring a claim, may be able to restructure its subsidiaries and assets to create or identify an investment in the host state owned by an investor in the home state⁵⁴ (although such a restructuring was found to amount to an abuse of rights, leading to a denial of jurisdiction, in the Philip Morris investment treaty claim against Australia).⁵⁵ Further, the most-favoured nation (‘MFN’) obligation in many IAs also potentially widens the number and scope of possible claims, as some tribunals have allowed an investor to invoke the MFN obligation in one IIA to gain access to more favourable protections from another IIA.⁵⁶

One possibility for curtailing possible claims against holistic dietary guidelines lies in the reasoning of certain tribunals restricting the notion of ‘investment’ separately from the terms of the relevant IIA. For example, most famously, in *Salini v Morocco* the tribunal found that an ‘investment’ brought under the *ICSID Convention* must contribute to the economic development of the host state. Where the investor is the purveyor of unhealthy foods, the host state could argue that, through the negative health implications of the product, the investor

⁵¹ UNCITRAL Rules on Transparency in Treaty-based Investor–State Arbitration, incorporated in the UNCITRAL Arbitration Rules as adopted in 2013.

⁵² *United Nations Convention on Transparency in Treaty-based Investor–State Arbitration*, opened for signature 17 March 2015 (entering into force 18 October 2017). See also Stephan W Schill, ‘Editorial: The Mauritius Convention on Transparency’ (2015) 16 *Journal of World Investment & Trade* 201; Esmé Shirlow, ‘Dawn of a New Era? The UNCITRAL Rules and UN Convention on Transparency in Treaty-based Investor–State Arbitration’ (2016) 31(3) *ICSID Review* 62.

⁵³ See, eg, *Agreement Between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments*, 15 September 1993 (entered into force 15 October 1993) art 1(e).

⁵⁴ See generally Tania Voon, Andrew Mitchell and James Munro, ‘Legal Responses to Corporate Manoeuvring in International Investment Arbitration’ (2014) 5 *Journal of International Dispute Settlement* 41.

⁵⁵ *Philip Morris v Australia*, Award on Jurisdiction and Admissibility, above n 42 [588].

⁵⁶ See, eg, *Emilio Agustín Maffezini v Spain*, ICSID Case No ARB/97/7, Decision on Objections to Jurisdiction (25 January 2000) [39], [54], [56], [64].

undermines the host state's economic development. However, Uruguay made this argument unsuccessfully in the jurisdictional stage of the claim brought by Philip Morris against its tobacco packaging measures (although Uruguay later won the dispute by majority on the merits).⁵⁷ The tribunal there declined to accept the existence of such a criterion in the definition of investment.⁵⁸ Even if such a criterion were acknowledged, the negative link between economic development and a particular unhealthy food product would likely be much harder to establish than the negative link between economic development and tobacco products. Thus, once a subsidiary is established in its territory in accordance with its domestic laws,⁵⁹ it becomes harder for a host state to claim the entity is not an investment.⁶⁰

As in the WTO, although mandatory government measures may be more easily subject to challenge, non-binding measures and those involving non-government aspects may also create difficulties in international investment law. For example, a common obligation in IIAs to accord 'full protection and security' to investments is generally understood as requiring a host state to protect investments against (often non-government) actions involving 'physical harm'⁶¹ such as 'labor unrest'⁶² or 'civil strife and physical violence'.⁶³ The government's responsibility under an IIA for non-governmental activities or non-binding guidelines will thus depend on the investment obligation in question and the factual and regulatory circumstances.

B *Combining Health and Environmental Objectives*

1 *Tribunals' Recognition of Measures with Multiple Policy Objectives*

The combination of objectives to promote both public health and the environment in holistic dietary guidelines raises the question whether tribunals in international economic law are equipped to understand and evaluate regulatory measures with multiple policy objectives. Developments in the WTO dispute settlement system suggest an increasing awareness of the reality of such measures.

In *Brazil – Retreaded Tyres*, the WTO Appellate Body upheld a WTO Panel finding that a Brazilian ban on the importation of retreaded tyres was necessary to protect human, animal or plant life or health within the meaning of paragraph (b) of GATT article XX (discussed further below), for example because retreaded tyres become waste tyres more quickly than new tyres

⁵⁷ *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay* ('*Philip Morris v Uruguay*'), ICSID Case No ARB/10/7, Award (8 July 2016). See also Tania Voon, '*Philip Morris v Uruguay: Implications for Public Health*' (2017) 18 *Journal of World Investment & Trade* 320; Benn McGrady, '*Implications of Ongoing Trade and Investment Disputes Concerning Tobacco: Philip Morris v Uruguay*' in Tania Voon, Andrew D Mitchell and Jonathan Liberman with Glyn Ayres (eds), *Public Health and Plain Packaging of Cigarettes: Legal Issues* (Edward Elgar, 2012) 173.

⁵⁸ *Philip Morris v Uruguay*, ICSID Case No ARB/10/7, Decision on Jurisdiction (2 July 2013) [204], [209].

⁵⁹ IIAs refer to compliance with host state laws in different ways, including sometimes defining the term 'investment'. See generally Jarrod Hepburn, *Domestic Law in International Investment Arbitration* (Oxford University Press, 2017).

⁶⁰ See, eg, *Philip Morris v Uruguay*, Decision on Jurisdiction, above n 58 [171]–[172].

⁶¹ *Suez v Argentina*, ICSID Case No ARB/03/17, Award (30 July 2010) [167].

⁶² *MNSS BV and Recupero Credito Acciaio NV v Montenegro*, ICSID Case No ARB(AF)/12/8, Award (4 May 2016) [354].

⁶³ *Saluka Investments BV (Netherlands) v Czech Republic*, Permanent Court of Arbitration, UNCITRAL, Partial Award (17 March 2006) [483].

and then become breeding grounds for mosquitoes carrying disease.⁶⁴ However, unlike the Panel, the Appellate Body found that the Brazilian ban did not comply with the *chapeau* (the opening paragraph) to article XX because Brazil applied the ban in a manner constituting ‘arbitrary or unjustifiable discrimination’, by exempting from the ban imports from countries within the Mercado Común del Sur (Southern Common Market) (‘MERCOSUR’), that is, Brazil, Argentina, Uruguay and Paraguay.⁶⁵ According to the Appellate Body, arbitrary or unjustifiable discrimination arises, contrary to the *chapeau* to GATT article XX:

when a measure provisionally justified under a paragraph of Article XX is applied in a discriminatory manner ‘between countries where the same conditions prevail’, and when the reasons given for this discrimination bear no rational connection to the objective falling within the purview of a paragraph of Article XX, or would go against that objective. The assessment of whether discrimination is arbitrary or unjustifiable should be made in the light of the objective of the measure.⁶⁶

As the MERCOSUR exemption was implemented not for public health purposes but to comply with a ruling of the MERCOSUR arbitral tribunal — that the exemption was required to avoid violating MERCOSUR law — the Appellate Body found the exemption contrary to the *chapeau*.⁶⁷

The Appellate Body’s reasoning on this matter focused on ‘the objective’ of the measure, apparently precluding recognition of the possibility of a measure being justified under, for example, paragraph (b) of GATT article XX and yet being applied in a discriminatory manner for a *different* legitimate objective, whether recognised under article XX or not (keeping in mind that although article XX contains an exhaustive list of objectives that may be justified under this provision, it does not exhaust the universe of possible legitimate objectives).⁶⁸ However, the Appellate Body’s reasoning in more recent disputes seems to have evolved somewhat to allow greater recognition of measures with more than one objective.

In two cases focusing on articles 2.1 and 2.2 of the *TBT Agreement*, the Appellate Body demonstrated an understanding of regulatory measures pursuing multiple objectives. In *US – Clove Cigarettes*, the Appellate Body specifically stated, in its analysis of ‘like products’ under article 2.1, that measures ‘may have more than one objective’⁶⁹ and indeed that ‘measures often pursue a multiplicity of objectives’.⁷⁰ Similarly, in *US – Tuna II (Mexico)*, in its analysis of

⁶⁴ WTO Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres* (‘Brazil – Retreaded Tyres’), WTO Doc WT/DS332/AB/R (circulated 3 December 2007, adopted 17 December 2007) [119], [155], [212].

⁶⁵ *Ibid* [233].

⁶⁶ *Ibid* [227].

⁶⁷ *Ibid* [228].

⁶⁸ See, eg, Frieder Roessler, ‘Diverging Domestic Policies and Multilateral Trade Integration’ in Jagdish Bhagwati and Robert Hudec (eds), *Fair Trade and Harmonization: Prerequisites for Free Trade?* (vol II, MIT Press, 1996) 21, 30. For example, GATT art XX does not explicitly recognise the objectives of income redistribution (for example underlying a tax on luxury goods) or privacy protection.

⁶⁹ WTO Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes* (‘US – Clove Cigarettes’), WTO Doc WT/DS406/AB/R (circulated 4 April 2012, adopted 24 April 2012) [115].

