Columbia Studies in WTO Law and Policy

Trade and Human Health and Safety

EDITED BY

George A. Bermann and

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CAMBRIDGE
UNIVERSITY PRESS

CAMBRIDGE UNIVERSITY PRESS
Cambridge, New York, Melbourne, Madrid, Cape Town,
Singapore, São Paulo, Delhi, Tokyo, Mexico City

Cambridge University Press
32 Avenue of the Americas, New York, NY 10013-2473, USA

www.cambridge.org
Information on this title: www.cambridge.org/9780521384377

First published 2006
First paperback edition 2011

A catalog record for this publication is available from the British Library

Library of Congress Cataloging in Publication data

Trade and human health and safety / edited by George A. Bermann, Petros C. Mavroidis.
p. cm.
Includes bibliographical references and index.
ISBN-13: 978-0-521-85528-0 (hardback)
ISBN-10: 0-521-85528-4 (hardback)
1. Product safety – Law and legislation. 2. Hazardous substances – Law and legislation.
3. Public health laws. 4. Foreign trade regulation. I. Bermann, George A.
II. Mavroidis, Petros C. III. Title.
K3663.T68 2005
344.04′7 – dc22 2005018122

ISBN 978-0-521-85528-0 Hardback
ISBN 978-0-521-38437-7 Paperback

Trade and Human Health and Safety

This book gathers papers from distinguished experts discussing how health-based, trade-restrictive measures have fared in World Trade Organization (WTO) case law. With an analysis of applicable primary law (General Agreement on Tariffs and Trade [GATT], Technical Barriers to Trade [TBT], and Sanitary and Phytosanitary Measures Agreement [SPS]) and all case law in the area of trade and health, this book offers a comprehensive discussion of the standards established for the regulation of public health and safety issues. Experts in the field answer two important questions – How can a country which is a member of the WTO define its policy on health issues? and What are the WTO constraints on the exercise of health policy, if any? The various contributions in this volume aim to demonstrate how the world trading regime has come of age and accepted that trade liberalization cannot take place at the expense of nationally defined social values.

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Preface to the Series

This is the first volume of the Columbia Law School series on "The Law and Policy of the World Trade Organization." This series, consisting of biennial thematic volumes, is based upon the papers presented in the Seminar in WTO Law and Policy organized every fall semester at Columbia. Each volume – representing the papers that will have been presented in that seminar over a two-year period – addresses different, but always vital, aspects of the WTO integration process. The contributors are, without exception, outstanding experts in their field of expertise, and they include economists, political scientists, and lawyers, all specializing in the WTO. By the time these volumes appear, each author will have in principle benefited from presentation and discussion of their work in a Columbia Law School seminar composed of a highly select group of WTO students.

WTO law is a dynamic and richly evolving field, and the series will reflect that reality. Upcoming volumes will deal with WTO law and developing countries; intellectual property in the WTO; and the WTO dispute resolution process.

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GEORGE A. BERMANN AND PETROS C. MAVROIDIS

Introductory Remarks

I. The Issue

In this volume, we aim to present a comprehensive discussion of the constraints that the WTO agreement imposes on national health policies. The primary WTO texts, to some extent, address this question, and there are by now a number of cases that have dealt with the issue. Health policies are of course domestic policies which may be enforced, either internally or at the border, based on efficiency criteria. There is nothing like a world health policy, that is, some sort of transfer of sovereignty to the world plane to this effect. Cooperation at the world level takes place among governments, usually under the auspices of the WHO (World Health Organization). However, there is evidence, in recent years, of substantial cooperation on this front through non-governmental organizations as well.

Of special interest in this volume is the "conflict" between health policies and trade liberalization. In principle, anything can affect trade flows, health-based measures included. However, it would be unreasonable for governments to enter into contractual arrangements with other governments by which, in the name of trade liberalization, they agree to succumb and expose their populations to health externalities.

