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Christiane R. Conrad

Excerpt

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Introduction

Freer international trade, fostered by the WTO Agreements, has led to strong economic integration, to growth and to an increase in aggregated global welfare. At the same time, however, political integration has lagged behind. Nation-states, as well as the global community, are facing intensifying social conflicts and pressing environmental problems, such as air and water pollution or climate change. Despite a high degree of international economic integration and an increase in global wealth, global society's problem-solving capacities are rather poor. Views on the extent to which international trade has contributed to these problems diverge considerably. It has been observed that the environmental and social costs of goods production and consumption are hardly ever completely reflected in market prices: thus, goods are traded internationally for prices that do not reflect their true costs, for instance, in terms of pollution, related health damage or other social hardship. While scientists and researchers from different disciplines have been investigating extensively the serious medium- and long-term effects of these neglected costs on the economy, the environment and on humankind, corresponding changes in the global economic systems are not yet conceivable. There are good reasons to believe that, together with technological progress, international trade has enormous potential as a tool to tackle these global problems successfully. However, political stakeholders and society still need to develop sufficient will and capabilities to tap the potential and utilize this tool effectively.

Against this backdrop, it is not surprising that the impact of WTO law on national social policies and regulation has been at the centre of political and scholarly attention in recent years. The broader problem encompasses the relationship of the multilateral trading system to social policies, such as protection of the environment, health, human rights, labour rights or culture and minority rights, and it occurs in all areas of trade, namely, trade in goods, services and intellectual property rights.

This book addresses but a small portion of this larger problem. It discusses the question, under which conditions states may link product

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measures to aspects other than physical characteristics of a product, or to put it differently, to non-physical aspects (NPAs), in order to pursue social policy objectives. Such NPA measures distinguish between physically identical products based on aspects not revealed in the product itself. Examples for NPA measures are national measures linked to a process or production method (PPM) without physical impacts on the end products, such as an import prohibition for products produced by small children, or tax or tariff reductions for products produced by ecological methods.

The production process, however, has traditionally been a core field of national regulation. In the – hypothetical – absence of international trade, the regulation of production, products, their sale, consumption and waste disposal and other socially important issues would take place within a single territory and would therefore fall into the jurisdiction of a single regulator. Since goods are actually traded internationally on an immense scale, production and consumption of goods in the contemporary world are decoupled: production and consumption, or use, take place in territories of different states and within different regulatory regimes and legal frameworks. Products produced according to the rules in force in the country of production are traded to countries and consumers which possibly regulate production within their own territories in an entirely different way.

There are different motivations that may lead legislators and regulators to link measures to NPAs such as production. First, they may intend to discourage or to encourage certain aspects of production, no matter where. Second, they may want to satisfy calls for measures by domestic populations in cases where the public feels strongly about certain aspects, for instance, where child labour is concerned. Third, if domestic regulations are stricter, regulators may aim at protecting their domestic production from competition with foreign products that have been produced in a cheaper way due to softer regulation abroad. Fourth, national regulators may find it necessary to supplement internal regulation with trade measures in order to maintain effectiveness of regulation, and last, but not least, regulators may actually pursue plainly protectionist goals. Of course, a mix of the above and other motives and rationales also need to be taken into consideration. Whatever the motivation, if applied to imports, NPA measures inherently relate to foreign facts. Border measures linked to NPAs often have an extraterritorial reach which are considered to be problematic: due to the tight net of transnational economic and business relations and great economic interdependencies, measures with an extraterritorial reach may cause considerable effects on the economy

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[More information](#)

INTRODUCTION

3

and social life within other states. For this reason, some feel that states must be prevented from imposing their domestic regulatory framework via NPA measures on other countries, and fear that the functioning of the multilateral trading system could otherwise be put at risk.

Since the debate has sometimes been tense and attitudes hardened, it has often been overlooked that there is broad international agreement on the need to address certain social problems, including those created or exacerbated by unsustainable production. Thus, the debate is characterized as a debate on the means to achieve certain goals, namely, through the use of measures affecting international trade, while the ultimate goals pursued will seldom be called into question. This work tries to identify basic rationales and common ground with the potential to do justice to the different dimensions of the problem. In a first step, it is necessary to untangle the complex issues involved. Thus, this work addresses the legal questions arising with respect to NPA measures, while taking into account their political and economic context and relevance. The analysis of the status of NPA measures *de lege lata* and *de lege ferenda* is based on three important considerations emerging from the socio-economic context of the problem. First, the absolutely prevailing view in economic theory holds that government intervention and regulation are necessary in certain situations. This implies that from an economic point of view, regulatory NPA measures should be considered adequate under certain circumstances. Second, the WTO Agreements, constituting the foundations of the multilateral trading system, must be interpreted in line with basic economic rationales of the system and its objectives. Third, it is believed that WTO law, forming part of the much larger realm of public international law, must be construed in a coherent way that does not impair the essential problem-solving capacities of global society.