⁷⁰ *Ibid* [113].

reasonably available alternative measures under article 2.2, the Appellate Body accepted that the challenged United States measures were designed to pursue two legitimate objectives: informing consumers about whether tuna products contain tuna caught in a manner harmful to dolphins; and contributing to the protection of dolphins.⁷¹

Subsequently, in *EC – Seal Products* (in a legal context more similar to that of *Brazil – Retreaded Tyres*, that is, involving GATT article XX) the EU justified its import ban on seal products primarily on the basis of ‘public morals’ associated with seal welfare pursuant to GATT article XX(a).⁷² However, the Appellate Body acknowledged in addition to this ‘principal objective’ of the ban a desire to ‘accommodat[e] ... other interests so as to mitigate the impact of the measure on those interests’.⁷³ In particular, an exception applied for ‘seal products obtained from seals hunted by Inuit or other indigenous communities’,⁷⁴ contributing to their subsistence.⁷⁵ In analysing this discrepancy under the GATT article XX *chapeau*, the Appellate Body seemed to reinterpret its comments in *Brazil – Retreaded Tyres* to require an emphasis on the relationship between any discrimination and the primary objective rather than a requirement that the discrimination be justified by that objective:

One of the most important factors in the assessment of arbitrary or unjustifiable discrimination is the question of whether the discrimination can be reconciled with, or is rationally related to, the policy objective with respect to which the measure has been provisionally justified under one of the subparagraphs of Article XX.⁷⁶

Thus, rather than being unable to accommodate the interests of indigenous communities through an exemption from the ban, the EU had to adjust the exemption to align it more closely with the public moral objective concerned with seal welfare.⁷⁷ The EU responded by modifying the exception for indigenous communities to ‘explicitly ad[d] animal welfare considerations as a condition for the use of the exception’.⁷⁸

Reflecting on this decision, Robert Howse and Joanna Langille have emphasised the importance of both ‘permitting pluralism’⁷⁹ in the WTO and recognising non-instrumental objectives:

⁷¹ WTO Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc WT/DS381/AB/R (16 May 2012) [325], [331].

⁷² WTO Panel Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products* (*EC – Seal Products*), WTO Docs WT/DS400/R, WT/DS401/R (circulated 25 November 2013, adopted 18 June 2014) [7.401], [7.410], [7.411]; WTO Appellate Body Reports, *EC – Seal Products*, WTO Docs WT/DS400/AB/R, WT/DS401/AB/R (circulated 22 May 2014, adopted 18 June 2014) [5.142].

⁷³ Appellate Body Reports, *EC – Seal Products*, above n 72 [5.167].

⁷⁴ *Ibid* [1.4].

⁷⁵ *Ibid* [5.16].

⁷⁶ *Ibid* [5.306] (emphasis added).

⁷⁷ *Ibid* [5.320], [5.338].

⁷⁸ World Trade Organization, *EC – Seal Products: Status Report by European Union – Addendum*, WTO Docs WT/DS400/16/Add.7, WT/DS401/17/Add.7 (16 October 2015) 2.

⁷⁹ Robert Howse and Joanna Langille, ‘Permitting Pluralism: The *Seal Products* Dispute and Why the WTO Should Accept Trade Restrictions Justified by Noninstrumental Moral Values’ (2012) 37 *Yale Journal of International Law* 367, 430.

[T]he same citizens may genuinely hold with equal sincerity two different noninstrumental moral beliefs (for instance, animal welfare, as well as the intrinsic value of traditional indigenous ways of life) that require a complex reconciliation. That a measure reflects such a reconciliation does not thereby impugn, even presumptively, the sincerity of either of the noninstrumental moral beliefs in question. Thus the perspective of pluralism entails a sensitivity to the varied totality of deeply held beliefs within each society, and even within the value system of a given individual.⁸⁰

As a general matter, investment treaty tribunals may not have the same difficulty in reconciling investment protections with regulatory measures with multiple policy objectives, because of the traditional absence of general exceptions akin to GATT article XX from BITs and the investment chapters of PTAs. Without the exhaustive list of legitimate objectives set out in article XX, and the complex approach to assessing compliance with the article's subparagraphs and then its *chapeau*, investment treaty tribunals have more freedom to adopt a holistic approach to regulatory measures and their legitimacy. As we discuss further below in the context of specific investment obligations, tribunals may take account of a government's genuine policy objectives in different ways depending on the nature of the challenge. The existence of multiple objectives, such as health and environmental objectives, does not of itself raise any suspicion in the assessment of a challenged measure under international investment law.

2 *Holistic Dietary Guidelines Not Usually SPS Measures*

The *SPS Agreement* applies to WTO members' measures designed to protect human, animal or plant life or health that may directly or indirectly affect international trade.⁸¹ In this sense, it is directed at measures that may have both health and environmental objectives. More specifically, the agreement defines a 'sanitary or phytosanitary' ('SPS') measure to include measures applied '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'.⁸² Such measures include 'all relevant ... regulations' including, inter alia, end product criteria, processes and production methods, certification and approval procedures, and 'packaging or labelling requirements directly related to food safety'.⁸³

Holistic dietary guidelines could be considered a form of 'regulation' that is applied to protect human life or health. Some dietary guidelines also incorporate food safety aspects that could be seen as fulfilling the other characteristics of an SPS measure.⁸⁴ Generally, though, dietary guidelines are centred on translating nutritional science to inform food choices to lessen the risk of diet-related NCDs and other adverse health impacts.⁸⁵ The reference to disease-causing

⁸⁰ Ibid 429–30.

⁸¹ *SPS Agreement*, above n 22, art 1.1.

⁸² Ibid annex A 'Definitions' [1(b)].

⁸³ Ibid annex A 'Definitions' [1].

⁸⁴ See, eg, German Nutrition Society, *10 Guidelines of the German Nutrition Society (DGE) for a Wholesome Diet* (2017) <<https://www.dge.de/ernaehrungspraxis/vollwertige-ernaehrung/10-regeln-der-dge/10-guidelines-of-the-german-nutrition-society/>>.

⁸⁵ See, eg, B Sandström, 'A Framework for Food-based Dietary Guidelines in the European Union' (2001) 4 *Public Health Nutrition* 293.

organisms quoted above (and other references to diseases and pests in the definition of an SPS measure)⁸⁶ would not usually be understood as referring to NCDs, given the context of food safety and the focus of the *SPS Agreement* on the *spread* of pests and diseases.⁸⁷ As such, dietary guidelines would not usually be understood as constituting SPS measures, although they could be used as a basis for implementing regulations more directly addressing food safety (such as labelling requirements with respect to food safety) that might themselves be SPS measures.

Nevertheless, some commentators have pointed out that the original intended scope of the SPS Agreement may be open to evolution. For example, Benn McGrady has argued that artificial trans fat may be considered an ‘additive’ within the meaning of the definition of SPS measure in the *SPS Agreement* and that ‘naturally occurring fat’ such as in ‘mutton flaps or turkey tails’ could constitute a disease-causing organism.⁸⁸ Added sugar and salt might also be described as additives or toxins.⁸⁹ However, this kind of broad interpretation may be at odds with the context, and object and purpose of the *SPS Agreement*, potentially leading to every regulation of any food ingredient being regarded as an SPS measure subject to onerous risk assessment and other requirements under the *SPS Agreement*. In contrast, SPS disputes to date have addressed measures restricting food products such as hormone-treated beef,⁹⁰ biotech products,⁹¹ salmon,⁹² and apples⁹³ allegedly at risk of certain diseases, poultry products allegedly raising food safety concerns,⁹⁴ animal products allegedly at risk of foot-and-mouth disease,⁹⁵ and pigs and pork products allegedly at risk of African swine fever virus.⁹⁶

The *SPS Agreement* encourages WTO members to base SPS measures on ‘the relevant international standards, guidelines or recommendations’⁹⁷ and on a risk assessment, taking account of ‘risk assessment techniques developed by the relevant international organizations’.⁹⁸ For ‘food safety’, the *SPS Agreement* refers to the ‘standards, guidelines and

⁸⁶ *SPS Agreement*, above n 22, annex A ‘Definitions’ [1(a)], [1(c)], [1(d)].

⁸⁷ *Ibid* annex A ‘Definitions’ [1(a)], [1(c)], [1(d)].

⁸⁸ Benn McGrady, *Trade and Public Health: The WTO, Tobacco, Alcohol, and Diet* (Cambridge University Press, 2011) 178–180.

⁸⁹ *Ibid* 178.

⁹⁰ See, eg, WTO Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)* (‘*EC – Hormones*’), WTO Docs WT/DS26/AB/R, WT/DS48/AB/R (circulated 16 January 1998, adopted 13 February 1998).

⁹¹ See, eg, WTO Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products* (‘*EC – Approval and Marketing of Biotech Products*’), WTO Docs WT/DS291/R, WT/DS292/R (circulated 29 September 2006, adopted 21 November 2006).

⁹² See, eg, WTO Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WTO Doc WT/DS18/AB/R (circulated 20 October 1998, adopted 6 November 1998).

⁹³ See, eg, WTO Appellate Body Report, *Australia – Measures Affecting the Importation of Apples from New Zealand*, WTO Doc/WT/DS367/AB/R (circulated 29 November 2010, adopted 17 December 2010).

⁹⁴ See, eg, WTO Panel Report, *United States – Certain Measures Affecting Imports of Poultry from China*, WTO Doc WT/DS392/R (circulated 29 September 2010, adopted 25 October 2010).

