Necessary complications? Observations on the nexus between trade law and domestic regulation

In the two decades since the WTO's inception, the interaction between trade law and domestic regulation has usually been couched in terms of how far it is appropriate to balance the "right to regulate" with trade concerns. However, over the same period, many jurisdictions have been unilaterally implementing best practice regulatory guidelines that can be seen as internal constraints on the scope for regulation, in order to ensure that regulation is welfare enhancing. The pertinent question therefore, is how these guidelines, and notably the concept of net economic benefits that underpin them, relates to trade law concepts, and in particular the necessity test. While highlighting differences, we also draw on recent cases involving the Agreement on Technical Barriers to Trade (TBT), and especially rulings in the US-COOL dispute, to show how the concept of necessity under trade law has evolved, bringing it closer in line with a traditional net-benefits test. We argue that though there is little scope to formally enshrine a net-benefits test in trade law, a more diligent application of best practice regulation at the domestic level would be both welfare enhancing and would also reduce trade friction. [1]

Introduction

How far should international trade rules constrain the domestic regulatory choices? The matter has been one of intense, even fevered, debate over the two decades that have passed since the founding of the WTO. The WTO's Dispute Settlement Mechanism has considered policy areas as diverse as health, food safety, environmental protection and conservation, consumer protection, and public morals. Moreover, the reasoning applied by Panels and by the Appellate Body to matters of regulation seems to evolving: as discussed in this paper, recent rulings by both on country of original labelling requirements imposed by the US ("US-COOL") suggest a more expansive approach to the concept of necessity than was previously the case.

While dispute proceedings are the most visible way in which the WTO addresses the interaction between trade and regulatory matters, they form the leading edge of a sizeable wedge that includes a vast body of technical work done at the committee level. Since 1995, WTO Members have notified around 20,000 different regulations to the WTO's committee on technical barriers trade, around 450 of which have les to partners expressing serious trade concerns. The relative magnitudes of notifications, expressions of serious trade concerns and disputes

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helps to place in some context the more emotive concerns about the WTO's "reach" into domestic regulation, but it does not obviate the need to examine closely how the economics underlying, respectively, approaches to regulation and to trade law interact with each other.

The regulations that feature in WTO disputes and in WTO committee work have been designed to address market failures – an expression used by economists to describe situations in which markets do not coordinate the self-interested decisions of producers and consumers in a way that maximises the well-being of society as a whole. Not all types of regulation find their way into disputes: the ones that have featured prominently relate mainly to public goods and/ or externalities[2], while a significant, number of disputes also relate to regulations that respond to problems of imperfect information or uninformed consumer choices.[3] The economic regulation of market power has not been the subject of disputes, which is understandable because the pro-competitive intent of such regulations is largely in sympathy with the liberalising intent of trade rules.[4]

In various rulings, the WTO's Appellate Body has referred to the right to regulate of sovereign state as an established principle of law, while at the same time balancing this right against trade concerns.[5] It is the nature of this balancing exercise that has led the WTO's critics to question the legitimacy of impinging on the right to regulate.

But casting the issue simply in terms of an encroachment on the right to regulate belies the complexity of the interaction between approaches to domestic regulation, on one hand, and international trade rules on the other. In particular, it neglects the fact states themselves choose to constrain the way in which they enact regulation, and that the same economic principles that guide regulation do not support untrammelled powers of regulation. This is because, as we shall see

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2 Public goods are ones that cannot be provided to one individual without being provided to everyone; and the enjoyment of which by one person does not diminish the ability of others to enjoy the good. Externalities arise when the consumption or production decisions by one party imposes a cost on another party or confers a benefit on another party that is not taken into account by the first party. Notable examples of disputes involving these sorts of market failure include EC-Measures affecting asbestos and products affecting asbestos (health); EC- Measures concerning meat and meat products – hormones (health and environment); Australia – Measures affecting the importation of Salmon (biosecurity); US- measures concerning the importation, marketing and sale of tuna and tuna products and the US- import prohibition of shrimp products (conservation); US-standards for reformulated gasoline (environmental protection).

3 Recent examples include US –Certain Country of Origin Labelling; Australia – Tobacco Plain Packaging.

4 An exception is the dispute filed by Russia in 2014 against the EU regarding the latter's Third energy package, and certain aspects of its proposals for unbundling energy supply activities which Russia alleged were discriminatory. This dispute, as at March 2015, had not progressed to the panel stage.

