Chapter 2
Evaluating the Impact of International Law: A Taxonomy of Analytical Choices

Abstract The SPS Agreement is commonly adjudged by legal commentators to place a constraint on domestic policy-makers and therefore threaten WTO members’ legitimate policy preferences. This chapter takes a first step to understanding why this view has come to dominate writing on SPS rules. It identifies and discusses three major analytical choices—field of enquiry, conception of how law functions and evaluative perspective—that, consciously or not, shape the evaluation of the impact of law. Firstly, the analyst decides the appropriate object of study (field of enquiry), for example, formal texts, domestic legal practice or the social effects of regulations that will significantly inform the conclusions drawn about the rules under study. Secondly, a conception of how international law functions will determine expectations as to the consequences of the legal regime. In particular, those viewing law as ‘regulating’ domestic actors will anticipate different outcomes to those focussing on the ‘generative’ potential of law to instil new ideas and behaviour. Finally, the commentator may choose to study the impact of international rules from the ‘ascending’ perspective of the State, for example, its implications on sovereignty or national values, or alternatively from the ‘descending’ perspective of the legal regime, that is, the furthering of its stated goals. This choice of perspective will bring to fore different aspects of the functioning of rules. The chapter finally draws together these dimensions to form a taxonomy of analytical choices which creates a framework for assessing commentary on the SPS Agreement.

2.1 Introduction

The view of the World Trade Organisation (WTO) Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) as a constraint on, and potential threat to, domestic policy-making is a prominent theme among legal commentators. What lies at the root of this scholarly anxiety surrounding the SPS Agreement? Howse and Mavroidis explain the disquiet as follows:

1 See Chap. 1, s 1.3 above.
Many of the controversies about the effect of WTO law on domestic regulation have been influenced by the view that the law as it stands may well impede the ability of governments to regulate new and uncertain risks to health and the environment.\(^2\)

If, as these authors imply, consternation about the SPS Agreement results from the particular ‘view’ adopted over a decade of study, we may speculate as to the possible consequences of an alternative perspective. In order to understand the claim that the SPS Agreement constrains domestic policy-making, we should first seek greater insight into the reasoning that sustains the view of it that is generally taken.

With this end in mind, Part I of this book scrutinises existing scholarly study of the Agreement, and in particular the views of law that inform it, before turning to a direct evaluation of the Agreement’s impact in Parts II and III. As the approach taken in Part I is unusual in legal scholarship, it perhaps requires further explanation. After all, if we are concerned with the impact of international law, surely the answers lie ‘out there’ and not in extended academic introspection? Self-reflection may be justified on a number of grounds, however. The notion that commentators of diverse origins, backgrounds and intellectual persuasions share a common view of law seems improbable, and therefore is an intriguing topic for further investigation in itself. At the very least, we need to verify whether there is indeed a scholarly way of approaching the Agreement, which can explain the divergence noted between academic and bureaucratic perceptions of the regime. If such a common approach is identified, we need to then reflect on how this may colour our understanding and expectations of the Agreement. In turn, this will help, in Parts II and III of this book, to stake out new ground, rather than succumbing to what Joel Trachtman has described as ‘one of the pathologies of international economic law’, namely ‘to cover ground that has already been covered’.\(^3\)

Chapter 2 strives to facilitate such a review by identifying the fundamental analytical choices associated with any attempt to define the influence of the SPS Agreement. The question at the heart of this enquiry—what is the Agreement’s impact on domestic policy-making?—seems simple enough, but cannot be addressed, even superficially, without assuming a position on three analytical dimensions. Firstly, a commentator must choose what evidence is relevant to an understanding of the Agreement’s effect. For example, is it enough to examine the text of the Agreement itself, or must we scrutinise domestic behaviour in order to assess its significance? A decision about the appropriate field of enquiry will determine the basic scope of any analysis. Secondly, in order to comment on the effect of international law on domestic


policy, a view must be taken on how the two interrelate. Without a hypothesis about this relationship, the possibility of impact can be neither postulated nor dismissed. A *conception of how law functions* therefore forms a second dimension of any analysis. A third choice when examining the influence of the Agreement is to decide on what impact one wishes to assess. Does the analyst’s interest lie in the extent to which the Agreement has attained its intended goals or is it rather what it implies for a state’s capacity to manage domestic SPS issues? While the investigation of the former may reveal something of the latter (and *vice versa*), the nature of the enquiry will differ significantly according to this third dimension, the *evaluative perspective* adopted. The seemingly simple question posed above thus spans three complex issues: how does law really influence state behaviour, what should we be evaluating and how?

