*In Search of Healthy Trade: Recent Contributions to the Trade and Public Health Debate*

Gabriel Alexander Baumstark, *The Human Right to Health and its Relation to the WTO* (Boorberg 2016); Benn McGrady, *Trade and Public Health: The WTO, Tobacco, Alcohol, and Diet* (Cambridge 2011); Geert Van Calster and Denise Prevost (eds), *Research Handbook on Environment, Health and the WTO* (Edward Elgar 2013)

This year, the United Nations will stage the third High-Level Meeting on the prevention and control of Non-Communicable Diseases, at which Heads of State and Government will conduct a comprehensive review of the progress achieved in reducing the risk of dying prematurely from non-communicable diseases (NCDs). The prevention and control of NCDs has become a priority, not only for the World Health Organization (WHO) but also for the United Nations (UN) system more broadly. NCDs are recognised as a major challenge for sustainable development, and targets to combat and reverse their spread are included within the UN Sustainable Development Goals (SDGs).[[1]](#footnote-1) This meeting not only marks the continuing importance given to NCDs and public health within the international community, but also the acknowledgment that public health protection lato sensu is not only something that States *should* pursue but rather something that States *must* pursue.[[2]](#footnote-2) The shift from the desirable to the obligatory makes the relationship between the pursuit of health policies and the pursuit of free(er) trade and their attendant legal regimes especially relevant.

As is the case with other essential public policy objectives today, world trade law plays a key role, albeit often framed in negative terms (i.e. trade law’s challenge to public health protection, or the restrictions imposed by world trade law on the regulatory autonomy of States).[[3]](#footnote-3) In the case of public health policies, in particular, trade law has increasingly been viewed as a barrier to effective government regulation, whether by restricting Members’ ability to tackle risk factors of non-communicable diseases such as tobacco, alcohol, and sugar or fat, or limiting the ability of Members to access mitigating tools needed to combat communicable and non-communicable diseases through meaningful access to medicines.[[4]](#footnote-4)

The impact of trade law on public health policies has become particularly acute as the international community increasingly accepts its obligations in responding to public health challenges, and the complex nature that these responses entail. The complexity and nuances needed in governmental approaches necessarily imply an overlap with trade obligations as Members use all the tools at their disposal, including action from across government departments and taking many forms, whether fiscal, regulatory, educational or others.[[5]](#footnote-5)

While the ‘trade and…’ literature of the early WTO years looked to the relationship of trade law and public health, it was heavily influenced by the experiences and expectations of the Uruguay Round, viewing trade and health through the nexus of sanitary and phytosanitary measures and the tension between increased liberalisation of trade in (particularly agricultural) goods and the protection of healthy populations.[[6]](#footnote-6) Thus rather than viewing individualised health (that is, health of people rather than their wider environment) as the focus, much of the health aspects of the linkage literature focussed on health and environment, or alternatively, the interface between health and intellectual property and the role of TRIPS within health policies.[[7]](#footnote-7) Since then, however, the increasing awareness of public health challenges within trade spheres (and equally importantly, the trade awareness within the public health community), the literature has shifted, moving toward a more detailed application of trade law in the public health context. Attention has been paid to the nature of labelling requirements, the rules relating to taxes relating to product contents in terms of fat, sugar, or salt, or the ways in which tariff bindings may have specific repercussions for members that are net importers of food.[[8]](#footnote-8) This review examines three such contributions, each of which takes a very different approach to contributing to this accounting of the relationship between trade and health. What we see in these works is a common challenge, expressed and examined through different lenses, reflecting different approaches that arise from both the trade and public health disciplines.

The first of these, Ben McGrady’s monograph *Trade and Public Health: The WTO, Tobacco, Alcohol, and Diet*, has set the agenda for trade law and public health work for some years.[[9]](#footnote-9) McGrady’s book marks a generational shift in the field, framing WTO law not in contradistinction to, or tension with, ‘non-trade’ law such as human rights, but rather but examining the operation of WTO law when viewed from a public health perspective. By moving away from the confrontational, dialectical relationship which became standard in the early days of trade law literature, McGrady permitted a rigorous analysis on trade law’s own terms of the public health challenges to trade law and the trade law challenges to public health.[[10]](#footnote-10)

The scope of the book is carefully delimited, he focusses on the three key risk factors for non-communicable diseases (tobacco, alcohol, and diet) and concentrates his study on specific elements of WTO law. McGrady identifies the key limitations and carve-outs of his project early on – he does not examine regional trade agreements (whether free trade areas or customs unions) nor does he analyse the intellectual property dimensions of trade law’s overlap with public health objectives (most notably through TRIPS and access to medicines). While much work has been done on the latter,[[11]](#footnote-11) it is surprising that seven years on from the publication of the book, there is less material on regional agreements and public health outside of the European context than might be expected.[[12]](#footnote-12)