5 See for example, Brazil-Measures Affecting Imports of Retreaded Tyres, WT/ DS332/AB/R, para 210 for an articulation of this right in the context of GATT Article XX.

shortly, regulation is not costless. The emergence over the last two decades of best-practice regulatory guidelines suggests that the deeper issue is not simply one of domestic sovereignty versus international commercial obligations, but more one of differences in the ways in which the regulatory and trade spheres, respectively, approach a given issue.

Domestic disciplines on regulation find their origin in a different set of concerns to disciplines on regulation that apply via trade law. The economics of regulation is primarily concerned with optimal responses to market failure, taking into account that government interventions carry their own costs. Trade effects are one of many factors that enter into play when crafting domestic legislation, and whether they are determinative or not depend on their magnitude. By contrast, the concern of trade law is to provide mechanisms to limit the extent to which regulations can serve a protectionist purpose and/ or, whether by design or otherwise, shift the costs of regulation from domestic to overseas jurisdictions.

Tensions between the two approaches are not necessarily inescapable. Indeed, because both are concerned with economic efficiency, one would expect there to be various points of resonance. For example, measures that are discriminatory on the grounds of origin are difficult to sustain in a cost-benefit analysis, because such measures are ill suited to dealing with core issues of market failure.[6] As the Australian economist W. Max Corden put it in relation to environmental policy:

> Taxes and regulations aimed to deal with environmental externalities should be applied as close as possible to the source of the problems (...). Trade interventions are normally clumsy second-, third- or twelfth-best ways of dealing with environmental problems.[7]

Having said that, debates, and disputes, stimulated by the interaction between regulatory and trade concerns are unlikely to abate in the near future. This is partly because closer global integration, driven by the emergence of global supply chains, has stimulated an increased focus on regulation and its impacts on trade via transactions costs. But it is also because of the broadening scope of issues that seems to come under regulatory scrutiny. For example, insights from the field of behavioural economics inform the design of regulation geared at consumer and health protection, particularly in cases of imperfect information or "bounded" rationality (plain packaging in tobacco being a current example). Environmental concerns have motivated regulations that have a substantial extra-territorial application, even in cases when global environmental goods are not at stake (as seen in the case of the recent EU-Seals dispute, in which the main policy issue was concerns regarding production and processing methods).

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6 A counterargument is that if the cost-benefit analysis is done on a national basis – which is the case with domestic regulation – it will not take into account the costs imposed by discriminatory or trade restrictive measures on foreign jurisdictions. We address this issue later in the paper.

7 W.M. Corden (1996) Trade Policy and Economic Welfare

The remainder of this paper develops the notion of good regulatory practice, and discusses how this can be useful in understanding points of resonance and dissonance between approaches taken by domestic regulation, and approaches to domestic regulation taken in the context of trade disciplines. We consider the extent to which trade rules can promote regulatory best practice, and thus promote the welfare of the regulating jurisdiction. We then consider how regulatory best practice can contribute to reducing trade tensions and increasing the gains from trade.

Regulation and public policy

As discussed, the economic rationale for regulation is primarily couched in terms of correcting market failure. But not all market failures justify intervention by the government authorities, and regulation will entail its own costs, just as government intervention can also create more problems than it solves. Costs include compliance costs for firms, and administrative costs for governments. Regulation is also likely to affect competition in markets by raising barriers to entry or, through its impact on marginal costs, by reducing the incentive for firms to compete for the marginal customer, hence reducing the intensity of competition in the market. Less competition is of course a primary incentive for regulatory capture – firms lobby for regulation precisely to increase market power, defined as the mark-up of price over marginal cost. Lower competition will reduce domestic welfare, all else being equal. Welfare losses will be greater the less well conceived the regulation is and/ or the more influenced by capture.

Regulators also need to address issues of risk and uncertainty. Risk refers to variance around an expected outcome, while uncertainty refers to cases in which the probabilities regarding an outcome are unknown. Both factors increase the cost of regulation – in particular, they imply that the costs of regulation are likely to increase the more the regulator seeks to ensure a particular outcomes, as opposed to setting broad tolerance levels.