⁹⁵ WTO Panel Report, *United States – Measures Affecting the Importation of Animals, Meat and Other Animal Products from Argentina*, WTO Doc WT/DS447/R (circulated 24 July 2015, adopted 31 August 2015).

⁹⁶ See, eg, WTO Appellate Body Report, *Russian Federation – Measures on the Importation of Live Pigs, Pork and Other Pig Products from the European Union*, WTO Doc WT/DS475/AB/R (circulated 23 February 2017, adopted 21 March 2017).

⁹⁷ *SPS Agreement*, above n 22, art 5.8.

⁹⁸ *Ibid* art 5.1.

recommendations established by the Codex Alimentarius Commission ('Codex') relating to food additives, veterinary drug and pesticide residues, contaminants, methods of analysis and sampling, and codes and guidelines of hygienic practice'.⁹⁹ Such instruments tend to be established by the Commission¹⁰⁰ through a process of scientific evidence gathering, evaluation, and voting by its member countries.

Codex has not developed its own dietary guidelines, or standards focused on dietary guidelines. It has, however, issued standards for many food products, including for the preparation of traditional food products, which are often promoted in holistic dietary guidelines.¹⁰¹ The Codex also contains general standards for making claims (eg that a product is organically grown)¹⁰² and guidelines on nutrition and health claims (eg that a product is low in energy, sodium or saturated fat or sugar-free).¹⁰³ The latter guidelines specify that '[n]utrition claims should be consistent with national nutrition policy and support that policy. Only nutrition claims that support national nutrition policy should be allowed'.¹⁰⁴ In addition, '[h]ealth claims should be supported by a sound and sufficient body of scientific evidence to substantiate the claim'.¹⁰⁵ More specifically as regards dietary guidelines, these Codex guidelines specify that claims related to dietary guidelines or 'healthy diets' are permitted subject to certain conditions, including:

9.1 Only claims related to the pattern of eating contained in dietary guidelines officially recognized by the appropriate national authority. ...

9.5 Foods should not be described as 'healthy' or be represented in a manner that implies that a food in and of itself will impart health.¹⁰⁶

The Codex recommendations in these guidelines as to the scientific substantiation of health claims¹⁰⁷ might also provide informal guidance in establishing a scientific basis for particular aspects of proposed holistic dietary guidelines. Even if dietary guidelines concerned primarily with nutrition and sustainable diets rather than food safety do not constitute SPS measures, these and other Codex materials may also provide relevant evidence to support particular guidelines or measures challenged under other WTO agreements or under international investment law. At the same time, the reliance on scientific evidence in Codex standard-setting processes, and its specialty in food safety, may hinder the institution's capacity to support the cultural, social or synergistic aspects of holistic dietary guidelines.

⁹⁹ Ibid annex A 'Definitions' [3(a)].

¹⁰⁰ World Health Organisation and Food and Agriculture Organisation of the United Nations, *Codex Alimentarius: International Food Systems* <<http://www.codexalimentarius.org/standards/list-of-standards/>>.

¹⁰¹ Codex, *Standards for Kimchi*, CXS 223-2001 (last rev 2017); Tomer Broude, 'From Chianti to Kimchi: Geographical Indications, Intangible Cultural Heritage, and Their Unsettled Relationship with Cultural Diversity' in Irene Calboli and Wee Loon Ng-Loy (eds), *Geographical Indications at the Crossroads of Trade, Development, and Culture: Focus on Asia-Pacific* (Cambridge University Press, 2017) 461, doi:10.1017/9781316711002.020.

¹⁰² Codex, *General Guidelines on Claims*, CAC/GL 1-1979 (last rev 2009) [5.1(iii)]. See also Codex, *Guidelines for the Production, Processing, Labelling and Marketing of Organically Produced Foods*, GL 32-1999 (last rev 2013).

¹⁰³ Codex, *Guidelines for Use of Nutrition and Health Claims*, CAC/GL 23-1997 (last rev 2013) 3.

¹⁰⁴ Ibid 1.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid 6.

¹⁰⁷ Ibid annex ('Recommendations on the Scientific Substantiation of Health Claims').

III ASSESSING COMMON STRATEGIES OF HOLISTIC DIETARY GUIDELINES UNDER INTERNATIONAL ECONOMIC LAW

In this section, we address two broad strategies that are sometimes pursued in holistic dietary guidelines in order to illustrate their implications under WTO law and international investment law: promoting local products either *de jure* or *de facto*, which would often violate the national treatment obligation under the GATT 1994; and discouraging over-consumption of ‘unhealthy’ foods, which if supported by substantial evidence would not usually violate investment protection obligations.

A *Prioritising Local Products: A Potential Breach of the GATT 1994*

In 2009, Sweden’s National Food Administration and Environmental Protection Agency published ‘Environmentally Effective Food Choices’, which were the proposed next edition of Sweden’s dietary guidelines.¹⁰⁸ The guidelines recommended eating *locally produced* meat, chicken, fruits and vegetables. Under EU trade law, Sweden was required to inform and consult with the European Commission on these proposed ‘de facto technical regulations’,¹⁰⁹ which must comply with the principle of ‘free movement of goods’ within the EU market.¹¹⁰ The EU Commission, with the support of Romania, objected to the guidelines.¹¹¹ They considered that the guidelines potentially hindered the free movement of goods by promoting the consumption of locally-produced, Swedish goods. Although the proposed guidelines were revised to address this objection, the Swedish government withdrew them, due to lingering concerns that they would breach EU trade policy.¹¹² This example highlights the potential for both an emphasis on local production in dietary guidelines and a resulting tension with international trade law.

1 *Explicit Tax Advantages for Local Products*

GATT article III imposes on WTO members an obligation of ‘national treatment’. Under article III:2, members must not subject products imported from other WTO members to internal taxes or charges ‘in excess of those applied, directly or indirectly, to like domestic products’ (first sentence). In addition, members must not subject such imports to internal taxes or charges so as to afford protection to domestic production of directly competitive or substitutable domestic products (second sentence). Like products addressed in the first sentence of article III:2 form a subset of directly competitive or substitutable domestic products, which are addressed in the

¹⁰⁸ ‘The National Food Administration’s Environmentally Effective Food Choices’ (Proposal notified to the EU, Livsmedels Verket (National Food Administration), 15 May 2009) <http://graphics8.nytimes.com/packages/pdf/science/sweden_foodguidelines.pdf>.

¹⁰⁹ *Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 Laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society Services* [1998] OJ L 204/37, preamble [12], art 1(11).

¹¹⁰ *Treaty on the Functioning of the European Union*, opened for signature 7 February 1992, [2012] OJ C 326/47 (entered into force 1 November 1993) [cited as amended] art 28.

¹¹¹ B Dahlbacka, ‘Sweden Withdraws Proposal on Climate Friendly Food Choices’ (GAIN Report SW1007, USDA Foreign Agricultural Service, Global Agricultural Information Network, 12 December 2010) <https://gain.fas.usda.gov/Recent%20GAIN%20Publications/Sweden%20Withdraws%20Proposal%20on%20Climate%20Effective%20Food%20Choices_Stockholm_Sweden_12-1-2010.pdf>.

¹¹² *Ibid.*

second sentence of article III:2, by virtue of its cross-reference to article III:1 and *ad* article III:2, which states:

A tax conforming to the requirements of the first sentence of [art III:2] would be considered to be inconsistent with the provisions of the second sentence only in cases where competition was involved between, on the one hand, the taxed product and, on the other hand, a directly competitive or substitutable product which was not similarly taxed.

The Appellate Body has determined that a *de minimis* threshold of excess tax is allowed under the second but not the first sentence of article III:2.¹¹³ Thus, an imported product may not be subject to an internal tax or charge in excess of that imposed on the like domestic product, but an imported product may be subject to an internal tax or charge that minimally exceeds that imposed on a directly competitive or substitutable domestic product that is not a like product. Holistic guidelines dictating lower sales or excise taxes for local food products than imported food products could breach GATT article III:2, as would regulations implementing dietary guidelines in this way. This conclusion would depend on: (i) identifying like or directly competitive or substitutable domestic products; and (ii) comparing the treatment of those products with that of the imported products subject to the higher tax. We address these two steps in turn.

The four criteria that WTO panels and the Appellate Body typically cite in determining likeness under the GATT 1994 (including the national treatment obligation as reflected in both article III:2 (first sentence) and article III:4) are: the properties, nature and quality of the products; (ii) the end-uses of the products; (iii) consumers' tastes and habits in respect of the products;¹¹⁴ and (iv) the tariff classification of the products.¹¹⁵ Although the Appellate Body has stated that this list of criteria is not closed¹¹⁶ and that the purpose is to identify the competitive relationship between the products,¹¹⁷ the list is routinely used and tends to be persuasive. We return to the question of likeness below in assessing *de facto* discrimination against imported products.

The complexity of the likeness analysis is significantly diminished for measures that distinguish between products solely on the basis of origin, as in our example here of a tax advantage for domestically produced products in comparison to imported products. In that instance, a WTO tribunal need not apply the four likeness criteria but may instead expect that some domestic and imported products subject to the measure will be like.¹¹⁸ However, as

¹¹³ WTO Appellate Body Report, *Japan – Taxes on Alcoholic Beverages* ('*Japan – Alcoholic Beverages II*'), WTO Doc WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (circulated 4 October 1996, adopted 1 November 1996) 27.

