

CONTENTS

<i>List of figures and tables</i>	page xv
<i>Preface and acknowledgements</i>	xvii
<i>Table of GATT 1947 Reports</i>	xix
<i>Table of WTO Reports</i>	xxi
<i>List of abbreviations</i>	xxvi

Introduction 1

I Foundations: the relevance of NPA measures at the interface of domestic regulation, economic globalization and world trade law 7

1	Setting the stage for legal analysis	11
1.1	Brief introduction to the topic	11
1.2	The crucial cases	13
1.2.1	<i>Tuna-Dolphin I</i> (1991)	13
1.2.2	<i>Tuna-Dolphin II</i> (1994)	15
1.2.3	<i>Shrimp Turtle</i> (1998)	16
1.2.3.1	The Panel Report	17
1.2.3.2	The Appellate Body Report	18
1.2.3.3	<i>Shrimp Turtle</i> – Article 21.5 (2001)	20
1.3	Overview of the PPM debate	20
1.3.1	Emergence of the PPM debate	21
1.3.2	Developments in academia and practice	22
1.3.3	Concepts and terms central to the ‘PPM debate’	25
1.3.3.1	The product–process distinction	25
1.3.3.2	Processes and production methods	27
1.3.3.3	‘Product-related’ and ‘non-product-related’ PPMs	28
1.3.4	Unanswered questions and legal uncertainty	29
1.4	Identification of key legal issues	31
1.4.1	Customs tariffs	32
1.4.1.1	Article II	32
1.4.1.2	The relevance of international rules	33
1.4.1.3	Obligation to most-favoured-nation treatment	35
1.4.2	Import prohibitions or other quantitative restrictions	36

1.4.3	Non-tax internal regulation	38
1.4.4	Internal taxes and other internal charges	39
1.4.4.1	Indirect taxation and NPAs	40
1.4.4.2	Direct taxes and NPAs	43
1.4.5	Border tax adjustment	43
1.4.5.1	Imports	44
1.4.5.2	Exports	45
1.4.6	Anti-dumping duties	46
1.4.7	Subsidies	48
1.4.7.1	Subsidies linked to NPAs	48
1.4.7.2	Low standards as illegitimate subsidization	51
1.4.8	General exceptions	52
1.4.8.1	The particular exceptions	53
1.4.8.2	The introductory provision of Article XX	54
1.4.9	Technical barriers to trade and sanitary and phytosanitary measures	55
1.4.10	Summary	56
1.5	Delineation and foundations of the legal analysis	57
1.5.1	Scope of the analysis	57
1.5.1.1	General object of research: trade in goods	57
1.5.1.2	Scope of the legal analysis	60
1.5.2	Terms and concepts	61
1.5.2.1	NPA measures	61
1.5.2.2	Processes and production methods or 'PPMs'	62
2	Putting the debate into perspective: analysis of the socio-economic context	64
2.1	National regulation and NPAs	65
2.1.1	Overview of regulation	66
2.1.1.1	General domestic regulation	66
2.1.1.2	The notion of social regulation	68
2.1.1.3	Different modes of regulation	70
2.1.2	Differences and similarities in regulatory cultures: the example of the United States and Europe	74
2.1.2.1	Regulation in the United States	75
2.1.2.2	Regulation in Western Europe	78
2.1.2.3	Assessment of differences and similarities	81
2.1.3	The economic case for state intervention	83
2.1.3.1	Basic considerations on free markets and the economic role of governments	84
2.1.3.2	Categories of economic rationales for regulation	86
2.1.3.2.1	Regulation to safeguard competitive markets	87
2.1.3.2.2	Regulation addressing market failure	88
2.1.3.2.3	Regulation in pursuit of distributional or social objectives	90
2.1.3.3	Preliminary conclusion	91

