

Regional Trade Agreements and the WTO Legal System

Edited by

LORAND BARTELS

and

FEDERICO ORTINO

OXFORD
UNIVERSITY PRESS

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General Editor's Preface

JOHN H. JACKSON*

One of the most perplexing and complex problems relating to the world trading system today, is the proliferation of a wide variety of so-called 'regional trade agreements (RTAs)'. These agreements vary greatly in composition and structure, from numerous bilateral 'Free Trade Agreements (FTAs)' to certain small regional or mini-lateral agreements such as NAFTA (North American Free Trade Agreement) or CAFTA (Central American Free Trade Agreement), and in some cases involving nations which are not even in the same region. These agreements have a wide variety of provisions, and often vary greatly even when involving one same partner. This volume, which is part of the Oxford University Press series of books on subjects of the extraordinarily broad landscape of international economic law, contains an excellent analysis of the various characteristics and problems of regional trade agreements.

This volume, edited by Lorand Bartels and Federico Ortino, is a very welcome contribution to the legal knowledge about international economic policy and the structure and configuration of the world trading system. The great proliferation of a wide variety of agreements poses considerable concern to the multilateral trade system, as most often represented by the WTO. On the other hand, many of these agreements can perform useful functions in a world that is often hobbled by difficult 'constitutional' problems of making timely decisions so as to keep abreast of rapid paced economic developments frequently described as 'globalization'.

Among other recent examples of commentary about the proliferation or 'spaghetti bowl' of RTAs is the annual WTO report for the year 2003, which includes an analytical section describing the multiplying development of regional trade agreements, in expressing some serious reservations about the policy implications of them, while recognizing some of the advantages. More recently, these issues were explored by the 'Sutherland' Consultative Board, which in its January 2005 report devoted an important chapter to the dangers to the multilateral system that can occur from the 'erosion of non-discrimination', attributed to the great growth in the number of FTAs and RTAs.

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Clearly there are some advantages for the RTAs, partly because, with a limited number of members, decisions often can be made more easily, more efficiently, and in a more timely way. Furthermore, these agreements often explore and experiment with subjects that have proven virtually impossible to develop in the broader multilateral framework of about 150 member countries or more.

On the other hand, many concerns are important. To some degree, RTAs can develop protectionist measures which discriminate against certain parts of the world trade and in any event create additional transaction costs because of the need of customs officials to analyse the 'origin' of goods (in a world where national origin becomes less and less meaningful for goods or services.) The rules of origin often themselves are manipulated in such a way to provide protectionist effects. In addition there are some subjects which do not well lend themselves to smaller grouping of states. For example, subsidies, particularly those on agriculture, cannot be effectively contained by agreements between small groups of countries, since the world market is what will drive many of the problems regarding subsidies and the market will restrict ways to diminish the distorting allocation effects of subsidies.

This book takes these various issues up in considerable detail and with very able perspective, in five parts which span very effectively these policy conundrums. Part I, entitled 'Framework Issues', sets the stage with an economic and political analysis of regional trade agreements and a discussion of 'constitutional functions' of the WTO and its relationship to regional trade agreements. Part II is entitled 'WTO Regulation of Regional Trade Agreements', and in this Part a series of some of the legal issues of regional trade agreements is explored. For example, the text explores whether these agreements and their rules of origin truly comply with the mandatory disciplines embodied in the norms expressed in Article XXIV of the GATT text incorporated in the WTO. Part III, which is entitled 'WTO-Plus Issues in Regional Trade Agreements', is a series of seven chapters and presents an awesomely extensive analysis of a number of different characteristics found in regional trade agreements, which in some cases push the frontiers of trade policy and ably provide answers in situations where the multilateral trade system has not been proven very effective. Subjects taken up include: services liberalization, foreign investment, intellectual property, competition law, harmonization ideas, constitutional reforms including possible interaction with human rights norms, and environmental issues of various sorts.

