
Book Reviews

de Búrca, Gráinne and Joanne Scott (eds). *The EU and the WTO. Legal and Constitutional Issues*. Oxford, Portland, Oregon: Hart Publishing. 2001. Pp. x + 328. £40, ISBN 1841131997.

This book deals with a subject which has gained enormous importance in recent years, the relationship between European Union law and WTO law. While in the past the reciprocal interdependencies between the EC and the GATT were the subject of study by only a rather small number of experts, this situation radically changed during the course of the Uruguay Round and especially after the establishment of the WTO on 1 January 1995. Both entities, the European Union and the WTO, are the result of an institution-building process, which saw during the last decade of the twentieth century, in Europe as well as on a universal level, an increase in membership, power and competences for the relevant organizations. The ongoing accession process to the WTO,¹ which gained particular attention with the accession of the People's Republic of China to the WTO on 11 December 2001 and the intensified accession negotiations with Russia and, on the other hand, the enlargement process of the EU, show that there is still considerable momentum in this direction. As these institutions gain ever more importance, their fields of interaction should attract increasing attention. This is especially true if we consider that these points of interaction are growing. Thus, one may predict that many legal questions arising from this interaction process will favour the development of a special discipline in international economic law dealing with ever more numerous and complex questions in the intersection between the law of the European Union and that of the

WTO. The book under review will constitute a pivotal contribution for the development of such a discipline.

This collection of essays explores the possibilities of comparison between EU law and WTO law — and the limits of such a comparison. In this sense, the studies can be attributed not only to the disciplines of public international law and European Union law, but also comparative (public) law. In the literature it has been stated that comparison in comparative law is not an end in itself, but helps to better understand a legal system.² Reformulated in the context of public international law, where overlapping legal structures mean that it is not always possible to distinguish between 'ours' and 'theirs', and applied to the specific context under consideration here, this statement takes on particular significance as the juxtaposition of related aspects of EU law and WTO law opens the way to interesting new insights and a new understanding both of individual elements of these legal systems as well as of their specific roles in international trade relations.

The introductory chapter by Gráinne de Búrca and Joanne Scott on 'The Impact of the WTO on EU Decision-making' starts out by offering a broad panoply of similarities and differences between EU law and WTO law. In so doing, the limits of such comparison are also evidenced. Several case studies show that there are subtle and very effective ways that WTO law, even without direct effect, has an

¹ On 1 January 2002 the WTO had 144 members.

² See L.-J. Constantinesco, *Rechtsvergleichung*, vol. II, Die rechtsvergleichende Methode (1971), at 335 *et seq.*; Neumayer, 'Grundriß der Rechtsvergleichung', in R. David and G. Grasmann (eds), *Einführung in die großen Rechtssysteme der Gegenwart* (1988) 35; M. Rheinstein, *Einführung in die Rechtsvergleichung* (1987), at 14 *et seq.*

impact on the EU system. In this context, emphasis is given to the importance of procedural values, such as participation, consultation and due process, which the WTO Appellate Body referred to in the *Shrimp/Turtle* dispute.³ It is suggested that these values can lead to more inclusive political processes, giving voice to unrepresented communities and individuals. If these procedural values are applied in an effective and flexible manner and are not translated in a formal, elusive way, they could make a powerful contribution to bridging the 'legitimacy gap' which seems to threaten the foundations of the WTO.

The next two chapters address the various attempts to 'constitutionalize' WTO law from a rather abstract point of view. 'Constitutionalism' is much *en vogue* as an issue these days. The sub-title of the book itself speaks of 'legal and constitutional' issues, giving, at first glance, the impression that they are two conflicting concepts. This impression is misleading; the sub-title was probably intended to provide catchwords to attract attention to the main issues of this book rather than as an attempt to devise a new delimitation for an intensely debated subject.

Many reasons could be given for the continuing attempts to give a 'constitutional' connotation to WTO law. Whatever the concrete meaning of this qualification, it certainly gives a more prominent status to the subject, at least at the academic level, as it can be associated with meanings such as 'basic norms', 'higher norms', 'provisions which cannot be easily modified'. Those who study these norms can expect to be dealing with the very foundations of international economic law. In the past, I have suggested that attempts to constitutionalize GATT/WTO law are especially pronounced in countries like Germany where international economic law is taught mainly by academics specializing both in public international law and in constitutional law.⁴ There is an attempt to give

structure to a legal system which has grown at an extremely rapid pace, leaving open many questions of interpretation. There are the repercussions of the various initiatives to give a constitution to the European Union. Finally, to end this by no means exhaustive list, this development is the result of efforts to address the legitimacy question, to democratize WTO law and to transpose basic values of our national constitutions to the new international trade regulations in order to make sure that standards achieved with great effort on the national level are not contradicted, at least partly, by new international agreements. The existence of these and many other divergent explanations for the various attempts to describe the WTO from a constitutional viewpoint guarantees that the results reached are widely differing. Contrasting viewpoints on the constitutionalization process are also expounded by the various authors of this book.