2.2	International trade and NPA measures	92
2.2.1	Design parameters of the multilateral trading system	92
2.2.1.1	Object and purpose of the WTO Agreements	92
2.2.1.1.1	Identification	93
2.2.1.1.2	Relevance	96
2.2.1.2	Economic rationales of the multilateral trading system	98
2.2.2	The interface of domestic regulation and international trade	100
2.2.2.1	The general debate on domestic regulation	100
2.2.2.2	NPA measures and international trade in goods	103
2.2.3	Political arguments in the international debate	104
2.2.3.1	Effective and efficient protection of national or foreign objects	104
2.2.3.2	Sovereignty and extraterritoriality	106
2.2.3.3	Unilateralism	108
2.2.3.4	Competitiveness and effective regulation	110
2.2.3.5	Summary	113
II	Legal analysis: reviewing the status of NPA measures <i>de lege lata</i>	115
3	Preliminary considerations: applicability of WTO law and other international law to NPA measures	119
3.1	Applicability of WTO law to NPA measures	120
3.2	The relevance of conventional international law in WTO dispute settlement	121
3.2.1	No closed self-contained regime	122
3.2.2	General applicability of international law	124
3.2.3	Conflicts with other international treaties and instruments	128
3.2.3.1	Existence of a conflict of norms	128
3.2.3.2	Applicable conflict rules	132
3.2.3.2.1	Asymmetrical conflicts	133
3.2.3.2.2	Symmetrical conflicts	134
3.2.3.3	Conflicts of norms, NPAs and the example of CITES	138
3.3	NPA measures and the law on state responsibility	140
3.4	Conclusion	145
4	Consistency with GATT obligations	147
4.1	The scope of the national treatment obligations	149
4.1.1	The use of specific terms	150
4.1.1.1	Narrow interpretation: products	151
4.1.1.2	Broad interpretation: 'affecting'	152
4.1.1.3	Preliminary conclusion	155
4.1.2	Comparison of Article III:2 and 4	156
4.1.3	Measures 'of the same nature'	158
4.1.4	Summary and conclusion	161

4.2	The principle of non-discrimination and the 'like products' concept	162
4.2.1	Introduction to the principle of non-discrimination	162
4.2.1.1	General problems inherent to the principle	163
4.2.1.2	Clear prohibition of origin-based discrimination	165
4.2.1.3	Non-discrimination and NPAs	167
4.2.2	Interpreting the 'like products' concept with special consideration of NPAs	168
4.2.2.1	The DSB approach: 'objective' determination	169
4.2.2.1.1	Main features	170
4.2.2.1.1.1	Relevant factors	172
4.2.2.1.1.2	Varying importance of factors	174
4.2.2.1.1.3	Degree of 'likeness' under different provisions	177
4.2.2.1.2	Relevance of NPAs	179
4.2.2.1.2.1	Processes and production methods	179
4.2.2.1.2.2	Output and producer characteristics	183
4.2.2.1.2.3	Price	189
4.2.2.1.2.4	National policies and regulatory regimes	192
4.2.2.1.3	Relevance of 'minor' physical differences	196
4.2.2.1.3.1	Editorial content	197
4.2.2.1.3.2	Environmental impacts	200
4.2.2.1.3.3	Toxicity and risk	201
4.2.2.1.3.4	Genetic modifications	203
4.2.2.1.4	Summary	204
4.2.2.2	The 'aim and effects' theory	206
4.2.2.2.1	Rationales and main elements	207
4.2.2.2.1.1	The criteria	208
4.2.2.2.1.2	Scope and relevance	209
4.2.2.2.1.3	Diversity of opinions	210
4.2.2.2.2	Significance for NPA measures	211
4.2.2.2.3	The 'aim and effects' theory in WTO adjudication	212
4.2.2.2.3.1	<i>US – Malt Beverages</i> (1992)	213
4.2.2.2.3.2	<i>US – Taxes on Automobiles</i> (1994)	214
4.2.2.2.3.3	<i>Japan – Alcoholic Beverages</i> (1996) and <i>EC – Bananas</i> (1997)	215
4.2.2.2.3.4	Subsequent jurisprudence	218
4.2.2.2.4	Critique	220
4.2.2.3	Market-based or economic approaches	222
4.2.2.3.1	Rationales and main elements	223
4.2.2.3.2	Significance for NPA measures	226
4.2.2.3.3	Relevance in WTO adjudication	228
4.2.2.3.4	Critique	232
4.2.3	Summary	236
4.3	Detrimental treatment and NPA measures	240
4.4	Conclusions	244

