

NIJHOFF INTERNATIONAL TRADE LAW SERIES

NON-ECONOMIC OBJECTIVES IN WTO LAW

*Justification Provisions of GATT,
GATS, SPS and TBT Agreements*

STEFAN ZLEPTNIG

MARTINUS NIJHOFF PUBLISHERS

Non-Economic Objectives in WTO Law

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and TBT Agreements

By
Stefan Zleptnig



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PREFACE

This study is a timely and important contribution to the scholarly literature on the relationship between economic and non-economic objectives in WTO law. The relationship goes to the very heart of the international trading system, and Stefan Zleptnig has written a remarkable book about the subject. It is well written and analytical. It also contains much interesting material, and the systematic analysis of this material provides support for Dr Zleptnig's general thesis, but has practical uses beyond this. Academics and practitioners of WTO law alike will benefit from going deeper into the chapters of this book.

In a context of where the fragmentation of law and legal disciplines dominates scholarship, Dr Zleptnig moves effortlessly across the boundaries that divide the law. He is not necessarily searching for underlying unities, but he offers us new insights through the way in which he draws in scholarship from different fields of international trade law and other international and European law materials and concepts. It is also perhaps his comparative method that saves him from the temptation to write about international law from the point of view of a national tradition. Much of the current scholarship emanates from the US, and is frankly US WTO law, using US concepts and reflecting domestic US controversies about international law and constitutional law. There is German WTO law and EU WTO law (often also written from a national perspective to add another layer). This is a book dealing with WTO law, making clear what the foundations are for concepts and arguments, not just transposing those from one of the underlying jurisdictions and traditions.

The main message establishes as its starting point that the relationship between economic and non-economic objectives needs to be established on a case-by-case basis, taking into account the relevant legal provisions of WTO law and, in particular, the jurisprudence of the GATT/WTO dispute settlement bodies. Dr Zleptnig rejects the claim that many critics of the WTO would make, that in WTO law trade always trumps non-economic objectives and values. He examines in detail the relevant factors which define whether nation states may pursue non-economic objectives or are prevented by WTO law from doing so. Drawing this line is not always an easy task, as the rich body of jurisprudence of the GATT/WTO dispute settlement bodies shows. One may also read this book as a warning against too simplistic ideological arguments against or in favour of the current WTO system. As the author shows, the law of non-economic justification is a complex and sophisticated area of the law not easily lending itself to one-sided ideological views or positions.

Dr Zleptnig's book shows that there are issues relating to non-economic concerns (including the treatment of human rights or extraterritorial trade measures) which are not yet satisfactorily dealt with by the current WTO regime. It is incumbent on the Members of the WTO to remedy the deficiencies highlighted by this book in systematic and detailed manner; the analysis of these unresolved issues on non-economic concerns is one of the great merits of this book.

The book is not only of interest to WTO lawyers but also to EC lawyers. Dr Zleptnig demonstrates his deep knowledge of EC law, which enables him to move back and forth between WTO law and EC law, and to analyse differences and common factors between these two legal systems. This enriches the debate about non-economic objectives in WTO law.

This book sets out to analyse in detail the jurisprudence of the GATT/WTO dispute settlement bodies. At the same time, the book goes beyond a mere analysis of the case law, providing the reader with a broader picture about the main structural features of the law of non-economic justification in WTO law.

The book is both a challenge for and contribution to the scholarly and practical debate about non-economic objectives in WTO law. While not everybody will agree with all conclusions reached by the author, all will find merit in his analysis and argument. This book is an important and necessary contribution to legal literature dealing with WTO law and the international regulation of trade.

This is the first book in The Nijhoff International Trade Law Series.

The Series is a forum for important and original research. It moves across the boundaries that have divided the law and include studies of trade law subjects that would fall within the fields of public and private international and comparative law. Comparative law is increasingly used as a tool in the making of law at national, regional and international levels. Private international law is now often affected by international conventions, and the issues faced by classical conflict rules are dealt with by substantive harmonization of law under international auspices. Mixed international arbitrations, especially those involving state economic activity, raise questions of public and private international law, while in many fields (such as the protection of human rights and democratic standards, investment guarantees) international and national systems interact. National constitutional arrangements relating to 'foreign affairs', and to the implementation of international norms, are a focus of attention. The focus is on scholarly monographs, with a particular emphasis on those which are interdisciplinary in nature, both in relation to legal disciplines and the humanities and social sciences. Edited collections of essays will also be included where they are appropriate. The series is wide in scope and aims to cover studies of particular areas of substantive and

of institutional law, economic and historical works, theoretical studies, and analyses of current debates.

