

Laura Nielsen. ***The WTO, Animals and PPMs***. Leiden: Martinus Nijhoff Publishers, 2007. Pp. 355. \$115.00. ISBN 9781571051868.¹

A series of books and an even greater number of articles have examined, over the last 10–15 years, the interplay between WTO law and non-economic concerns, in particular those pertaining to environmental protection. Many of these works have focused *inter alia* on one particularly difficult issue: the question whether a WTO Member may restrict imports of goods which stem from production and processing methods which do not leave physically detectable traces on the products (so-called non-product-related process and production methods or NPR PPMs). A well-known example is the famous case of shrimp caught with devices which endanger sea turtles: such a method will not normally be physically detectable in the final product (shrimp) when it is imported into another country. Another example is products stemming from conditions of production which are perceived, by importing countries, as inhumane or otherwise problematic. Such measures are highly controversial from a legal perspective, given that some exporting countries tend to take the view that production conditions which do not affect the quality of the exported product are 'of no concern' to importing countries, so that WTO Mem-

bers may not prohibit their importation. In academic writings, a series of divergent views have been taken on this issue; thus, it has repeatedly been held for example that such measures need to be justified under the GATT; moreover, it has been contended that justification may even be impossible in respect of such measures.²

A new work focusing on a subset of these issues is Laura Nielsen's book, which examines the WTO consistency of trade measures designed to protect animals on the basis of environmental and animal welfare concerns. The focus of the book is rather narrow: even though it contains brief overviews of the GATT, the WTO, SPS, and TBT Agreements in its central parts, the study concentrates on the policy tests in Article XX, the so-called 'general exceptions' clause of the GATT. According to the author, the novelties presented in her book are 'a new way of analyzing GATT Article XX' and 'an analysis of why public moral issues are different from environmental issues in general' (at 2).

An important distinction for understanding the analysis provided in this study is Nielsen's differentiation between animal protection in the environmental area and in the area of animal welfare. She defines environmental protection of animals as the protection of a species, and animal welfare protection as that of individual specimens (at 80). Furthermore, in her view, 'the most important thing to understand is that animal welfare concerns stem from morals' (at 106). This distinction is connected to the author's view that public moral issues are 'a purely moral determination', whereas environmental issues in general are 'science-based' (at 2 *et passim*). As becomes clearer in the course of reading this study, Nielsen takes the view that it is a problem 'that animal welfare measures are analyzed in the same sub-sections [of Article XX of the GATT] as environmental measures' (at 327 *et passim*). This appears connected to the

¹ An extended version of this review with additional references to relevant academic writings and judicial decisions is available at: www.globallawbooks.org.

² On this discussion cf e.g. Charnovitz, 'The Law of Environmental "PPMs" in the WTO: Debunking the Myth of Illegality', 27 *Yale J Int'l L* (2002) 59, at 75 ff with extensive further references.

author's contention that 'moral policies' such as animal welfare measures cannot properly be reviewed under Article XX of the GATT.³

In the first chapter, the book states two theses which it subsequently attempts to verify. Thesis 1 is related to the structure of Article XX of the GATT, which in a series of sub-sections lists several policy goals that may be pursued through measures complying with the conditions laid down in Article XX. According to Thesis 1, 'the "overlap" between the sub-sections of Article XX is not in conformity with the principle of effectiveness in treaty interpretation'. Thesis 2 is concerned with three different types of trade measure which, unfortunately, are only defined in later chapters of the book, namely 'internal measures', 'product-related PPMs', and 'non-product-related PPMs'. The notion of 'internal measure' is not very clearly defined by the author. According to her, an example of it is an import ban which pursues domestic concerns.⁴ 'Product-related PPMs', by contrast, are commonly understood, in trade circles, as measures affecting trade in goods which are concerned with process and production methods which impact on the physical characteristics of the goods in question (so-called 'product-related PPMs'). 'Non-product-related PPMs', on the other hand, are regularly understood, in the trade law community, as measures affecting trade in goods which are concerned with process and production methods not related to the goods concerned in the sense of bearing on their physical characteristics.⁵ An example of the last category is the aforementioned case

of shrimp caught with devices that endanger sea turtles. Pursuant to Thesis 2, 'the division of measures under sub-sections (a), (b) and (g) [of Article XX of the GATT]...into three distinct categories (internal measures, non-product-related PPMs and product-related PPMs) can provide a systematic analytical framework for the analysis of the subsections and the *chapeau* analysis' in Article XX of the GATT (at 15–16).