Because neither the need for regulation, nor its optimality, can be taken as given, many jurisdictions have developed best practice guidelines that authorities are called to follow in enacting and reviewing regulation. For example, the OECD's recommendations, adopted by member countries in 1995, on improving the quality of regulation state that

> Government intervention should be based on clear evidence that government action is justified, given the nature of the problem, *the likely benefits and costs of action* (based on a realistic assessment of government effectiveness), and alternative mechanisms for addressing the problem[8] (emphasis added)

8 OECD (1995), Recommendation of the Council on Improving the Quality of Government Regulation, C(95)21/FINAL, accessed at

The OECD's approach to evaluating regulation is based on the paradigm of cost-benefit analysis. This is much more than an accounting framework. It is a logical framework that requires identifying the problem to be solved, considering alternative ways of solving the problem, and justifying the chosen approach on the basis of its superiority in terms of the balance of costs and benefits. The costs are those enumerated above; the benefits often take the form of avoided damages (e.g. to the environment or human health).

From an economic perspective, the approach requires the regulator to examine how closely a measure is tied to the source of market failure. The tighter the link, the greater the likely benefit from the regulation through the mitigation of the failure in question. Importantly, this approach does not presume that a specific regulatory objective must be maintained: it allows for the possibility of no regulation if the social costs of not meeting a particular objective are sufficiently small compared to the costs generated by regulation.

The emergence of best-practice regulation guidelines based on cost-benefit analysis underscores that even though the "right to regulate" is considered the prerogative of states, it is one that is itself subject to disciplines and guidelines to ensure that regulation does indeed further the good of society as a whole.

Regulation and trade law

An overarching concern of trade law has been to ensure that regulatory measures applied behind the border are not used to undo trade liberalisation achieved through the reduction of border measures, such as tariffs, by pursuing protectionist ends through discriminatory non-tariff measures instead (the concept of national treatment).

These concerns are reflected in Article III of the General Agreement on Tariffs and Trade (GATT), and Article 2.1 of the Agreement on Technical Barriers to Trade (TBT) and Articles 2.3 and 5.5 of the Agreement on Sanitary and Phytosanitary Measures (SPS). GATT Article XX affirms the principle of non-discrimination while permitting measures that are justifiable on policy grounds.

The second objective is to balance the pursuit of public interest objectives with trade concerns, whether or not the latter concern questions of discrimination. This basic philosophy is picked up and developed in the SPS and TBT agreements, albeit in slightly different ways. The TBT agreement explicitly requires that measures not be more trade restrictive than necessary to address a legitimate public interest goal (Article 2.2) while the SPS agreement requires that

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http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=128&InstrumentPID=124&Lang=en&Book=False

measures are taken only to the extent that they are necessary to protect human, life, or plant health, and that they are based on scientific principle and evidence (Article 2.2).[9] Importantly, both agreements state that where measures are based on international standards, the measures shall be presumed to be necessary. [10][11]

How the doctrine of necessity is applied in practice has attracted some attention, and it has been suggested that statements made by the Appellate Body, in the context of rulings involving GATT Article XX, imply conflicting views.[12] In practice, the Appellate Body seems to have recognised the freedom of states to select levels of regulatory protection. The issue of necessity has turned around whether the measure in dispute was essential to achieve that desired level of protection, or if not essential, whether other measures were either no less trade restrictive, or had such significant implementation costs as to make them unviable alternatives. At the same time, some statements made by the Appellate Body elsewhere in the same rulings have suggested a doctrine of necessity in which the level of protection chosen by the authorities was itself subject to assessment under WTO law.[13]

The Appellate Body has further articulated its approach to the question of necessity through a spate of cases that have involved a consideration of Article 2.2 of the TBT agreement. As explained by the Appellate Body[14], the necessity "test" under Article 2.2 requires a "relational analysis" of the trade-restrictiveness of the technical regulation; the degree of contribution the measure makes to the legitimate objective; and the risks of non-fulfilment of the objective pursued by measure. The analysis is a comparative one insofar as parties seeking to establish that a measure is more trade restrictive than necessary will need to compare it to some other alternative measure that would be suited to meeting the objective in question.

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9 It is generally accepted that the text of the SPS agreement places a higher requirement on domestic regulators in terms of ensuring WTO consistency, than the text of the TBT agreement. These include the requirements for sufficient scientific justification and for evidence based on risk assessment.

10 The SPS agreement allows for jurisdictions to select a higher level of protection than is offered by international standards, on condition that this is justified scientifically, is based on a risk assessment, and takes into account a range of economic costs and adverse trade impacts.

