1. Introduction

1.1 INTRODUCTION

At the conclusion of the Uruguay Round in 1994, Members of the World Trade Organization (WTO) adopted the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement). The SPS Agreement stipulates rules that Members must follow when adopting and enforcing sanitary and phytosanitary (SPS) measures. These are measures adopted to protect humans, animals, and plants against risks arising from, *inter alia*, pests, additives, contaminants, toxins, or diseases. The SPS Agreement’s rules are intended to further its key objectives of ensuring that no Member should be prevented from adopting or enforcing measures necessary to protect human, animal, or plant life or health; and that the negative impacts of domestic SPS measures on trade are minimized. By these objectives, the SPS Agreement recognizes the important role played by both domestic health protection and trade liberalization in advancing global and domestic welfare.

Achieving both objectives is complicated by the fact that, even where there is no protectionist intent on the part of lawmakers when they adopt SPS measures, differences between countries in regulatory or standard-setting regimes can impede trade.¹ The SPS Agreement seeks to overcome this apparent conflict by recognizing the importance of health protection as a domestic regulatory objective and permitting trade-restrictive SPS measures where they are ‘necessary’ to protect health. This proviso is subject to a number of substantive and procedural rules regarding the SPS measures that countries may enact.

The SPS Agreement encourages Member countries to base their SPS measures on international standards, guidelines, or recommendations, where they exist.² Where countries wish to introduce or maintain SPS measures that result in a higher level of protection than would be achieved by measures based on the relevant international standards, guidelines, or recommendations, they must ensure that the SPS measure chosen ‘is applied only to the extent

² Article 3.1.
necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence’. Further, SPS measures must be based on an assessment of the risks to human, animal, or plant life or health. The implication of these provisions is that unless scientific justification can be provided for a trade-restrictive SPS measure, it will not be justifiable under the SPS Agreement, even if it is enacted with the genuine intention of protecting human, animal, or plant health. The rationale for this approach is that requiring scientific justification for standards that deviate from international norms makes it more difficult for countries to shelter domestic industries behind restrictive health regulations or to disguise protectionist strategies under the cloak of health regulations.

The SPS Agreement’s negotiators apparently believed that these scientific evidence requirements would make it a straightforward task to deal with conflict between health and trade by enabling WTO panels and the Appellate Body to determine when a measure is necessary. Once a determination of necessity is made, the Agreement allows health to be privileged over trade. However, the task is not always straightforward. Rather, there are a range of cases where it is difficult, if not impossible, to determine by any objective scientific standard whether or not a measure is necessary. In these cases, conflict between trade and health persists. It is in such cases that WTO panels and the Appellate Body face difficulties – both conceptual and factual – in balancing the competing objectives of health protection and trade liberalization. The difficulties are intensified where countries diverge in their scientific opinions, and where public opinion and scientific opinion are at odds.

The SPS Agreement’s reliance on scientific evidence as a benchmark to determine when measures are necessary to protect health has drawn much criticism from commentators and scholars. These critics tend to follow one of two strands of thought. The first strand (in the minority) is concerned with the integrity of the Agreement’s trade liberalization objectives. These critics contend that the use of a scientific benchmark allows Member countries too much discretion in their regulatory decision-making. They argue that ‘science’ should not be relied upon as a ‘neutral arbiter’ because it is neither objective nor politically untainted as is often presumed, but is in fact socially constructed. This view of science might conceivably lead to the conclusion

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3 Article 2.2.
4 Article 5.1.
7 See for example, Robert Hudec, ‘Science and “Post-Discriminatory” WTO
that the provisions requiring scientific justification fail to achieve the drafters’ goal of preventing protectionism.

In contrast, the second strand of thought finds that the provisions impose too much of a straitjacket on governments. Sykes, for example, suggests that the scientific benchmark represents undue hurdles for regulators who sincerely pursue objectives other than protectionism.8 Others are concerned with the SPS Agreement’s apparent exclusion of non-scientific justifications for measures, arguing that reliance on science is misplaced because it precludes any consideration of broad social, cultural, and ethical concerns.9 They consider that social factors such as public opinion should be regarded as a legitimate reason to restrict trade through SPS measures. Such arguments gain support from social science accounts of risk perception as well as trends towards greater public participation in public policy decision-making regarding risk.

These various criticisms raise the question of what factors influence domestic regulatory decision-making concerning SPS measures, and why there are regulatory differences between countries. It is axiomatic to note that regulatory measures differ between countries, even where the objective is the same (that is, the protection of the life and health of humans, animals, and plants).10 What is perhaps not so obvious is why such regulatory divergence exists. This book identifies a number of reasons for regulatory divergence, including the role played by ‘public sentiment’, a term adopted as shorthand for the public expression of cultural, social, individual, ethical, and/or political values and beliefs. Public sentiment often influences (directly or indirectly) regulatory decision-making in the face of risk and differs between countries for a wide variety of reasons, including underlying political, cultural, ethical, religious, and social circumstances.

1.2 AIMS AND LIMITATIONS

This book asks whether the SPS Agreement allows an appropriate balance to
be struck between conflicting domestic health protection and trade liberalization objectives. It takes stock of the voluminous literature on the subject and advances the discussion by focusing on difficult situations not yet fully contemplated either in the literature or by the WTO’s Dispute Settlement Body (DSB). These are situations where there is scientific uncertainty as to the existence of a risk and the necessity of the chosen regulatory measure, and those where public sentiment is an influencing factor demanding regulation at the national level.