The book does not immediately turn to a verification of these theses. Rather, it sets out the broader legal background in the following chapters, describing basic concepts in public international law, the notion of sustainable development, environmental protection of animals, animal welfare protection, fundamentals of the WTO legal system, and the basic disciplines of the GATT, the SPS, and the TBT Agreements in chapters 2–7, respectively. These parts of the thesis are preponderantly descriptive. It is conspicuous that they are generally based on a very small set of academic writings, often general textbooks, and on only very few pertinent articles or monographs. This scarcity is not only surprising in view of the abundance of relevant legal literature on most aspects dealt with here; it goes without saying that such an approach also runs the risk of overlooking essential legal issues. A case in point is one of the author's starting-points, expressed in a brief statement, that WTO law 'is bilateral in nature' (at 24). This view is apparently based on one author only, disregarding the fact that other writers appear to have taken a different view⁶ and that even the one writer referred to by Nielsen has – rightly – taken a considerably more nuanced view on the issue.⁷ Generally speaking, one wonders whether the book would have profited from shortening these

³ On this cf *infra*, Section III.

⁴ On this definition, which is provided in Chapter 9 of this book, cf *infra*, Section IV.

⁵ Cf e.g., the definition provided by Canada in a communication to the CTE ('[n]on-product-related (npr) PPMs describe a process or production method which does not affect or change the nature, properties, or qualities of (nor discernible traits in or on) a product.': cf Labelling and Requirements of the Agreement on Technical Barriers to Trade (TBT): Framework for informal, structured discussions. Communication from Canada, WTO Doc. WT/CTE/W/229, 23 June 2003).

⁶ Cf Marceau, 'Conflicts of Norms and Conflicts of Jurisdictions. The Relationship between the WTO Agreement and MEAs and other Treaties', 35 *J World Trade* (2001) 1081, at 1104–1105 and *passim*.

⁷ The book referred to by Nielsen is J Pauwelyn, *Conflict of Norms in Public International Law. How WTO Law Relates to other Rules of International Law*

largely descriptive chapters, which still have an introductory character, and from broadening the focus of the book to include issues such as the relationship between Articles III and XI of the GATT and the question of the legality of non-product-related PPM measures under these clauses. After all, meanwhile there are indications in WTO panel practice that such measures may not even *prima facie* violate GATT disciplines (and may therefore not require justification under Article XX), when they neither *de jure* nor *de facto* discriminate against foreign products.⁸

The main parts of this book are chapters 8 and 9 which more directly address the aforementioned two theses developed in the first chapter. Chapter 8 examines 'the policy area of Article XX' of the GATT (at 189 (title)), concentrating mostly on Article XX (a), (b), and (g). Pursuant to Article XX, WTO Members which are found *prima facie* to have violated basic obligations under the GATT through the adoption of a given measure, are exceptionally permitted to maintain such a measure if this is 'necessary to protect public morals' (paragraph (a)), 'necessary to protect human, animal or plant life or health' (paragraph (b)), and/or is 'relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption' (paragraph (g)). Thus, the wording differs under these subsections, in that the policy goals listed in paragraph (a) and (b) may be pursued only through measures which can be regarded as *necessary* for these goals, whereas the aim in paragraph (g) may

only be pursued through measures, *relating to* this aim, which are adopted *in conjunction with* similar domestic restrictions. In other words, a measure will be subjected to *different textual tests* when paragraphs (a) and (b) on the one hand or paragraph (g) on the other hand are invoked in its defence. This is why it is important which policy goal is invoked by a defending WTO Member in WTO dispute settlement proceedings. Evidently, these subsections do overlap in certain constellations, namely when a given trade measure pursues multiple aims, such as an import prohibition on alcohol which is meant to protect public morals (paragraph (a)) and human health (paragraph (b)) at the same time.