In his essay entitled 'The EU and the WTO: Constitutionalism in a New Key', Neil Walker presents a very sophisticated analysis of the concept of 'constitutionalism'. He shows that much of the misunderstanding associated with this concept is due to a problem of 'translation', in that a concept created in a national context has to be transposed to an international setting. By pointing to the fact that there is a relationship of mutual constitution and containment between politics and constitutional law he develops a series of factors according to which the intensity and the direction of a constitutionalization process, understood in a broad sense, can be measured. These are discursive maturity, authority, jurisdiction, interpretive autonomy, institutional capacity, citizenship and representation. By applying them both to the WTO and the EU he shows that the constitutionalization process is far more developed in the latter. However, this does not allow, according to Walker, a total denial of a constitutional quality to WTO law, as constitutionalization and constitutionalism are multifaceted phenomena and cannot be quali-

³ *United States — Import prohibitions of certain shrimp and shrimp products.*

⁴ See P. Hilpold, *Die EU im GATT/WTO-System* (1998).

fied by a single threshold. In any case, the invocation of constitutionalism should allow a structure to the ensuing discussion and lead to a richer and more productive normative debate. In addition, with regard to the relationship between the WTO and the EU, the constitutionalization of the debate should, according to Walker, finally lead to a greater 'political inclusiveness' and 'democratic legitimacy'. The opponents of the 'constitutional approach', on the other hand, point precisely to an insufficient development of these qualities, especially with regard to the WTO.

In the next chapter entitled 'The WTO and the EU: Some Constitutional Comparisons', Peter Holmes embarks on an in-depth and informative institutional comparison between the EU and the WTO. He points out that the EU influenced the way in which the WTO was set up and that the WTO dispute settlement mechanism resembles a constitutional court. While the legitimacy problem of EU decision-making and jurisprudence is well known and hotly debated, this is not yet true in relation to the corresponding problems within the WTO which seem to be, upon closer examination, even more pronounced.

In the following chapter Ernst-Ulrich Petersmann, one of the most outspoken advocates for a constitutionalization of WTO law, develops his position already stated in a series of articles in ever more detail. He pleads for a restructuring of international economic law in order to take account of the 'human rights revolution' and the 'emerging right to democracy' and points to the need for better democratic legitimization of WTO rule-making procedures, for the protection of the freedom of trade as a human right and for advisory parliamentary and civil society institutions in the WTO so as to promote better representation of citizen interests.

The most vigorous criticism towards this position has recently come from Robert Howse. Various elements of this criticism are cited in other essays published in this book, and it is clearly discernible that the essays have been strongly influenced by this view-

point.⁵ A detailed exposition of this position is, however, lacking in this book. The collection of essays would have been more complete if Robert Howse had been given the chance to express his fundamental opposition towards human rights constitutionalism in international economic organizations, as developed by Petersmann. Though present in this book with a case study of the important *Canada-EC Asbestos* dispute (with Elisabeth Tuerk), which is analysed in great detail, an additional contribution on the abstract issue of constitutionalism within the WTO system would surely have been appreciated by readers.⁶ In any case, this is a very topical discussion which will surely gain even more momentum over time.⁷

Next to the broad 'constitutional issue' more traditional questions arising out of the special relationship between the EU and the WTO are treated in this book, such as those regarding the effect of WTO law in the legal system of the European Union and the role and position of regional integration agreements in the WTO system. The first question seemed to have been settled with the ECJ's sentence in the *Portugal v. Council* case,⁸ but nonetheless the discussion continued, with authors partly criticizing this judgment and partly searching for alternatives to direct

⁵ See Howse and Nicolaidis, 'Legitimacy and Global Governance: Why Constitutionalizing the WTO is a Step Too Far', in R. B. Porter, P. Sauve and A. Subramian (eds), *Efficiency, Equity, Legitimacy and Governance: The Multilateral Trading System at the Millennium* (2001).

⁶ But see now Howse, 'Human Rights in the WTO: Whose Rights, What Humanity? Comment on Petersmann', 13 *EJIL* (2002) 658.

⁷ See also Philip Alston's critique of Petersmann, 'Resiting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann', 13 *EJIL* (2002) 815, and Petersmann's rejoinder, 'Taking Human Dignity, Poverty and Empowerment of Individuals More Seriously: Rejoinder to Alston', 13 *EJIL* (2002) 845.

