Preface

The 'domestic regulatory autonomy' debate in world trade law pitches the freedom of a sovereign State to pursue important 'regulatory' interests (such as environment, public health, consumer protection and animal welfare) against the free trade commitments which the same State has voluntarily committed to. At multilateral level, these trade commitments are found in the agreements of the World Trade Organization (WTO).

Free trade agreements, including those making up the body of WTO law, are not oblivious to the continuing desire of participating States to regulate to promote the societal interests referred to above. Consequently they provide, to varying degrees, room for 'domestic regulatory autonomy', subject of course to the checks and balances provided by the legal disciplines in the relevant agreement. These disciplines aim to limit the impact of national regulations on liberalised trade, both by preventing disguised protectionism and by reducing the trade restrictive effect of legitimate regulation. This fragile balance between free trade and regulatory autonomy is particularly crucial in the sensitive areas of health and the environment, as shown through the discussions in this volume. Its contours have been sketched through the interpretation of key WTO provisions in considerable case law, initially under the GATT 1947, and increasingly under the WTO agreements.

The analysis of GATT 1947 Panels focused on two main issues. First, the *like product analysis* within GATT non-discrimination rules circumscribed the possibilities for regulatory distinctions. GATT Panels reviewed this issue inter alia in the *US – Tuna/Dolphin* Cases, in *US – Malt Beverage*s, and in *US – Taxes on Automobiles*. The 1970 Working Party Report on Border Tax Adjustments inadvertently served as the principal lead in the discussion on like products and product distinctions made on the basis of non-product-related processes and production methods.

Second, the 'balancing' role of the *exceptions* of GATT Article XX, and the extent to which health and environment objectives could be pursued in otherwise GATT-inconsistent regulation, received useful clarification. In particular GATT Article XX(b) and (g), and the 'chapeau' of Article XX were relevantly applied in *US – Tuna/Dolphin*, and in *Thailand – Cigarettes*.

With the establishment of the WTO came increased attention to the importance of achieving an appropriate balance between free trade and

regulatory autonomy in the area of health and the environment, in keeping with growing national attention to these concerns. Consequently, case law addressing these issues reflected greater sensitivity to the complexities involved. First, case law on the GATT regulatory disciplines reached new levels of sophistication, including through the rejection of the consideration of the 'aim-and-effect' of a measure in the determination of likeness of products. Second, domestic regulatory measures became subject to a much wider plethora of agreements, with detailed disciplines going beyond non-discrimination rules. The GATT is no longer singlehandedly relevant. The TBT and SPS Agreements in particular (both building upon pre-WTO codes), now may catch domestic regulatory measures affecting trade in goods, including in the field of health and the environment, and discipline their trade restrictive effects even if they are non-discriminatory. In addition, with GATS, regulations to pursue health objectives in the area of trade in services may now also come within the ambit of WTO obligations, albeit providing States with more say in the applicability of some of these and leaving greater elbow room for regulation. WTO case law was therefore immediately relevant to trade and health/environment discussions. This is seen with the very first WTO case, *US – Gasoline*, and subsequently with later benchmark decisions such as *US – Shrimp/Turtle*, *EC – Asbestos* (where the demarcation between GATT and TBT was raised as an issue for the first time), *EC – Hormones* and *Brazil – Tyres*.

This volume groups analysis of a dream team of international academics and practitioners. The topics which they review reflect the most relevant anchor points for the interaction between trade, health and environmental concerns. Not only do these contributions present the state of the art on a number of topics of continuing relevance for the delicate balance between trade and health/environment regulation, such as the scope for precautionary measures, the relevance of regulatory purpose and the choice of an appropriate level of protection; but they also cover emerging issues of great importance for this balance, including the scope in WTO law for measures to address the challenges of climate change, non-communicable diseases, animal welfare and public health services.

A current series of dispute settlement reports in the WTO is further refining the debate, in particular the very recent Appellate Body decisions in *US – Clove Cigarettes*, *US – Tuna II* and *China – Raw Materials*, new discussions on export restrictions in the *China – Rare Earths* dispute, and the pending litigation in *EC – Seal Products, Canada – Renewable Energy* and *Australia – Plain Packaging of Tobacco*. Given the speed of development, the delay between writing, editing and publication may mean that not all the detail of the most recent reports has been included

in the various chapters. However the conceptual analysis in which these reports play out, has.

The issues addressed in this volume touch upon the lives and well-being of many. 'Trade' here is reflected in health and welfare opportunities gained and lost, not in mere export and import statistics.

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