The WTO Agreement regulates the interplay between trade and health in various places. The GATS (the General Agreement on Trade in Services) is not immune to such concerns either. Safety regulations in the supply of services can largely affect the supply as such and their trade component as well. This relationship, however, is not the exclusive concern of primary WTO law. The August 2003 decision on pharmaceuticals made the headlines, deservedly so for a series of reasons. TRIPs (the WTO agreement on trade-related intellectual property rights) had been portrayed – mostly rightly so – as a means of transferring wealth from the south to the north. By extending the possibilities of compulsory licensing, the August 2003 decision went some distance toward addressing that concern.

Still, it is no exaggeration to say that the bulk of the discussion of trade and health so far has taken place within the GATT and its annexes.

II. The GATT

The founding fathers of GATT were aware that states may have recourse to "beggar thy neighbour" policies, not only through border measures, but also through

internal measures. This is essentially an application of the "equivalence proposition," as explained in economic theory (Lerner theorem). In principle, both border and internal measures can be the subject of a trade contract. The amount of work associated with contracting the latter, however, should not be underestimated. Indeed, negotiators need not only lay out each and every policy which potentially affects trade; they need also to contract specific obligations each and every time the exercise of such policies actually impacts on trade.[1]

The first leg of this exercise is quite demanding: indeed, it is almost impossible to exclude a policy straight off, arguing that it does not affect trade. At least potentially or indirectly, almost all policies (even those most remotely connected to trade) affect trade. On the other hand, policies change, as revealed preferences of societies change over time, and, consequently, there is an unavoidable need to renegotiate the original contract. Besides, contracting social policies might be deemed politically undesirable in some domestic quarters. For all these reasons, and probably others as well, the GATT founding fathers opted for an incomplete contract when designing the disciplines to be applied in shaping domestic policies.[2] They were well aware that various policies, including health, might have an impact on trade, and this is why they decided to discipline the exercise of these policies. They did not, however, proceed to enumerate every one of them, nor did they provide specific disciplines for each. They opted for an incomplete contract in this respect, imposing essentially one obligation on all trading partners: any time a domestic policy has an impact on trade, it must be exercised in a non-discriminatory manner; that is, it must address all products affected in an origin-neutral manner.

There is, of course, a necessary by-product. By opting for an incomplete contract in this respect, and allowing WTO Members to unilaterally define their policies affecting trade, the founding fathers of the GATT, indirectly but clearly, prescribed the legal nature of the GATT. Because domestic policies affecting trade will continue to be unilaterally defined, the GATT is a negative integration type of contract. There is no compulsory adherence to international standards, and there is no pre-defined set of policies to which all WTO Members must subscribe.[3]

The end result is that WTO Members cannot through internal measures afford protection to domestic production. All protection[4] under the GATT regime is a matter of negotiation and must, in light of Article XI of GATT, take the form of tariff protection. In other words, once imported products have paid their ticket of entry (in the form of tariffs) into a particular market, they must be assimilated to domestic products and be subjected to a regulatory regime identical to that applied to domestic products. This means that tariff commitments will not be allowed to become meaningless, as

[1] It is also quite onerous to write in payoffs, à la Maskin and Tirole (1999), because, as will become obvious, the nature of the GATT Agreement is such that calculating payoffs is far from a mundane exercise.

[2] See the analysis along these lines in Horn and Mavroidis (2004).

[3] A notable exception is of course TRIPs, adherence to which is compulsory for all WTO Members. Some steps towards positive integration are taken through the incorporation of international standards into the WTO legal regime, by virtue of the TBT and the SPS agreements.

[4] As will be shown *infra*, protection is an elusive notion. Although there are various approaches and suggested definitions in economic theory, we still lack an *operational* definition of this term. On this issue, see Bagwell and Staiger (1995), Bagwell et al. (2002), Grossman and Helpman (2002), Horn (2004), and Neven (2001).

a result of unilaterally defined internal policies. WTO Members, in turn, will have an incentive to continue negotiating and further liberalizing trade, knowing that the end-product of their negotiation will not be undone through subsequent actions that they cannot influence. This is in essence the rationale for the inclusion of the national treatment obligation in the GATT.