In terms of substance, McGrady prioritises three key risk factors for non-communicable diseases: tobacco, alcohol, and diet. Using these three subjects he examines the extent to which the regulatory autonomy preserved by WTO law for members to regulate public health issues is balanced with the objectives of the WTO. In doing so he walks the reader through an array of WTO legal issues that can play a role in public health regulation of these risk factors from the requirements on necessity under Article XX(b) GATT (strongly informed by the, then recent, *Brazil -Tyres* dispute) to the possible scope of a GATS claim in response to the introduction of marketing restrictions on harmful products. Since the publication of the book the law has moved on in some areas: attention is less focussed on SPS measures for questions relating to dietary restrictions and food labelling and more on TBT, and the arrival of the three landmark TBT disputes of *US – COOL*, *US – Clove Cigarettes*, and *US – Tuna (II)* have all provided greater clarity on the interpretation of the TBT Agreement. *EU – Seals* has also informed our understanding of the *chapeau* of Article XX and, most recently (currently subject to appeal), are the panel reports in *Australia –Plain Packaging Requirements* which has developed the case-law on both TRIPS and Article 2.2 TBT. Nonetheless, the issues identified by McGrady, and the way in which he approaches them are still the starting point for any WTO lawyer seeking to consider the impact of world trade law on public health regulation.

It is important to note, however, that in *Trade and Public Health* McGrady does not merely present the law descriptively but also makes a number of claims, contentious even now, over the appropriate scope of the obligations under the covered agreements. For example, in his analysis of the scope of Annex A of the SPS Agreement and the extent to which a measure constitutes an SPS measure, he takes a broad interpretation, which would include the regulation of transfats, for example.[[13]](#footnote-13) This falls in line with the GMO panel report’s willingness to accept genes as ‘additives’ for the purposes of interpreting Annex A(1) and, while defensible, now that the TBT Agreement has taken what some might consider its proper place as the primary legal instrument to discipline technical barriers relating to content of goods, there is no longer a justification for such contortions of legal reasoning.[[14]](#footnote-14) In practice, the legal landscape has changed considerably in the last seven years – it is a testament to the legal scholarship presented that it still merits close reading.

A central theme running throughout the book is the importance of the (in)determinacy of rules, and how these rules empower or limit the ability of members to regulate on public health matters while ensuring that the intended benefits of managed trade liberalisation are not undermined. This nuanced approach allows McGrady to sidestep the customary discussion over ‘regulatory chill’ as the *bête noire* of international economic law.[[15]](#footnote-15) Rather than viewing any restriction as necessarily bad, instead he looks to the advantages of trade while acknowledging that increased market access has played a role in the worsening of health outcomes for some members as increased availability of nutrient poor foodstuffs undermines diet, reduces the price of tobacco and alcohol. This move adds a depth to a discussion that is oftentimes hampered by the uncritical acceptance of regulatory chill as a catch-all term for the influence of law in ways we may not find palatable: As a textual medium, all law is necessarily indeterminate, producing penumbral cases where meaning is unclear.[[16]](#footnote-16) While there is a clear demand (particularly from the view of the policy-maker or public health actor) to have a reasonable sense of the content of legal obligations and their predictability, it is commonly understood that the nature of law is to *prospectively* restrict action.[[17]](#footnote-17) In practice, ‘regulatory chill’ becomes short-hand for the influence of law prospectively restricting action in ways we deem unreasonable or undesirable. Thus, a State that does not legislate for the unilateral imposition of safeguard measures sans an agency investigation is acting within the remit of WTO law, while a member that does not introduce a differential tax on the basis of the salt content of processed food is the subject of regulatory chill. McGrady’s study, however, avoids the dichotomisation of trade law and public health objectives by noting the importance of incorporating ‘health protection’ while rejecting ‘health protectionism’.[[18]](#footnote-18)

Of the areas of overlap between public health and trade law identified by McGrady, a number have been subsequently examined in Van Caster and Prévost’s *Research Handbook on Environment, Health and the WTO*. This edited collection extends beyond the trade and public health focus of this review, taking on broader issues including health but also the environment *lato sensu*.[[19]](#footnote-19) It offers an impressive array of contributions covering all the expected chapters on issues in trade law and health, but also more speculative contributions that are some of its true highlights. For example, Voon’s chapter on risk factors for NCDs and WTO law,[[20]](#footnote-20) identifies the ways in which WTO law can be used to ‘buttress rather than to undermine Members’ health policies.’[[21]](#footnote-21)

