6-1-2015

Obesity Prevention: Assessing the Role of State and Non-State Actors under International Law

Anna K. Sims
Obesity Prevention: Assessing the Role of State and Non-State Actors under International Law

Anna K. Sims*

Abstract

Obesity is a global epidemic affecting both the developed and developing world. Governments have instituted different policy measures to counter their citizens' increasing weight, and these measures are often incompatible with the international trade laws protected by the World Trade Organization. Scholars have tried to interpret the various international trade law treaties in ways that would legitimize those diet-related policies that are in tension with the international trade regime. Such efforts, though, are misdirected because of their potential to be ineffective and regressive. Instead, this Comment will propose that non-state actors that have prospered within the global free trade system—specifically corporations, such as Wal-Mart, whose revenues rival the GDP of many nations—may be best situated to help counteract the obesity epidemic.

TABLE OF CONTENTS

I. Introduction ............................................................................................................. 217
II. "Globesity" Is on the Rise ................................................................................... 218
III. International Trade Liberalization Is Fattening Us Up .................................. 219
IV. International Efforts to Combat Obesity Are Toothless ................................ 222
V. The Domestic Toolbox to Fight the Flab is Limited by WTO Law .............. 224
   A. Import Restrictions on Unhealthy Foods or Ingredients .......................... 225
      1. The SPS Agreement ...................................................................................... 226
      2. Import restrictions on unhealthy food based on food safety ................. 227

* J.D. Candidate 2016, The University of Chicago Law School. The author would like to thank Cliff Haimann, Mark Rohan, and Thomas Ginsburg for their helpful comments and feedback.
B. Nutrition Labeling ................................................................. 228
  1. The TBT Agreement ......................................................... 229
  2. Mandatory labeling in Chile ........................................... 230
  3. Voluntary labeling in the U.K. ......................................... 231
C. “Fat” Taxes ............................................................................ 232
  1. Article III:2 of the GATT ................................................. 233
  2. The Danish fat tax .......................................................... 233
D. Subsidies to Encourage Healthy Eating ............................... 234
  1. The Agreement on Agriculture ........................................ 235
  2. Food stamps and incentives for healthy purchases .............. 235
VI. Domestic Efforts to Fight Obesity Can Be Ineffective and Regressive ...... 236
VII. Addressing Globesity Requires Imposing Legal Obligations on Non-State
  Actors That Have Thrived within the Global Free Trade System ............. 239
  A. Focus on Price-Barrier to Healthy Foods ......................... 242
  B. Corporate Social Responsibility and International Law: The Wal-Mart
     Solution .............................................................................. 243
     1. Negative and positive corporate duties under international law ....... 244
     2. Voluntary corporate commitments create international legal obligations:
        scope and enforceability .................................................. 246
VIII. Conclusion .......................................................................... 248
I. INTRODUCTION

Globally, the number of obese people is approaching the number of undernourished people. While commentators have blamed a number of factors for this trend, a particularly salient one is trade liberalization. Scholars have argued that trade liberalization affects the availability of certain foods because it removes barriers to foreign investment in food distribution. In response, governments have implemented a variety of policy measures to correct for their populations' growing waistlines. These measures are sometimes incongruous with the international trade laws safeguarded by the World Trade Organization (WTO), and as a result, countries may abandon or soften them so as to avoid sanctions or retaliation. These instances of incongruence suggest a degree of tension between the international trade regime and certain, although not all, government efforts to change unhealthy diet patterns.

In response, scholars have tried to interpret the various international trade law treaties in ways that would legitimize those diet-related policies that are in tension with the international trade regime. This Comment, though, will argue that the potential for these efforts to be ineffective and regressive demands that scholars and policymakers focus their efforts to alleviate “globesity” elsewhere—namely, on non-state actors, specifically corporations, that have particularly thrived within the global free trade system. This Comment posits that international human rights law should be understood as recognizing corporate responsibilities to address distributive barriers to healthy eating.

The sections below proceed as follows. Section II discusses global trends and provides background information regarding weight and diet. Section III argues that trade liberalization has contributed to the world’s growing waistlines. Section IV discusses international efforts to fight obesity, and Section V then examines four different policy tools under WTO law that national governments

---

1 See ROBERT L. PAARLBERG, FOOD POLITICS: WHAT EVERYONE NEEDS TO KNOW 220 (2d ed. 2013) (observing that the total number of obese adults and children approaches the 2008 UN Food and Agriculture Organization estimate of the number of undernourished individuals, which was 876 million).

2 See, for example, Chantal Blouin et al., Trade and Social Determinants of Health, 373 LANCET 502, 502–07 (2009).

3 See, for example, BENN McGRADY, TRADE AND PUBLIC HEALTH: THE WTO, TOBACCO, ALCOHOL, AND DIET 84–87 (2011); W. Philip T. James et al., Food Imports and Dietary Change: A Perspective from Thailand, in TRADE, FOOD, DIET AND HEALTH 169, 184 (Corinna Hawkes et al. eds., 2010).

have employed to combat obesity. Section VI questions the desirability of some of these state policies in terms of their efficacy and distributive effects. Section VII posits that, instead of trying to legitimize these state policy tools, efforts should be redirected to trying to strengthen the normative expectations on corporate non-state actors to address obesity associated with poverty. This section advocates for the “Wal-Mart Solution” before Section VIII offers concluding remarks.

II. “GLOBESITY” IS ON THE RISE

The worldwide prevalence of overweight and obese individuals shot up by 27.5 percent among adults and 47.1 percent among children between 1980 and 2013. The number of overweight and obese individuals increased from 857 million to 2.1 billion from 1980 to 2013. Childhood obesity is also up from 5 percent in 1980 to 17 percent in 2013. As of 2014, there were around 805 million individuals who were undernourished around the world, but also 600 million individuals who were obese. As one scholar has noted, “[t]he problem of hunger that previously monopolized political attention is now sharing the stage with this new and rapidly growing problem of excessive food consumption.”

Over 50 percent of the 672 million obese people in the world live in the following ten countries, listed in order of numerosity: the U.S., China, India, Russia, Brazil, Mexico, Egypt, Germany, Pakistan, and Indonesia. In 2013, 31.6 percent of U.S. men and 33.9 percent of U.S. women were obese, accounting for 13 percent of the world’s obese population. China and India jointly account for 15 percent, and 62 percent of the world’s obese population live in developing countries. As the U.N. Food and Agricultural Organization (FAO) has observed, “[i]t is a bitter irony that as developing countries continue their efforts

6 See id.
7 PAARLBerg, supra note 1, at 82.
8 The FAO Hunger Map 2014, supra note 1.
9 Fact sheet No. 311, supra note 1.
10 PAARLBerg, supra note 1, at 81.
11 See Ng et al., supra note 5, at 777.
12 Id.
13 Id.
to reduce hunger, some are also facing the opposing problem of obesity.”¹⁴ Even sub-Saharan Africa, where hunger is most prevalent, has been experiencing a rise in obesity.¹⁵ In some countries like Brazil and Mexico, obesity is ceasing to be associated with relatively high economic status and is becoming a marker of poverty (as in developed countries).¹⁶

The medical and public health community generally discusses these numbers with alarm. According to the World Health Organization (WHO), approximately 3.4 million adults die annually as a result of being overweight or obese.¹⁷ Additionally, 44 percent of the “diabetes burden,” 23 percent of the “ischaemic heart disease burden,” and between 7 percent and 41 percent of certain “cancer burdens” are attributable to being significantly overweight.¹⁸ While the causal relationship between obesity itself and these outcomes is hotly debated, studies generally show that “consistent risks” for these diseases increase as BMI increases.¹⁹ Research in this area often focuses on resource consumption, and studies frequently discuss weight in terms of the burden placed on domestic health systems. One study even has claimed that the U.S. devoted 20.6 percent of its health expenditures to treating obesity-related illness.²⁰ In sum, the public health community undoubtedly views obesity as taking a real toll on an individual’s health.