The book is organized in three parts. Part I, 'Foundations', provides the background relevant to the legal questions at issue. This part pays tribute to the threefold nature of the object of the analysis: it starts with the legal dimension by identifying the legal key issues to be explored comprehensively in the main part. The object of the analysis, national NPA measures, also has a political and an economic dimension. The political dimension concerns the relevance of NPA measures for domestic regulation and touches upon questions of sovereignty, while the economic dimension encompasses, on the one hand, the economic rationales for government intervention in free markets, and economic effects of NPA measures, on the other hand. From an economic perspective, national regulation is needed in order to ensure the proper functioning of markets,

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to prevent or reduce market failure or to correct market outcomes if these do not conform to basic ideas of fairness and equity. The perspective of this work on the three dimensions, however, is the perspective of international trade law. By transferring the problem to the international stage, a fourth dimension is introduced into the analysis: due to international trade, NPA measures apply to foreign goods, and the congruence of the legal, political and economic dimension with national territorial borders is erased. Part I closes with a review and explanation of the legal, political and economic arguments relevant to the legal status of NPA measures in the international debate.

Part II, 'Legal analysis', is the main part of this work, and takes the perspective of international trade law as it stands and analyses the legal status of NPA measures. Accordingly, it starts with the preliminary question of whether multilateral trade agreements are the right standard for assessing NPA measures. Since NPA measures usually relate to public policies other than trade, other international law may also be applicable and possibly trump provisions of WTO Agreements in the case of conflicts. In most cases, however, the WTO Agreements will apply to NPA measures due to their inherent trade relevance. Since this analysis is limited to measures applying to products, the review is limited to the relevant multilateral agreements on trade in goods, in particular, the GATT 1994 and the TBT Agreement. The analysis focuses on the legal issues that have been identified as crucial in Part I of this work. It begins in Chapter 4 with an assessment of whether NPA measures violate GATT obligations, such as the obligation to provide national treatment, and explores the relevance of the non-discrimination principle and of the notion 'like products' to NPA measures in depth. Finding considerable legal uncertainty on these issues, this work assumes, in line with the prevailing view, that most NPA measures would automatically violate basic obligations under the non-discrimination principle. Chapter 5, therefore, explores justification under the general exceptions. Although the language of Article XX does not accord a special status to NPA measures, there are some particularities relevant for the justification of NPA measures, both with respect to provisional justification and to the chapeau. This chapter concludes that there is considerable flexibility in Article XX, which allows justification of some important NPA measures. However, the flexibility is limited: not all NPA measures that might be considered legitimate by global society or by different national societies are justifiable under the general exceptions as they stand. Of the set of NPA measures, some PPM measures fall into the scope of some of the particular agreements on trade in goods.

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Excerpt

[More information](#)

INTRODUCTION

5

Chapter 6 discusses primarily the importance of the TBT Agreement. It finds that the TBT Agreement is applicable to labelling requirements, and also where unincorporated PPMs are concerned. An important finding of this particular analysis is the consideration that consumer information as the predominant objective of most labelling laws concerning PPMs must be considered a legitimate objective under the TBT Agreement.

Part III provides a broader 'Outlook' on the topic. The legal assessment of NPA measures under the existing WTO Agreements in Part II shows that, despite a decades-long debate and a few relevant reports of the GATT and WTO adjudicatory bodies, the legal status of NPA measures under WTO law, including the scope for justification, is still characterized by considerable legal uncertainty. Taking into account that the legal status of NPA measures is actually the most important application of the even broader and more politically dominated debate on the interface of WTO law and non-economic public policies, the so-called 'linkage' or 'trade and ...' debate, the legal uncertainty, even on the meaning of specific words in the legal texts, can hardly be a surprise. The broader debate exceeds the borders of WTO law and ultimately aims at solving conflicts or trade-offs between different public policies at the global level. It has produced a large number of reform proposals that would be highly relevant to the WTO as an institution and likewise to the legal status of NPA measures. Part III begins in Chapter 7 with an outline of the broader debate and reviews some proposals of a substantial, procedural or institutional nature that are highly relevant for WTO law. Against the backdrop of these proposals, the final chapter develops a specific perspective that could be utilized in determining whether NPA measures should be consistent with WTO law. This perspective is founded on the assumption that NPA measures as part of national regulation are, under certain conditions, needed to maintain the functioning of markets or to correct market outcomes. Given that markets are no longer national, it seems that, depending on the economic rationales underlying the NPA measures at issue, there may be a greater or smaller overlap with the key economic rationales of the multilateral trading system on, the one hand, and with its fundamental objectives, on the other. Three important findings arising from an application of this perspective are particularly relevant for NPA measures: first, squaring aims and effects of national regulatory measures with objectives and economic rationales of the multilateral trading system gives a good indication of whether or not a particular measure should be consistent with WTO law. Second, information requirements must not be merely justifiable, but should be *prima facie* consistent with WTO

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law. Third, in order to bring NPA measures in line with the WTO objective of sustainable development and the principle of special and differential treatment for developing countries, regulators ought to be obliged to consider and mitigate the economic effects of national NPA measures on developing countries.