¹¹⁴ GATT Working Party Report, *Border Tax Adjustments*, GATT Doc L/3464, BISD 18S/97 (adopted 2 December 1970) [18].

¹¹⁵ See, eg, WTO Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc WT/DS135/AB/R (12 March 2001) [109] ('*EC – Asbestos*'); Appellate Body Report, *Japan – Alcoholic Beverages II*, above n 113, 20–22.

¹¹⁶ Appellate Body Report, *Japan – Alcoholic Beverages II*, above n 113, 20–22, 25.

¹¹⁷ See, eg, Appellate Body Report, *US – Clove Cigarettes*, above n 69, [111].

¹¹⁸ See WTO Appellate Body Report, *Argentina – Measures Relating to Trade in Goods and Services*, WTO Doc WT/DS453/AB/R (circulated 14 April 2016, adopted 9 May 2016) [6.36], [6.38]. See also, eg, WTO Panel Report,

discussed further below in the context of GATT article III:4, the national treatment obligations under articles III:2 and III:4 apply to measures that discriminate against imported products either explicitly (de jure — in law, or on their face) or implicitly (de facto — in fact, or in practice).¹¹⁹

As noted above, a measure that is consistent with the first sentence of article III:2 because it does not tax imported products in excess of like domestic products might still breach the second sentence of article III:2 if it taxes imported products so as to afford protection to directly competitive or substitutable domestic products. Such products are identified according to factors such as the elasticity of substitution (eg how much does the price of one product have to increase in order for consumers to switch to the other product), price competition, and actual or potential competition.¹²⁰

If a respondent has established that the relevant imported and domestic products are either like or directly competitive or substitutable, the next question is whether the imported products are taxed in excess of (under the first sentence of article III:2), or so as to afford protection to (under the second sentence) the relevant domestic products. In the case of explicit discrimination (eg where holistic dietary guidelines or their implementing measures impose higher taxes explicitly on imported products), a breach is likely to be easily established. As with the likeness analysis, the assessment of less favourable treatment becomes more complicated when a measure favours local products implicitly rather than explicitly, as discussed further in the following section.

2 *De Facto Regulatory Preferences for Local Products*

Article III:4 imposes a national treatment obligation not in respect of taxation measures and other internal charges but in terms of other relevant regulatory measures. It begins:

The products of the territory of any Member imported into the territory of any other Member shall be accorded treatment no less favourable than that accorded to 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.¹²¹

As noted above, GATT articles III:2 and III:4 apply to both de jure and de facto discrimination. In this section we use the advantage of a regulatory preference for local products pursuant to holistic dietary guidelines to explore the nature of de facto discrimination. Some of the factors discussed above in relation to article III:2 apply equally here. In particular, the likeness analysis under article III:4 is very similar to that under article III:2 (first sentence), except that the category of like products under article III:4 is broader than that under article III:2 (first

India – Certain Measures Relating to Solar Cells and Solar Modules, WTO Doc WT/DS457/R (circulated 24 February 2016, adopted 14 October 2016) [7.83], [7.84] (this finding not appealed).

¹¹⁹ See, eg, WTO Appellate Body Report, *Philippines – Taxes on Distilled Spirits* ('*Philippines – Distilled Spirits*'), WTO Docs WT/DS396/AB/R, WT/DS403/AB/R (circulated 21 December 2011, adopted 20 January 2012) [255]–[257].

¹²⁰ See, eg, *ibid* [207], [215], [226]–[229].

¹²¹ Emphasis added.

sentence).¹²² Because of the absence of a reference to ‘directly competitive or substitutable’ products under article III:4, the category of like products under article III:4 may be seen as approximating, although not wholly subsuming, the categories of both like products under article III:2 (first sentence) and directly competitive or substitutable products under article III:2 (second sentence).¹²³ The examination of less favourable treatment under article III:4, discussed below, could equally apply to tax treatment under article III:2 that allegedly entails de facto discrimination against imported products.

The reference in article III:4 to laws, regulations and requirements affecting sale etc has been interpreted broadly ‘to cover not only laws and regulations which directly govern the conditions of sale or purchase but also any laws or regulations which might adversely modify the *conditions of competition* between domestic and imported products’.¹²⁴ The Appellate Body has also suggested that measures creating an incentive to use or purchase domestically produced rather than imported goods can be understood as affecting their internal sale, purchase or use.¹²⁵ Thus, even non-mandatory holistic dietary guidelines or implementing measures that provide some incentive or encouragement to producers or even consumers to prefer particular types of food or food products over others may fall within the scope of GATT article III:4.

We turn to the likeness analysis, which as we have noted usually depends on the application of four traditional criteria but becomes potentially more complicated in relation to alleged de facto discrimination. The Appellate Body has made clear that the ‘aims and effects’ of a measure, including its regulatory purpose, do not affect the likeness analysis under GATT article III¹²⁶ (or article 2.1 of the *TBT Agreement*).¹²⁷ This means that evidence of the domestic regulatory aims and scientific evidence supporting the promotion of particular food products under holistic dietary guidelines, on the basis of health and environmental concerns, as well as international instruments endorsing such approaches, may not be directly relevant to the analysis of likeness. Nevertheless, the regulatory purpose might be reflected in the four traditional factors for determining likeness or more generally in its impact on ‘the competitive relationship between and among the products concerned’.¹²⁸ In *EC – Asbestos*, for instance, the Appellate Body found that the health risks associated with asbestos could be considered as part

¹²² See, eg, Appellate Body Report, *EC – Asbestos*, above n 115 [99]; Appellate Body Report, *Japan – Alcoholic Beverages II*, above n 113, 21.

¹²³ Cf Appellate Body Report, *EC – Asbestos*, above n 115 [94]–[100] (leaving that question open).

¹²⁴ WTO Panel Report, *Canada – Certain Measures Affecting the Automotive Industry*, WTO Docs WT/DS139/R, WT/DS142/R (circulated 11 February 2000, adopted 19 June 2000) [10.80] (emphasis added). See also WTO Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas* (*‘EC – Bananas III’*), WTO Doc WT/DS27/AB/R (circulated 9 September 1997, adopted 25 September 1997) [136], [211], [213].

¹²⁵ WTO Appellate Body Report, *China – Measures Affecting Imports of Automobile Parts*, WTO Docs WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R (circulated 15 December 2008, adopted 12 January 2009) [196].

¹²⁶ Appellate Body Report, *EC – Bananas III*, above n 124 [216], [241]. See also Robert E Hudec, ‘GATT/WTO Constraints on National Regulation: Requiem for an “Aims and Effects” Test’ (1998) 32 *The International Lawyer* 619.

¹²⁷ Appellate Body Report, *US – Clove Cigarettes*, above n 69 [117].

¹²⁸ *Ibid* [119]–[120] (in the context of *TBT Agreement* art 2.1).

of the relevant products' physical characteristics and consumer preferences, influencing the competitive relationship between products.¹²⁹ The regulatory purpose is also likely to be relevant to whether the measure is applied 'so as to afford protection' within the meaning of GATT article III:1 (which is a separate assessment applied to the second sentence of GATT article III:2)¹³⁰ and whether the measure satisfies the requirements of the general exceptions in GATT article XX as discussed below.

A related question is whether processes and production methods ('PPMs') are relevant in assessing likeness. For example, are products created using more 'environmentally friendly' means not like those created using other means?¹³¹ PPMs might be distinguished based on the underlying regulatory purpose (eg protecting the environment), which as noted above is not relevant to likeness under the GATT 1994 according to the Appellate Body. PPMs that affect the final product might nevertheless be relevant under a traditional likeness analysis to the extent that the PPMs affect physical properties, end-uses or tariff classifications. Even non-product-related PPMs (those that do not affect the final product) could be relevant in distinguishing products under a traditional likeness analysis, to the extent that they affect consumer preferences regarding the product (eg where consumers recognise the different environmental impacts of the underlying PPMs and therefore distinguish between the relevant products).

Holistic dietary guidelines or implementing measures that promote, for example, the consumption of field-grown fruit and vegetables,¹³² may disadvantage greenhouse-produced fruit and vegetables. Such measures do not discriminate on their face against imported products but may do so in effect, if greenhouse-produced fruit and vegetables tend to be imported (as discussed further below in relation to the meaning of less favourable treatment). However, in order to establish that such measures breach the national treatment obligation under GATT article III:4, the complainant would need to show that imported greenhouse-produced fruit and vegetables are 'like' domestically produced field-grown fruit and vegetables. The regulatory purpose of the measures may be to promote health and environmental interests through the concept of a sustainable diet, but the Appellate Body says the purpose is not directly relevant to the likeness analysis. The measures are directed at a PPM that may or may not be described as product-related. The products may well be alike in physical characteristics, end-uses and tariff classifications. Nevertheless, the two groups of products might be distinguished on the basis of consumer perceptions, if consumers regard field-grown fruit and vegetables as more

¹²⁹ Appellate Body Report, *EC – Asbestos*, above n 115 [113], [135], [136], [139].