Part IV discusses 'Dispute Settlement in Regional Trade Agreements' and includes the perplexing problems of how these dispute settlement systems interact with each other. Finally, Part V, 'Interfaces Between the WTO and Regional Trade Agreements', begins to look more systemically at questions of overlap and jurisdiction between the WTO and RTAs and the question of applicability of WTO law in RTAs.

This book will certainly become a standard source of analyses which will influence future scholarship, and will be a necessary component of the thinking of policy makers, academics, and all professionals who have to grapple in-depth with the problems of world trade and globalization.

Acknowledgements

The contributions in this book are for the most part the proceedings of a conference of the same title held in Edinburgh in May 2005. We would like to express our deep gratitude to the International Law Association (British Branch), the British Academy, the University of Edinburgh, and Oxford University Press, for their generous support of the conference and of this publication. We would also like to thank the participants in the conference for their contributions, both formal and informal, which have enriched this publication. And we are grateful to Humberto Zúñiga Schroder for first class editorial assistance, and to John Louth and Gwen Booth at OUP for their helpfulness and efficiency with the production process of this book.

List of Abbreviations

ACP	African, Caribbean and Pacific
AJIL	American Journal of International Law
Alb L J Sci & Tech	Albany Law Journal of Science & Technology
ALCA	Área de Libre Comercio de las Américas (Free Trade Area of the Americas)
Am Rev Int Arb	American Review of International Arbitration
Am U Int L Rev	American University International Law Review
APEC	Asia-Pacific Economic Cooperation
Appl Econ Lett	Applied Economics Letters
Ariz J Int & Comp L	Arizona Journal of International and Comparative Law
ASEAN	Association of Southeast Asian Nations
ASEAN Econ Bull	ASEAN Economic Bulletin
Asian Econ J	Asian Economic Journal
ASIL Proc	American Society of International Law Proceedings
Asper Rev Int Bus & Trade L	Asper Review of International Business and Trade Law
Aust YIL	Australian Yearbook of International Law
BISD	Basic Instruments and Selected Documents (GATT Series)
BIT	Bilateral Investment Treaty
Brook J Int L	Brooklyn Journal of International Law
BYIL	British Yearbook of International Law
BYU L Rev	Brigham Young University Law Review
CACM	Central American Common Market
CAFTA-DR	Central American Free Trade Agreement
Cal W Int L J	California Western International Law Journal
Caricom	Caribbean Community
CCAEC	Canada–Chile Agreement on Environmental Cooperation
CCLCA	Canada–Chile Labour Cooperation Agreement
CCRLCA	Canada–Costa Rica Labour Cooperation Agreement
CEC	Commission for Environmental Cooperation
CEPA	Mainland and Hong Kong Closer Economic Partnership Agreement
CMLR	Common Market Law Review
Colo J Int Envtl L & Policy	Colorado Journal of International Environmental Law and Policy
Colum J Eur L	Columbia Journal of European Law

Comesa	Common Market for Eastern and Southern Africa
Cornell Int L J	Cornell International Law Journal
CRTA	WTO Committee on Regional Trade Agreements
CU	Customs Union
CUP	Cambridge University Press
CUSFTA	Canada-US Free Trade Agreement
DSB	Dispute Settlement Body
DSM	Dispute Settlement Mechanism
DSU	WTO Dispute Settlement Understanding
EBL Rev	European Business Law Review
EC	European Community or EC Treaty (after Article number)
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECOWAS	Economic Community of West African States
ECR	European Court Reports
ECT	Energy Charter Treaty
ECtHR	European Court of Human Rights
EEA	European Economic Area
EFA Rev	European Foreign Affairs Review
EFTA	European Free Trade Association
EJIL	European Journal of International Law
EL Rev	European Law Review
ELJ	European Law Journal
EPA	Economic Partnership Agreement
EPL	European Public Law
ERPL	European Review of Private Law
EU	European Union or Treaty on European Union (after Article number)
Euratom	European Atomic Energy Community
Euromed	Euro-Mediterranean
Far East Econ Rev	Far Eastern Economic Review
Ford Int LJ	Fordham International Law Journal
FTA	Free Trade Agreement or Free Trade Area
FTAA	Free Trade Area of the Americas
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GCC	Gulf Cooperation Council
Geo Int Env L Rev	Georgetown International Environmental Law Review
Geo Wash Int L Rev	George Washington International Law Review
GSP	Generalized System of Preferences
GTAP	Global Trade Analysis Project
GYIL	German Yearbook of International Law