This chapter examines the main alternatives available to analysts in each of the three dimensions identified. In so doing, it sets out a taxonomy of analytical choices, using which we can start to characterise and categorise existing legal study of the SPS Agreement.

### 2.2 Focus of Research: Field of Enquiry

Embarking upon a study of the SPS Agreement and its relationship with domestic policy-making, a primary consideration will be where one’s enquiry should begin and end. This decision may be influenced by simple practicalities. What information is freely available? How much time does such a study merit? In addition, however, the scope of analysis chosen will probably reflect a deeper conviction, instinctive or elaborated, as to what elements are relevant to understanding a legal regime. This section considers three alternative approaches to this issue: formalism, empiricism and critical theory.

#### 2.2.1 Formalism

Formalism views law as ‘a body of rules with fixed determinate meaning’, and its practitioners strive for the ‘identification of a definitive assessment of “what international law says”’.4

For a formalist, an understanding of the SPS Agreement is to be found primarily in the texts of the Agreement5 and the decisions arising from the World Trade

---


Organization’s (WTO) dispute-settlement mechanism. As one moves beyond these sources, however, views can diverge sharply as to what is relevant to ascertaining the meaning of the Agreement. Some consider the WTO to be a ‘self-contained’ legal system, one that is ‘closed’ from obligations arising from international law. Others reject this notion, arguing that the WTO ‘is not a secluded island but part of the territorial domain of international law’.8 According to this view, not only the immediate WTO Agreements, but all sources contained in Article 38(1) of the Statute of the International Court of Justice can be relevant to the meaning of WTO texts.9 Moreover, measures which are prima facie legal according to WTO provisions may nevertheless be illegal where in breach of other international agreements.10 Whatever the textual merits of either argument, as has been noted (and lamented11), the trend in dispute-settlement bodies is towards the latter ‘incorporative’ approach to non-WTO law.12

In addition to this long-standing debate, formalists face the added complexity in interpreting the SPS Agreement of the evident importance, but ambiguous legal status, of two related normative sources. The first is Codex Alimentarius standards,13

---


7 The expression ‘self-contained’ has been the general shorthand for describing this perspective on WTO law. See JP Kelly, ‘Judicial Activism at the World Trade Organization: Developing Principles of Self-Restraint’ (2002) 22 Northwestern Journal of International Law and Business 353, 357. The WTO Dispute Settlement Understanding (DSU) lends itself to this view of WTO law, stressing throughout that dispute settlement applies to the ‘covered agreements’ and ‘serves to preserve the rights and obligations of Members under the covered agreements’ (Art 3(2)), but also see Arts 7(2) and 11. Understanding on Rules and Procedures Governing the Settlement of Disputes, 15 April 1994, UNTS, vol 1869, 401.


9 In brief, Art 38(1) sources are international conventions, international custom, general principles of law, judicial decisions and the teachings of publicists. Statute of the International Court of Justice, 26 June 1945, 59 Stat 1055, 33 UNTS 993. Palmeter and Mavroidis argue that the terms of reference established by Art 7 of the DSU (to ‘address the relevant provisions in any agreement or agreements signed by the parties to the dispute’) establishes this article as ‘the WTO substitute, mutatis mutandis, for Article 38’. D Palmeter and PC Mavroidis, ‘The WTO Legal System: Sources of Law’ (1998) 92 AJIL 398, 399.