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[More information](#)

PART I

Foundations: the relevance of NPA measures
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[More information](#)

In spite of numerous legal problems related to measures linked to non-physical aspects (NPA measures), the debate on such measures cannot be reduced to a problem of law. The issue is highly complex, due to the relevance of facts central to other disciplines as well. Any attempt to solve the PPM debate based on only one of the relevant disciplines, namely, law, economics, international relations or political science, is bound to fail. A sustainable solution needs to take all aspects of the debate and their implications into consideration. Therefore, the legal status of NPA measures needs to be analysed, taking into account other dimensions. With respect to the agreements underlying the multilateral trading system, implications of economic theory need to be taken into account. Furthermore, since the economic interests of WTO members diverge, and since perceived restrictions on national sovereignty go beyond merely economic issues, the debate has huge political implications. Any solution should address those diverging national and political perspectives and reconcile them. The two chapters forming Part I provide the background relevant to the legal analysis *de lege lata*, as well as to newer perspectives on the issue as offered in Part III.

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Excerpt

[More information](#)

1

Setting the stage for legal analysis

Legal uncertainty relating to measures linked to non-physical aspects under the law of the WTO is not a new phenomenon. Albeit with a focus on measures linked to processes and production methods (PPMs), it has been debated intensely in legal, economic and political circles since the early 1970s. Nevertheless, most legal questions underlying the debate have remained unsettled. The fact that this analysis builds on a decades-old debate facilitates the analysis in some respects, but also raises difficulties. The debate has given structure to the large problem-field, and it has developed concepts, some of which are used in this analysis. However, other concepts and terms developed and used in the debate have remained blurred, and their usefulness is doubtful. The intention of this chapter is to illustrate the topic and to identify the concepts and terms used in the subsequent parts of this analysis. It begins with a brief illustration of the topic detached from the legal debate, followed by a description of the landmark cases of GATT and WTO dispute settlement. The next section focuses on the debate that emerged around these disputes, the so-called ‘PPM debate’. It describes the basic concepts and terms developed for and used in this debate. Section 1.2 briefly reviews the legal status of the most important types of measures relevant to the debate in order to identify the legal core issues. Based on the key legal issues so identified, the final section rethinks the concepts and the terms central to the so-called PPM debate and defines those used in the remainder of this work.

1.1 Brief introduction to the topic

Product regulation usually refers to the physical properties of products. In this way, all risks or dangers to consumers’ health from use or consumption of a product can be addressed, since such dangers must logically arise from ingredients, materials or other physical properties of a product. There are, however, also measures that distinguish between products because of an aspect that is not physically incorporated into it.

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[More information](#)

The latter type of measure is the object of this analysis. Such measures are characterized by a link to an aspect other than physical product characteristics, or in other words, to a non-physical aspect or NPA. This NPA is reflected in the objective or factual elements of a measure. The legal consequences of an NPA measure, just like other measures, apply to products. For instance, exemptions from VAT could be granted to products which have been traded in a 'fair' way, or an import ban might stop the importation of certain timber originating in countries which do not pursue general reforestation policies. In both examples, legal consequences are applied to products because of certain NPAs linked to those products in some way. The range of facts, aspects and actual events to which NPA measures can be linked is almost unlimited.

Perhaps the most important group of NPAs comprises aspects of production, or more precisely, a process or production method, or PPM.¹ A common example for a measure linked to a PPM, or a PPM measure, is an import ban on fish caught with driftnets without so-called turtle excluder devices.² This ban distinguishes between tuna products based on a PPM, namely, the way in which the tuna have been caught. Another well-known example of a PPM measure is a labelling requirement for eggs, which requires producers and importers to print a code on each egg disclosing the respective farming method for chickens before placing these eggs on the market.³

Although PPMs arguably represent the most common subset of NPAs, it is important to note that the set of potential NPAs is much larger. As shown above, there are numerous other NPAs to which measures can be linked. A more recent example for a producer, rather than a process-related NPA measure, is European legislation prohibiting the placing on the market of seal products if these do not result from hunts traditionally conducted by Inuit and other indigenous communities and contribute to their subsistence.⁴ A hypothetical and producer-related example from the field of environmental and health policies would be the requirement on the importation of oil that certain security standards for drilling rigs and

¹ PPMs are a subset of NPAs only if the respective aspect of production does not shape or otherwise physically affect the end-product itself. The distinction between product-related and non-product-related PPMs is addressed in more detail below.

² The example is based on the famous *Tuna-Dolphin* cases outlined in more detail in the next section.

³ Example is discussed in more detail in Chapter 6, below.

⁴ Article 3:1, Regulation (EC) 1007/2009 of 16 September 2009, OJ of the European Union, L 286/36 of 31 October 2009.