This rationale for the inclusion of the national treatment obligation in the GATT has been espoused by the Appellate Body. On page 16 of its report on *Japan – Taxes on Alcoholic Beverages* (WTO Doc. WT/DS 8, 10 and 11/AB/R of 4 October 1996), the Appellate Body pertinently stated:

> ... The broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures. More specifically, the purpose of Article III is to ensure that internal measures 'not be applied to imported or domestic products so as to afford protection to domestic production'. Toward this end, Article III obliges Members of the WTO to provide equality of competitive conditions for imported products in relation to domestic products.

The national treatment obligation is therefore a promise given by each WTO Member to its trading partners, but at the same time also a sanction. Policies will be unilaterally defined, and they will eventually have international spill-over (or externalities). Adherence to the national treatment principle guarantees "tolerance" of their international spill-over. From an evidence perspective, because for all practical purposes we are operating here under conditions of informational asymmetry, adherence to the national treatment principle can be also seen as a proxy that the regulation at hand does not operate "so as to afford protection."

We should note at the outset that the national treatment obligation is assumed with respect to laws affecting goods, irrespective whether they are subjected to bound or unbound duties. We quote from page 17 of the Appellate Body report on *Japan – Taxes on Alcoholic Beverages* (WTO Doc. WT/DS 8, 10 and 11/AB/R of 4 October 1996):

> ... The Article III national treatment obligation is a general prohibition on the use of internal taxes and other internal regulatory measures so as to afford protection to domestic production. This obligation clearly extends also to products not bound under Article II.

According to the wording of Article III of GATT, the national treatment obligation extends to regulatory interventions of both a fiscal (Article III:2 GATT) and non-fiscal nature (Article III:4 GATT). However, two measures are explicitly exempted from the national treatment obligation by virtue of Article III:8 of GATT: subsidies and government procurement. Government procurement is not regulated in the context of a multilateral agreement. WTO Members interested in disciplining this activity have entered into a separate contractual arrangement. The agreement on government procurement (GPA) is a plurilateral agreement which, in a nutshell, reintroduces the national treatment obligation for the list of entities (and for purchases above an agreed monetary threshold) as to which each participant has made a commitment.[5]

[5] See, on this issue, the various contributions in Hoekman and Mavroidis (1997).

This means that health policies will be unilaterally defined and, to the extent that they affect trade, will have to be exercised in a non-discriminatory manner. Discrimination, however, is a highly elastic notion. The level of disaggregation is crucial in defining whether discrimination has occurred, as is the benchmark (standard of review) that will be adopted by adjudicating bodies to define whether discrimination has occurred, or not. For this, recourse to WTO case law is indispensable.

III. TBT and SPS

The TBT (WTO Agreement on Technical Barriers to Trade) and SPS (WTO Agreement on Sanitary and Phyto-Sanitary Measures) are both relevant to the trade and health discussion. The TBT, in its Article 2.2, explicitly mentions "human health" in the body of an indicative list reflecting the obligations of WTO Members when pursuing their regulatory objectives. The same is true for SPS; the very definition of an SPS measure in the Annex to the Agreement makes it clear that the disciplines imposed concern, *inter alia*, protection of human health.

In contrast to the GATT, the TBT and the SPS agreements fine-tune the non-discrimination obligation. Recourse to proxies, such as scientific evidence, coherence in shaping national health policies, and necessity of the intervention, are employed to facilitate the quest for truth. Assume that country A enacts legislation which is ostensibly based on health concerns but which negatively affects international trade flows. B, a trading partner of A, doubts whether A's policies are health-mandated and introduces a complaint before a WTO adjudicating body. A is the informed, and B the uninformed, party as to what prompted the enactment of the challenged legislation.