¹³⁰ See, eg, Appellate Body Report, *Japan – Alcoholic Beverages II*, above n 113, 24, 30; Appellate Body Report, *Canada – Certain Measures Concerning Periodicals*, WTO Doc WT/DS31/AB/R (circulated 30 June 1997, adopted 30 July 1997) 30–32. But see Andrew D Mitchell, David Heaton and Caroline Henckels, *Non-discrimination and the Role of Regulatory Purpose in International Trade and Investment Law* (Edward Elgar, 2016) 47.

¹³¹ See generally, eg, Robert Howse and Donald Regan, 'The Product/Process Distinction — An Illusory Basis for Disciplining "Unilateralism" in Trade Policy' (2000) 11 *European Journal of International Law* 249; Steve Charnovitz, 'The Law of Environmental "PPMs" in the WTO: Debunking the Myth of Illegality' (2002) 27 *Yale Journal of International Law* 59; Donald H Regan, 'How to Think About PPMs (and Climate Change)' in Thomas Cottier, Olga Nartova and Sadeq Z Bigdeli (eds), *International Trade Regulation and the Mitigation of Climate Change: World Trade Forum* (Cambridge University Press, 2009) 97.

¹³² See, eg, Sustainable Development Commission, *Setting the Table: Advice to Government on Priority Elements of Sustainable Diets* (2009) <http://www.sd-commission.org.uk/data/files/publications/Setting_the_Table.pdf>.

environmentally friendly or healthier. If evidence of such consumer distinctions is not available, the two groups of products would probably be regarded as like, according to the prevailing analysis based on the four traditional criteria.

If the relevant products were identified as like, the tribunal would then need to determine whether the challenged measure treats imported products less favourably than domestically produced products. The tribunal could find less favourable treatment amounting to a national treatment breach where a single imported product is treated less favourably than a single domestic imported product, in what Ehring has described (in the context of both articles III:2 and III:4, as well as article III:1)¹³³ as the ‘diagonal’ test.¹³⁴ Under that approach, a breach is relatively easy to find. A more rational approach, which Ehring describes as the ‘asymmetric impact’ test,¹³⁵ and which has perhaps been favoured in more recent disputes,¹³⁶ would be to compare the treatment of the group of imported products as a whole with that of the group of like (or directly competitive or substitutable, in the case of the second sentence of article III:2) domestic products. A breach would then be more likely to arise only if the burden of the challenged regulation falls predominantly on the imported products (eg if greenhouse-grown fruit tends to be imported) while the domestic products are predominantly favoured (eg if field-grown fruit tends to be domestically produced). This analysis may be based on quantitative evidence of actual trading patterns and possibly any demonstrable trade effects of the challenged measure. The Appellate Body has confirmed that, in assessing less favourable treatment under GATT article III, no additional ‘gloss’ akin to that under article 2.1 of the *TBT Agreement* applies: that is, under GATT article III a breach may be found even if the ‘detrimental impact’ on imports ‘stems exclusively from a legitimate regulatory distinction’.¹³⁷

3 *General Exceptions Under Article XX of the GATT 1994*

If holistic dietary guidelines or their implementing measures are found inconsistent with GATT article III on the basis that they discriminate de jure or de facto against imported products, they may still be justified under the general exceptions in GATT article XX. Under that provision, a measure must satisfy a two-tiered test.¹³⁸ First, the measure must satisfy the terms of one of the sub-paragraphs (a) to (j) of article XX. Second, the measure must meet the overarching requirements of the *chapeau* of article XX. Article XX of the GATT states in relevant part:

¹³³ Lothar Ehring, ‘*De Facto* Discrimination in World Trade Law: National and Most-Favoured-Nation Treatment — or Equal Treatment?’ (2002) 36 *Journal of World Trade* 921, 929–931.

¹³⁴ Ibid 924. Diebold refers instead to the ‘obligation to grant the best treatment accorded to any domestic market actor: Nicolas F Diebold, ‘Standards of Non-discrimination in International Economic Law’ (2011) 60 *International and Comparative Law Quarterly* 831, 844.

¹³⁵ Ehring, above n 133, 924–925. Diebold refers instead to the ‘disproportionate disadvantage’ test: Diebold, above n 134, 842–844.

¹³⁶ See, eg, Appellate Body Report, *EC – Asbestos*, above n 115, [100]; Appellate Body Reports, *EC – Seal Products*, above n 72, [5.115]. See also Mitchell et al, above n 130, 151.

¹³⁷ Appellate Body Reports, *EC – Seal Products*, above n 72 [5.105].

¹³⁸ WTO Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline* (‘*US – Gasoline*’), WTO Doc WT/DS2/9 (circulated 29 April 1996, adopted 20 May 1996) 22; WTO Appellate Body Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WTO Doc WT/DS302/AB/R (circulated 25 April 2005, adopted 19 May 2005) [64].

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 Member of measures:

- (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 inconsistent with the provisions of this Agreement, including those relating to ... the prevention of deceptive practices; ...
- (f) imposed for the protection of national treasures of artistic, historic or archaeological value;
- (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption; ...¹³⁹

In relation to the first tier of the analysis, the most relevant exceptions for holistic dietary guidelines are in paragraphs XX(b) and XX(g). We consider each in turn, thereafter noting the likely irrelevance of paragraph XX(d).

The necessity of a measure to protect human, animal or plant life or health under article XX(b) is determined by first balancing the importance of the identified objective, the contribution of the measure to that objective, and the trade restrictiveness of the measure.¹⁴⁰ The more trade restrictive the measure, the higher the degree of contribution needed to justify it.¹⁴¹ If this balancing exercise leads to a provisional conclusion that the measure is necessary, a WTO tribunal will consider whether any less trade restrictive measure that would make an equal contribution to the objective is reasonably available to the respondent, taking account of the respondent's financial resources and technical capacity.¹⁴² If no such alternative exists, the measure will be deemed necessary for the purpose of article XX(b), subject to fulfilling the requirements of the *chapeau*.

The necessity of holistic dietary guidelines and associated measures pursuant to this analysis is likely to depend on their underlying scientific basis and the government's consideration of less intrusive alternatives. The Appellate Body has held that the preservation of human life and health is 'both vital and important in the highest degree'.¹⁴³ The extent of contribution to that objective will depend on the factual circumstances and the design and operation of the measure. As for its trade restrictiveness,¹⁴⁴ the Appellate Body has characterised an import ban as 'by design as trade-restrictive as can be'.¹⁴⁵ Holistic dietary guidelines and associated measures would not usually prohibit imports and thus would usually be considered less trade restrictive than an import ban. Guidelines and measures that simply provide information to consumers or

¹³⁹ Emphasis added.

¹⁴⁰ See, eg, Appellate Body Report, *Brazil – Retreaded Tyres*, above n 64 [210]; Appellate Body Reports, *EC – Seal Products*, above n 72 [5.169].

¹⁴¹ See, eg, Appellate Body Reports, *EC – Seal Products*, above n 72 [5.215].

¹⁴² See, eg, Appellate Body Report, *Brazil – Retreaded Tyres*, above n 64 [156].

¹⁴³ Appellate Body Report, *EC – Asbestos*, above n 115 [172].

¹⁴⁴ See generally Tania Voon, 'Exploring the Meaning of Trade-restrictiveness in the WTO' (2015) 14 *World Trade Review* 451.

¹⁴⁵ Appellate Body Report, *Brazil – Retreaded Tyres*, above n 64 [150].

producers are likely to be regarded as less trade restrictive¹⁴⁶ than measures that impose higher taxes or explicitly target imported products.

Continuing uncertainties in the field of nutritional science will not necessarily preclude a successful defence under article XX(b). The Appellate Body has maintained that scientific consensus is not required; a measure may still be justified in the face of conflicting evidence, as long as the ‘scientific sources ... represent ... qualified and respected, opinion’.¹⁴⁷ Similarly, quantitative evidence is not necessarily essential. In some circumstances, qualitative evidence may be sufficient.¹⁴⁸ The Appellate Body has also acknowledged that ‘certain complex public health or environmental problems may be tackled only with a comprehensive policy comprising a multiplicity of interacting measures’ and that it may not be possible in the short-term to isolate the expected or actual effects of a single measure.¹⁴⁹

Resolutions or recommendations of the WHO regarding NCDs and healthy diets could be used to support the defence of a particular aspect of holistic dietary guidelines under article XX(b), especially as regards the contribution of the measure to its health objective. The WHO’s *Global Strategy on Diet, Physical Activity and Health* required WHO member states to introduce policies to promote healthy diets.¹⁵⁰ More specifically, guidelines that recommend reducing the consumption of red and processed meat could be buttressed by scientific reports of the WHO.¹⁵¹ WHO’s International Agency for Research on Cancer has declared that people should moderate their consumption of red and processed meats to mitigate the risk of colon, stomach and other cancers.¹⁵² These kinds of objective findings could also assist in distinguishing red and processed meats from other meat products for the purpose of the likeness analysis discussed above in relation to GATT article III:2 or III:4. A *WHO FCTC*-type treaty in the context of obesity, NCDs or healthy diets addressing these issues could similarly be persuasive. Environmental objectives may be addressed more easily under article XX(g) than article XX(b), provided that some evidence supports the connection between the chosen measure and those objectives. Under article XX(g), rather than meeting the stringent test of necessity, the respondent would simply have to show that the challenged measure ‘relat[es] to’ the conservation of exhaustible natural resources. The Appellate Body has held that a measure relates to the conservation of exhaustible natural resources if it is ‘primarily aimed at’ such conservation,¹⁵³ as identified by ‘the relationship between the general structure and design of

¹⁴⁶ See, eg, Tania Voon, Andrew Mitchell and Catherine Gascoigne, ‘Consumer Information, Consumer Preferences and Product Labels under the TBT Agreement’ in Tracey Epps and Michael J Trebilcock (eds), *Research Handbook on the WTO and Technical Barriers to Trade* (Edward Elgar, UK, 2013) 454, 461.