III. INTERNATIONAL TRADE LIBERALIZATION IS FATTENING US UP

Scholars have posited a number of factors for why the world’s population is getting fatter. Most directly, excess calorie consumption is the culprit. The modern obesity epidemic is the result of excess calorie consumption and decreased movement. ²¹ Genetics provides part of the explanation, “but it cannot explain the rapid increase that we have seen in prevalence across

¹⁵ See id.
¹⁷ Fact sheet No. 311, supra note 1.
¹⁸ Id.
¹⁹ Ng et al., supra note 5, at 779.
²¹ See PAARLBERG, supra note 1, at 84.
generations, because human genetics does not change that fast.” 22 Between 1970 and 2003, average daily caloric intake increased to a point 20 percent more than the WHO recommends, while average muscular exertion declined. 23

While there are a number of different factors scholars and public health experts identify as contributing to our increased caloric intake, the most crucial is international trade liberalization because of its multifold and dynamic effect on food distribution. Scholars often posit that there is a “relationship between trade liberalization and increasing levels of obesity.” 24 Notably, countries like Japan, Norway, and South Korea that have maintained higher import tariffs have relatively lower levels of obesity compared to more liberalized countries such as the U.S. or Australia. 25 Scholars have observed that trade liberalization decreases the relative cost of dietary energy because it leads to the increased global trade in energy-dense foods such as refined grains, corn sweeteners, and vegetable oils. 26 As a result, energy-dense foods using these inputs tend to cost less than nutrient-dense foods, and these relative price differences, in turn, shape consumption patterns, especially among the poor. 27

Chantal Blouin, a Canadian global health expert, and others have highlighted the relationship between trade liberalization, foreign investment, and obesity. 28 She suggests that through removing barriers to foreign investment in food distribution, trade liberalization affects food availability: “Evidence suggests penetration of supermarkets into various food retail markets of southern Africa, Latin America, and China. Transformation of food retail has facilitated a pronounced shift to consumption of processed food.” 29 Additionally, the removal of such investment barriers increases investment in and the proliferation of multinational fast-food restaurants in middle-income countries. 30 And after foreign direct investment by multinational food companies, the availability of processed foods in developing countries also

---

22 Id.
23 See id.
24 McGrady, supra note 3, at 5.
25 See Blouin et al., supra note 2, at 505.
26 See Adam Drewnowski et al., International Trade, Food and Diet Costs, and the Global Obesity Epidemic, in TRADE, FOOD, DIET AND HEALTH 77, 77–80 (Hawkes et al. eds., 2010).
27 See id. at 88–89.
28 Blouin et al., supra note 2, at 504–05. See also John Kearney, Food Consumption Trend and Drivers, 365 PHIL. TRANS. ROYAL SOC’Y B 2793 (2010).
29 Blouin et al., supra note 2, at 504–05.
30 See id.
increases.\textsuperscript{31} This influx of cheap, processed food shifts consumption habits away from traditional diets based on domestically produced food products to largely imported “energy dense, nutrient poor foods that are high in fat, sugar and salt.”\textsuperscript{32} Moreover, the “[i]ntroduction of foreign capital and competition has also boosted investments in marketing and advertising,” which have facilitated sales of “highly processed foods in nations of middle and low income.”\textsuperscript{33}

These general phenomena are reflected in research showing that trade liberalization is “a significant driver” of the noncommunicable disease epidemic in Asia.\textsuperscript{34} From 1999 to 2013, China saw a 3.2-fold consumption increase in processed food, and Vietnam saw a 3.6-fold increase.\textsuperscript{35} These scholars suggest that the “evolving layers of the international and regional trade regimes have facilitated increased market penetration” by processed food as well as tobacco and alcohol corporations, which have led to increased consumption of such “risk commodities in Asia.”\textsuperscript{36} These scholars offer similar reasons regarding decreased barriers to exports and imports and increased foreign direct interest, but they also posit that “through reducing tariff revenues and imposing significant costs associated with compliance and negotiation, trade agreements can indirectly impact health by reducing the resources available to governments used to fund policy development and implementation.”\textsuperscript{37} Moreover, as will be discussed later, becoming a member of the WTO and complying with its laws and regulations inherently limits a state’s freedom to implement policies regarding the health of its citizens.\textsuperscript{38}

Corinna Hawkes, a global food policy expert, has synthesized the relationship between trade liberalization and changing dietary patterns. She posits that “trade liberalisation affects the whole food supply chain by

\textsuperscript{31} See id. (“For example, U.S. investment in foreign food-processing companies grew from U.S.\$9000 million in 1980 to U.S.\$36000 million in 2000, with sales increasing from U.S.\$39200 million in 1982 to U.S.\$150000 million in 2000.”).


\textsuperscript{33} Blouin et al., supra note 2, at 505.

\textsuperscript{34} See Phillip Baker et al., Trade and Investment Liberalization and Asia’s Noncommunicable Disease Epidemic: A Synthesis of Data and Existing Literature, 10(66) GLOBALIZATION AND HEALTH 1, 1 (Aug. 25, 2014), available at http://www.globalizationandhealth.com/content/10/1/66.

\textsuperscript{35} See id. at 7.

\textsuperscript{36} Id. at 16.

\textsuperscript{37} Id. at 8.

\textsuperscript{38} See id.
influencing the incentives farmers and agribusinesses have to produce different foods; food imports and exports (very directly); and food processing, retailing, and advertising, which have all been profoundly affected by the growth of global food companies. As such, it seems that trade liberalization is at least highly correlative to the rise of obesity and at most a large contributing factor.

IV. INTERNATIONAL EFFORTS TO COMBAT OBESITY ARE TOOTHLESS

In 2004, the WHO developed its Global Strategy on Diet, Physical Activity and Health after the World Health Assembly authorized the WHO to address the prevalence of non-communicable diseases related to unhealthy diets and physical inactivity. The Global Strategy functions as a non-binding blueprint of suggested policy mechanisms that countries can employ to combat obesity within their jurisdictions, and it also includes recommendations for non-state actors.

The Global Strategy addresses both state and non-state actors. It specifically recommends that governments reexamine their agricultural policies and advertising regulations; use fiscal policies to influence the availability of and access to food; craft school policies and programs that support healthy diets and exercise; and implement measures to incentivize the reduction of salt, hydrogenated oils, and sugar in processed foods. In tandem, the Global Strategy recommends that the food industry specifically work to limit the level of saturated fats, trans-fatty acids, free sugars, and salt in existing products and “continue to develop and provide affordable, healthy and nutritious choices to consumers.” Moreover, the Global Strategy recommends that the private

---


41 See id.

42 See id. art. 41.4.

43 See id. art. 40.3.

44 See id. art. 41.2.

45 See id. art. 43.

46 See id. art. 41.1.

47 Id. art. 61.
sector engage in "responsible marketing," issue clear, evidence-based labels, and assist in developing physical activity programs.\textsuperscript{48}

The WHO's role in realizing the Global Strategy is limited, though. Member States are responsible for choosing and implementing their own policies and programming, and the WHO only provides technical support upon request.\textsuperscript{49} Because the Strategy is non-binding, the voluntary initiative of Member States, therefore, is the primary vehicle for realizing the Global Strategy. As one scholar has noted, "even if countries are willing to implement the recommendations outlined in the Global Strategy, the practical force of domestic rules or regulations is weak without the backing of an international body ready to enforce, interpret, and provoke Member Nations into following through with their commitments."\textsuperscript{50}

Additionally, the U.N. Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health released a recent report on unhealthy foods and non-communicable diseases.\textsuperscript{51} Among its recommendations, the document calls on states to make healthy food more affordable\textsuperscript{52} and on the food industry to focus on steps such as improving the nutritional content of unhealthy food.\textsuperscript{53} Special rapporteurs have limited power, though. They can only (1) examine, monitor, advise, and publicly report on human right situations; (2) send letters transmitting allegations to states or communications requesting state action to protect rights; and (3) carry out country visits to examine implementation, report findings, and make recommendations.\textsuperscript{54} Because enforcement at the international level is so weak, compliance is largely brought about through public shaming or fear of

\textsuperscript{48} Id.


