Foreword

Michael J. Trebilcock

The collection of essays in this volume focuses on a relatively new frontier for legal and policy analysis of international trading regimes: technical barriers to trade. It has become something of a truism in international trade circles that as classical border barriers to trade, i.e., tariffs and quotas, have been reduced dramatically in the course of successive trade negotiations in the post-war period, remaining barriers to trade increasingly take the form of 'within the border' domestic measures of trading partners. However, unlike classical border barriers to trade, the large volume and widely divergent character of 'within the border' measures that may constitute impediments to trade are often – perhaps mostly – not adopted with a view to restricting trade and protecting domestic industries, but with a view to advancing a variety of legitimate domestic policy objectives, including health and safety and environmental objectives, while sometimes incidentally burdening trade.

From the perspective of importing countries, as international trade has expanded dramatically in the post-war period, the challenges of regulating the safety of imports to ensure that they adhere to the same standards that apply to domestically produced goods has grown more daunting. The logistical challenges of effectively inspecting and monitoring goods at ports of entry, given the volume of imports, the diversity of countries from which they originate, and the complexity of international supply chains are formidable.[1] Even countries committed to the nondiscriminatory application of health, safety and environmental regulations to imports, and to ensuring that such regulations do not constitute unnecessary obstacles to trade, face significant legal and policy challenges in ensuring that such measures comply with international trade

[1] See Cary Coglianese, Adam Finkel and David Zaring, 'Consumer Protection in an Era of Globalization,' in Coglianese, Finkel and Zaring, eds., *Import Safety: Regulatory Governance and the Global Economy* (Philadelphia: University of Pennsylvania Press, 2009), Chapter 1.

obligations.[2] From the perspective of exporting countries, these challenges may be equally daunting in that they may face divergent requirements in each of their foreign export markets, along with the multiple compliance costs that these entail. For small exporters in poor developing countries, these costs may be especially burdensome and indeed effectively foreclose access to many foreign markets.

In the course of the Uruguay Round that culminated in 1993, two new multilateral agreements were negotiated to address these concerns: the Agreement on the Application of Sanitary and Phytosanitary Measures, and the Technical Barriers to Trade Agreement. The former focuses primarily on food standards, while the latter relates to product regulations and standards of all kinds, other than those covered by the SPS Agreement. This volume focuses on product regulations and standards that fall within the domain of the TBT Agreement. Under this Agreement, product regulations and standards are required to be notified to the TBT Committee, and these notifications now run into the many thousands. The TBT Committee itself provides a forum in which concerns on the part of either importers or exporters can be ventilated and informally resolved through modifications to existing or proposed measures, while in the last resort disputes between Member countries may be formally resolved by the WTO Dispute Settlement Body. Somewhat in contrast to experience under the SPS Agreement, the TBT Agreement yielded very few formal disputes until recently, when in 2012 the Appellate Body decided three high-profile formal disputes under the TBT Agreement: the *Tuna Labelling* case, the *Country of Origin Labelling* case, and the *Clove Cigarettes* case, all extensively analyzed in various essays in this volume. While the phrase 'technical regulations or standards' as used in the TBT Agreement might be taken to imply that such regulations and standards lie on the margins of international trade policy and are of interest only to the technical professions centrally engaged in standard-setting processes, these three cases, along with much of the analysis in the essays in this volume, underscore the fact that product regulations and standards engage a much broader and more fundamental set of normative concerns relating to consumer protection and environmental policy (including climate change), and engage a much broader set of politically salient constituencies.

The TBT Agreement (like the SPS Agreement) attempts to walk a fine and highly contestable line between recognizing the importance of

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[2] See Tracey Epps and Michael Trebilcock, 'Import Safety Regulation and International Trade,' in Coglianese, Finkel and Zaring, eds., *ibid.*

domestic policy space and autonomy for Member countries to regulate these issues of fundamental concern to many of their citizens, while at the same time discouraging Member countries from adopting product regulations or standards ostensibly on health, safety or environmental grounds, but that are in fact disguised forms of protectionism for domestic industries, or that gratuitously or excessively burden international trade. Drawing and maintaining this distinction in a principled and consistent way is a major legal and policy challenge (as the essays in this volume explore in detail), given that protectionist motivations will rarely be as evident as in the case of the classic border forms of protection. Yet, regulatory protectionism, when this is in fact the motivation for product regulations or standards, is likely to entail much larger social costs than more transparent forms of protectionism (such as classic border measures).[3] Thus, in formal dispute settlement proceedings entailing complaints by exporting countries of alleged violations by importing countries of their obligations under the TBT Agreement – principally the obligation of non-discrimination, and the obligation to avoid creating unnecessary obstacles to trade – WTO panels, and ultimately the Appellate Body, in determining the standard of review to be applied to challenged measures, face the unenviable task, both under the TBT and SPS Agreements, of determining how much deference, or 'margin of appreciation', should be extended to Member countries in exercising their domestic policy autonomy. This task may be especially acute when the challenged measures in question do not appear to be motivated primarily by protectionist reasons, but nevertheless have a disparate impact on imports relative to competing domestic products.[4]

It seems a safe prediction that these issues will increasingly engage the attention of the international trade law and policy community in the years ahead. The collection of essays in this volume provides important insights and illumination as to how this new frontier in international trade law and policy might most productively evolve.

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[3] See Alan Sykes, 'Regulatory Protectionism and the Law of International Trade,' (1999) 66 University of Chicago Law Review. 31.

[4] See, e.g., Michael Trebilcock and Julie Soloway, 'International Policy and Domestic Food Safety Regulation: The Case for Substantial Deference by the WTO Dispute Settlement Body under the SPS Agreement,' in Daniel Kennedy and James Southwick, eds., *The Political Economy of International Trade* (Cambridge, UK: Cambridge University Press, 2002); Tracey Epps, *International Trade and Health Protection: A Critical Assessment of the WTO's SPS Agreement* (Cheltenham, UK and Northampton, MA, USA: Edward Elgar, 2008).