¹⁴⁷ Appellate Body Report, *EC – Asbestos*, above n 115 [178].

¹⁴⁸ See, eg, Appellate Body Report, *Brazil – Retreaded Tyres*, above n 64 [146]. See also Tania Voon, ‘Evidentiary Challenges for Public Health Regulation in International Trade and Investment Law’ (2015) 18 *Journal of International Economic Law* 705, 805.

¹⁴⁹ Appellate Body Report, *Brazil – Retreaded Tyres*, above n 64 [151].

¹⁵⁰ World Health Assembly, *Global Strategy on Diet, Physical Activity and Health: Report by the Secretariat*, WHA Res 57.17, 57th sess, 8th plen mtg, WHO Doc A57/2004/REC/1 (22 May 2004).

¹⁵¹ As Table 2 in the companion piece to this article demonstrates, holistic dietary guidelines all include recommendations to reduce animal product consumption and to adopt plant-based diets.

¹⁵² Véronique Bouvard et al, ‘Carcinogenicity of Consumption of Red and Processed Meat’ (2015) 16 *The Lancet Oncology* 1599.

¹⁵³ Appellate Body Report, *US – Gasoline*, above n 138, 19.

the measure ... and the policy goal it purports to serve'.¹⁵⁴ As indicated in the text of article XX(g), the measure must also apply in an 'even-hand[e]d' manner to domestic and imported products.¹⁵⁵ Due to the current dearth of evidence supporting the environmental justification for promoting local food products, guidelines granting explicit tax or other regulatory advantages to such products are unlikely to meet even this lower threshold. However, if evidence could be collated to support the environmental superiority of field-grown fruit and vegetables over greenhouse-grown fruit and vegetables, article XX(g) could provide an important means of preventing guidelines promoting field-grown fruit from violating the national treatment obligation in article III, notwithstanding the irrelevance of the regulatory purpose per se in establishing likeness under the latter provision.

As foreshadowed above, the exception in article XX(d) for measures necessary to secure compliance with WTO-consistent laws or regulations would be unlikely to assist in justifying holistic dietary guidelines, even if they were based on an international treaty. The Appellate Body has consistently maintained that the laws or regulations described in article XX(d) are domestic laws or regulations, and that international laws may be relevant only to the extent that they have been implemented domestically.¹⁵⁶ Moreover, under the terms of article XX(d), a challenged measure can be justified under article XX(d) only if it is necessary to secure compliance with another domestic measure that is itself consistent with WTO rules. Thus, a *WHO FCTC*-type obesity treaty or other WHO diet-related instrument would not constitute a law or regulation under article XX(d) with which domestic holistic dietary guidelines could be said to be necessary to secure compliance.

The WTO Appellate Body is also unlikely to accept a WHO instrument or obesity treaty as an *independent* defence, untethered to GATT article XX, justifying holistic dietary guidelines that are otherwise inconsistent with WTO rules. Notwithstanding its early pronouncement that the GATT 1994 is 'not to be read in clinical isolation from public international law',¹⁵⁷ the Appellate Body has repeatedly demonstrated reluctance to apply or give effect to non-WTO international rules in the absence of a connection to the WTO treaty text.¹⁵⁸ Thus, for example, the Appellate Body has refused to give effect to inter se agreements between WTO members modifying WTO provisions as between themselves.¹⁵⁹ Nevertheless, the Appellate Body has sometimes referred to multilateral treaties or other international instruments as 'factual

¹⁵⁴ WTO Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products* ('*US – Shrimp*'), WTO Doc WT/DS58/AB/R (circulated 12 October 1998, adopted 6 November 1998) [137].

¹⁵⁵ Appellate Body Report, *US – Gasoline*, above n 138, 21.

¹⁵⁶ See Appellate Body Report, *India – Solar Cells*, above n 35, [5.106], [5.141], [5.148]–[5.151]; WTO Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages* ('*Mexico – Taxes on Soft Drinks*'), WTO Doc WT/DS308/AB/R (circulated 6 March 2006, adopted 24 March 2006) [69], [79].

¹⁵⁷ Appellate Body Report, *US – Gasoline*, above n 138, 17.

¹⁵⁸ An exception may arise in practice for general principles of law, rather than non-WTO treaties, including procedural rules exercised as a part of inherent jurisdiction. See generally Andrew D Mitchell, *Legal Principles in WTO Disputes* (Cambridge University Press, 2008); Andrew D Mitchell and David Heaton, 'The Inherent Jurisdiction of WTO Tribunals: The Select Application of Public International Law Required by the Judicial Function' (2010) 31 *Michigan Journal of International Law* 561.

¹⁵⁹ See, eg, WTO Appellate Body Report, *Peru – Additional Duty on Imports of Certain Agricultural Products*, WTO Doc WT/DS457/AB/R (circulated 20 July 2015, adopted 31 July 2015) [5.110]–[5.113]. Cf Appellate Body Report, *Mexico – Taxes on Soft Drinks*, above n 156 [44], [54].

reference[s]’¹⁶⁰ or apparently as evidence of the ‘ordinary meaning’ of particular treaty terms¹⁶¹ for the purpose of article 31(1) of the *Vienna Convention on the Law of Treaties* (‘VCLT’),¹⁶² or occasionally as constituting relevant rules of international law applicable between the parties under VCLT article 31(3)(c).¹⁶³ In this way, international instruments could still be relevant in supporting a respondent’s arguments under GATT article XX(b) or XX(g).

Another example of the Appellate Body’s general reluctance to apply non-WTO international law directly is its refusal to rule on whether the ‘precautionary principle’ is a general principle of law or a part of customary international law that might therefore apply in resolving WTO disputes. In *EC – Hormones*, the European Communities argued that the precautionary principle forms a part of international law and therefore affects the interpretation of articles 5.1 and 5.2 of the *SPS Agreement*.¹⁶⁴ The Appellate Body agreed with the Panel that such a principle would in any case not override articles 5.1 and 5.2¹⁶⁵ and found it unnecessary to rule on whether the principle constitutes ‘a principle of *general* or *customary international law*’.¹⁶⁶ As it stands, then, a respondent defending holistic dietary guidelines or associated measures would have difficulty relying on the precautionary principle in justifying its linking of environmental (or health) objectives to particular measures in the face of scientific uncertainty. As indicated above, the second tier of analysis under GATT article XX involves assessing the compliance of the challenged measure with the requirements of the *chapeau*. These requirements are stringent, and challenged measures often satisfy the specifications of the relevant paragraph of article XX but fail to satisfy those of the *chapeau*, typically because they are applied in a discriminatory manner (with exemptions for some products not linked to the declared regulatory purpose).¹⁶⁷ As noted above (Part IIB1), the WTO Appellate Body appears to have adopted a slightly more flexible approach in more recent cases regarding the connection between any discrimination and the declared objectives under article XX, potentially allowing greater recognition of the twin environmental and health objectives of holistic dietary guidelines. Nevertheless, a challenged measure that includes discrimination or exemptions that undermine the health or environmental objectives (eg the inclusion in dietary guidelines of recommendations to consume some local vegetables that are grown in greenhouses, while all imported vegetables grown in greenhouses are disfavoured) will be difficult to defend under the *chapeau*.

¹⁶⁰ WTO Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*, WTO Doc WT/DS58/AB/RW (circulated 22 October 2001, adopted 21 November 2001) [130]. See also Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (Cambridge University Press, 2003) 269.

¹⁶¹ See, eg, Appellate Body Report, *US – Shrimp*, above n 154 [130].

¹⁶² *Vienna Convention on the Law of Treaties*, opened for signature 22 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

¹⁶³ See, eg, WTO Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WTO Doc WT/DS379/AB/R (circulated 11 March 2011, adopted 25 March 2011) [312]–[313].

¹⁶⁴ Appellate Body Report, *EC – Hormones*, above n 90 [121].

¹⁶⁵ *Ibid* [125].

¹⁶⁶ *Ibid* [123] (emphasis in original). See also Panel Reports, *EC – Approval and Marketing of Biotech Products*, above n 91, [7.88]–[7.89].

¹⁶⁷ See, eg, Appellate Body Report, *Brazil – Retreaded Tyres*, above n 64 [228]; WTO Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc WT/DS285/AB/R (circulated 7 April 2005, adopted 20 April 2005) [371].