\textsuperscript{52} See id. at 9 ("Reducing the price of nutritious foods to levels cheaper than or comparable to unhealthy foods would make healthy foods more affordable.").

\textsuperscript{53} See id. at 66(c) ("Special Rapporteur recommends that the food industry ... [i]nvest[s] in improving the nutritional content of unhealthy foods.").

reputational harm. Given that the WHO cannot enforce its recommended policies, improving global obesity prevention requires an examination of state-driven counter-obesity policies.

V. THE DOMESTIC TOOLBOX TO FIGHT THE FLAB IS LIMITED BY WTO LAW

This section will discuss four different policy tools that national governments have employed in order to combat obesity and examine them under WTO law: (1) import restrictions, (2) labeling regimes, (3) “fat” taxes, and (4) subsidies to encourage healthful eating. The purpose of these case studies is to illustrate the compatibility of the international trade regime and these government policies. Each measure discussed falls into the scope of a different treaty. The section on import restrictions focuses on the Agreement on Application of Sanitary and Phytosanitary Measures (SPS); the section on labeling implicates the Agreement on Technical Barriers to Trade (TBT); the section on taxes discusses Article 111.2 of the General Agreement on Tariffs and Trade (GATT); and the section on food benefits examines the Agreement on Agriculture.

It is important to note, though, that while this Comment will focus on these more specific treaties, Member States could theoretically justify an anti-obesity measure by invoking GATT Article XX(b), which carves out an exception to the general requirements in the GATT for measures that are “necessary to protect human, animal or plant life or health.” To date, only the


56 This part of the discussion will only focus on government mechanisms and not private industry action. For example, industry groups commonly take voluntary public pledges to commit to promoting healthful diets. For instance, the International Food and Beverage Alliance (IFBA) recently announced its “Global Policy on Advertising and Marketing Communications to Children,” which created a non-binding voluntary commitment not to advertise their products to children under 12 years of age. See Global Policy on Advertising and Marketing Communications to Children, INTERNATIONAL FOOD & BEVERAGE ALLIANCE, (Nov. 2011), available at https://www.ifballiance.org/sites/default/files/IFBA%20Global%20Policy%20on%20Advertising%20and%20Marketing%20Communications%20to%20Children%28FINAL%202011%202011%2029.pdf.

57 “Sanitary (human and animal health) and phytosanitary (plant health) measures apply to domestically produced food or local animal and plant diseases, as well as to products coming from other countries.” Understanding the WTO Agreement on Sanitary and Phytosanitary Measures (May 1998), available at https://www.wto.org/english/tratop_e/sps_e/spsund_e.htm.

measure at issue in the *EC – Asbestos* WTO dispute,\(^5^9\) namely a French ban on asbestos products, has managed to qualify as an Article XX(b) exception.\(^6^0\) Surviving an Article XX(b) challenge is particularly difficult because, to survive WTO scrutiny, a state will also have to defend any health-related measure it implements under the appropriate and more specific provisions of the SPS, TBT, Article III:2 of the GATT, or the Agreement on Agriculture. Therefore, discussing such provisions, not Article XX(b), suffices to illustrate the compatibility of the international trade regime with domestic anti-obesity policy tools.

A. Import Restrictions on Unhealthy Foods or Ingredients

A few countries have tried to implement import bans on unhealthy foods. In light of its obesity problem, the South Pacific island of Samoa banned the import of turkey tails and New Zealand mutton flaps in 2007.\(^6^1\) To gain approval to join the WTO, however, the country had to drop its ban on turkey tails.\(^6^2\) Within the accession agreement, Samoa was allowed to place an import duty of 300 percent for two years, but after those two years, the state could enforce a 100-percent tariff on the tails for a year.\(^6^3\) The time lag was meant to give the state time “to develop and implement a nation-wide programme promoting healthier diet and life style choices.”\(^6^4\)

It would be easy to argue that this example suggests *prima facie* that the WTO is hostile to health-related measures that restrict forms of trade. The issue, however, is not that simple, because the Samoan example does not answer whether a country could craft a more WTO-friendly import ban on certain “unhealthy” or “junk” foods. Scholars have argued that a country could ban the

---


\(^6^0\) See id. at IX(1)(f).


\(^6^3\) See id.

\(^6^4\) Id.
import of excessively sugary or fatty foods as a legally valid safety measure protected under the SPS Agreement.\textsuperscript{65} If this option were viable, it might be of particular interest to countries in the beginning or in the midst of trade liberalization, because opening up markets to the import of foreign processed foods appears to correlate with increasing obesity rates.\textsuperscript{66} Government officials in Samoa specifically noted that before the arrival of foreign foods, few people were obese.\textsuperscript{67} The followings subsections explain the applicable SPS provisions and the viability of a safety-based import ban on “junk” foods.

1. The SPS Agreement.

In the context of food, the SPS agreement is implicated if a Member Nation has advanced a measure relating to food safety.\textsuperscript{68} The most relevant provision is Annex A(b), which defines a sanitary or phytosanitary measure as any measure 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.”\textsuperscript{69} A food safety measure under Article 2 is illegal, regardless of whether it treats imported and domestic products differently, if it is maintained “without sufficient scientific evidence.”\textsuperscript{70} These measures must not be “more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility.”\textsuperscript{71}

In applying the SPS, WTO panels rely on standards set by the Codex Alimentarius Commission (Codex); a national health standard is presumptively legal if it conforms to a standard, guideline, or recommendation set by the Codex.\textsuperscript{72} When a national standard is more stringent than the Codex, the standard is presumptively illegal unless the panel decides that an appropriate “risk assessment” has been conducted under Article 5 and that there is a

\begin{thebibliography}{9}
\bibitem{65} See, for example, James et al., supra note 3, at 184.
\bibitem{67} See Barclay, supra note 61.
\bibitem{69} \textit{Id.} Annex A(b).
\bibitem{70} \textit{Id.} art. 2.
\bibitem{71} \textit{Id.} art. 5.6.
\bibitem{72} \textit{Id.} art. 3.2.
\end{thebibliography}
“scientific justification” that the Codex standard, guideline, or recommendation is “not sufficient to achieve its appropriate level” of protection.\textsuperscript{73}

2. Import restrictions on unhealthy food based on food safety.

The Codex does not officially recognize fat, sugar, or salt as additives or toxins, but there is an argument to be made that the terms “additives” and “toxins” extend the scope of the SPS to such nutrients. It might seem plausible to argue that the sugar, fat, and salt found in processed foods, for instance, should be described as “additives”;\textsuperscript{74} however, the Codex defines “food additive” to mean a substance “not normally used as a typical ingredient” in food.\textsuperscript{75} This definition would seem to exclude characterizing salt, sugar, or fat as additives—even in the context of processed foods—because they are typical ingredients normally included in food products.