11 There is no equivalent of the TBT or SPS provisions in relation to services. Article VI of the General Agreement on Trade in Services contains some general language applicable to non-discriminatory regulation, but does not contain a necessity test (or any other test) relating the measure to the public policy objective sought. The annex on basic telecommunication services contains pro-competitive regulatory principles.

12 See especially Donald H. Regan (2007), "The meaning of necessity in GATT Article XX and GATS Article XIV: The myth of cost-benefit balancing", *World Trade Review*, Vol. 6, No.3, pp347-369

13 See Regan (2007), op.cit, pp 34-348.

14 See for example, United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Report of the Appellate Body, para 318.

The reference to the "risks of non-fulfilment" as one of the legs of the tripartite relational analysis raises the question as to whether the necessity test involves forming a view on the social value of the objective that is intended to be preserved by the measure in question. If that is the case, it would push the necessity test in the direction of a net-benefits test. This possibility is considered at greater length below.

Good regulation and the necessity test

Necessity versus optimality arguments

We observe, therefore, that regulation is subject to scrutiny from within, and from outside, the implementing jurisdiction. In principle, the net benefits test under domestic regulation is a more stringent hurdle than the necessity test under trade regulation. This is because the net-benefits test is concerned with the *optimality* of a response, which includes an assessment of how much an objective matters to society and whether that objective should be pursued at all; whereas the necessity test, strictly speaking, would not address these questions.

We say "in principle" because whether the net-benefits test is actually more stringent than the necessity test depends on how they are implemented in practice. On this score, the evidence is varied, particularly if we take into account recent development in the jurisprudence on TBT cases.

The notion that the necessity test, as opposed to the net-benefits test is not concerned with optimality finds some support in the jurisprudence developed through two recent TBT cases, respectively the US-COOL[15] and US-Clove Cigarette Cases[16]. In both these cases, the rulings found that in order to satisfy the provisions of the necessity test, what was required was that a measure be shown to make a contribution to the stated objective (information on country of origin in the first case, reduction of cigarette addiction among young people in the second), and not that it was an *optimal* contribution. This contrasts with the aim of the net-benefits test. Many of the claims made by the respective plaintiffs in the cases mentioned focused on how well the measures performed, or not, against the stated objective – points that were rejected, but that (ironically) might have carried greater weight in a net-benefits test carried out by a domestic regulator.

Having affirmed that the net-benefit test is more stringent than the necessity test, two qualifying points are worth considering. The first is how well the net-benefits

15 United States –Certain Country of Origin Labelling, Report of the Panel and Report of the Appellate Body

16 United States – Measures Affecting the Production and Sale of Clove Cigarettes, Report of the Panel and Report of the Appellate Body.

test performs in relation to trade concerns specifically. The second is whether approaches taken by panels and the Appellate Body to the question of non-fulfilment have infact "beefed up" the necessity test to bring it more in line with the net-benefits test.

Treatment of trade –related costs in national net-benefits tests

The first issue reflects the fact that a national cost benefit analyses will not usually take into account regulatory costs imposed on foreign jurisdictions. On this argument, the necessity test acts as an additional "screen" to catch potentially protectionist measures that might escape a net-benefits test.[17]

But even if a national net-benefits test does not place weight on the costs imposed on foreign producers, it should capture the adverse domestic impact that results from the consequences of these costs imposed on foreign suppliers, namely in the form of weaker competition on the domestic markets, and the welfare costs that consequently follow from the weakening of competitive constraints. These effects would show up strongly, especially in those circumstances when a measure would be a trade restrictive and the putative public policy rationale for the measure a weak one.

But what of a case in which the external effects on a foreign producer would be significant, but the domestic competition effects are small because the foreign producer only accounts for a small share of the importing market? In principle, one would imagine that if foreign producers were marginal suppliers of the market, pressures for protectionism are likely to be limited, and hence (*pari passu*) the possibility of regulatory capture.

A possible counter-example to this, though, is the 2010-12 US-Clove Cigarette case. This followed legislation in the United States that banned clove cigarettes, which were principally imported from Indonesia, while allowing certain other flavoured cigarettes (such as menthol) that were principally produced domestically. The stated purpose of the legislation was to limit access by youth to flavoured cigarettes and therefore reduce the incidence of addiction. Clove cigarettes accounted for a very small proportion of the overall market for cigarettes in the US (around 0.1%).