The Handbook also provides a genuine mix between broad brushstrokes pieces which take common themes in trade and present them in an original light, building on recent case law. Regan’s chapter on regulatory purpose in light of the *US – COOL*, *US – Clove Cigarettes*, and *US – Tuna (II)* cases is especially strong, challenging the siren’s call of economic analysis to resolve disputes under WTO law.[[22]](#footnote-22)

Other contributions treat very specific issues that rarely get the attention they deserve. For example, Echol’s chapter on regulatory equivalence in SPS measures is a critical topic, examining how trade law and public health concerns interact in more complex FTAs and their regulatory cooperation structures.[[23]](#footnote-23) Similarly, in Epps’ chapter on premarket approval systems and the systemic and institutional challenges they present to the daily practice of trade under trade law regimes she examines a topic that most general works of trade law fail to acknowledge, less treat in detail. Returning to McGrady’s focus on determinacy in the law so that public health actors might be able to have a sense of the legal status of a proposed policy, Atik’s contribution is particularly telling, taking a different tack, instead acknowledging and making explicit what he sees as the ‘illusions’ of the SPS Agreement, and the difficulty with providing clear and certain rules in such matters.[[24]](#footnote-24)

Gruszcynski’s chapter on the standard of review applied by panels merits particular attention, as while this is left to the end of the collection, in practice, standard of review is the core underlying challenge behind many of the issues discussed. The extent to which a panel will examine the decision of a Member, the deference it will accord the decision-making agencies on their use and treatment of evidence, the extent to which the available alternatives will be rigorously considered, at its core these are questions over standard of review. While Gruszcynski’s chapter focusses mostly on the SPS Agreement, questions similarly arise in the context of TBT. It might be suggested that one could also build on the analysis by conducting a comparative examination of the treatment of standard of review by panels in trade defence instrument disputes also.[[25]](#footnote-25) When examined in light of the quest for an application of trade law that maximises its benefits while minimises its potential negative impacts on health policy, the degree to which panels are able to monitor Members’ regulatory behaviour while still permitting them sufficient autonomy is a consistent theme in this volume.

As the *Research Handbook on Environment, Health and the WTO* provides a broad range of perspectives, more specifically targeted to each instant case or topic, it is also able to cover more of those issues that other works (such as McGrady’s) have had to exclude. Notably, the overlap with FTAs identified in some of the chapters noted above, but also Mercurio’s contribution on TRIPS and access to medicines which has long been the most present element of WTO law within debates in the public health community.[[26]](#footnote-26)

The third book, Baumstark’s *The Human Right to Health and its Relation to the WTO* makes a very different type of contribution to the work in the field. We have seen how the literature has moved from a general ‘trade and…’ focus on the environment broadly understood, to an increased attention to the specific priorities of public health regulation, to then increasingly innovative and speculative work on challenges at the sharp end of health regulation’s interaction with trade law. In the meantime, in parallel to this specialisation of public health and trade research, has come a deeper appreciation of the overlap between the rights dimensions of trade and health. This was particularly visible in the novel contributions of authors such as Hestermeyer (bringing the right to access to medicines and the TRIPS into a more holistic understanding of the WTO regime) [[27]](#footnote-27) and Joseph (examining the wider relationship between trade law and human rights)[[28]](#footnote-28), seeking to identify the increasing importance of the right to health in human rights terms, with both reflecting what is now becoming a recognised human rights approach to public health regulation.[[29]](#footnote-29)

It is in this tradition that Baumstark’s book, *The Human Right to Health and its Relation to the WTO*, is based. The book is based on the author’s doctoral thesis, and it still bears the hallmarks of a thesis: it is clearly structured, logically presented, carefully communicated, and highly accessible. It is also, however, principally responsive to the work of those that have gone before. As such, it presents a good review of the core literature in the field, and engages sufficiently to move the discussion forward, albeit in a modest fashion – with the notable exception of the final chapter where the individualisation of health protection through the use of health impact assessments is raised. This is an innovative approach that would have benefitted from greater space within the book to explore further. No doubt it will be part of a future line of investigation but only coming late in the book and briefly it whets the appetite rather than provides a comprehensive account of the possibilities of such a system.