10 Pauwelyn (n 8) 551 (giving the example of a trade right that must be foregone due to the agreement of a later environmental rule).


13 The focus here is only on food-related standards and not the other international standards referred to in SPS Annex A, para 3.
non-binding in themselves, but ‘hardened’\textsuperscript{14} by their inclusion in the SPS Agreement as an appropriate reference point in considering the legality of sanitary measures. The second is decisions agreed by the Committee on Sanitary and Phytosanitary Measures (SPS Committee), the body formally mandated to ‘carry out the functions necessary to implement the provisions of this Agreement’.\textsuperscript{15} Adopted by consensus, some of the latter closely resemble formal legal texts, establishing clear obligations (of what Members \textit{shall} do), while others deliberately constrain their own legal significance.\textsuperscript{16} Both standards and SPS Committee decisions appear to be integral to establishing the propriety of WTO Member actions, while their legal standing remains questionable. The Vienna Convention on the Law of Treaties (VCLT) offers some partial solutions to this dilemma for formalists. For example, depending on the interpretation required, Codex standards could be ‘informative’ sources which help in the interpretation of the SPS Agreement’s ‘ordinary meaning’,\textsuperscript{17} while SPS Committee decisions may constitute ‘subsequent agreement between the parties’ under VCLT Article 31(3)b.\textsuperscript{18}

For present purposes, the puzzle of precisely which norms are valid in the appreciation of SPS Agreement obligations need not be resolved. Whilst one approach may be more true to formalism than another,\textsuperscript{19} even the more inclusive method is still formalist. In other words, whether drawing exclusively from dispute settlement reports or extrapolating from Codex standards, there is a common premise that the meaning and significance of the SPS Agreement is to be derived from such written sources.

\subsection*{2.2.2 Empiricism}

For some scholars, the narrow interpretation of legal sources alone provides an unnecessarily arid view of law. Why undertake an abstract evaluation of a WTO treaty, when that text only has real meaning in the domestic context in which it is


\textsuperscript{15} SPS Agreement Art 12.1.


\textsuperscript{17} VCLT Art 31(1). This was the approach taken by the EC—Biotech panel, for example, in defining ‘pests’. See EC—Measures affecting the Approval and Marketing of Biotech Products (EC—Biotech), Panel Report (adopted 29 September 2006) WT/DS/291–293/R, para 7.238. For a critique of the Panel’s methods in this respect, see MA Young, ‘The WTO’s Use of Relevant Rules of International Law: An Analysis of the Biotech Case’ (2007) 56 ICLQ 907, 918.

\textsuperscript{18} See Scott (n 16) 73 and fn 141.

Evaluating the Impact of International Law

(or is not) enacted? Instead, we should consider the ‘multifaceted ways in which legal norms are disseminated, received, resisted “on the ground”’. Alternatively labelled New Legal Realism, the ‘new’ New Haven School and sociolegalism, such scholarship broadly shares a shift of analytical focus from law as derived from legal texts, towards law’s meaning within society. The generic term of ‘empiricism’ will be used here to describe this second field of enquiry. Escaping the shackles of formalist thinking is seen by many as liberating. Empirical study is believed to bring ‘new facts, [allowing us to] see existing ideas through a different lens’ and furnish a ‘better understanding of the world in which law operates’. How would an empirical study of the SPS Agreement differ from a formalist one? There are three aspects to the answer.

Firstly, a view that ‘international law is happening all around’ naturally leads empirical researchers to turn to non-formal sources. There appear to be no particular limitations as to where empiricists should turn their attention. Statements that reveal important attitudes towards law, evolutions in policy-making, the behaviour of actors in the domestic system, and the interrelationship of state and non-state law-making illustrate just some of the possible avenues for exploring legal impact. Indeed, an eclectic approach is itself viewed as an important catalyst in fostering new insights.

Secondly, lawyers must find new methods for managing the newly generated data. A qualitative approach—describing in depth the impact of law using data in specific cases—is felt to provide a heightened level of scrutiny of the issue.