B *Discouraging Over-consumption of ‘Unhealthy’ Foods: An Unlikely IIA Breach*

Holistic dietary guidelines may discourage over-consumption of ‘unhealthy’ foods such as soft drinks, red meat (especially processed or preserved meats), and ‘ultra-processed’ foods. Such discouragement may take various forms, such as tax disincentives (or, conversely, tax incentives for healthier products), product or ingredient bans (eg a prohibition on added trans fats), labelling requirements (eg ‘traffic light’ labelling), and education or information campaigns. These kinds of measures may have implications under international trade law or international investment law. Here, we consider some of the possible investment law implications with respect to three key obligations: non-discrimination, expropriation, and fair and equitable treatment.

1 *Non-discrimination*

Non-discrimination in international investment law corresponds broadly to non-discrimination in WTO law, except that the comparators are different. Pursuant to the national treatment obligation, for example, whereas GATT article III:4 addresses less favourable treatment of imported compared to like domestic products, modern IIAs often address less favourable treatment of foreign compared to domestic investors (or investments) in like circumstances. For example, under the *Australia–United States Free Trade Agreement* (‘AUSFTA’) (which contains investment obligations but no ISDS mechanism):

Each Party shall accord to investors of the other Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.¹⁶⁸

Unlike in the WTO context, where the Appellate Body has rejected the relevance of regulatory purpose in the determination of whether given domestic and imported products are like, investment treaty tribunals have scope to take account of regulatory purpose in assessing whether relevant foreign and domestic investors are ‘in like circumstances’. For example, if a foreign investor grows vegetables in a greenhouse and a domestic investor grows them in a field, even if the vegetables produced are physically indistinguishable, a tribunal might conclude that the two investors are not in like circumstances with respect to a dietary guideline discouraging consumption of greenhouse-grown vegetables, to the extent that evidence supports the environmental distinction between these products. Some tribunals have adopted such approaches to the meaning of ‘like circumstances’, although some uncertainty remains regarding the nexus required between the purpose and the chosen measure.¹⁶⁹ One reason for

¹⁶⁸ *Australia–United States Free Trade Agreement*, signed 18 May 2004 (entered into force 1 January 2005) (‘AUSFTA’) art 11.3.1 (emphasis added).

¹⁶⁹ See, eg, *Pope & Talbot v Canada*, NAFTA ch 11, UNCITRAL, Award on the Merits of Phase 2 (10 April 2001) [78]. See also Nicholas DiMascio and Joost Pauwelyn, ‘Non-discrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?’ (2008) 102 *American Journal of International Law* 48, 72–75.

this apparently greater willingness to accommodate policy space at this earlier stage of the analysis may be that most IIAs do not include a general exception akin to GATT article XX.¹⁷⁰ Reforms in some newer treaties also codify this approach to ‘like circumstances’, which has the effect of increasing certainty regarding tribunals’ approaches to this question. For example, a footnote in the investment chapter of the *Trans-Pacific Partnership* (‘TPP’) as signed in February 2016 provides:

For greater certainty, whether treatment is accorded in ‘like circumstances’ under Article 9.4 (National Treatment) or Article 9.5 (Most-Favoured-Nation Treatment) depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives.¹⁷¹

Regional or international evidence and guidance concerning distinctions between different types of food products on health grounds¹⁷² is likely to assist in buttressing a host state’s health-based distinctions between products. However, if the ‘like circumstances’ requirement is met, claimants may find it much easier under investment law to establish less favourable treatment than in the WTO.¹⁷³ This is because, with a more individualised and less competition-based focus, the claimant does not need to establish that foreign investors were predominantly burdened by the measure; the claimant needs to show only that it was treated less favourably.¹⁷⁴ Thus, for example, if just one foreign investor growing vegetables in a greenhouse was regarded as being in like circumstances to just one domestic investor growing vegetables in a field, this could well constitute less favourable treatment in the context of the national treatment obligation under many IIAs.

2 Expropriation

A fundamental obligation in international investment law is that states may engage in expropriation only if certain conditions are met. This obligation was originally designed to protect investors from governments nationalising their factories, for example.¹⁷⁵ However, IIAs today generally encompass not only direct expropriation or taking of ownership in this manner but also indirect expropriation via regulations. A high threshold applies to indirect expropriation, which entails a substantial deprivation of value, use or enjoyment of the investment.¹⁷⁶ Banning or placing significant burdens on a product (such as bottled water, soda, or ultra-processed food) that happens to be produced in the territory of the regulating state by

¹⁷⁰ See, eg, *Bilcon v Canada*, PCA Case No 2009-04, UNCITRAL, Award on Jurisdiction and Liability (17 March 2015) [723].

¹⁷¹ *Trans-Pacific Partnership*, text released following legal review 26 January 2016, signed 4 February 2016 (not in force) (‘TPP’) ch 9 n 14 (emphasis added).

¹⁷² See, eg, WHO/PAHO, *Pan American Health Organization Nutrient Profile Model* (PAHO, 2016); Codex, *Guidelines for Nutrition and Health Claims*, above n 103.

¹⁷³ See, eg, Jürgen Kurtz, ‘The Merits and Limits of Comparativism: National Treatment in International Investment Law and the WTO’ in Stephan W Schill (ed), *International Investment Law and Comparative Public Law* (Oxford University Press, 2010) 266.

¹⁷⁴ See, eg, DiMascio and Pauwelyn, above n 169, 82; Diebold, above n 134, 844.

¹⁷⁵ See, eg, Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International, 2009) 18, 24.

¹⁷⁶ See, eg, *Philip Morris v Uruguay*, Award, above n 57 [192].

a foreign investor may have a substantial negative impact on the investor's business. Nevertheless, the case law on expropriation leaves some regulatory space for genuine health regulations.

For example, the tribunal in *Philip Morris v Uruguay* unanimously found no expropriation arising from either of the challenged measures: the 80/80 regulation (requiring graphic health warnings covering 80 per cent of the front and back of cigarette packages);¹⁷⁷ and the single presentation requirement ('SPR') (allowing only one product variant per brand, eg Marlboro Red and not also Marlboro Blue).¹⁷⁸ The tribunal maintained that a loss of profits does not amount to expropriation if significant value remains in the business, and that in any case the measures did not involve expropriation because they were a valid exercise of Uruguay's police powers under customary international law.¹⁷⁹ Although another tribunal might not have followed this approach, this reasoning highlights the nuances and inherent flexibilities that may be built in to the understanding of investment obligations even in the absence of explicit clarifications or exceptions.

This decision also holds more direct lessons for holistic dietary guidelines. In reaching its conclusions on expropriation, the tribunal emphasised that the challenged measures were directed at fulfilling Uruguay's legal obligations under domestic and international law, including the *WHO FCTC*.¹⁸⁰ This emphasis demonstrates the importance of international instruments and treaties in defending national public health measures. A treaty centred on diet-related NCDs, and international guidelines and standards regarding sustainable healthy diets, may thus assist in providing evidence to support national approaches to such matters.

The tribunal also stated that, '[p]articularly in an industry like tobacco, but also more generally, there must be a reasonable expectation of regulation'.¹⁸¹ We return to the question of 'legitimate expectations' below, in the context of the fair and equitable treatment obligation. However, also in the context of expropriation, host states are more likely to face difficulty in international investment law if they make direct promises to individual foreign investors about future regulation or the protection of their business, or even if they make more general promises to investors at large about regulatory approaches. States can protect themselves to some extent by making clear that they intend to engage in progressive regulation to address NCDs, including through measures targeting unhealthy diets. Such a stance may be communicated through explicit public statements as well as participation in international negotiations or efforts to develop relevant standards or guidelines.

Rather than relying on tribunals invoking the customary doctrine of police powers, treaty reforms can also assist in ensuring appropriate policy space under international investment law. Such reforms can be adopted in the course of negotiating new treaties and in revising existing treaties, as occurred recently through amendments agreed by Australia and Singapore to their PTA. For example, these amendments added the following clarification to the expropriation obligation: 'Non-discriminatory regulatory actions by a Party that are designed and applied to

¹⁷⁷ Presidential Decree No 287/009 (15 June 2009).

¹⁷⁸ Uruguayan Ministry of Public Health, Ordinance 514 (18 August 2008).

¹⁷⁹ *Philip Morris v Uruguay*, Award, above n 57 [286]–[287].

¹⁸⁰ *Ibid* [302].