In the event, the measure was found to be inconsistent with national treatment requirements under Article 2.1 of the TBT agreement because, as clarified by the Appellate Body, it discriminated between products that were in a competitive relationship based on their likeness, as defined by physical characteristics, end-uses, consumer tastes and habits, and tariff classification. The ban was not found

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17 As an aside this argument also sheds light as to why the demands of necessity test may be poorly received domestically – it is not that it they are stronger than those of the net-benefits test, but rather that they give weight to foreign stakeholders.

to violate the necessity test, since it was deemed to make a contribution, however small, to a legitimate public policy objective. What is of interest is that in its determination of likeness, the Appellate Body found that there was strong substitutability between clove cigarettes and methanol cigarettes among young consumers. From a regulatory point of view, this suggests that the health benefits of banning clove cigarettes while permitting methanol-flavoured ones are likely to have been very limited. This in turn suggests that a rigorous cost-benefit analysis would not have supported the measure.[18]

Do rulings in the US-COOL case suggest a more expansive treatment of necessity under the TBT agreement?

On the second issue, it is also worth exploring some of the statements made by the Appellate Body, in the context of its "relational" analysis of the necessity test in recent disputes. Of interest is the treatment of the risks created by non-fulfilment, in keeping with TBT Article 2.2. The concept of "risk" in economics, and as applied in economic regulation, has a very specific meaning, namely the variance around an expected value.[19] Applied to the wording of TBT Article 2.2, the concept would mean the *value* lost to society if the objective supposedly promoted by the measure in question was not met (and not simply the likelihood the objective would be met).

Risk is thus not simply about the likelihood of an objective not being attained, but how much it matters if the level of attainment is lower than envisioned. It follows that the lower the value, the greater the scope there is to find alternative measures, including one that might trade-off certainty in meeting the objective for lower costs through their impact on trade. Under best practice regulation guidelines, an evaluation of the risks of non-fulfilment is usually required to justify the need for regulation in the first place.

The Appellate Body's reasoning in the *US-COOL* dispute suggests that its understanding of risk is along the lines set out above. Considering the facts on record, the Appellate Body noted the panel's observation that on the whole, US consumers had a low willingness to pay for information on the origin of products, and on that basis, observed that

> "This in turn seems to indicate that the consequences that may arise from non-fulfilment of the objective would not be particularly grave."[20]

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18 Submissions made by the complaining parties to the disputes

19 For example, if a regulation specifies that flood defences need to withstand flood occurrences of a certain intensity, the associated risk would be measured by the likelihood that a flood would exceed that intensity multiplied by the value of assets lost or damaged

20 US –COOL, para 478, p 279.

The panel in the compliance proceedings followed a similar approach, considering the issue of the gravity of the consequences of non-fulfilment based on information on consumer willingness to pay; though the evidence before it did not enable to come to view.[21]

The concept of willingness to pay is exactly the sort of information regulators would take into account when considering risks in a cost-benefit analysis of regulations that aimed at securing a specific public good. A low willingness to pay, for example, would reduce the net benefits associated with a particular regulation. In particular, it would make it more favourably disposed to less costly alternatives even if they did not provide the same assurance, in terms of likelihood, of achieving the objective in question, simply because the social value at risk would be low.

The suggestion is, therefore, that the tripartite relational analysis employed by the Appellate Body in the context of TBT Article 2.2 has the scope to push the necessity test in the direction of a more fully fledged net-benefits test. Especially if parties to the case were to submit evidence (for example, econometric estimates of willingness to pay for specific public goods) that would enable a quantitative assessment of risk in the sense of how much it matters to society that an objective might not be achieved, or achieved only partially. If the Appellate Body were to concern itself with such questions, then it would imply that the overall objectives of a regulation would not necessarily be treated as a given, but would be endogenous to the analysis, as they are under a net-benefits test. [22]

Bridging remaining gaps

The general thrust of the previous sections is that many of the regulatory issues litigated before the WTO are one that could have been caught through the proper application of a net-benefits test. On this view, the occurrence of disputes may be less about the impingement of trade law on regulatory sovereignty, and more about a failure by domestic regulators to implement economically sensible regulation.

If that is the case, it suggests that a better upstream investment in the quality of domestic regulation could be both welfare promoting, and conducive to reducing trade disputes. This is something that would happen separately to the development of trade rules, and in line with long-standing attempts to promote

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21 US-COOL, Recourse to Article 21.5 of the DSU by Mexico and Canada, Report of the Panel WT/DS384/RW pp131-136.