---


24 Shaffer (n 20) 42.


28 Levit (n 25).

29 Describing the new generation of empirical work, Dickinson notes that ‘these scholars seem to share a common commitment not to adhere too strictly to any particular method or model, but to try and to understand the complexity and plurality of the forces at work in the world.’ Dickinson (n 22) 552.
concerned. Although such studies are relatively infrequent in international law, well-documented economic institutions such as the WTO are viewed as particularly amenable to such research. This type of study is certainly more favoured than a quantitative empirical approach which applies statistical methods, such as regression, to available data. The latter is treated with some caution even by advocates of empirical research, and with considerable scepticism elsewhere.

Thirdly, empirical-based work is often associated with a commitment among its practitioners to improving the functional operation of international law. Indeed, Garth argues that this type of research is ‘by definition concerned with promoting social change’. There is certainly a normative drive to much empirical work, be it advancing policy reform, institutional change or simply reasserting the importance and effectiveness of international law. However, while new legal realists may share a belief in the transformative power of international law, it is not clear why this should necessarily be the case. Empirical accounts are equally capable of undermining the status of international law.

### 2.2.3 Critical Theory

Critical theory, the third field of enquiry discussed here, shares the doubts of empiricists about the value of formalism. However, instead of assessing the operation

---

30 Franck (n 23) 786.
33 See DJ Bederman, ‘Constructivism, Positivism, and Empiricism in International Law’ (2007) 89 Georgetown Law Journal 469 (criticising Anthony Arendt’s attempt at quantitative analysis); G Verdirame, ‘“The Divided West”: International Lawyers in Europe and America’ (2007) 18 EJIL 553, 561 (lamenting the tendency of these studies to ‘restate the obvious, confirm the well known or repeat the commonsensical’). For a concrete example of the limitations of empirical studies, see JW Yackee, ‘Conceptual Difficulties in the Empirical Study of Bilateral Investment Treaties’ (2008) 33 Brooklyn Journal of International Law 405.
34 Garth (n 22) 944.
35 See Hathaway (n 32) 210 (asserting that empirical research ‘must be linked to concrete policy recommendations’).
37 Dickinson sees the creation of a counter-narrative to growing scepticism towards international law as an integral element of this empiricism-based scholarship. Dickinson (n 22) 552.
38 Consider, for example, the sceptical portrayal presented in JL Goldsmith and EA Posner, The Limits of International Law (Oxford, OUP, 2005).
of law in reality, critical theorists strive to lay bare the realities that led to, and are ultimately concealed by, law. They attempt to

undo the naturalness of conventional ways of thinking about law and proceed to show us that the way we conceptualize it binds us to … commitments which may or may not be ones that we like to make.\(^\text{39}\)

Such critiques have a dual focus. There is firstly an analysis of law itself: that is, the way that law captures and reasserts a certain understanding of social reality.\(^\text{40}\) Secondly, the lawyers who perpetuate the ‘conventional ways of thinking’ are also the subject of critical analysis.\(^\text{41}\) By adopting and furthering the categories imposed by dominant legal discourse in an uncritical fashion, lawyers are guilty of ‘entrenching the bias’.\(^\text{42}\) These critiques form what Koskenniemi describes as the ‘negative aspect’ of the critical programme.\(^\text{43}\) The ‘positive aspect’ consists of a common engagement to identify social injustice with a view to advancing social transformation.\(^\text{44}\) This requires lawyers to challenge existing dogma and start to reconceptualise international law.\(^\text{45}\)

International trade law would appear to be fertile ground for critical theorists. A number of contestable notions are essential to the cohesiveness of the WTO project and arguably sanitise what are highly inequitable arrangements.\(^\text{46}\) The term ‘contracting parties’ wrongly signifies a free and comparable input into trade


\(^{41}\) Roman, for example, points to positivists’ ‘failure to question the underpinnings and normative values of their doctrinal formulations [which] renders their laws to be limited, incoherent, anachronistic, and apologetic attempts to be objective in spite of historical occurrences.’ E Roman, ‘Reconstructing Self-Determination: The Role of Critical Theory in the Positivist International Law Paradigm’ (1999) \textit{53 University of Miami Law Review} 943, 949.