Though *The Human Right to Health and its Relation to the WTO* is lacking in some detail on the primary sources, preferring to point readers to established secondary sources, it is nonetheless an excellent resource for those seeking to enter the now increasingly diverse space of trade law and public health. The core concepts are conveyed clearly and concisely, and the author is able to communicate complex ideas in an accessible manner. These strengths are also visible in the positioning of the text as a work of public international law scholarship within which the WTO legal order and its relationship to the right to health sits. As such, Baumstark frames the human rights dimensions of the international legal order, the systemic public international law elements relating to custom and interpretative practices, and the primary rules of WTO law that overlap with health policy. It is not an easy task given the Venn diagram one could draw of ‘human rights and public health’, ‘human rights and the WTO’, ‘WTO and public health’, and indeed ‘WTO as a regime of public international law’ literature, and Baumstark does this with no shortage of skill.

The book is short, clear, and accessible in terms of cost (something academic writing is not well known for). As an introductory text, it is a welcome addition and, while not moving the ground of debate, it does an admirable job of bringing those wishing to enter the field up to speed and providing them with the basic conceptual tools with which to approach this developing sub-discipline.

In McGrady’s conclusion, he identifies indeterminacy of rules as a key challenge: the WTO texts are open to interpretation and it is only with the increased clarity provided by panels and the Appellate Body that we have been able to progressively approach a balance between the pursuit of health protection and the avoidance of health protectionism.[[30]](#footnote-30) Given the perilous current status of the Appellate Body, and the question marks this leaves over the WTO’s dispute settlement system as a whole, increased work by scholars in clarifying the law and providing glosses on key issues will be central.

While attention has recently shifted to the role of international investment law in public health protection policies (in particular since the Uruguay arbitration), the WTO still plays a key role in both empowering and providing certainty for members who will want to regulate to protect public health, as well as providing avenues for others to dissuade them. Rather than seeking dramatic legal reform which, given the WTO’s current status, seems unlikely in the near-to-medium future, comprehensive legal analysis and education is instead where the greatest good can be achieved. It is in seeking to build such a project that these works are signposts for continued research and investigation.

1. ‘Transforming Our World: The 2030 Agenda for Sustainable Development’, GA Res 70/1, UN Doc. A/Res/70/1 (25 September 2015). [↑](#footnote-ref-1)
2. See: Article 12 International Covenant on Economic, Social and Cultural Rights 1966 (993 UNTS 3); A Eide ‘The Right to Adequate Food as a Human Right’, (7 July 1987) E/CN.4/Sub.2/1987/23. A recent analysis is presented in T Voon & A Mitchell, ‘Community Interests and the Right to Health in Trade and Investment Law’, in E Benvenisti & G Nolte (eds), *Community Interests Across International Law* (OUP 2018). [↑](#footnote-ref-2)
3. This review will focus principally on trade law, though an increasingly detailed literature also exists with regard to the role of international investment law in the field of public health protection. [↑](#footnote-ref-3)
4. For a brief overview, see: WHO & WTO, ‘WTO Agreements and Public Health: A joint study by the WHO and WTO Secretariat’ (2002) available at < http://www.who.int/media/homepage/en/who\_wto\_e.pdf?ua=1> accessed 1st September 2018. For a critical response: R Howse, ‘The WHO/WTO Study on Trade and Public Health: A Critical Assessment’, 24 *Risk Analysis* 4 (2004) 501. [↑](#footnote-ref-4)
5. See paras 33-42, Political declaration of the High-level Meeting of the General Assembly on the Prevention and Control of Non-communicable Diseases, as adopted by GA Res 66/2, UN Doc. A/Res/66/2 (24 January 2012). [↑](#footnote-ref-5)
6. Note the volume of literature commenting on, for example, the beef hormones saga. [↑](#footnote-ref-6)
7. It is interesting that in a special issue on Health and the WTO of this journal in 2002, the contributions focussed principally on IP protection, with a prescient exception examining the tacit deference demonstrated by the WTO on health matters: M Gregg Bloche, ‘WTO Deference to National Health Policy: Toward an Interpretative Principle’ *JIEL* (2002) 825. [↑](#footnote-ref-7)
8. On tariff bindings and scheduled commitments, the commonly discussed example of Samoa is instructive where Samoa’s desire to restrict the import of turkey tails (meat cuts particularly high in fat) to combat obesity was challenged by exporting Members. See: Report of the Working Party on the Accession of Samoa to the World Trade Organization, WT/ACC/SAM/30 (1 November 2011), paras 102-106.