The explicit wording of the GATT, TBT, and SPS leaves no room for doubt that trade can be blocked (or reduced), if such a measure is necessary to protect health. So, in principle, health protection may be privileged over trade liberalization. However, in order to ensure that trade has been blocked on genuine health protection grounds, the TBT and the SPS impose, alongside the obligation not to discriminate, additional obligations. In an asymmetry of information context, as in the example of A and B above, intelligent proxies are, in the current state of affairs, an appropriate means of distinguishing wheat from chaff.

IV. The Contributions in This Volume

The various contributions in this volume aim to shed light on all of those issues.

Marceau and Trachtman kick off with a discussion of the relevant legal provisions of the SPS, TBT, and the GATT, and the institutional interplay among them. They note that the three agreements provide norms having subtle but important variations, and that, consequently, it is necessary to evaluate these variations and determine the applicability of these norms. Their analysis provides both a "map" through the highways and byways of the WTO law of domestic regulation of goods and a basis for achieving greater coherence among these agreements. In their view, it is clear that the GATT has concentrated on negative integration, and its negative integration norms remain applicable, while being supplemented in some instances by the SPS and TBT agreements. On the other hand, they note that the SPS and

TBT agreements lend greater support for positive integration, through strengthened incentives for adoption of international standards and promotion of recognition and harmonization. They note too that there are a number of instances of differences in the substantive obligations under these three agreements. Some of the differences, in their view, result in varying room for protectionism and for domestic regulatory autonomy. They would support, in future negotiations, discussions aiming at greater convergence. It is also possible, they note, that the interpretative process of dispute settlement will itself yield a degree of convergence. Already, the jurisprudence seems to read into GATT provisions, and in particular Article XX of GATT, criteria and requirements that are specifically dealt with in the TBT and SPS agreements.

Following analysis of the relevant legal provisions and the interplay among them, we move to the contributions discussing, from a critical perspective, the interpretation of the main provisions in the relevant WTO case law.

Howse and Türk discuss the notorious *Asbestos* litigation. In this case, the WTO adjudicating bodies were called upon to judge whether a French measure banning sales of construction material containing asbestos was consistent with the obligations of the European Community under the WTO. (Asbestos was scientifically proven to be a carcinogenic substance leading to one form of cancer, mesothelioma.) In their view, through this decision, the Appellate Body of the WTO introduced many important refinements in the interpretation and application of key provisions of the GATT that address the relationship of WTO law to internal regulation. Overall, the consequence of this ruling, they argue, is clearer and perhaps more ample assurance to regulators that non-protectionist domestic regulations enacted for important policy purposes will not be significantly constrained by WTO law. This consequence should enhance what another noted scholar, Joseph Weiler, has termed the "external legitimacy" of the WTO. The Appellate Body, they also argue, has at the same time moved in this direction in a manner that is sensitive to what Weiler terms "internal legitimacy." It has framed its interpretations within the evolving GATT/WTO *acquis*, avoiding bold colours and strokes in favour of subtler tones and finishes. In so doing, it has managed to paint a quite different picture from the one that GATT panels had painted in the *Tuna–Dolphin* case law, which, for all practical purposes, condemned unilateral environmental policies for being unilateral.

Davey discusses the famous *Hormones* litigation. The European Community had enacted legislation banning the imports of hormone-treated beef. In doing so, it deviated from an international standard regulating this matter without justifying its deviation. It did not base its measures on scientific evidence, and it did not invoke the precautionary principle. Following a complaint by the United States and Canada, the WTO adjudicating bodies held that the measure at hand was indeed WTO-inconsistent. Davey concludes that the *Hormones* decision of the Appellate Body tends to undermine the SPS Agreement by subverting the obligation to use international standards (although, as the author argues, the decision merely permits justification of lower standards and does not prevent the use of higher standards) and by finding no obligation to conduct a risk assessment prior to adopting SPS measures. The latter decision is perhaps not of great importance because, if challenged, a Member will have to have made a risk assessment and therefore has every incentive to conduct one in any event. Moreover, as Davey notes, at least in advanced democracies, the risk assessment process is mostly well-entrenched legally anyway.