⁸ 1999 ECR I-8395.

effect.⁹ Although Steve Peers criticizes many aspects of this judgment in his essay entitled 'Fundamental Right or Political Whim? WTO Law and the European Court of Justice', he comes to the conclusion that the denial of direct effect of WTO law was justified because of the lack of reciprocity with the other trading partners. The second part of Peers' contribution addresses the constitutional issue again, where he points to the fact that an enforceable 'right to trade' would not solve the legitimacy issue as long as this right has to be enforced through an international 'judiciary' with 'considerable legal uncertainty' and 'even further doubts about the legitimacy of the Dispute Settlement Body's decisions'.

In 'Collision, Co-existence or Co-operation? Prospects for the Relationship between WTO Law and European Union Law', Armin von Bogdandy and Tilman Makatsch are also quite critical of the ECJ's judgment in *Portugal v. Council*. However, they also point to the often overlooked fact that the ECJ still seems to be prepared to control acts of EU Member States on the basis of WTO law. The first part of their essay deals in part with the important decision by the WTO dispute settlement organs in *Turkey-Restrictions on Imports of Textiles and Clothing Products*,¹⁰ affirming the jurisdiction of the WTO dispute settlement organs over Article XXIV and further delimiting the scope of this exception.

A thoughtful analysis of this case can also be found in 'Neutrality or Discrimination? The WTO, the EU and External Trade' by Marise Cremona. She examines in great detail the implications of the principle of non-discrimination, which is of pivotal importance in WTO law but not in the EC external trade law. This becomes evident with the proliferation of bilateral preferential agreements with third

states, which has created an inherently discriminatory system. This situation also has constitutional consequences: the author points to the need for the Community legal order to develop its own constitutional principles in order to find an adequate solution for the tension between non-discrimination and preferential free trade.

While regionalism within GATT/WTO law has largely been treated from the transnational viewpoint, Thomas Cottier and Christophe Germann argue in 'The WTO and EU Distributive Policy: The Case of Regional Promotion and Assistance' that the sub-national perspective will also become increasingly important in the future. They analyse in particular the degree to which EU regional policies of promotion and assistance are compatible with WTO law and whether there is a need for a reform of the relevant legislation, particularly in view of the imminent enlargement of the European Union. This is a field in which little research has been undertaken to date. The authors point to the many uncertainties surrounding this issue, but they also warn that the further 'process of liberalisation and the bringing about of equal conditions of competition may eventually require the development of flanking policies and thus regional policies on the part of the WTO.'

In his essay on 'Constitutional Concepts for Free Trade in Services', Piet Eeckhout examines the development of the liberalization of trade in services in the EC and in the WTO where he also shows the close relationship of these approaches with the liberalization of trade in goods. He points to the different ways these institutions have achieved a balance between liberalization and regulation, with all the ensuing constitutional consequences.

In 'Trade in Culture: International Legal Regimes and EU Constitutional Values', Bruno de Witte examines in which way cultural concerns in trade issues can be considered both in general international economic law and in the EU context. He shows that the European Union plays a very important role in this debate. The European Community leaves on the one hand very much

⁹ For an excellent recent contribution in this field see also Eeckhout, 'Judicial Enforcement of WTO Law in the European Union — Some Further Reflections', *JIEL* (2002) 91.

¹⁰ Panel Report WT/DS34/R of 31 May 1999 and Appellate Report WT/DS34/AB/R of 22 October 1999.

autonomy to its Member States, but this also implies that it is very difficult to develop a common policy by which a Community position could be strongly defended at the international level.

Finally,¹¹ in his essay 'Is There Any Such Thing as Free or Fair Trade? A Constitutional Analysis of the Impact of International Trade on the European Social Model', Miguel Poiares Maduro turns to the broad free trade versus fair trade debate. In this essay, he poses the fundamental question of who should, in different circumstances, determine the balance between these two principles, thereby focusing the debate once more on a constitutional level.

This book does not claim to have the final word on the issues it treats. Indeed, this would not be possible as the relationship between WTO law and European Union law is rapidly evolving and continuously changing. Behind the transitory nature of many elements of this relationship there are, however, some basic questions which remain constant in time and which are fundamental for the entire international order. One of the most important of these regards the place to be given to human rights in the international economic order. As the recent exchange of views on this issue in this journal¹² has shown, we are a long way from even the appearance of a consensus on such a basic question. Therefore, at the moment, the primary goal has to be to find a common language for this necessary and inevitable debate. Recourse to the term 'constitution', notwithstanding its elusiveness, has created a large platform on which this discussion can engage. In this sense, the most important contribution of this book has been to prepare the field for further research and discussion. All in all, this is a very important book on a very important issue for international lawyers; for academics with a special

interest in international economic law (or, more modestly, in WTO law) it is essential reading.

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¹¹ The last essay in numerical order in this volume is the case study by Robert Howse and Elisabeth Tuerk of the *Canada-EC Asbestos* dispute already discussed above.

¹² See *supra* note 7 and the contributions cited therein.