The book’s central argument is that while aspects of the rationale underlying the SPS Agreement’s science-based framework are questionable, such an approach is the most appropriate means available of dealing with conflict between health and trade. It is argued that this conclusion is consistent with a normative position that recognizes the importance of both health protection and trade liberalization, but accepts that in some cases the welfare gains from trade should properly be foregone in order to protect health (including in some cases where there is lack of clarity as to the necessity of the SPS measures taken). The conclusion is in large part driven by a positive analysis of domestic regulatory decision-making which notes the potential for regulatory capture by domestic protectionist interests and the consequent importance of ensuring that decisions are made on a sound and principled basis. It is supported by an examination of decision-making regarding risk which finds that the science-based framework provides countries with more flexibility to respond to scientific uncertainties and public sentiment than many critics contend.

Having addressed the critics’ concerns surrounding the SPS Agreement’s science-based framework, it is argued further that if the WTO is to command legitimacy among the public, panels and the Appellate Body must take a principled approach to disputes that reflects the vital importance of health and carefully considers how it can be balanced against trade liberalization interests. It will be argued that such an approach has not been sufficiently evidenced to date, but will be particularly critical in cases where it is difficult to determine the necessity of a health protection measure, for example, where there is only a low probability of a risk eventuating, but the potential consequences are serious, or where there is genuine scientific uncertainty combined with strong public sentiment demanding regulation. Given the complexity and indeterminacy of science, the value of public sentiment, and importance of sovereignty issues, it is argued that panels should take a relatively deferential approach to the decisions of domestic regulatory agencies. However, deference cannot be total and still allow detection of protectionism and thus it is argued that panels should focus on reviewing the procedural integrity of a country’s decision-making rather than second-guessing their final scientific conclusions.

Some limitations must be noted at the outset. Hudec described the SPS
Agreement as ‘post-discriminatory’ because its scientific evidence requirements do not require proof of discrimination, but essentially call for an international tribunal to judge the rationality of a regulatory judgment at the national level.\textsuperscript{11} It is unlike the General Agreement on Tariffs and Trade (GATT) where discrimination (or some other violation of the Agreement) must be found before the regulating country is required to justify its actions under the exceptions found in Article XX. This, Hudec argued, is an extension of WTO oversight into regulatory areas not impacting trade, and the amount of information required to justify regulatory actions is therefore much higher than under the GATT regime where only a certain subset of measures is subject to such scrutiny.\textsuperscript{12}

The ‘post-discriminatory’ nature of the SPS Agreement is open to criticism on several fronts, including that it goes beyond the WTO’s mandate of promoting international trade and that the rules give foreign traders a higher set of legal rights than is given to the domestic producers with whom they compete.\textsuperscript{13} However, the book will not address this issue. Proceeding on the basis that political economy factors augur against reform of the post-discriminatory orientation of the SPS Agreement, it seeks to work within the current framework to suggest methods of interpretation that will provide countries with sufficient policy space to regulate to protect health while minimizing opportunities for protectionism.

Second, it is recognized that countries at unequal levels of development have different policy priorities and different levels of capacity to adopt or comply with SPS measures. Issues arising out of this reality will be acknowledged, but it is beyond the scope of the book to explore the problem in the full detail that it deserves.

1.3 ORGANIZATION

The book is organized as follows. The chapters in Part I provide an historical and factual background to the issues. Chapter 2 explains the linkage between health and international trade. Chapter 3 explores the extent to which health regulations have conflicted with international trade liberalization – both in the past and currently. It also describes efforts taken to allay this conflict through multilateral negotiations and discusses key aspects of the SPS Agreement. Finally, Chapter 4 identifies factors that point to likely future conflicts, thereby highlighting the importance of the questions raised in the book.

\textsuperscript{11} Hudec, supra note 7 at 2.
\textsuperscript{12} Ibid.
\textsuperscript{13} Ibid. at 3.
Part II establishes the normative basis which frames the book’s critique of the SPS Agreement’s science-based framework and its interpretation by panels and the Appellate Body. It does so by outlining the theoretical foundations underlying both international trade theory and domestic regulatory theory, and identifying situations where conflict between health and trade objectives persists despite the SPS Agreement’s tolerance of trade-restrictive measures where its requirements are met. The final chapter in Part II summarizes the normative basis that will be adopted throughout the remainder of the book. While acknowledging the value of both international trade liberalization and human, animal, and plant health, it suggests that in certain cases, panels and the Appellate Body ought to adopt a bias towards health protection where there is conflict or tension between the two.

As Perez observes, the power to strike out national health regulations has transformed the WTO into a key player in the global debate about risks. Part III explores aspects of this debate, beginning with a discussion of subsidiarity in which it questions at what level health regulations are most appropriately made, and asks whether one way in which conflict or tension between health and trade objectives might be avoided is by negotiating an end to regulatory differences through ‘regulatory harmonization’. It then investigates the rationale behind the Agreement’s science-based framework by examining regulatory decision-making in the context of risks to health, including the role of both scientific and non-scientific factors (including public sentiment).

Part IV begins by exploring criticisms of the SPS Agreement’s science-based framework and then seeks to counter these criticisms in a section entitled ‘validating the science-based approach’. This section sets out an approach which it is argued that panels and the Appellate Body should follow when reviewing domestic agency decisions. It then goes on to critique interpretation of the SPS Agreement by panels and the Appellate Body by reference to the suggested approach. It also considers decisions under the GATT in cases where the panel and/or Appellate Body’s analysis therein is relevant to interpreting the SPS Agreement.

Finally, in Part V, a conclusion sums up the arguments made in the book.