¹⁸¹ *Ibid* [269].

protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriation, except in rare circumstances'.¹⁸² Some IIAs provide even greater protection to host states' regulatory autonomy by excluding the words 'except in rare circumstances'.¹⁸³

3 Fair and Equitable Treatment

Two relevantly recent successful ISDS claims against Canada for violation of the fair and equitable treatment ('FET') obligation in connection with environmental matters have highlighted the potential breadth of this obligation and the risks it creates for host states apparently engaging in legitimate regulation for policy purposes. In 2015, the majority of the tribunal in *Bilcon v Canada* found that Canada had breached its FET obligation under the investment chapter of the *North American Free Trade Agreement* ('NAFTA')¹⁸⁴ in rejecting a development project on environmental grounds.¹⁸⁵ In dissent, Professor Donald McRae described this decision of the majority as 'not only an intrusion into the way an environmental review process is to be conducted, but also an intrusion into the environmental public policy of the state'.¹⁸⁶ Again, in 2016, a tribunal found that Canada had breached the NAFTA FET treatment standard through conduct relating to Ontario's moratorium on offshore wind power developments,¹⁸⁷ which Canada argued 'fell within the legitimate policy-making power of the Government of Ontario to regulate in the public interest'.¹⁸⁸

The outcome in *Philip Morris v Uruguay* was different. The tribunal unanimously found no FET breach arising from the 80/80 regulation, noting with reference to the *WHO FCTC* and its implementing guidelines that 'the principle of large health warnings is internationally accepted; it is for governments to decide on their size, and they are encouraged to require health warnings of 50% or more'.¹⁸⁹ The tribunal described the 80/80 regulation as 'a reasonable measure adopted in good faith to implement an obligation assumed by the State under the FCTC'.¹⁹⁰

¹⁸² *Singapore–Australia Free Trade Agreement*, signed 17 February 2003 (entered into force 28 July 2003), as amended 13 October 2016 (not yet in force), annex 8-A, [3(b)] (footnote omitted).

¹⁸³ See, eg, *Agreement Establishing the ASEAN–Australia–New Zealand Free Trade Area*, signed 27 February 2009 (entered into force 1 January 2010), as amended by the *First Protocol to Amend the Agreement Establishing the ASEAN–Australia–New Zealand Free Trade Area*, signed 26 August 2014 (entered into force 1 October 2015), annex on expropriation and compensation, [4]; *Malaysia–Australia Free Trade Agreement*, signed 22 May 2012 (entered into force 1 January 2013), annex on expropriation, [4]; Model Text for the Indian Bilateral Investment Treaty: Bilateral Investment Treaty between the Government of the Republic of India and ___ (December 2015) art 5.5.

¹⁸⁴ *North American Free Trade Agreement*, signed 17 December 1992 [1994] CTS 2 (entered into force 1 January 1994) ('NAFTA').

¹⁸⁵ *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc v Canada*, PCA Case No 2009-04, UNCITRAL, Award on Jurisdiction and Liability (17 March 2015) [592], [600], [604].

¹⁸⁶ *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc v Canada*, PCA Case No 2009-04, UNCITRAL, Dissenting Opinion of Professor Donald McRae (10 March 2015) [49].

¹⁸⁷ *Windstream Energy LLC v Canada*, PCA, UNCITRAL, Award (27 September 2016) [515(b)].

¹⁸⁸ *Ibid* [7].

¹⁸⁹ *Philip Morris v Uruguay*, Award, above n 57 [412].

¹⁹⁰ *Ibid* [420].

This aspect of the decision reinforces the significance of international health instruments in supporting domestic measures challenged in ISDS. Such instruments can help address the common underlying question (as under GATT article XX) of whether the regulating state is acting in bad faith by using public health as a cover for a measure that is actually intended to protect local or domestic industries over foreign industries. Regardless, any aspect of the design or application of a measure that suggests such hidden interests may create problems for the defence under either WTO law or international investment law. For example, if the line drawn between low fat, /salt, /sugar and high fat, /salt, /sugar foods, or otherwise between targeted and non-targeted products, happens to align with practical distinctions between imported or foreign and domestic products and producers, this alignment might create suspicion.

In relation to the SPR, the majority found no FET breach, taking account of amicus curiae briefs submitted by the WHO and the Pan American Health Organization.¹⁹¹ The majority accepted the relationship between the SPR and *WHO FCTC* obligations regarding misleading labelling and also suggested that Uruguay did not need to conduct additional studies instead of relying on the evidence-based *WHO FCTC* and its implementing guidelines, given its ‘limited technical and economic resources’.¹⁹² Whereas the majority recognised the SPR as ‘an attempt to address a real public health concern’ and ‘that the measure taken was not disproportionate to that concern and that it was adopted in good faith’,¹⁹³ Mr Gary Born in dissent considered the SPR both over-inclusive and under-inclusive and was troubled by the limited consultation and consideration conducted in developing this measure.¹⁹⁴

Although Uruguay succeeded in this case whereas Canada did not in the cases mentioned above, the existence of a strong dissent in the Uruguay dispute highlights the uncertain nature of the FET obligation and its potential interference into legitimate regulation. The difference between the approaches of the majority and the dissenting arbitrator in *Philip Morris v Uruguay* can at one level be understood as a different approach to the standard of review, ie the level of deference to be accorded to governments, even though they articulated the standard in similar terms.¹⁹⁵ The case indicates how vague the FET obligation is and how different arbitrators can apply it in very different ways. One obvious way to remedy this uncertainty is through treaty clarifications, which have already been implemented in many more modern treaties. For example, to link the FET obligation explicitly to the customary international law minimum standard of treatment¹⁹⁶ may assist in reining in more expansive definitions. An exhaustive list of FET breaches as found in a few treaties¹⁹⁷ may also assist in appropriately narrowing the scope of the obligation.

¹⁹¹ Ibid [391], [407].

¹⁹² Ibid [393], [396], [401], [404].

¹⁹³ Ibid [409].

¹⁹⁴ Ibid Concurring and Dissenting Opinion [108], [158], [172]. Mr Born also dissented on the question of denial of justice.

¹⁹⁵ *Philip Morris v Uruguay*, Award, above n 57 [399], [418] cf Concurring and Dissenting Opinion [137], [144].

¹⁹⁶ See, eg, AUSFTA above n 168, art 11.5.1, annex 11–A.

¹⁹⁷ See, eg, *Comprehensive Economic and Trade Agreement between Canada and the European Union*, signed 30 October 2016 (not yet in force but provisionally applied in part) (‘CETA’) art 8.10.2; EU, *Transatlantic Trade and Investment Partnership* ch II proposal (12 November 2015) art 3.2.

Some treaties also limit the role of ‘legitimate expectations’ of investors in the FET obligation,¹⁹⁸ although arguably such expectations should play no role in this context at all. The use by some tribunals of the notion of ‘legitimate expectations’ again shows the importance of host states taking care in their statements to investors to avoid expectations of particular levels of profit or regulation. For example, although Canada successfully defended its courts’ approaches to patent law against an ISDS claim regarding pharmaceuticals in *Eli Lilly v Canada*, the tribunal would have considered whether a breach of the claimants’ ‘legitimate expectations’ could found an FET breach had the claimants been able to establish a ‘dramatic change’ in this law.¹⁹⁹

In sum, the outcome and majority reasoning regarding the FET obligation in *Philip Morris v Uruguay* provide comfort in relation to a successful defence of holistic dietary guidelines supported by international standards, a solid evidence base, and careful regulatory development. However, it and other investment treaty arbitrations focusing on the FET standard also present this obligation as the least predictable and most risky for regulating states, in the absence of more modern treaty clarifications.

IV CONCLUSION

Preferences for particular products under holistic dietary guidelines based on health objectives create less of a problem than environmental objectives in terms of the initial WTO breach of national treatment obligations under the GATT 1994. Distinctions between food products based on their health attributes will tend to be linked to their physical characteristics such as nutritional content. In contrast, non-product-related PPMs distinguished on the basis of their environmental impact may not be as easily assimilated into the traditional likeness analysis to show that the resulting products are not alike, given the Appellate Body’s refusal to address regulatory purpose per se as a distinguishing factor in that analysis. In the absence of progressive development of the Appellate Body’s approach to regulatory purpose or PPMs, separate from the traditional criteria of likeness, distinctions based on these kinds of environmental concerns may have to be justified instead under the general exceptions in GATT article XX, at least where the distinctions disproportionately burden imported products.

Under the general exceptions in GATT article XX, scientific evidence informing distinctions drawn between food products on the basis of their health or environmental impact will be important. Such evidence may be developed domestically in the respondent member or another country, or developed in an international forum. International guidelines, treaties or other international instruments reflecting a multilateral or common understanding of health and environmental aspects of the food in question may also assist in justifying measures under article XX. Explicit exceptions or exclusions for some or all domestically produced products (or products imported from only some countries) are likely to be viewed with particular suspicion in the absence of a demonstrable link to the health and/or environmental objectives being pursued.

¹⁹⁸ CETA, above n 197, arts 8.9.2, 8.10.4.

¹⁹⁹ *Eli Lilly & Company v Canada*, UNCITRAL Case No UNCT/14/2, NAFTA ch 11, Final Award (16 March 2017) [380]–[381].

As in the WTO context, *WHO FCTC*-type treaties and other international instruments and evidence may be helpful in supporting a host state's defence of its holistic dietary guidelines or associated measures under international investment law. Host states that engage in extended consultation and detailed investigation of proposed measures and alternatives, including evidence gathering, will also be able to defend ISDS claims better. In addition, international investment law demonstrates the importance of whole of government awareness of the impact of statements to the public, industry, or individual investors about future regulation and business potential. States need to be cautious of making promises about expectations of profits or the regulatory landscape and instead need to signal their intention to protect public health, including through a range of regulatory measures that may include dietary guidelines and incentives for consumers to adopt healthier and more sustainable diets. If non-discriminatory measures discouraging over-consumption of unhealthy products are adopted against a background of scientific or other multilateral consensus and a history of health-directed regulation rather than promises of non-regulation, they are unlikely to breach international investment obligations.