I am certain that the reader will agree with me that Dr Zleptnig's approaches, as discussed above, makes it a very happy choice as the first book in the series.

Mads Andenas
General Editor

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This book is based on my doctoral thesis submitted to the Faculty of Laws at the University of Vienna in 2008. Its origins go back several years, and I would like to express my gratitude to many people for their help and support throughout this period.

My first contact with WTO law was during my post-graduate studies at the London School of Economics and Political Science (LSE), where Deborah Cass taught me the basics of international economic law. I am grateful for her guidance and support at the beginning of my academic career.

This study was conceived during my work as Research Fellow at the British Institute of International and Comparative Law (BIICL) in London. I am very grateful to its then Director, Professor Mads Andenas, for his continuous support, encouragement and our discussions throughout all phases of this study. It was at BIICL that I met many practitioners and scholars of WTO law who have influenced my thinking about international trade law. I am particularly grateful to Kevin Gray, Philip Marsden and Federico Ortino for discussions on various aspects of this study.

I wish to express my sincere gratitude to Professor Bernhard Raschauer, for his generosity and personal and academic support during my time at the Institute of Constitutional and Administrative Law at the University of Vienna. Professor August Reinisch acted as my dissertation supervisor. I am very grateful for his continuous advice and encouragement over the last few years and for his readiness to comment on various drafts of this study. In Vienna my friends and colleagues Gerhard Holley and Christoph Konrath provided valuable feedback and were always ready to discuss specific issues relating to this study.

My thanks also goes to the University of Vienna which granted me financial support to undertake research for this study at the universities of London and Oxford. Thanks are also due to my editor at Brill, Peter Buschman, who readily supported the publication of this book, and to Ingeborg van der Laan for her assistance.

On a personal level, I am indebted to my parents who supported all my activities which led to the publication of this book.

TABLE OF ABBREVIATIONS

AB	Appellate Body
AG	Advocate General
AJIL	American Journal of International Law
ASIL	American Society of International Law
ATC	Agreement on Textiles and Clothing
CAC	Codex Alimentarius Commission
CAP	Common Agricultural Policy
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CMLR	Common Market Law Review
CPC	Central Product Classification
CTE	WTO Committee on Trade and Environment
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
DVBl	Deutsches Verwaltungsblatt
EBLR	European Business Law Review
EC	European Community
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EEC	European Economic Community
EJIL	European Journal of International Law
EPIL	Encyclopedia of Public International Law
EPZ	export processing zone
EU	European Union
EuR	Europarecht
FAO	Food and Agriculture Organization
FS	Festschrift
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GMO	genetically modified organism
GSP	Generalized System of Preferences
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ILC	International Law Commission
ILO	International Labour Organization
ISO	International Organization for Standardization

ITO	International Trade Organization
JIEL	Journal of International Economic Law
JWT	Journal of World Trade
LIEI	Legal Issues of Economic Integration
LQR	Law Quarterly Review
MEA	multilateral environmental agreement
MFN	most favoured nation
NAFTA	North American Free Trade Agreement
NGO	non-governmental organization
NT	national treatment
NTB	non-tariff barrier
ÖZW	Österreichische Zeitschrift für Wirtschaftsrecht
PPM	process and production methods
QR	quantitative restriction
RdU	Recht der Umwelt
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
TBT Agreement	Agreement on Technical Barriers to Trade
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNLCOS	United Nations Convention on the Law of the Sea
US	United States
VCLT	Vienna Convention on the Law of Treaties
VER	voluntary export restraint
WHO	World Health Organization
WTO	World Trade Organization
WTO Agreement	Agreement Establishing the World Trade Organization
WTR	World Trade Review
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

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