22 An additional implication is that complainants in disputes may be on stronger ground if they can force a consideration of issues under TBT Article 2.2 (instead of GATT Article XX), and provide robust econometric advice regarding the value to society of the regulatory objective pursued.

best practice regulation, which, as it happens, increased in momentum around the time of the WTO's inception. What are the main items on the agenda?

It seems trivial say so, but ensuring that the impact on trade is taken into account is a good starting point. As repeatedly observed in this paper, this does not mean taking into account the impact on foreign jurisdictions of domestic regulation, but rather, taking into account the impact on domestic welfare of the way regulation affects competition in markets, including through the trade channel. There is a wide body of theoretical and applied research into the way changes in market structure and costs – the main variables affected by regulation - affect patterns of competition, and thus welfare, that is routinely used in the economic regulation of market power in network industries, but much less so in areas of technical regulation responsible for the sorts of disputes that find their way into the WTO.

A second item involves quantifying risk, and specifically how much it matters to society if a particular objective is not met. Quantifying risk is challenging, especially when it involves measuring things that could be unobservable such as consumers' willingness to pay. However, a range of econometric techniques have evolved in recent years to estimate the willingness to pay of consumers. What stands out in the US-COOL case is the lack of sophistication of the empirical evidence submitted by the parties.

Moreover, quantification is a challenge that needs to be met, if appeals to consumers preferences serve as the basis for regulation. In the recent *EU-Seals* case, for example, the motivating factor behind the EU regulations banning seal products was aversion to cruelty toward seals i.e. not just the products, but the knowledge that seals were hunted was considered as a bad. This corresponds to a class of public goods known as "existence goods". For example, people may value knowing that the Great Barrier Reef exists even if they don't personally experience it. In the case of seals, people value knowing that seals are not made to suffer.

The difficulty is that with a bit of creativity, anything, such as the existence of a certain domestic industry could be repackaged as an existence good[23]. The challenge, both for good regulation and for good trade policy, is, having established that the claimed existence good cannot be provided through market mechanisms, to establish how much it is worth.

A third challenge arises from cases where the motivation for regulation lies in the view that preferences themselves are flawed, because they reflect a lack of

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23 The claims is often made in connection with assistance to the car industry, or airlines – the claim being that nationals value having a national car manufacturer or an airline career, and derive satisfaction from knowing that one exists. That raises the obvious question as to why their preference is not reflected in actual market transactions.

information, cognitive difficulties that impair "rational" decision-making, or the view that consumer decisions do not reflect their true preferences because the decisions are not freely formed. Addictive substances, such as tobacco, are ones that raise all three issues. But the increasing influence of behavioural economics, and its application (and misapplication) to a broader range of issues, means that regulation based on views of what consumer preferences *ought* to be is likely to become more important.

Clearly, addressing these issues requires not only a significant investment in analytical capacity, but also tackling a number of normative issues and value judgements. This makes any detailed disciplining and review through trade law impractical; reducing trade friction will lie in encouraging regulators at home embrace best practices.

Conclusions

The interaction between trade law and domestic regulation is often couched in terms of the conflict between the freedom to regulate and the constraints imposed through trade treaties. However, the reality is that an untrammelled freedom to regulate is rarely consistent with socially optimal regulation, and indeed regulators and national jurisdictions themselves have developed numerous guidelines and disciplines to ensure that regulation is welfare enhancing. In essence, optimal regulation and trade rules both have as an aim the promotion of welfare, even though they originated from different contexts. Over the years, developments in regulatory practice and in the application of trade rules have created numerous points of resonance between the two.

The work-horse of regulatory evaluation is cost-benefit analysis. The net benefits test that underpins it resonates to some extent with the necessity test that is used in trade law, through the application of the necessity test reveals it to be a narrower test. Recent rulings by the Appellate Body regarding Article 2.2 of the TBT agreement point to the importance of weighing, amongst other things, the risks of non-fulfilment, which requires taking into account the social value of the objectives promoted by the measures under consideration. Under this interpretation, the necessity test is closer to the net-benefits test.

While the question of regulation has been flagged as a central one in some of the large-scale preferential trade agreements under negotiations, our observations suggest that the best way to ensure that regulation does not spill over into trade disputes is to strengthen domestic regulation through the promotion of best practice, separate from the process of trade negotiations, but as an important counterpart to them.