In this context, Nielsen takes the view that this overlap is problematic. Unfortunately, this view, which is central for her book and directly connected to Thesis 1, is not very clearly explained. The author states in particular that 'the most important problem with the overlap of the sub-sections is "the reason behind" the exception. Exceptions are created to *carve out policy areas* – and these policy areas need to be defined' (at 196). This statement indicates a fundamental misunderstanding which fails to pay sufficient attention to the crucial distinction between *aims* and *means*: the 'general exceptions' clause in Article XX of the GATT does *not* carve out *policy areas* as such from the disciplines of the GATT. It merely permits WTO Members to pursue *aims* – i.e., the policy goals listed in Article XX – with the least trade-restrictive *means*.

This first misunderstanding seems to be connected to a second one: according to Nielsen, there is a difference between 'moral measures' and 'other more scientific policies' in that 'it appears that there is no manner in which a moral policy can be second guessed by the panels or the Appellate Body, because the policy in most cases is a country- or region-specific policy'. The author goes on to state that '[t]his can be illuminated by the example of a country that decides to ban pornographic materials. This policy cannot be claimed to be *unimportant or disproportionate*...When verification is inherently not possible, the moral measure must hence be accepted as a

(2003). Pauwelyn, however, has appropriately pointed out that some WTO rules, such as certain rules relating to the operation of WTO bodies, are undoubtedly integral in character. Pauwelyn also rightly suggests that some provisions of the TRIPS Agreement may give rise to integral obligations (*ibid.*, at 69 ff). On the legal nature of WTO obligations see also the extensive study by MJ Hahn, *Die einseitige Aussetzung von GATT-Verpflichtungen als Repressalie* (1996).

⁸ Panel report, *Canada — Certain Measures Affecting the Automotive Industry*, WT/DS/142/R, adopted on 19 June 2000, paras 10.25 ff.

moral measure *without screening*' (at 232–233). This view leads Nielsen to argue that the utilization of subsection (a) of Article XX of the GATT 'poses difficulties, which may not be solvable'. Nielsen apparently presupposes that a measure which is meant to protect both the environment or animal health in line with Article XX(b) and public morals – e.g., animal welfare – in line with Article XX(a) would automatically be justified, because such a measure – to use Nielsen's words again – 'cannot be claimed unimportant or disproportionate' and 'must hence be accepted as a moral measure without screening'. This reading of the book – which is not unambiguous in this context – may explain why Nielsen goes on to argue that 'sub-section (a), in this manner, "destroys" the mechanism by which human health and environmental measures otherwise can be screened for its [sic] legitimacy by the utilization of other instruments in international law. This screening would not be "allowed", if the measure were analyzed under sub-section (a) and was labelled moral'. This reading would also explain why the author feels that it is necessary to find a method 'by which the scope for sub-section (a) could be narrowed down' (at 233–234). This may also be a main reason – among others (cf at 207–208) – why Nielsen thinks that the overlap between the subsections in Article XX is so problematic.

This second obvious misconception also seems to stem from a failure to distinguish aims (policy goals) and means (the measure adopted in the pursuit of such policy goals) in the Article XX analysis. Given that panels and the Appellate Body – just like, for example, the ECJ under similar clauses in EU law – rightly tend to review the policy goals pursued by a WTO Member with considerable deference, it may indeed be correct to state that a moral policy goal will not normally 'be claimed to be unimportant', to use Nielsen's words again. This does not mean, however, that the *means* adopted – the trade measure – 'cannot be claimed...disproportionate': even when a policy goal is accepted, with or without close scrutiny in judicial review, as falling within the legitimate aims listed in Article XX, it does

remain possible of course to assess – *possibly* with a (considerably) *reduced standard of review* – whether the *means* adopted is suitable and necessary, i.e., whether it is the least trade-restrictive means among a set of alternative measures which are capable of making a contribution to furthering the policy goal at issue. When one accepts this view – which appears to be the common understanding of the functioning of the necessity test in Article XX – then a trade measure which is meant to protect public morals need of course *not* 'be accepted...without screening'. Contrary to Nielsen, the structure and purpose of Article XX is not 'destroyed', and it remains difficult to understand why the overlap between the subsections is seen as so problematic in this book.