5	Limits to the justification of NPA measures under the general exceptions	247
5.1	Particularities in interpreting Article XX	249
5.1.1	Relevance of international law for interpretation	249
5.1.1.1	Basic framework of interpretation	250
5.1.1.2	GATT and WTO case law	252
5.1.1.3	Signatories-based approach	254
5.1.1.3.1	Congruence within disputes	255
5.1.1.3.2	Incongruence within disputes	257
5.1.1.4	Objective approach	258
5.1.1.4.1	The nature of interpretation	258
5.1.1.4.2	Relevance of international instruments	260
5.1.1.4.3	Summary	263
5.1.1.4.4	Excursus: <i>inter se</i> understanding on interpretation	264
5.1.2	Other interpretative questions	265
5.1.2.1	No restrictive interpretation	265
5.1.2.2	Static or evolutionary interpretation?	267
5.1.3	Summary	269
5.2	General concerns regarding justifiability of NPA measures	269
5.2.1	Vagueness of basic objections	270
5.2.2	Review of arguments against justifiability	272
5.2.2.1	Irreconcilability with WTO objectives and purpose	272
5.2.2.2	<i>Per se</i> violation of the chapeau	274
5.2.2.3	Violation of the sovereignty principle	275
5.2.3	Result	281
5.3	The scope of Article XX	281
5.3.1	The geographical scope and the problem of extraterritoriality	281
5.3.1.1	Insufficient GATT and WTO case law	283
5.3.1.2	The text of the particular exceptions	284
5.3.1.2.1	Direct references to the geographical scope	285
5.3.1.2.2	Indirect reference: the means–end relationship	286
5.3.1.2.2.1	‘necessary’	286
5.3.1.2.2.2	‘relating to’ and ‘imposed for’	288
5.3.1.2.2.3	Implications for the geographical scope	291
5.3.1.2.3	Indirect reference in exception (g): domestic restrictions	295
5.3.1.2.3.1	History and relevant case law	295
5.3.1.2.3.2	Distinction between foreign and shared resources	297
5.3.1.3	Object and purpose	300
5.3.1.4	Negotiating history	302
5.3.1.5	Alternative approaches to extraterritoriality	305
5.3.1.6	Conclusions on the geographical scope	308
5.3.2	Subject coverage of the particular exceptions	309
5.3.2.1	Exclusivity of listed policies	310

5.3.2.2	Coverage of other policies	311
5.3.2.2.1	Protection of the environment	311
5.3.2.2.2	Human rights and labour standards	313
5.3.2.3	Summary	316
5.3.3	Special consideration of the public morals exception	316
5.3.3.1	Open subject coverage	317
5.3.3.2	Standards of right and wrong	321
5.3.3.3	The geographical scope	323
5.3.3.3.1	Location of moral standards	323
5.3.3.3.2	Location of the threat	324
5.3.3.3.3	Preliminary conclusions	326
5.3.3.4	Requirements relating to the means–end relationship	326
5.3.3.4.1	Motivation for moral NPA trade measures	327
5.3.3.4.2	Suitability	328
5.3.3.4.3	Necessity	329
5.3.3.4.3.1	‘Relative’ and ‘absolute’ necessity	330
5.3.3.4.3.2	WTO jurisprudence on ‘weighing and balancing’	331
5.3.3.4.3.3	Other approaches	338
5.3.3.4.4	Conclusions for an adequate ‘necessity’ test	339
5.3.3.4.4.1	Step 1	340
5.3.3.4.4.2	Step 2	341
5.3.3.4.4.3	Step 3	342
5.3.4	Summary	343
5.4	The chapeau and other requirements regarding the application of measures	345
5.4.1	A ‘balancing process’ under the chapeau?	347
5.4.2	The requirements	349
5.4.2.1	Introductory remarks	350
5.4.2.2	General requirements and principles	352
5.4.2.2.1	An ‘unavoidable’ standard of justifiability?	352
5.4.2.2.2	Relevance of different conditions in countries	353
5.4.2.2.3	Special and differential treatment	356
5.4.2.2.3.1	The principle of SDT	356
5.4.2.2.3.2	Relevance of SDT for the chapeau	359
5.4.2.2.4	Due process and general principles	359
5.4.2.3	Specific problem fields	361
5.4.2.3.1	No prohibition of unilateral measures	361
5.4.2.3.2	Are serious negotiations obligatory?	362
5.4.2.4	Specific requirements for NPA measures	364
5.4.2.4.1	Relevant characteristics of NPA measures	365
5.4.2.4.2	Consultations and negotiations	366
5.4.2.4.3	Implementation periods	367
5.4.2.4.4	Transfer of technologies, administrative and financial support	369
5.5	Conclusions	372