Others like Philip James, British chairman of the International Obesity Taskforce, have argued for the characterization of these ingredients as toxins:

[I]t could be argued that saturated fats, sugars or salt have many features analogous to classic toxicants, in that repeated exposure of the population to appreciable amounts of these foods would induce the population risk factors to rise (e.g. raise blood cholesterol, weight gain and increases in hypertension). In that sense, saturated fats are just as damaging, if not more harmful on a population basis, as the steady consumption of modest amounts of a heavy metal.\textsuperscript{76}

Even if this argument seems attractive, the case law may limit its viability. In \textit{EC–Biotech Products},\textsuperscript{77} the panel drew a distinction between foods that pose a danger to the life or health of a consumer and foods that are “nutritionally disadvantageous for the consumer if it does not provide the body with nutrients in the right quantity or of the right quality.”\textsuperscript{78} In the context of genetically modified organisms (GMOs), the panel in \textit{EC–Biotech Products} recognized that a consumer who normally drinks orange juice as an important source of vitamin C might become nutritionally disadvantaged if she began to drink orange juice

\textsuperscript{73} Id. art. 3.3.

\textsuperscript{74} See, for example, Roger S. Magnusson, \textit{Non-Communicable Disease and Global Health Governance: Enhancing Global Processes to Improve Health Development}, \textit{3 GLOBALIZATION & HEALTH} (2007).


\textsuperscript{76} James et al., \textit{supra} note 3, at 184.


\textsuperscript{78} Id.
made with GMO oranges hypothetically deficient in vitamin C. However, the panel did not view this issue as falling within the scope of the SPS because the deficiency could be rectified by consuming vitamin C from other sources.\textsuperscript{79}

The panel’s vitamin C hypothetical highlights how the WTO is likely to view James’s argument: through the lens of consumer choice. Because the consumer can correct his vitamin C deficiency through consuming other products rich in vitamin C, such a product stands outside the scope of the SPS. In the context of “junk” foods, these same consumers can correct the nutrient deficiencies resulting from eating a bag of chips by choosing something with higher nutritional value. James’s argument assumes that the SPS should apply given the adverse long-term effects of sugar, fat, and salt consumption; however, given the panel’s reasoning in \textit{EC-Biotech Products}, the WTO seems disinclined to assume away consumers’ ability to correct for disadvantageous nutritional outcomes.

B. Nutrition Labeling

Another common diet-related national measure is nutrition labeling. In 1994, the U.S. became the first government to require that all processed food provide a nutritional disclosure panel.\textsuperscript{80} The Codex guidelines specifically mandate nutrient declarations.\textsuperscript{81} Some countries, however, have pioneered more creative labeling requirements in an effort to curb obesity and incentivize healthy choices. Chile has proposed placing “STOP” signs on “junk food” in response to the country’s obesity problem, which particularly plagues youth, and claimed that “the measure [is] necessary to provide easily understandable warnings on products.”\textsuperscript{82} Likewise the U.K., which suffers from one of the highest obesity rates in the world, has implemented a voluntary traffic-light scheme that depicts specific nutrient levels of a food as green, amber, or red.\textsuperscript{83} While neither schema has yet been challenged at the WTO, to understand how the Chilean and the

\textsuperscript{79} See id.


\textsuperscript{81} See Codex, supra note 75, 4.1.1.


U.K. programs are likely to hold up under WTO scrutiny, it is important to consider the relevant sections of the TBT.

1. The TBT Agreement.

The relevant definitions in the TBT regard technical regulations and standards. A technical regulation is defined as a document that lays down product characteristics or their related processes and production methods, compliance with which is mandatory. With standards, on the other hand, compliance is not mandatory. Standards are approved by recognized bodies and provide rules, guidelines, or characteristics for products or processes and production methods.

If a panel finds a given regulation to be a standard, then the Member State faces less stringent obligations because, under Article 4 of the TBT, Members “shall ensure that their central government standardizing bodies [...] accept and comply with the Code of Good Practice for the Preparation, Adoption and Application of Standards in Annex 3 to this Agreement.” Under the Code of Good Practice, Member States must (1) not discriminate against imported like products; (2) not prepare, adopt, or apply standards with a “view to, or with the effect of, creating unnecessary obstacles to international trade;” and (3) adopt international standards where they exist. Whereas if the panel finds the regulation to be a technical regulation, then the labeling scheme is subject to the stricter requirements of Article 2.1, which articulates a no-less-favorable treatment standard, and Article 2.2, which imposes an additional requirement that the measure “shall not be more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfillment would create.” Among the legitimate objectives listed in Article 2.2 is the “protection of human health or safety.”

---

85 See id. Annex 1.2.
86 See id. Annex 1.2 and 3(B).
87 Id. art. 4.1.
88 Id. art. 5.1.2.
89 TBT Agreement, supra note 84, art. 2.2.
90 Id.
When hearing a TBT dispute at the WTO, the adjudicatory panel must first determine whether the measure constitutes a technical regulation or a standard. If entrance into a market were contingent on compliance with a statute regarding a health label, then there is no doubt that that regulation would be a technical regulation; however, “[t]he boundaries between the two concepts get blurred when public bodies adopt measures that establish labeling requirements that a manufacturer only must observe if he wants to use that specific label on a voluntary basis.”

Perhaps most importantly, regulations may be challenged “as such” or “as applied,” which means that voluntary labeling on its face can be considered *de facto* mandatory.

2. Mandatory labeling in Chile.

Chile’s STOP labeling amendment is designed to deter consumption of foods high in fat, sugar, and salt by including warnings labels on products containing high levels of those substances. The original amendment proposed that the STOP icon take up 20 percent of the package, but after TBT Committee Members voiced concerns, Chile adjusted it to require the icon to account for 7.5 percent of the total surface of the package. After further complaints about how 80 percent of all prepackaged foods might need the “high in” icons, Chile narrowed the scope of the food categories to which the icon would have to be applied.

Given that this label is mandatory, it must meet the requirements of Article 2.2 that the measure shall be no more trade-restrictive than necessary to fulfill a legitimate objective. As the U.S. Trade Representative has argued, narrowing the scope of food categories raises “questions about the scientific basis for food category selection.” Because the categories appear to be less scientific and more political, the legitimacy of the objective required by Article 2.2 comes into question. Moreover, the USTR has specifically argued that “voluntary labeling schemes could address Chile’s stated objective.” It is

---

92 Holle et al., *supra* note 83, at 158.
93 *See* “Junk Food” Sign, *supra* note 82.
95 *See* id.
96 *See* id. at 55.
97 Id.
98 Id. at 52.
plausible that a panel would suggest a series of less trade-restrictive approaches, including voluntary labeling schemes combined with public health education campaigns similar to those mandated for Samoa accession to WTO membership.

3. Voluntary labeling in the U.K.

In 2007, the U.K. Food Standards Agency (FSA) released the first technical guidance for its traffic-light scheme. The system shows how much fat, saturated fat, sugar, and salt there is in foods by coding the nutrient as red, amber, or green according to the relevant percentage of these ingredients in the food. The labels are “considered to be semi-directive as they make the nutrient content of the food transparent but at the same time illustrate whether the content of a certain nutrient is regarded to be high, medium or low in nutritional terms.” Companies may voluntarily sign up to participate in the labeling scheme.