The remainder of chapter 8 is largely devoted to overcoming the overlap issue. When one accepts the view presented here, most of this exercise – unfortunately – appears in vain.

Chapter 9, entitled 'A New Analytical Framework', is obviously meant to verify Thesis 2. As mentioned above, pursuant to this thesis, 'the division of measures under sub-sections (a), (b) and (g)...into three distinct categories (internal measures, non-product-related PPMs and product-related PPMs) can provide a systematic analytical framework for the analysis of the subsections and the *chapeau* analysis' in Article XX of the GATT (at 15–16 and 261).

In addressing the PPM conundrum, chapter 9 touches upon a series of complex issues such as the legality of NPR PPM-based regulations under Article XX, and the relationship between NPR PPM-based regulations, the exercise of extraterritorial jurisdiction, and unilateral trade measures, respectively. In addition to these intricate issues, however, Nielsen *inter alia* also tries to address, more or less thoroughly, the appropriate standard of review under Article XX, the concept of 'common concern' in international law, *erga omnes* obligations, countermeasures under international and WTO law, the interrelationship between multilateral environmental agreements and WTO law, and the controversial topic of jurisdiction and applicable law in WTO proceedings. Evidently, attempting to address

these manifold concepts and their interrelationships in merely one chapter of roughly 60 pages is a risky scholarly undertaking. For reasons of space, in the following this review concentrates on those issues which are treated comparatively more extensively in this book.

Chapter 9 first tries to clarify that trade measures may have different ‘directions’, by which the author quite obviously means that such measures may pursue domestically and/or extraterritorially located concerns (an example of a trade measure pursuing domestically located interests is an import ban on disease-carrying foodstuffs; an example of a trade measure pursuing extraterritorially located interests is an import restriction on products the production or transport of which endangers a regional fauna or flora abroad, etc). Indications of what the author understands by ‘internal measures’ are given in section 1.3.1 of chapter 9, where the author states that, as respects internal measures, ‘the product itself is the subject for the trade policy. An example is an import ban on pandas or on ivory. In this case, the policy is directed inwardly and is, moreover, linked directly to the product itself; i.e., it is the product *per se* that is undesirable’ (at 271). It is debatable whether this definition is adequate, given that an import ban of this sort – which is a measure which is enforced at the border – will commonly not be referred to as an ‘internal measure’ (as opposed to a domestic regulation which is applied to domestic products and imported products in a similar manner). Even when one emphasizes the geographical ‘direction’ of a measure – i.e., whether it pursues domestically or extraterritorially located concerns – this definition does not appear very helpful in view of the fact that an ‘import ban on pandas or on ivory’ might also be motivated by the protection of a species located abroad, and thus by an extraterritorially located concern.

Perhaps even more problematic is the author’s understanding of NPR PPM-based regulations. Nielsen seems to presuppose that such regulations are coercive *per se* (at 262 and 270). Moreover, according to Nielsen, the policy of such measures is ‘clearly aimed at seeking to “regulate” “something” outside the jurisdictional limits of the member’ which

adopts such regulations. Even though the author concedes that such regulations may have an ‘inwardly directed effect’, namely ‘the “moral” satisfaction’ of not importing products stemming from problematic productions processes (at 272 *et passim*), there are at least three problems with this definition: first, it has rightly been emphasized in academic writings that NPR PPM-based regulations are not necessarily based on an intention to ‘regulate’ conduct occurring in another country: an NPR PPM-based import prohibition by a given WTO Member may be motivated by the fact that the Member in question simply does not wish to have anything to do with products stemming from certain problematic production processes.⁹ Secondly, NPR PPM-based regulations arguably are not necessarily coercive: whether other countries will actually be forced into changing their production processes by the NPR PPM-based import restriction of a given WTO Member depends very much on additional contingencies such as the market size of that Member and the related demand for the products in question. Thirdly, Nielsen’s view seems not sufficiently to distinguish NPR PPM-based regulations and the concept of extraterritorial jurisdiction.¹⁰

