Foreword

With this book Barbara Cooreman tackles a big, controversial subject: does WTO law constitute an obstacle for countries to do something about environmental harm that occurs outside of their own borders? More specifically, does WTO law permit a country to restrict the imports of products which have been produced outside its territory in environmentally harmful ways?

The WTO treaty texts do not give a definite answer about these questions. One has to look to case law for further clarification. The Shrimp – Turtle rulings of the late 1990s and early 2000s remain the key precedent to date. The United States restricted imports of shrimp from third countries which were caught with nets that did not include a device that allowed turtles to escape. There was little doubt that this import restriction violated basic WTO rules. The debate focused on the question whether the United States could rely on one of the public policy exceptions included in the WTO agreements to justify its environmental concern.

The threshold issue was whether the United States was well placed to take action with respect to fishing activities outside of its territorial waters. The WTO Appellate Body dealt only summarily with this issue; because some of the turtles migrated through US waters some of the time, it found that there was a sufficient nexus between the endangered turtle species and the United States. While helping to arrive at a ruling that was ultimately turtle-friendly, this finding of the WTO Appellate Body provided only a slim basis to assess other trade measures that address environmentally bothersome production processes outside of the territory of the regulating state. It is probably fair to say that, as a result, the WTO’s reputation suffered, at least in those circles that worry about the environment. Moreover, uncertainty about the WTO- legality of so-called extraterritorial trade measures may also have had a chilling effect on the adoption of otherwise worthwhile measures seeking to protect the environment.

Barbara Cooreman decided to tackle her big and sensitive subject circumspectly. Having outlined the issues as they arose under WTO and prior to that GATT law, she first looked to other areas of law to see how extraterritorial measures are dealt with. She reviewed public international law, competition law, and international human rights law, and with the
perspectives she obtained there she came back to the WTO context. Here she has made significant contributions.

First, Cooreman establishes an analytical framework, a decision tree as she calls it, which provides almost step-by-step guidance to decision-makers and tribunals in reaching a more robust conclusion on the legality under WTO law of extraterritorial trade measures. Second, this framework is underpinned by a new insight. The regulating state is not only permitted to address production processes abroad when they produce substantial effects within its territory, a lesson that could be drawn notably from general public international law and competition law. In addition, when the effects on its territory are weaker, the regulating state can still draw justification to act in the WTO from environmental treaties and to some extent even soft law. This is what Barbara calls ‘communicating vessels’: the more international law a regulating state can point to, the fewer effects on its territory are needed before it is entitled to act. As she argues, in this respect environmental protection differs from the preserve of competition law, given that there is so little international competition law.

Accordingly, and with hindsight, the Appellate Body got it right in the Shrimp – Turtle case by not requiring a strong territorial link with the United States. Through a careful analysis the author adds substance to the Appellate Body’s more intuitive approach. This inspires confidence for future cases. Usefully, she illustrates the viability of her research by applying her decision tree to several controversial regulations adopted by the EU concerning illegal fishing and logging, as well as aviation under the EU’s emission trading system.

With these insights Barbara Cooreman achieves a breakthrough. She demonstrates that governments cannot hide any longer between the constraints allegedly found in existing treaty texts, and the difficulties and delays inherent in amending WTO law: WTO law as it stands is no excuse for environmental inaction. At the same time, the author cautions against overreach in the use of unilateral trade measures by powerful, developed nations. She also warns against the misunderstanding that her conclusion implies a preference for unilateral action over multilateral action; rather, she points out, unilateral trade measures can be a trigger for multilateral agreements on environmental protection. All this extends the interest of her work well beyond legal experts; her conclusions have societal importance. To be sure, this is no mean feat, for which she deserves high praise.

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