Technically, this scheme is voluntary, thus bypassing the stricter Article 2 requirements. But as Martin Holle, a German professor of food law and administrative law, and others argue, “one could easily think that we are dealing with standards because the U.K. has adopted neither a statute nor a regulation. However, in the WTO context, a measure must be considered as a whole, and it can be challenged ‘as such’ or ‘as applied.’” If it becomes practically impossible to market a product without the label—if, for instance, citizens groups and NGOs have been particularly effective at promoting boycotts against retailers selling products without the government label—then a panel could consider the measure to be de facto mandatory.

The WTO addressed this issue in the *Dolphin Safe* labeling dispute. In the case, the panel found that even though the U.S. did not obligate products to bear the label, the label was a technical regulation under the TBT. While the Appellate Body found that the label was not more restrictive than necessary to

---


100 Holle, *supra* note 83, at 149.

101 See *id*.

102 *Id*.


104 See *id*.
fulfill a legitimate objective of protecting dolphins and informing consumers, the label had changed competitive conditions in the U.S. market in such a way that was disadvantageous to Mexican tuna and thus constituted de facto discrimination inconsistent with the TBT's no-less-favorable-treatment provision.

The *Dolphin Safe* case highlights some of the issues that would likely be in dispute if the U.K. traffic light system were challenged. The U.K. Minister of Public Health has put pressure on food companies to join the labeling program, and although the program has not been challenged yet at the WTO, if the program were so successful that companies felt they had to participate in it to enter into the U.K. market, a panel could deem it inconsistent with the TBT given the *de facto* market exclusion. Similar to the tuna label, a panel may find that such a label modifies the competitive conditions in such a way as to be discriminatory. Ironically, it is only if the label is less successful that it avoids this issue under WTO law.

C. "Fat" Taxes

Taxing "sinful" features of food is a popular method of trying to shape consumer consumption patterns. Norway has taxed sugar, chocolate, and sugary drinks since 1981. Hungary passed a tax in 2011 aimed at products high in sugar, salt, and caffeine and redirected the revenue towards healthcare costs. Following suit, Denmark implemented a 9 percent tax on foods with a saturated fat content that exceeds 2.3 percent by weight. France increased taxes on soft drinks in 2012. Most recently, Mexico enacted a tax on all sugar-sweetened beverages. Understanding the viability of these types of taxes under WTO law requires a discussion of Article III:2 of the GATT.

---

105 See id. ¶ 342.
106 See id. ¶ 240. See also TBT Agreement, *supra* note 84, art. 2.1; Holle, *supra* note 83, at 159.
111 See id.
112 See Boseley, *supra* note 108.
1. Article III:2 of the GATT.

Dietary taxes can pose GATT problems; when a differential tax favors domestic over foreign goods, there is an Article III:2 violation:

The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.113

The first sentence creates a test for when a tax violates the GATT: if (1) the taxed imported and domestic products are like products, and (2) the imported products are taxed more than their domestic counterparts.114 The adjudicatory panel established by the Dispute Settlement Body of the WTO is supposed to determine “like products” by looking at a few criteria: the properties, nature, and quality of the products; their end-uses; and consumer tastes and habits.115 The second sentence applies where one of these conditions has not been met.116 The meaning of the second sentence of Article III:2 is clarified in paragraph 2 of Ad Article III:

A tax conforming to the requirements of the first sentence of paragraph 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.117

To understand the relationship between these two sentences and their application, it is useful to examine the Danish fat tax.

2. The Danish fat tax.

Recall that the Danish tax imposed an excise on products whose saturated fat content exceeded 2.3 percent by weight.118 Alberto Alemanno and Ignacio Carreño, two European lawyers and legal scholars, argue that “it seems highly

113 GATT, supra note 58, at art. III:2.
116 Appellate Body Report, Canada—Certain Measures Concerning Periodicals, WT/DS31/AB/R, at 23 (June 30, 1997). See also Alemanno & Carreño, supra note 114, at 106.
117 Appellate Body Report, Korea—Taxes on Alcoholic Beverages, WT DS75/AB/R (Jan. 18, 1999), Interpretative Note Ad Article III from Annex I.
118 Sassi, supra note 110.
possible that similar products with minor differences in fat content may be considered as 'like products' by a WTO panel."

Consequently, it would be problematic "if the effective burden of the tax would lie predominantly on imported goods, while the majority of domestically produced like products contain saturated fat at a level lower than 2.3 percent and are thus exempted from the tax." However, given that the Danish tax applies to "the widest list of food products of 6 large subgroups" and captures substitute or imitation goods, it would be hard to imagine this issue arising.

Alemanno and Carreño also examine the Danish tax in light of GATT Article III:2's second sentence. The Danish policy taxes a whole chicken, which has 3.4 percent saturated fat, but exempts the inner fillet, which has 1 percent saturated fat. Even assuming that these two products are directly competitive or substitute products, Alemanno and Carreño explain that the tax is unlikely to violate the second sentence if the tax has not been applied "so as to afford protection" to domestic products. Consequently, when compared to import restrictions and labeling, fat taxes have more latitude under WTO law if levied for health-related purposes and not for covert protectionist purposes.

D. Subsidies to Encourage Healthy Eating

Some governments have used their domestic food-subsidy programs as a tool to change their citizen's consumption choices. For instance, Michelle Obama's "Let's Move!" initiative to stop childhood obesity has modified the federal assistance meal program for school lunches to make them healthier. Governments often provide direct assistance to low-income individuals to purchase food items with food stamps or debit cards. In the U.S., the program is called the Supplemental Nutrition Assistance Program (SNAP). About 80

---

119 Alemanno & Carreño, supra note 114, at 107.
120 Id.
121 Id.
122 See id. at 108.
123 Id. at 107 (internal quotations omitted). Compare with Chile - Alcohol, Appellate Body Report, ¶ 3, 80 WT/DS/87/AB/R, WT/DS110/AB/R (Dec. 13, 1999) (finding that that a tax on alcohol that was differentiated according to alcohol content burdened imported spirits more heavily than comparable domestic alcohols).
124 See McGrady, supra note 3, at 103.
Obesity Prevention

percent of the U.S. farm bill actually goes towards food stamps.\textsuperscript{126} The federal government has not conditioned SNAP benefits on healthy choices beyond prohibiting the use of the benefits to purchase alcohol and tobacco.\textsuperscript{127} The suitability under WTO law of using such subsidy programs to change food consumption patterns largely depends upon the Agreement on Agriculture.

1. The Agreement on Agriculture.

Domestic food assistance programs do not generally run into problems under WTO law because such welfare programs explicitly fall into the “Green Box” in Annex 2 of the Agreement on Agriculture.\textsuperscript{128} Green Box measures are considered to have “no, or minimal distortive effects on trade.”\textsuperscript{129} Since these programs have not required that users buy domestic over foreign products, they have been viewed largely as non-trade distortive. The Agreement on Agriculture places no limits on the extent to which a State can implement Green Box measures.\textsuperscript{130} Consequently, unlike with some of the other measures discussed, WTO Members have a large degree of flexibility in utilizing domestic subsidies to shape consumption patterns of those dependent on the subsidy.

2. Food stamps and incentives for healthy purchases.

Given this wide latitude, it is theoretically possible that a food stamp program to incentivize healthy food choices could be constructed. Researchers at the USDA have looked into how such incentives could be structured. For example,

Based on shopping behavior, a financial incentive could be offered that would result in SNAP participants receiving a rebate for future healthy purchases. SNAP shoppers would receive a rebate based on the healthy choices in their total basket. A percentage threshold of healthy purchases would be established for earning the rebate. If a certain percentage of the

\textsuperscript{126} See Brad Plumer, \textit{Is It Time for Food Stamps to Come out of the Farm Bill?}, \textit{Washington Post} (July 10, 2013) available at \url{http://www.washingtonpost.com/blogs/wonkblog/wp/2013/07/10/is-it-time-for-food-stamps-to-come-out-of-the-farm-bill/}.

