

Lorand Bartels and Federico Ortino (eds).
***Regional Trade Agreements and the
WTO Legal System.*** New York City:
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The escalating growth of bilateral and regional trade agreements is a visible phenomenon in contemporary international relations. The number of free trade agreements notified to the WTO grew from 20 in 1990 to 159 in 2007, and it has been

estimated to reach 400 by the year 2010.¹ A recent expert's report commissioned by the WTO Director General identified the 'spaghetti bowl' of miscellaneous trade deals as a fundamental threat to the future of the WTO.² These instruments raise questions beyond the subject-specific area of trade law. The often inconsistent coverage between bilateral and WTO commitments feeds squarely into the current preoccupation with the increased fragmentation of international law.³ Despite its evident importance, the shift to bilateralism and regionalism in trade policy has to date attracted relatively little comprehensive analysis. With this in mind, the 2006 collection of papers edited by Lorand Bartels and Federico Ortino is to be welcomed as an overdue contribution to the field.

At its most fundamental, the shift towards bilateralism and regionalism may represent a departure from the precepts that motivated the architects of the post-war trading system. These were a curious blend of self-interest (encompassing the promise of gains from liberalized trade) and visionary re-imagining of the trading system. John Gerard Ruggie has described the normative principle infusing the GATT as one of a compromise of 'embedded liberalism'.⁴ The liberal component of this bargain was of course the reduction of barriers in trade in goods between member states. This element of the GATT was influenced, though, by a particular vision of history; the inter-war period had been marked by progressive and ruinous 'beggar thy neighbour'

policies of increased trade protection,⁵ a practice widely regarded as contributing to the eventual outbreak of hostilities in the Second World War.⁶ The Kantian desire to discipline those hostile tendencies dictated in turn the multilateral form of the project. An initial fundamental question then would look to identify and evaluate the motivations that are now driving states to bifurcate trade policy among different *fora*.

Part I of the edited collection examines the question of motivation as part of a series of 'framework issues'. Chapter 1 provides a useful, if not particularly analytical, overview of the economic consequences (trade creation/diversion and transaction costs) of the shift to regional trade agreements. It is chapter two, though, on the political economy of these agreements that promises much, but ultimately disappoints. This chapter accurately tracks the large range of

¹ UNCTAD, *Trade and Development Report 2007*, at 54–7 (2007).

² Consultative Board, *The Future of the WTO: Addressing Institutional Challenges in the New Millennium*, at 19–23, 79 (2005).

³ *Fragmentation of International law: Difficulties Arising From the Diversification and Expansion of International Law* (Report of the Study Group of the International Law Commission, UN Doc. A/CN.2/L. 682, 2006).

⁴ John Gerard Ruggie, 'Embedded Liberalism and the Postwar Economic Regimes', in *Multilateralism Matters: The Theory and Praxis of an Institutional Form*, at 72–6 (John Gerard Ruggie ed., 1993).

⁵ The infamous 1930 U.S. Smoot-Hawley increase in tariffs as a response to the onset of the Great Depression saw immediate relation by other governments. For example, Great Britain – the political champion of economic liberalism in the 19th century – negotiated the Ottawa Agreements to set up a system of tariff preferences amongst the Commonwealth countries. The impact of protectionist policies on the international economy in the inter-war years was severe; in the period 1929 to 1934 alone, world trade levels declined by 66 per cent. See Andrew G. Brown, *Reluctant Partners: A History of Multilateral Trade Cooperation 1850–2000*, at 69–73 (2003); Gilbert R. Winham, *The Evolution Of International Trade Agreements*, at 30 (1992).

⁶ The idea of a causal relationship between protectionism and a heightened potential for conflict infused much of the International Trade Organization and GATT negotiations in the post-Second World War period. See Richard Gardner, *Sterling-Dollar Diplomacy: Anglo-American Collaboration in the Reconstruction of International Trade*, at 4 (1956); Judith Goldstein, 'Creating the GATT Rules: Politics, Institutions and American Policy', in *Multilateralism Matters: The Theory and Praxis of an Institutional Form*, at 215 (John Gerard Ruggie ed, 1993).

political motivations for the shift to regional trade agreements including presumed ease of negotiation, the fear of marginalization, linkage to security concerns, the desire to lock in domestic reforms and the signalling function of such agreements. The author fails to disentangle and critically evaluate the strength of these different motivations. For example, a regional trade agreement may be taken as a means for a government to lock in liberalizing economic reforms and to signal to foreign investors that 'the country is open for business'. There is, however, a range of empirical work that has contested whether these types of commitments have the causal effect of leading to increased foreign investment.⁷ Similarly, the choice by the United States of particular trade partners is clearly driven by a linkage to new security objectives. It is difficult to imagine that the United States would have chosen to negotiate a bilateral trade deal with a major agricultural exporter, such as Australia, had the latter not been an active participant in the 'coalition of the willing' in Iraq. American beneficence only extends so far and no more; the eventual trade deal largely excluded, unsurprisingly, significant sectors of agricultural trade. This incident sharply illustrates that certain forms of sensitive trade may only ever be realistically covered in multilateral *fora* where one can construct adequate trade-offs across a range of partners and issues.