on the WTO accession negotiations of Samoa [↑](#footnote-ref-8)
9. B McGrady, *Trade and Public Health: The WTO, Tobacco, Alcohol, and Diet* (CUP 2011) [↑](#footnote-ref-9)
10. The seminal critique of the oppositional view in linkage debates was not published until 2007: A Lang, ‘Reflecting on “Linkage”: Cognitive and Institutional Change in The International Trading System’, 70 *Modern Law Review* 4 (2007) 523. [↑](#footnote-ref-10)
11. Paradigmatically: H Hestermeyer, *Human Rights and the WTO: The Case of Patents and Access to Medicines* (OUP 2007). [↑](#footnote-ref-11)
12. For example: A Garde, *EU Law and Obesity Prevention* (Kluwer 2010); A Alemanno & A Garde, *Regulating Lifestyle Risks: The EU, Alcohol, Tobacco, and Unhealthy Diets* (CUP 2015); and a broader selection to be found in T Voon, A Mitchell, & J Liberman (eds), *Regulating Tobacco, Alcohol and Unhealthy Foods: The Legal Issues* (Routledge 2014). See also: D Gleeson & S Friel, ‘Emerging Threats to Public Health from Regional Trade Agreements’, 381 *The Lancet* 9876 (2013) 1507. [↑](#footnote-ref-12)
13. McGrady (n8) 178-180. [↑](#footnote-ref-13)
14. *EC–Biotech* (*European Communities)—Measures Affecting the Approval and Marketing of Biotech Products*, Panel Report (26 September 2006) WT/ DS291,292,293/R, para 7.301. [↑](#footnote-ref-14)
15. For accounts that question the strength of regulatory chill: SW Schill, ‘Do Investment Treaties Chill Unilateral State Regulation to Mitigate Climate Change?’, 24 *Journal of International Arbitration* 5 (2007) 469; C Tietje & F Baetens, ‘The Impact of Investor-State-Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership’, Study Prepared for the Ministry of Foreign Affairs of the Netherlands, (2014) 39-48, available at: <https://www.rijksoverheid.nl/documenten/rapporten/2014/06/24/the-impact-of-investor-state-dispute-settlement-isds-in-the-ttip> accessed 1 September 2018. For the most current nuanced discussion on the difficulties of examining regulatory chill: J Bonnitcha, L Poulsen, & M Waibel, *The Political Economy of the Investment Treaty Regime* (Oxford University Press 2017). [↑](#footnote-ref-15)
16. This is not to say that meaning is fundamentally indeterminate, merely that beyond a core of meaning, there will always exist a lack of perfect clarity in the communication of substance. See: T Endicott, *Vagueness in the Law* (Oxford University Press 2000) 9–15. [↑](#footnote-ref-16)
17. For two distinct but informative views on the importance of law’s impact over time: JD Ohlin, ‘Nash Equilibrium and International Law’ 23 *EJIL* 4 (2012) 915; P Allott, ‘The Concept of International Law’ 10 *EJIL* 1 (1999) 31. [↑](#footnote-ref-17)
18. B McGrady (n10) p26. In a similar vein see also: A Mitchell & T Voon, ‘Implications of the World Trade Organization in combating non-communicable diseases’ 125 *Public Health* (2011) 832. [↑](#footnote-ref-18)
19. The distinction between health and the environment is, of course, somewhat arbitrary given the close relationship between the two. [↑](#footnote-ref-19)
20. Chapter 13. [↑](#footnote-ref-20)
21. At p394. [↑](#footnote-ref-21)
22. Especially at p53ff [↑](#footnote-ref-22)
23. Clearly, from a UK perspective, this is of acute interest given the clear relevance for SPS coordination that is likely to feature strongly in any bilateral arrangement with trading partners but most especially the EU. [↑](#footnote-ref-23)
24. At p.138. [↑](#footnote-ref-24)
25. For example, R Becroft, *The Standard of Review in WTO Dispute Settlement : Critique and Development* (Edward Elgar 2012). [↑](#footnote-ref-25)
26. For an illustration, see the special issue referenced above at n6. [↑](#footnote-ref-26)
27. Above n9. [↑](#footnote-ref-27)
28. S Joseph, *Blame it on the WTO? A Human Rights Critique* (OUP 2013). [↑](#footnote-ref-28)
29. For a practical application of this shift, see: UNICEF, *A Child Rights-Based Approach to Food Marketing: A Guide for Policy Makers* (April 2018) available at <https://www.unicef.org/csr/files/A\_Child\_Rights-Based\_Approach\_to\_Food\_Marketing\_Report.pdf> accessed 1 September 2018. [↑](#footnote-ref-29)
30. B McGrady (n10) p288. [↑](#footnote-ref-30)