6	The status of PPM measures under the TBT Agreement and the SPS Agreement	374
6.1	Introduction	374
6.2	The TBT Agreement and PPMs	374
6.2.1	Applicability of the TBT Agreement	375
6.2.1.1	Categorization of relevant norms linked to unincorporated PPMs	376
6.2.1.2	Technical regulations and standards	377
6.2.1.3	Labelling requirements	381
6.2.1.3.1	The EU regulatory framework on egg labelling	383
6.2.1.3.2	Coverage with respect to labelling of PPMs and NPAs	385
6.2.1.3.2.1	Labelling of unincorporated PPMs	385
6.2.1.3.2.2	Other NPAs	388
6.2.2	Substantive provisions	389
6.2.2.1	No <i>per se</i> illegality	389
6.2.2.2	Substantive requirements on technical regulations and standards	393
6.2.2.2.1	Overview of substantive requirements	393
6.2.2.2.2	The distinction between regulations and standards	395
6.2.2.3	Legitimacy of the objective pursued: special consideration of consumer information	396
6.2.2.3.1	Consumer information as an internationally recognized value	398
6.2.2.3.2	Consumer information as precondition for the functioning of markets	405
6.2.2.3.3	Preliminary conclusions	410
6.2.2.4	Necessity	412
6.2.3	The relationship of the TBT Agreement and the GATT	414
6.2.4	Special and differential treatment	415
6.3	The SPS Agreement	419
6.4	Result	421
III	Outlook: new perspectives on the legal status of NPA measures	423
7	The interface of international trade and public policies: an overview over existing proposals for reform	427
7.1	Review	427
7.1.1	Denial of competence?	428
7.1.2	Changes at WTO level	432
7.1.2.1	Substance	433
7.1.2.2	Procedure	438
7.1.3	Institutional changes and governance-related suggestions	440

7.1.3.1	Institutional changes	440
7.1.3.2	Governance in a multi-level system	443
7.2	Comment	448
8	A regulation-based perspective on NPA trade measures	451
8.1	Regulatory problems linked to international trade	452
8.1.1	Side-effects of international trade	453
8.1.2	The regulatory dilemma	454
8.1.2.1	Effectiveness of unimpaired national regulation	454
8.1.2.2	Effectiveness of impaired national regulation	456
8.1.3	Market failure and the lack of international institutions	461
8.1.4	Regulatory failure is not in line with objectives and key rationales of the WTO	463
8.1.5	Conclusions	466
8.2	Applying the regulation-based perspective	467
8.2.1	Deduction of the regulation-based approach	467
8.2.2	Categorization of national regulation	469
8.2.2.1	Category 1: Regulation reducing market imperfections	469
8.2.2.2	Category 2: Regulation addressing market failure	473
8.2.2.3	Category 3: Distributive regulation	478
8.2.3	General conditions of consistency	481
8.2.3.1	General requirements	481
8.2.3.2	National regulation and SDT	482
8.2.4	Conclusions	483
	<i>Summary and concluding remarks</i>	485
	<i>Bibliography</i>	494
	<i>Index</i>	513