\textsuperscript{127} See SNAP: Frequently Asked Questions, \url{http://www.snaptohealth.org/snap/snap-frequently-asked-questions/} (last visited Apr. 28, 2015). SNAP benefits also cannot be used to purchase vitamins and medicines, foods that will be eaten in the store, or hot foods.


\textsuperscript{129} Agriculture: Explanation—Domestic Support, WTO (2015), available at \url{http://www.wto.org/english/tratop_e/agric_e/agIntro03Domestic_e.htm}.

\textsuperscript{130} See id.
shopping trip or basket is composed of healthy items, consumers may receive an additional discount or a future coupon or rebate.¹³¹

This type of incentive structure would not run into problems with WTO law because it does not require that consumers purchase domestic over foreign items. As long as the incentive structure were set up in such a way that consumers were rewarded by purchasing, for example, higher quantities of fruits, vegetables, and whole grains rather than choosing a specific domestic product over foreign ones, it should avoid becoming discriminatory.

VI. DOMESTIC EFFORTS TO FIGHT OBESITY CAN BE INEFFECTIVE AND REGRESSIVE

The prior section illuminated the relationship between the international trade law regime and government policies meant to promote more healthful diets. The carve-outs within international trade law for domestic welfare programs and the degree of latitude given to states to implement taxes suggest that the relationship is not a completely hostile one. However, WTO law severely limits the viability of import restrictions and labeling schema to combat obesity.

Furthermore, because the WTO functions as a “forum to negotiate trade concerns,” countries may abandon certain policy measures even before dispute settlement.¹³² Specifically in the nutrition context, the TBT Committee meetings at the WTO have functioned as a forum to debate Chile’s STOP label.¹³³ The concerns raised at these meetings have led Chile to soften its STOP policy by making the sign smaller and requiring its placement on fewer categories of food.¹³⁴ The example functions to demonstrate how even short of formal litigation, the WTO arguably provides a forum to blunt health-related policy tools. So while the tension should not be overstated, as it often is, it does exist.

In response to this tension, commentators try to play with the language of the trade agreement in such a way that would allow government measures to survive WTO scrutiny. James tried to advance this type of argument in his proposition that certain nutrient components like sugars, salts, and fats could be

¹³³ See “Junk Food” Sign, supra note 82.
¹³⁴ See TBT Agreement, supra note 84.
defined as toxins so as to regulate them under the SPS.\textsuperscript{135} In the same vein, Benn McGrady, Director of the O'Neill Institute Initiative on Trade, Investment and Health at Georgetown University Law Center, suggests that if a government were able to create a comprehensive diet-related policy that involved a number of different tools and mechanisms, then it would be more likely to survive WTO scrutiny.\textsuperscript{136} These both are arguments that attempt to solve the trade-versus-health problem by shoehorning health-related measures into the trade-law system in such a way as to make them compatible. However, these arguments make some fundamental assumptions about the effectiveness and desirability of these measures.

For instance, a nutrition-related labeling policy assumes that there is an information asymmetry between the consumer and the food supplier.\textsuperscript{137} This asymmetry qualifies as a market failure that the government corrects for by creating information-forcing labeling requirements.\textsuperscript{138} Whether or not one believes that government action is justified here in correcting this market failure, the central assumption is that consumers, when provided information, will change their purchasing behavior to make better dietary decisions. This assumption is evidenced in the following statement by the USDA Economic Research Service: “[A]n intervention policy such as labeling could provide a mechanism for consumers to make better dietary choices and thus increase their own and society’s welfare.”\textsuperscript{139} Warning labels in particular increase the costs of purchasing unhealthy products by imposing a “psychic tax” on consumers “by provoking negative emotions such as fear, anxiety, or shame.”\textsuperscript{140}

\textsuperscript{135} See James et al., supra note 3, at 184; SPS Agreement, supra note 68, Annex A.1(b).

\textsuperscript{136} See McGrady, supra note 3, at 162. He argues that the Appellate Body has recognized the limits of alternative policies within comprehensive regulatory schemas. For instance, in Brazil—Retreaded Tyres, the Appellate Body found that possible alternatives the EC posited to an import ban “must be viewed in the context of the comprehensive strategy designed by Brazil to deal with waste tyres.” Appellate Body Report, Brazil—Measures Affecting Imports of Retreaded Tyres, WT/DS332/AB/R (Dec. 3, 2007). Substituting one element of this comprehensive policy for another would weaken the policy by reducing the synergies between its components. McGrady, supra note 3, at 162. As such, the Appellate Body ruled that the panel did not err in rejecting the alternatives.


\textsuperscript{139} Varyiam, supra note 137, at 6.

However, labeling is not necessarily an effective policy tool. Professors Wesley Magat and Kip Viscusi have argued that when people do not read or do not care about the information on the label, labels are not effective. With regard to calorie consumption labeling, numerous studies indicate that calorie labeling has little, if any, effect. As Professor Tomas Philipson and Judge Richard Posner similarly point out, “knowledge of proper diet and the importance of exercise has risen together with weight, indicating that lack of knowledge is not the major cause of obesity.” Moreover, efforts like calorie labeling have been shown to be particularly ineffective among lower-income obese populations. As a participant in a study looking at the effectiveness of calorie labeling among poor populations said, “It’s just cheap, so I buy it. I’m looking for the cheapest meal I can.”

Beyond ineffectiveness, labeling may actually have a regressive effect that tends to hurt poorer populations. Elise Golan, Director for Sustainable Development for USDA, and others have argued that some of the industry costs of labeling will probably be passed onto consumers in higher prices. As a result, what scholars have called a “reverse Robin Hood effect” occurs in which poorer individuals are forced to pay for labels that they do not necessarily value.

The same conclusions can be drawn in the context of taxes. Even if the trade regime seems friendly to nutrition-related tax policies, experience has proven such taxes to be untenable politically. The Danish government had to repeal its tax one year after enactment due to its unpopularity and

---

141 See id. See also, generally WESLEY MAGAT & W. KIP VISCUSI, INFORMATIONAL APPROACHES TO REGULATION (1992); Omri Ben-Shahar, The Myth of the “Opportunity to Read” in Contract Law, 5 EUR. REV. CONT. L. 1 (2009).
145 See Golan et al., supra note 138, at 128.
146 Id. at 148.
ineffectiveness.\textsuperscript{147} Danes actually avoided the tax by purchasing butter and cheese from across the border in Germany.\textsuperscript{148} Moreover, fat taxes also may be regressive. Some economists have estimated that a 10 percent tax on fat would fall almost entirely on poor consumers and that the welfare loss for families earning $20,000 is almost double that of a family earning $100,000.\textsuperscript{149} Specifically in the debate over soda taxes in the U.S., the argument has been made that such a tax theoretically would cut soda consumption by the poor who cannot afford the item after the tax but leave “rich people free to continue guzzling their Dr. Pepper.”\textsuperscript{150}

Given these doubts about how effective and regressive certain national-level tools may be, it seems counterproductive to propose interpretations of the international trade law treaties that would allow panels to make more frequent determinations of regulatory legitimacy. Additionally, given that the WTO is receptive to domestic welfare programs like food stamps and that the USDA is looking into ways to use such programs to incentivize healthier choices,\textsuperscript{151} there is little innovative that can be said regarding such mechanisms. Instead of trying to legitimize certain government diet-related policies under existing multilateral treaties or proposing an ideal government food stamp program, this Comment argues that certain non-state actors that have particularly thrived as a result of the global trade regime have a vital and legally cognizable role to play in addressing the globesity problem.

