



Social Regulation in the WTO

Trade Policy and
International Legal Development



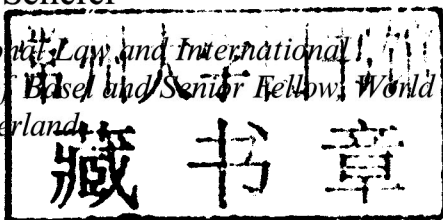
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Development

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Social Regulation in the WTO

For Elizabeth, Lily, Maria, and Markus

Preface

This book is an investigation into the relationship between the general international law on the use of unilateral trade sanctions and other trade regulations and the law of the World Trade Organization's framework for using such trade measures to pursue social goals. I was pulled to this topic by an interest in discovering what it is that makes some uses of trade so appealing and others so repulsive: why did I feel it was somehow 'right' to prohibit the importation of tunafish caught by methods that resulted in the unnecessary loss of significant numbers of dolphins, while it seems equally 'wrong' to wield the economic noose over trade partners which democratically elect leaders who stand for different political interests from those the sanctioning government itself has, for example? Yet upon starting my research, my work began to change shape somewhat, as I detected the increasingly preventative effects of WTO rules on not only national law-making, but also international treaty development. The potential effects of such an influence on the overall international legal system have been little examined, and spurred my thinking as a result.

A second motivation for this work is my conviction that international law must continue more actively to pursue a goal of enhancing the everyday life of all individuals. I take a cosmopolitan view of what goals the international legal system serves: the goals of individuals as complex social beings and as parts of an ecosystem, the health of which is, circularly, a part of the individual's well-being.

With these background impulses, I pursued a conservative outline for this book: laying out the status of trade sanctions and other trade regulations in general international law; investigating the approaches of the WTO as regards the use of trade measures for various non-economic purposes; and then drawing conclusions as to how the WTO might better fulfill the needs of an international community holding broader interests than the purely commercial. The introductory chapter sets out the requisite background to the problem as well as containing definitions. In it I define the project of international law as being one of creating an international community governed by laws which aim to afford each individual a life of happiness and dignity. Importantly, I argue that the idea of 'multilateralist' international law is insufficient to ensure the disaggregated well-being for which a community must strive. I also limit this work to an examination of 'regula-

tory measures' – legislative or policy-making actions taken by *governments* either to restrict or promote trade in order to achieve a goal which is not directly responding to a trading partner's WTO obligations.

In the second part of the book, I set out for the reader the framework posed by general international law on the use of trade regulations as a policy tool. The sovereignty values of general international law permitting states a virtually unhindered use of economic regulation for pursuing their goals are shown to be limited by the equally fundamental principles of international law regulating the use of force, non-forcible intervention, and the protection of human rights in times of peace and war. Due to the sovereignty-based norms of international law, *retorsion* has never been seen as problematic. Regulations as countermeasures or sanctions, however, have been cause for concern and, consequently, it is these limitations, being stricter than any limits on non-sanctioning actions, which are used as the basis of permissibility when we analyze broader trade regulations later in this book.

The rules on state responsibility, as setting out the main legal guidance on countermeasures, are then considered as guidelines for how states may respond to each other in the multilateral international law system of mutual obligations, bilateral commitments, and peremptory norms. As international law on state responsibility leaves open the possibility of agreeing to other rules on the use of sanctions/countermeasures, the general international law status of trade regulation used to advance non-economic policy purposes remains ambiguous when the sender and target are both members of a treaty-based legal system such as that of the World Trade Organization which has its own rules restricting the use of such measures.

The third part, therefore, turns to the law of the World Trade Organization. Here, the study broadens to encompass any action of trade regulation, as the laws of the World Trade Organization (WTO) are more restrictive on Members' use of trade policy than is general in international law. The scope of governmental action I intend to include in my study not only includes measures used in reaction to a previous violation by the target state (that is, *sanctions* as countermeasures), but also includes any trade-affecting governmental action employed to express a WTO Member's attitude toward another WTO Member's non-trade policies or practices. Thus, my choice of examining a particular regulation does not rest upon the legal status of the target's own policy.

The development of the WTO's law on the use of trade regulations that could further international community goals is examined on the basis of GATT/WTO dispute settlement rulings considering such cases up to summer 2008. This examination highlights that while there is a substantial

degree of flexibility available within the text of the agreements to countenance the use of trade measures for non-commercial purposes, this flexibility is rarely exercised so as to permit such results.

The conclusions, found in the fourth part, summarize the findings of the book and set out the possible resolutions to the difficulties posed by the WTO system rules to the further development of the law of an international community. Both intra-WTO and WTO-external solutions are considered, including the possibility of establishing clear hierarchies in international law. A suggestion for the use of equitable principles also appears as a solution to the case-specific nature of the problem.

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PART I

Introduction

DEFINING ‘SOCIAL TRADE REGULATIONS’

This book is a study of how the legal system of the World Trade Organization (WTO) treats its Members’ use of trade regulation as a policy tool and how that treatment in turn affects the international legal system. The term ‘social trade regulation’ implies that the common characteristic of all of the regulations in this work’s focus is their stated purpose.¹ While governments often decide to impose trade regulations based directly on economic factors, so as to alter the conditions of competition for the affected goods or services, they may also employ trade measures for purposes which are not related to the conditions of competition on the domestic or world market. It is the latter type of regulations that is the focus of this book.

This work is not primarily concerned, *inter alia*, with the imposition of increased tariffs to offset dumping practices (anti-dumping duties) or foreign subsidies (countervailing duties), or in retaliation for tariff increases or restrictions in quotas (counter-tariffs). Such regulations are effectively covered within the WTO system itself and generally infringe no other international obligations which Members may have. Here the work is focused on those governmental policies or actions which are primarily ‘social’ or, in Qureshi’s term, ‘non-trade’. Qureshi explains the concept as covering actions that ‘partake of a political, moral, cultural, ideological, environmental, and technical character’:

Considerations which are of a non-trade character, may in international trade be defined as those state actions or omissions which impact or may impact the

¹ Christian Joerges has popularized the term ‘social regulation’ from which I have developed the term ‘social trade regulation’. Christian Joerges and Ernst-Ulrich Petersmann, eds. *Constitutionalism, Multilevel Trade Governance and Social Regulation* (Oxford/Portland, OR: Hart Publishing, 2006).