Garcia's chapter is on *Salmon*, a dispute over an Australian measure banning imports of salmon on health grounds, if the fish are not treated in a particular manner. The author takes the view that the SPS "necessity" test has, through the Appellate Body's interpretation in *Salmon*, increased the likelihood that non-trade values will be respectfully considered in traditional Article XX GATT cases. At a minimum, the *Salmon* case, through its influence on cases such as *Korean-Beef* and *Asbestos*, has explicitly left room for consideration of such values in the case law, if not in the text itself. The main shortcoming of the AB's approach, in the author's view, is the possibility it leaves open that the panel will independently weigh the importance of the value pursued. This is disturbing, as this was the main defect identified in traditional Article XX GATT jurisprudence. It seems, the author notes, that for SPS measures, the political decision has been made to favour such measures, by privileging a member's own determination of the appropriate level of protection. Perhaps this is because, for SPS measures, the scientific evidence and risk assessment requirements constitute a check on the potential for protectionist abuse not available in standard Article XX GATT cases. Nevertheless, one can only wonder whether the cure is worse than the disease. Is there no other way, he asks, to address the risk of protectionism, say through the chapeau test, other than to permit a trade panel to independently assess the importance of the values chosen for protection by the Member?

Dunoff deals with the very interesting *Varietals* dispute. In this case Japan invoked *inter alia*, the precautionary principle in order to justify a measure which aimed at the protection of a series of commodities. The burden of Dunoff's chapter is to show that the *Varietals* dispute is less interesting for its specific facts and result than it is for the insights it provides into the structure of the SPS Agreement and the WTO more generally. The author sheds light on the underlying legal structure within which WTO Members find themselves enmeshed, the need to look beyond the agreement's text and WTO dispute resolution reports (at least if we are to understand adequately the effect of the SPS Agreement), and an effective political strategy that panels and the AB might adopt in politically charged areas such as food safety. For these reasons, the *Varietals* dispute, despite its anodyne facts and seemingly technical reports, is worthy of sustained study.

Regan deals with a "horizontal" issue, namely, the standard of review that WTO adjudicating bodies should and do adopt when dealing with non-discrimination cases. Although his chapter focuses on Article III of GATT, its analysis and conclusions are worth reflecting upon even in the TBT and the SPS contexts. Consideration of regulatory purpose, the author argues, is required by the ordinary meaning of "like products" in the context of Article III:4 of GATT. "Like products" must be interpreted in light of the "so as to afford protection" policy of Article III:1 of GATT, and the existence of protectionism depends on regulatory purpose. Ordinary linguistic usage confirms this, as do both the role of Article III in the GATT as a whole and economic theory. (Regulation with a non-protectionist purpose should be presumed by WTO tribunals to optimize local interests, and in the trade context, that is enough to guarantee global efficiency.)

Palmeter's take on the same issue (that is, the standard of review in non-discrimination cases) reflects a different, although not necessarily divergent, perspective. In his view, the Appellate Body's *Asbestos* analysis was not, formally, a standard of review analysis. The issue was not the standard applied by the Panel to the