VII. ADDRESSING GLOBESITY REQUIRES IMPOSING LEGAL OBLIGATIONS ON NON-STATE ACTORS THAT HAVE THRIVED WITHIN THE GLOBAL FREE TRADE SYSTEM

Even though the multilateral trade agreements discussed above are the products of state action and primarily bind state actors, these laws are influenced by non-state actors. The legitimacy of a state’s regulatory policy under WTO law dictates how non-state actors can behave. Assuming that the size of an economic entity correlates with how much influence it has over the global trade


\textsuperscript{148} See id.


\textsuperscript{151} See HHFKA, supra note 125.
agenda, the most influential actors outside of states are corporations. In 2010, there were 25 major U.S. corporations whose revenues surpassed the GDP of entire countries. Nike’s revenues in 2010 would rank it as the 102nd largest country in terms of GDP, coming in just below Paraguay. Berkshire Hathaway would rank 57th, placing it above Hungary, and Wal-Mart would rank 25th (above Norway). In 2012, Wal-Mart alone was responsible for more than $18 billion in exports from China, which would make it China’s sixth-largest export market if it were a state. Because of statistics like these, scholars have argued that not only are multinational entities responsible for the liberalization of international markets, but they are the “engine[s] of international trade”; indeed, “it might be said that the WTO is all about multinational corporations.”

Multinational corporations are often considered to represent all that is wrong with trade liberalization. Wal-Mart—arguably “the most significant corporate player”—is a particular target of criticism. The term “Wal-Mart Effect,” which is not a completely pejorative term, refers, in part, to the economic effects attributable to the Wal-Mart retail chain, including local effects such as “forcing smaller competitors out of business and driving down wages.” Moreover, as with other multinational corporations, Wal-Mart has been accused of various human rights abuses. In 2007, Human Rights Watch accused Wal-Mart of going to unethical extremes to prevent its workers from forming unions, which violated their freedom of association. More recently in 2012, Wal-Mart was also accused of supporting human trafficking and debt bondage given that they source their shrimp from Thai fishing boats that have been linked to the illicit activity.

---

152 Trivett, supra note 4.
153 See id.
154 See id.
157 “In the current global free-trade regime, there is no doubt that Wal-Mart Stores, Inc. is the most significant corporate player.” Ellen Israel Rosen, The Wal-Mart Effect: The World Trade Organization and the Race to the Bottom, 8 Chap. L. Rev. 261, 261 (2005).
158 W. Davis Folsom, Understanding American Business Jargon: A Dictionary 330 (2d ed. 2005) (noting that the term “Wal-Mart effect” is not entirely negative but also refers to the “broader effects such as helping to keep inflation low and productivity high”).
Obesity Prevention

But because "Wal-Mart buys such a large quantity of items, it can purchase them at a lower rate and then sell them at lower prices." Moreover, "Wal-Mart leads the pack in efficiency in how it warehouses and inventories products, and employs some hardball tactics when dealing with suppliers." Given Wal-Mart's unmatched ability to deliver goods at low prices, the corporation is well positioned to help minimize obesogenic price-related barriers to healthy foods that affect poor populations. Wal-Mart already seems to recognize that it is well positioned to do so given certain public relations commitments it has undertaken over the past few years. In 2008, through its "Commitment to You" program, Wal-Mart promised to spend $400 million a year on local produce. Then in 2011, Wal-Mart "committed to making food healthier, affordable and accessible." According to its website, it has allegedly already saved customers approximately $1 billion per year on fresh fruits and vegetable "through a variety of sourcing, pricing, and transportation and logistics initiatives that will drive unnecessary costs out of the supply chain."

Wal-Mart recently announced that it would be opening 300 stores in 2016 in places that the USDA has identified as food deserts. It complied with a 2011 commitment of opening approximately 9,000 stores, 219 of which were opened in and around USDA-designated food deserts. In light of these public pronouncements together with the evidence that Wal-Mart has followed through on these promises, this Comment will argue that international human rights law should be understood as recognizing a continuing onus on the corporation to help mitigate price-related, distributive barriers to healthful eating.

162 Id.
164 JAMES E. MCWILLIAMS, JUST FOOD 39 (2009).
166 Id.
A. Focus on Price-Barriers to Healthy Foods

As Section III suggested, international trade liberalization has had obesegenic effects. But it is also the case that trade liberalization has contributed to the widening gap between the rich and the poor. This gap manifests in food consumption patterns as well. A recent study in the *Journal of the American Medical Association* argued that between 2005 and 2010, there was a doubling of the gap in diet quality between the wealthiest and poorest Americans. The study attributed this doubling to higher costs of meals that are both convenient and healthy as well as the problem of limited access to good supermarkets in poorer neighborhoods (that is, the food desert problem).

Ethical considerations as codified in international human rights treaties demand that in the context of the obesity problem, primary efforts should be directed at reducing distributive or access-issue causes. Article 12.1 of the International Covenant on Economic Social and Cultural Rights (ICESCR) concerns the “right of everyone to the enjoyment of the highest attainable standard of physical and mental health.” Put simply, if the price of nutritious food is not affordable, then everyone does not enjoy the possibility of the highest attainable standard of health. For a wealthy person who has access to nutritious items, but has instead made unhealthy choices that have resulted in obesity, his rights have not been violated since he enjoys the possibility of achieving the highest attainable standard of health even if he choose not to. For a poor person who is priced out of or has limited access to healthier choices, his same right has arguably not been realized.

The United Nations in 2002 established the mandate of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest

---


171 See id.

Attainable Standard of Physical and Mental Health. The Special Rapporteur is charged with monitoring compliance with the following standards in addition to Article 12 of the ICESCR. Article 25.1 of the Universal Declaration of Human Rights (UDHR) states that “[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food.” The Constitution for the World Health Organization states that “[t]he enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition.” Article 8 of the Declaration on the Right to Development provides that “[s]tates should undertake, at the national level, all necessary measures for the realization of the right to development and shall ensure, inter alia, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income.” These multi-fold international standards suggest that any solution to the globesity problem should prioritize access barriers to healthy eating.

B. Corporate Social Responsibility and International Law: The Wal-Mart Solution

As a starting point, it is clear that corporations enjoy legal rights under international law. For example, as embodied in the above discussion regarding multilateral trade agreements, corporations enjoy the right not to be discriminated against in comparison to national firms. However, the extent of their international legal responsibilities is less clear. Many scholars of corporate social responsibility argue that the answer depends upon the idea of “international legal personality.” This concept “refers to the extent to which an entity is recognized by the international legal system as having rights and


responsibilities." The concept is "functional, and is influenced by the area of regulation (and the role of the particular participant in it), the powers conferred upon the 'person' and the aims and needs of the international community overall." Corporations do not possess every indication of international legal personality since they lack qualities such as the ability to enter treaties and to bring claims before certain international courts that require state status. However, scholars have observed that there is a growing appreciation for the role of non-state actors on the international stage that has been accompanied by greater conviction that non-state actors such as companies "are also subject to some direct obligations under international law."

1. Negative and positive corporate duties under international law.

It is commonly accepted that corporations have negative duties to refrain from violating human rights. For instance, Article 30 of the UDHR states, "Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein." However, scholars have argued that international legal sources also recognize positive duties for corporations. The preamble of the UDHR stipulates that "every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance." Professor Louis Henkin has argued that the italicized words exclude no one, "no company, no market, no cyberspace."