Part II of the collection examines the constraints imposed by the WTO treaty on member states engaging in regional

trade agreements. Three chapters tackle the vague terms of GATT Article XXIV, a stark reflection of Robert Hudec's memorable description of the GATT as 'an old, and often badly drafted, instrument'.⁸ These chapters provide a careful and illuminating analysis of the limits of Article XXIV and possible means of increasing the efficacy of its injunction. The cat, however, is to some degree out of the bag. A more fruitful line of inquiry would be to identify areas of inevitable conflict between the growing universe of bilateral trade deals and WTO norms and to examine means by which that conflict can be managed. These questions are the subject of Parts III to V and are clearly the high points of the collection.

Part III traces the controversial use of WTO-plus provisions in regional trade agreements. These are either subject matters not directly covered by WTO law (such as foreign investment or competition) or the particular provision applies a more stringent standard than that of the relevant WTO norm (as in the case of intellectual property). A range of important points are drawn out in this analysis, not least of which is the paradoxical behaviour of developing state partners in relation to regional trade agreements. Many of those states have prominently banded together to present a consistent demand on development as part of the ongoing Doha negotiations of the WTO. At the same time, they are also entering into regional deals that significantly constrain their development policy space or limit flexibilities accorded under WTO rules (such as those of compulsory licensing in the case of the WTO TRIPS Agreement). A notable absence from Part III is a direct focus on the practice by certain developed states of including labour and environment provisions in their regional trade agreements. This is touched upon in an insightful chapter by Ernst-Ulrich Petersmann on the constitutional dimensions

⁷ See, e.g., Mary Hallward-Driemeier, 'Do Bilateral Investment Treaties Attract Foreign Direct Investment? Only a Bit... and They Could Bite', *World Bank Policy Research Working Paper No. 3121* (August 2003). Jennifer Tobin & Susan Rose-Ackerman, 'Foreign Direct Investment and the Business Environment in Developing Countries: The Impact of Bilateral Investment Treaties', *William Davidson Institute Working Paper No. 587* (June 2003). But cf. Jeswald Salacuse & Nicholas Sullivan, 'Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain', 46 *Harv. Int'l L. J.*, at 67 (2005).

⁸ Robert Hudec, 'GATT/WTO Constraints on National Regulation: Requiem for an "Aims and Effects" Test', 32 (3) *Int'l Lawyer*, at 619, 633 (1998).

of the WTO. These issues deserve specific attention, given their prominence and their ability to engender equally strident support and opposition in domestic constituencies of negotiating partners.

Parts IV and V cover the means by which conflicts between regional agreements and the WTO are likely to be managed. Much of course will come down to specific disputes where there is overlap between competing *fora*. Indeed, there have already been two specific cases heard in the WTO dispute settlement system that have involved (admittedly different) forms of conflict between WTO norms and those of the NAFTA and MERCOSUR respectively.⁹ The manner in which the dispute settlement organs interpret and reconcile competing treaty texts will be central to the project of managing conflict. Part IV guides the reader through different forms of dispute settlement in the EU, NAFTA, ASEAN and others. This is a useful overview, although there is a regrettable overlap in coverage in that part. Part V on the other hand, deals with the topical issue of formal conflict clauses and systems of interpretation as mechanisms of reconciling conflict. Indeed, this part of the collection tracks the heavy emphasis on treaty interpretation in the work of the International Law Commission on managing fragmentation of international law. The contribution by Kwak and Marceau is particularly notable as the authors contemplate general international legal precepts, such as abuse of process, rights and good faith as (admittedly exceptional) means of managing conflict. In the recent *Soft Drinks* case, a WTO Panel (and Appellate Body to a lesser degree) was largely dismissive of these possibilities in dealing with the fluid overlap in jurisdiction between the

WTO and NAFTA in that case.¹⁰ The reticence of the dispute organs of the WTO may indeed reflect the vestiges of a claim to priority and self-containment that marked the early years of the inception of the WTO. One need only look to the jurisprudence of the ICJ to find alternative and far more convincing claims of the basis of grounding or declining jurisdiction in contentious cases.¹¹

In sum, there is a distinct unevenness in the contributions contained in *Regional Trade Agreements and the WTO Legal System*. This being said, the hits far outweigh the misses. For those interested in the topical and consequential issue of the fragmentation of international trade law, this is a collection that should be drawn upon.

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⁹ *Mexico – Tax Measures on Soft Drinks and Other Beverages*, Report of the Panel, WT/DS308/R (Oct. 7, 2005); *Mexico – Tax Measures on Soft Drinks and Other Beverages*, Report of the Appellate Body, WT/DS308/AB/R (Mar. 6, 2006); *Brazil – Measures Affecting Imports of Retreaded Tyres*, Report of the Panel, WT/DS332/R (Jun. 12, 2007).

¹⁰ See *Mexico – Tax Measures on Soft Drinks and Other Beverages*, Report of the Panel, WT/DS308/R, 7.8-7.16 (Oct. 7, 2005). But cf. *Mexico – Tax Measures on Soft Drinks and Other Beverages*, Report of the Appellate Body, WT/DS308/AB/R 45-54 (Mar. 6, 2006);

¹¹ See, e.g., *Case Concerning Legality of Use of Force (Serbia and Montenegro v United Kingdom)*, International Court of Justice, Separate Opinion of Justice Higgins 9-12 (Dec. 15, 2004).