Chapter 9 then goes on to review case law relating to NPR PPM-based regulations under Article XX. It concludes that ‘extra tests’ have been imposed on such measures, namely that the WTO Member adopting such regulations is required to cooperate or negotiate with affected countries before adopting such measures, and/or to take into consideration foreign product certifications (at 275 ff). While this reading may be maintainable, it could, however, also be argued that cooperative efforts and recognizing foreign product certifications

⁹ On this argument cf Howse and Regan, ‘The Product/Process Distinction – An Illusory Basis for Disciplining “Unilateralism” in Trade Policy’, 11 *EJIL* (2000) 249.

¹⁰ In some passages of the book, it seems that Nielsen more or less equates these concepts (cf e.g., *ibid.*, at 269). For space reasons, these issues have been discussed elsewhere (see the extended review of this book at www.globallawbooks.org).

will typically constitute less trade restrictive means *quite generally*, and can therefore be seen as flowing from the necessity test.¹¹ Thus, it would arguably not be too surprising if such cooperative efforts and the recognition of foreign standards were to be regarded as the least trade-restrictive means in the judicial review of other, i.e., product-related, regulations, too. This implies that the requirements in question do not necessarily constitute 'extra tests' for a subtype of trade measures only.

The rest of chapter 9, under the heading 'Inclusion of "Other Law" in the Analysis', deals with a wide array of issues such as jurisdiction and applicable law in WTO proceedings, the relationship between MEAs and the WTO, and *erga omnes* obligations. As all of this is attempted in less than 30 pages, the argumentation in these final sections is more difficult to follow than in the rest of the book. This may be due to the fact that the pertinent reasoning sometimes appears contradictory: Thus, for example, the author announces that she will analyse the relevance of 'norms laid down in instruments outside the WTO system' *other than* the issue of direct conflict of norms between, for example, MEAs and WTO law. Almost immediately thereafter, the book addresses the issue of whether an MEA could be invoked 'as applicable law as a defense' in WTO proceedings, and, in Nielsen's view, the applicable law in WTO proceedings 'is not limited to the "covered [WTO] agreements"' (at 292, 293, and 298, respectively). Suffice it to say that the question whether an obligation under an MEA could be invoked 'as a defense' to a violation of a WTO obligation is, indeed, an issue of a direct conflict of norms. Also, the question whether non-WTO law can form part of the law applicable in WTO proceedings is highly controversial.¹²

The book ends with comparatively brief *de lege ferenda* considerations, suggesting as alternatives an authoritative interpretation of Article XX of the GATT so as to provide a clearer status for morally founded NPR PPM-based measures; a redrafting of Article XX; or the introduction of a new agreement on trade-related environmental measures (at 319 ff). In view of the fact that the relevant underlying legal analysis provided in this book is not very convincing, the necessity of adopting such measures *de lege ferenda* does not appear evident, either. This book implies in its very last sentence that the advantages of the 'new analytic framework' suggested in this final chapter have been proven (at 323). In view of the above considerations, and with due respect, the present reviewer cannot fully concur.

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¹¹ Cf JHH Weiler, 'Epilogue: Towards a Common Law of International Trade', in JHH Weiler (ed.), *The EU, the WTO, and the NAFTA. Towards a Common Law of International Trade?* (2000), at 201, 231.

¹² For a recent overview of pertinent writings cf e.g., Lindroos and Mehling, 'Dispelling the Chimera of "Self-Contained Regimes" in International and the WTO', 16 *EJIL* (2005) 857.