decision of the French authorities; rather, it was a legal analysis of the national treatment provisions of Article III:4 of GATT, based on the undisputed fact that chrysotile fibres are highly toxic and their substitutes are not. The panel's factual analysis might have been "objective," in the Appellate Body's view, but it was legally incorrect. Still, the author argues, in a broader and perhaps more practical sense, the Appellate Body's *Asbestos* opinion suggests an unspoken sympathy for what it views as well-intentioned health and safety measures. The verbal formulae of standards of review serve the purpose of attempting to draw lines, but verbal formulae are inevitably unclear at some level and open to interpretation. Most complex fact situations can be described in ways that will fit into just about any verbal formula. It really comes down, then, to the facts and how they are viewed by the tribunal. The author cites Robert Hudec, the quintessential trade lawyer, who had observed, in another context, that tribunals frequently "decide the case as best they can by making a 'seat-of-the-pants' judgment about whether the defendant government is behaving correctly or incorrectly – a process of judgment known in some circles as the 'smell test.' " The decisions of panels and the Appellate Body in disputes involving health and safety measures suggest that the "smell test" is alive and well in the WTO.

We then shift gears and turn to one of the most controversial issues in health-related disputes, the implications of the use of expert witnesses. Because at least some of the regulatory interventions will be based on scientific evidence, and because disagreements on this score cannot be *a priori* excluded, WTO judges might find themselves called upon to adjudicate a scientific disagreement. WTO judges, however, more likely than not lack the necessary expertise to opine on such issues. One way out is through court-appointed experts whose testimony can be *ex officio* requested by WTO adjudicating bodies. Court-appointed experts, though, have their own incentive structure and, as a result, the judge might find himself back at square one. Two chapters discuss this issue.

Pauwelyn first performs a reality check. The WTO judiciary makes increasing use of expert advice. This development, in his view, must be applauded, for it helps ensure the quality, transparency, and legitimacy of WTO decisions, in particular those that cut across a number of societal values. The input of expert and other "outside" opinions highlights the complex nature of WTO dispute settlement. It forms, he argues, a process in which a large number of agents interact: the panel, the Appellate Body, the parties and third parties, party-appointed experts and panel experts, standing technical bodies and political WTO organs, *amici curiae*, and other international organisations. As long as the WTO judiciary remains in control of this complex interaction, such dialogue can only be beneficial.

Sykes takes a more general view of this discussion. The battle, he argues, between the proponents of open trade and the proponents of national "sovereignty" has been central to the political fortunes of the WTO since its inception. Defenders of the system regularly insist that the tension is illusory, and that WTO rules do not intrude on proper national prerogatives. Without taking any normative position on the matter, this chapter argues that, in some contexts, a serious tension does indeed arise, and that the goals of open trade and respect for national sovereignty can be irreconcilably at odds, to the point that one of them simply must give way. With particular regard to the scientific evidence requirements of the SPS Agreement, the Appellate Body has embarked on a course that unmistakably elevates the policing

of trade-restrictive measures above the ability of national governments to address risk in the face of scientific uncertainty. There is little alternative, he concludes, to such a policy if scientific evidence requirements are to serve as more than window dressing.

Petersmann's chapter is a look into the future. The author places human health among human rights and addresses the more general question as to how the symbiosis between human rights and the world trading regime can evolve in harmony. The author argues that the universal recognition and protection of inalienable human rights at national, regional, and worldwide levels requires a new human rights culture and a citizen-oriented national and international constitutional framework different from prevailing state-centered conceptions and from pure functionalism. The author borrows from the European experience, where the emergence of "multi-level governance" has led to "multi-level constitutionalism" and "divided-power systems" that have succeeded in overcoming Europe's history of periodic wars and of the "constitutional failures" of nation-states to protect human rights and a peaceful division of labour across frontiers. Just as within federal states, "the federal and state Governments are in fact but different agents and trustees of the people, instituted with different powers, and designated for different purposes," international law and international organizations must be understood, the author goes on to claim, as parts of the constitutional apparatus, limiting abuses of foreign policy powers so as to protect human rights more effectively. He concludes that national constitutional law and human rights principles cannot achieve their objectives unless they are supplemented by international constitutional law and by effective protection of human rights – in the economy no less than in the polity.

BIBLIOGRAPHICAL REFERENCES

Bagwell, Kyle, Petros C. Mavroidis, and Robert W. Staiger. 2002. It is all about market access, *American Journal of International Law*, 96: 56–76.