Other provisions within the UDHR support Henkin's argument, such as Article 29, which provides that "[e]veryone has duties to the community in which alone the free and full development of his personality is possible." Moreover,

178 See ZERK, supra note 177, at 72.
179 Id. at 75.
180 See id.
181 Id.
183 UDHR, supra note 174, at art. 30.
184 See id. at preamble (emphasis added).
186 UDHR, supra note 174, at art. 29 (emphasis added).
the U.N. Human Rights Norms for Corporations state that "[w]ithin their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law." The use of the word "promote" suggests a positive duty to realize certain human rights rather than merely to refrain from committing violations.

An objection one might raise to positive corporate duties is that the U.N. Secretary-General's Special Representative on the issue of transnational corporations and other business enterprises and human rights has specifically made statements that appear to limit corporate responsibilities only to negative ones. Namely he has said that "[w]hile corporations may be considered 'organs of society,' they are specialized economic organs, not democratic public interest institutions. As such their responsibilities cannot and should not simply mirror the duties of States." 188

This Comment would respond to this counterpoint by first agreeing that corporate responsibilities do not, nor should they, mirror those of the states because of the very reasons the Special Representative addresses. As discussed above, corporations do not possess all the indications of international legal personality as do states. But it does not follow from this discrepancy that there exist no circumstances giving rise to positive corporate responsibilities. While the Special Representative says that the responsibility to respect "is the baseline expectation for all companies in all situation," he goes even further and admits that "[t]here are situations in which companies may have additional responsibilities—for example, where they perform certain public functions, or because they have undertaken additional commitments voluntarily." 189 While the Special Representative does not elaborate on this point about voluntary commitment, scholars should seize the moment to adopt and adapt this language in discourse about the normative expectations of corporations.

189 Id., ¶ 24 (emphasis added).
2. Voluntary corporate commitments create international legal obligations: scope and enforceability.

Given that international human rights standards would prioritize addressing price barriers to healthy food in the context of obesity (as discussed in Section VI.A), and given the evolving understanding of positive corporate responsibilities (discussed in Section VI.B), this Comment posits the following: by publicly committing to making food healthier, affordable, and accessible and following through on that commitment,190 Wal-Mart has arguably undertaken what the Special Representative terms an "additional voluntary commitment." In light of the Special Representative's admission that there are situations in which corporations may assume additional responsibilities through voluntary commitments, such voluntary commitment by Wal-Mart should be understood to qualify as an exception to the general rule against positive corporate duties.

Given that the Special Representative has made such limited explicit statements regarding voluntary corporate commitments, such an argument has not been made before. While the WHO Global Strategy recommends that the food industry "continue to develop and provide affordable, healthy and nutritious choices to consumers,"191 it does not go as far as to argue that international law may actually recognize a positive corporate duty to do so in certain circumstances. Note that this Comment is not arguing that Wal-Mart is legally obligated to open supercenters all over the world in poorer areas to deliver healthier foods at low prices to poor populations. Even if one were to think that the corporation should do so, a specific legal obligation to open stores is not only non-existent but also potentially counter-productive since if taken to the extreme could force the company to raise the price of the food it sells. Rather, this Comment is suggesting that the discourse surrounding positive corporate duties in international human rights law should be understood as recognizing such a large and apt corporation's responsibilities to help mitigate price-barriers to healthy food.

The closest analogous discourse surrounds the pharmaceutical industry's obligations to address access-to-medicine issues under international human rights law. The Special Rapporteur has issued Human Rights Guidelines for Pharmaceutical Companies in Relation to Access to Medicines outlining recommendations that call on pharmaceutical companies to take proactive steps related to areas such as research, licensing, and pricing to help realize the right to

190 Our Commitments, supra note 165.
191 Global Strategy, supra note 40, art. 61.
health. The pharmaceutical guidelines have a similar function to that of the WHO Global Strategy in so far as they are unenforceable and compliance is voluntary; however, the official commentary to the guidelines use uniquely strong language related to mitigating pricing barriers and claims that “[b]ecause the lives and health of millions are at stake, companies must approach such arrangements with urgency, creativity and boldness.” Guideline 5 specifically states that “[w]henever formulating and implementing its strategies, policies, programmes, projects and activities that bear upon access to medicines, the company should give particular attention to the needs of disadvantaged individuals, communities and populations.” The guidelines never explicitly state that because a drug company may have voluntarily reduced the price of a drug, it should be understood to have committed itself to continuing to do so under evolving international human rights norms. Nonetheless, if a company is supposed to give particular attention to the disadvantaged, it would implicitly be compelled to do so under the language of the guidelines. So while not perfectly analogous, similar discourse has been percolating around other health-related distributive injustices outside of the context of food.

Recall from Section IV the discussion of the unenforceability of international efforts to combat obesity both through the WHO Global Strategy and the U.N. special procedure mandates. So even if the reader accepts the argument that current human rights standards recognize Wal-Mart’s duty to mitigate price barriers to healthy food, the enforceability of this duty is so far limited. However, the adamant focus by the Global Strategy and Special Rapporteur on the right to health on the private sector’s role in supplying nutritious food only serves to reinforce and strengthen this developing normative expectation of corporations. Given the rising prioritization of obesity among policymakers worldwide, the WHO or Special Rapporteur could very well release future reports on this theme that expand the scope of its recommendations for the private sector. If such reports were to receive publicity, it would help encourage and pressure large corporate food retailers to commit, and then hopefully keep their commitments, to lowering the costs of healthy food.


193 Hunt, supra note 192, at Commentary to Pricing, Discounting, and Donations (emphasis added).

194 Hunt, supra note 192, at Guideline 5.
Moreover, it should not be forgotten what an elephantine role Wal-Mart plays in dictating world trade flows given how large of a corporation it is. As such, even though Wal-Mart clearly is not nor can be a member of the WTO, the global trade community should not miss this opportunity to discuss how governments could utilize the corporation’s competitive advantages to address distributive injustices related to food.

VIII. CONCLUSION

International trade liberalization has contributed to the world’s growing obesity rate, and the laws that protect and perpetuate such liberalization can, in certain instances, stand at odds with state efforts to address the public health issue. Although the global trade system has created the problem, it has also created a valuable solution: successful corporations that rival the wealth and power of states. Given that Wal-Mart is wealthier than the majority of countries in the world, it has the ability to do a great amount of public good, especially in terms of improving diet.

Specifically, this Comment has argued that a solution to the obesity problem lies in trying to address price-based barriers to nutritious food and that Wal-Mart is a world player particularly well positioned to address this distributive issue. Moreover, this Comment suggests that the discourse surrounding positive corporate duties in international human rights law should be understood as recognizing the corporation’s responsibilities to help mitigate these barriers given its voluntary commitments to doing so already.

This Comment does not pretend that eliminating price barriers to food would eliminate obesity that is at least exacerbated by poverty. Consumer choice will still always play a mediating role. Given people’s hedonic preference for the taste of sugar, fat, and salt, it is not necessarily the case that they will choose spinach over cookies even if they are able to afford more healthy options.

However, individual choice is not the only factor contributing to the rise in obesity, and given the prioritization of the access barriers to health in international human rights law, the steps that should be taken to reduce factors contributing to the rise in obesity are those most tied to wealth disparity.

195 See Tomas Philipson & Richard Posner, The Long-Run Growth in Obesity as a Function of Technological Change (John M. Olin Program in Law and Economics Working Paper No. 78, 1999), available at http://www.law.uchicago.edu/files/files/78.RPosner.Obesity.pdf (“If health is not everything in life, rational people will eat more and exercise less than medical science advises them because they prefer such behavior to better health and a longer life. In particular, people may prefer their high paying sedentary jobs to more physically demanding ones with less pay.”).

196 ICESCR, supra note 172, art. 12.1.