\(^{42}\) J Ngugi, ‘Making New Wine for Old Wineskins: Can the Reform of International Law Emanicipate the Third World in the Age of Globalisation?’ (2002) \textit{8 UC Davis Journal of International Law and Policy} 73, 76. See also S Dillon, ‘Opportunism and the WTO: Corporations, Academics and “Member States”’ in \textit{International Economic Law} (n 20) 57 (underlining how WTO literature dominated by a focus on disputes obscures the social realities of the WTO).

\(^{43}\) Koskenniemi (n 39) 540–541.

\(^{44}\) As Koskenniemi notes, this is theoretically speaking inherently difficult for the critical theorist whose own solutions for countering hidden domination, may be, in itself, the imposition of another form of oppression. ibid 541.


Conception of How Law Functions

The analyst who moves beyond the descriptive, that is, who attempts not only to identify what law is, but also reflect on its influence on society, must hold certain expectations as to how international law functions. Without a conception of how the legal regime and WTO Members interrelate, it is not possible to posit the impact of the regime upon domestic society.

To sketch out the choices available to the analyst, it is helpful to borrow a conceptualisation of international society more familiar within international-relations theory. If international interaction (or law) is considered ‘societal structure’ and states are ‘agents’, the relationship between the two can be conceived in three ways.

---

47 ibid 743–744.
49 Dillon (n 42) 63.
50 Davis and Neascu (n 46) 764.
51 Orford notes that the increasing value placed upon science is premised upon a gendered and racialised hierarchy of knowledge, in which Western science is treated as value-free, objective, impartial and rational, while other forms of knowledge are dismissed as emotive, partial, subjective, and irrational.

52 Dillon (n 42) 63 (claiming that scholarship on the WTO offers ‘scarcely a whiff of critical legal studies, feminism or postmodernism’).
The simpler analytical method is to focus on one of the elements, either structure or agents, and proceed on the basis that the one determines the other.\textsuperscript{53} We could thus firstly postulate, as realists do, that international law is entirely constituted by the actions and interests of states: states will behave according to their own interests and international law will not have any independent impact on state behaviour.\textsuperscript{54} Alternatively, one could presuppose that societal structure dictates the action of agents, in which case law would be expected to ‘regulate’ state behaviour.\textsuperscript{55} However, the relationship can also be treated in a third, more dynamic way, and one that acknowledges that states and international law are ‘mutually constituted’.\textsuperscript{56} From this perspective, we can understand international law only through the actions and intentions of states, but national interests and the state’s very identity are themselves shaped by international law. This ‘generative’\textsuperscript{57} conception of how law functions opens up the possibilities of studying social interaction between states, and generates more fluid expectations as to the ultimate influence of law. As our interest here is in the impact rather than non-impact of law, this section will sideline the realist perspective to concentrate in turn on the regulative and generative conceptions of how law functions.

\textbf{2.3.1 Regulative Function}

A regulative conception of international law casts the WTO Agreement as ‘a set of rules guiding and constraining the behaviour of governments’.\textsuperscript{58} However, while the meaning of ‘constraining’ the state is relatively straightforward, the particular process through which this occurs is less obvious. There are three particular accounts: coercive, strategic and normative.

\textbf{Coercive Force}

‘Coercion’ may appear an unpromising way to describe the mechanism by virtue of which states comply with the law. In the absence of credible, enforceable sanctions,


\textsuperscript{55} ATF Lang, ‘Some Sociological Perspectives on International Institutions and the Trading System’ in \textit{International Economic Law} (n 20) 73.

\textsuperscript{56} Wendt (n 53) 339.


\textsuperscript{58} Lang (n 55) 73.
The Impact of WTO SPS Law on EU Food Regulations
Downes, C.
2014, XVI, 266 p. 5 illus., Hardcover
ISBN: 978-3-319-04372-2