Bagwell, Kyle, and Robert W. Staiger. 1995. Protection and the business cycle, *NBER Discussion Paper 5168*, available at http://ideas.repec.org/s/att/wimass.html.

Grossman, Gene M., and Elhanan Helpman. 2002. *Interest groups and trade policy*, Princeton University Press: Princeton, NJ.

Hoekman, Bernard, and Petros C. Mavroidis. 1997. *Law and policy in public purchasing: The WTO Agreement on Government Procurement*, The University of Michigan Press: Ann Arbor, MI.

Horn, Henrik. 2004. National treatment in trade agreements. *Mimeo, American Economic Review*, 2006.

Horn, Henrik, and Petros C. Mavroidis. 2004. Still hazy after all these years: The interpretation of national treatment in the GATT/WTO case-law on tax discrimination. *European Journal of International Law*, 15: 39–69.

Maskin, Eric, and Jean Tirole. 1999. Unforeseen contingencies, property rights and incomplete contracts, *Review of Economic Studies*, 66: 83–114.

Neven, Damien Jules. 2001. How should protection be evaluated in Article III GATT disputes? *European Journal of Political Economy*, 17: 421–44.

GABRIELLE MARCEAU AND JOEL P. TRACHTMAN[1]

1. A Map of the World Trade Organization Law of Domestic Regulation of Goods

The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement and the General Agreement on Tariffs and Trade

I. Introduction

Free trade and regulatory autonomy are often at odds with one another. National measures of an importing state may impose costs on international trade, for example, by regulating goods in ways that vary from home market regulation. National measures may restrict market access of imported goods but may or may not be intended to act as protectionist measures favouring domestic industry to the detriment of imports. At the same time, domestic regulation may protect important values. The distinction between a protectionist measure – condemned for imposing discriminatory or unjustifiable costs – and a non-protectionist measure – restricting trade incidentally (and thus imposing some costs) – is difficult to make.

The search for the right balance between disciplining protectionist measures[2] and allowing Member states to maintain regulatory autonomy has characterized the evolution of the General Agreement on Tariffs and Trade (GATT) rules – namely Articles I, III, XI and XX of GATT; the Technical Barriers to Trade Agreement (TBT)[3] and the Sanitary and Phytosanitary Measures Agreement (SPS).[4] This chapter compares the disciplines on domestic regulation contained in each of these agreements, and provides an analysis of the conditions for application of each agreement and the possibility for overlap and conflict among these agreements.

[1] Adapted with permission from Kluwer Law International from Gabrielle Marceau and Joel P. Trachtman, "The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement and the General Agreement on Tariffs and Trade: A Map of the World Trade Organization Law of Domestic Regulation of Goods", *Journal of World Trade*, Vol. 36, No. 5 (October 2002), pp. 811–81. The views expressed in this article are personal to the authors and do not bind the WTO Secretariat or its Members. The authors are grateful to George Bermann, Bill Davey, Lothar Ehring, Marisa Goldstein, Merit Janow, Lia Mammiashvili, Petros Mavroidis, Joost Pauwelyn, Lisa Pearlman and Elisabeth Türk for their useful comments on earlier drafts. We are responsible for all opinions and errors herein.

[2] See the first paragraph of the Preamble of the Uruguay Round Ministerial Declaration: "Determined to halt and reverse protectionism and to remove distortions on trade", Ministerial Declaration on the Uruguay Round of 20 September 1986, BISD 33S/19; as well as the first paragraph of the Doha Development Agenda: "... We strongly reaffirm the principles and objectives set out in the Marrakesh Agreement Establishing the WTO and pledge to reject the use of protectionism", WT/MIN(01)/DEC (2001).

[3] Agreement on Technical Barriers to Trade, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization (hereinafter WTO Agreement), Annex 1A, *Legal Instruments – Results of the Uruguay Round*, Vol. 31, at p. 138 (hereinafter TBT Agreement).

