

## The Trade and ... Debate Today

Tuesday, 10 March 2020

17.00-19.00

Silva Casa Auditorium, World Trade Institute, University of Bern  
Hallerstrasse 6, 3012 Bern, Switzerland

### Brief description

Under the international law specialization principle, each IGO is responsible for a special subject matter: the WHO deal with health, the ITU deal with telecom, the ILO with labour issues, the IMF with exchange rates etc and the WTO deals with trade.

In the late 1980s, a new issue emerged in discussions of international trade law and policy: the linkages between trade and the environment. This marked the beginning of sustained attention to the relationship between trade and a long list of non-trade concerns. Soon, academics and NGOs started referring to the "trade and ..." debate, covering also trade and health, trade and human rights, trade and labor, and more recently trade and energy and trade in exchange rates, among others.

For generalist international lawyers, the trade and ... debate is especially interesting because it often concerns the relationship (including conflicts) between provisions of different and sometimes overlapping treaties, this bringing into focus international law rules on treaty interpretation and norm conflict. For WTO lawyers, the debate is particularly fascinating because it sheds light on the relationship between the often technical rules of international trade and the wider international law landscape. Moreover, international trade law is often applied in the context of a compulsory and quasi-automatic dispute settlement system where allegedly trade-distorting measures are sometimes defended on the basis of their contribution to non-trade objectives. In this context, WTO adjudicators have had occasion to discuss of non-trade concerns in the course of resolving trade disputes. An appreciation of these debates is therefore central to a proper understanding of WTO system.

WTO law deals with the regulation of international trade, and it includes rules disciplining discrimination and trade restrictions. But it has also always included important exceptions explicitly authorizing WTO Members to maintain potentially WTO-inconsistent measures when necessary to protect themselves, their values, their health, and their environment.

In the first WTO dispute, US – Gasoline, which was about trade and environment, the Appellate Body explained that the WTO Agreement "cannot be read in clinical isolation from public international law". This implies that WTO provisions must be interpreted taking into account the fact that WTO Members need to comply with all their international law obligations in a cumulative, simultaneous,

and harmonious manner. In other words, WTO Members must comply with their labour obligations, their environment obligations, their human rights obligations, and so on, and WTO provisions must be interpreted and applied taking this legal reality into account.

The Appellate Body has also stated that "[t]here must always be a balance between WTO market access obligations of some Members and the rights of other Members to favour policies other than trade". In principle, then, WTO Members can give priority to policies other than trade. However, the ways in which non-trade justifications are invoked and argued in WTO dispute settlement will vary depending on the specific non-trade concerns sought to be addressed. For instance, although environmental protection is explicitly identified in Article XX of the GATT 1994 as a non-trade concern justifying WTO-inconsistent measures, other important non-trade issues, such as human and labour rights, are not explicitly identified – although this does not necessarily mean that they could not provide a justification for WTO-inconsistent measures. For example, they may be relevant to the interpretation of WTO rules, pursuant to the customary rules on treaty interpretation. Ultimately, the question is: how does international trade law and the WTO system balance between trade and non-trade concerns, and how does WTO dispute settlement integrate non-trade concerns in the analysis and resolution of trade disputes?

In this lecture, we will discuss the differences and similarities in addressing various non-trade concerns in the context of international trade, and examine and how the WTO has responded to the various trade and ... issues. I will argue that, through an new consideration of PPMs (process and production methods) and other regulatory distinctions, and more holistic interpretation of the WTO, the AB was able to recognized that absent protectionism, a trade restriction based on legitimate non-trade concerns will generally comply with WTO law. Moreover, in leaving Members with the necessary flexibility to favour non-WTO or non-trade concerns, the WTO also recognizes the specialization, expertise and importance of other international organizations. The jurisprudence of the WTO Appellate Body on the balance between trade and non-concern is one of its greatest successes, and supports the harmonious interpretation and application of international law.

## Biography

Gabrielle Marceau, PhD, is Senior Counsellor in the Legal Affairs Division of the WTO, which she joined in September 1994. Her main function is to advise panellists in WTO disputes, the Director-General Office and the Secretariat on WTO related matters. From September 2005 to January 2010, Gabrielle Marceau was a member of the Cabinet of the WTO Director General Pascal Lamy. Professor Marceau is Associate Professor at the University of Geneva where she teaches WTO law to students from the law and international relations faculties. Before joining the GATT/WTO, Professor Marceau worked in private practice in Quebec, Canada, mainly in the sectors of labour law and insurance law. Professor Marceau has published extensively, namely in WTO related matters.

**Participation is free of charge. Registration is not necessary.**