[4] Agreement on the Application of Sanitary and Phytosanitary Measures, 15 April 1994, WTO Agreement, Annex 1A, *Legal Instruments – Results of the Uruguay Round*, at p. 69 (hereinafter SPS Agreement).

Although the Marrakesh Agreement Establishing the World Trade Organization (WTO) and its annexes (WTO Agreement) is today a single treaty, its provisions were originally negotiated through fifteen different working groups,[5] which may not have been sufficiently co-ordinated with one another. It was only towards the end of the negotiation that the creation of a "single undertaking"[6] was agreed on and governments decided to annex the resulting text from each working group to the Marrakesh Agreement Establishing the WTO.[7] Although some efforts of legal co-ordination must have been made, the late action of the Legal Drafting Group,[8] combined with the resistance by the United States to the creation of a formal international organization, must have limited the ability to make changes to the texts already drafted in working groups. In grouping under a framework agreement various negotiated texts, without any extensive discussion of the internal organization and hierarchy of WTO norms, negotiators may have hoped that the flexibility inherent in some of the WTO treaty provisions would suffice to reconcile all tensions among its various provisions. The wording of some WTO provisions does not always support such hope. It becomes very difficult to define clearly and precisely the legal parameters of the relationships among the provisions of different WTO agreements.

This chapter focuses mainly on the relationship between Articles III, XI and XX of GATT; the TBT Agreement and the SPS Agreement, all of which impose different regulatory constraints on government actions relating to standards, technical and sanitary regulations, etc. We have therefore identified disciplines (inherent and common to each set of provisions and often specifically addressed in the TBT or SPS Agreements), compared them, discussed their interaction and suggested some understandings. We have explored the avenues offered by teleological, contextual

[5] Ministerial Declaration on the Uruguay Round of 20 September 1986, BISD 33S/19.

[6] During the Uruguay Round negotiations the concept of a single undertaking was widely used. It refers to two different concepts: the "single political undertaking" referred to the method of negotiations ["nothing is agreed until everything is agreed", which was not inconsistent with the possibility of early implementation (early harvest)]; and the "single legal undertaking" which refers to the notion that the results of the negotiations would form a "single package" to be implemented as one single treaty. Both concepts are reflected in the Part I:B(ii) of the Uruguay Round Declaration: "The launching, the *conduct* and the *implementation of the outcome* of the negotiations shall be treated as *parts of a single undertaking*. However, agreements reached at an early stage may be implemented on a provisional or a definitive basis by agreement prior to the formal conclusion of the negotiations. Early agreements shall be taken into account in assessing the overall balance of the negotiations" BISD 33S/19 (emphasis added).

[7] The Marrakesh Agreement Establishing the World Trade Organization together with its annexes form the "WTO Agreement". When reference is made to the Marrakesh Agreement, the intention is to focus on the institutional agreement itself. Although the European Communities, Canada and Mexico put forward a draft for the creation of a multilateral trade organization (MTO) in autumn 1991, it was only in October and November 1993, during the intensive negotiations of the Institutional Group (chaired by Ambassador Lacarte, until recently a member of the Appellate Body), that discussions on the relationship between the various provisions of this "single undertaking" took place. Since its inception, the idea of an MTO was strongly resisted by the United States, which kept a reservation on this chapter until midnight on 14 December 1993. Only then, arguably after sufficient concessions from others, did the United States lift its reservation. See Debra Steger, "WTO: A New Constitution for the Trading System", in M. Bronckers and R. Quick (Eds.), *New Directions in International Economic Law: Essays in Honour of John H. Jackson* (The Hague: Kluwer Law International, 2001), at p. 135.

[8] The Legal Drafting Group was established by Director-General Dunkel, and worked initially from January to May 1992, under the chairmanship of Madan Mathur, a former Deputy Director-General. It reviewed all the agreements. Id.