Harv Int L J	Harvard International Law Journal
Harv J L & Pub Policy	Harvard Journal of Law and Public Policy
HTS	Harmonized Tariff System
ICJ	International Court of Justice
ICJ Rep	International Court of Justice Reports
ICLQ	International and Comparative Law Quarterly
ICSID	International Centre for Settlement of Investment Disputes
ILC	International Law Commission
ILM	International Legal Materials
ILO	International Labour Organization
Ind J Glob Leg Stud	Indiana Journal of Global Legal Studies
Int Org	International Organisation
IOLR	International Organizations Law Review
IPE	International Political Economy
IPR	Intellectual Property Rights
ITL Rev	International Trade Law Review
ITO	International Trade Organization
J Asian Econ	Journal of Asian Economics
J Copyright Soc USA	Journal of the Copyright Society of the USA
J Econ Integration	Journal of Economic Integration
J Econ Lit	Journal of Economic Literature
J Econ Perspect	Journal of Economic Perspectives
J Int Trade Econ Devel	Journal of International Trade and Economic Development
J Pol Econ	Journal of Political Economy
JEPP	Journal of European Public Policy
JIEL	Journal of International Economic Law
JWIP	Journal of World Intellectual Property
JWT	Journal of World Trade
Law & Bus Rev Am	Law and Business Review of the Americas
LCP	Law and Contemporary Problems
LDC	Least Developed Country
Leiden J Int L	Leiden Journal of International Law
LIEI	Legal Issues of Economic Integration
LMO	Living Modified Organism
Loy LAL Rev	Loyola of Los Angeles Law Review
Marq Intell Prop L Rev	Marquette Intellectual Property Law Review
MEA	Multilateral Environmental Agreement
Mercosur	Mercado Común del Sur (Southern Common Market)
MFN	Most Favoured Nation
Mich J Int L	Michigan Journal of International Law

Minn J Global Trade	Minnesota Journal of Global Trade
MJIEL	Manchester Journal of International Economic Law
MLR	Modern Law Review
N Amer J Econ Finance	North American Journal of Economics and Finance
N C J Int L & Com Reg	North Carolina Journal of International Law and Commercial Regulation
NAAEC	North American Agreement on Environmental Cooperation
NAALC	North American Agreement on Labor Cooperation
NAFTA	North American Free Trade Agreement
NAO	National Administrative Office
Neth Int L Rev	Netherlands International Law Review
New Eng L Rev	New England Law Review
Nord J Int L	Nordic Journal of International Law
NTB	Non-Tariff Barrier
Nw J Int L & Bus	Northwestern Journal of International Law & Business
NYIL	Netherlands Yearbook of International Law
NYU J Int L & Pol	New York University Journal of International Law & Politics
OECD	Organisation for Economic Cooperation and Development
OJ	Official Journal of the European Union (formerly European Communities)
ONLR	Ohio Northern University Law Review
OPEC	Organization of the Petroleum Exporting Countries
ORC	Other Regulations of Commerce
ORRC	Other Restrictive Regulations of Commerce
OUP	Oxford University Press
Pac Rev	The Pacific Review
PCA	Partnership and Cooperation Agreement
Polish YIL	Polish Yearbook of International Law
RTA	Regional Trade Agreement
SAA	Stabilization and Association Agreement
SADC	Southern African Development Community
SPS	Sanitary and Phytosanitary (measures)
SYIL	Singapore Yearbook of International Law
TBT	Technical Barriers to Trade
TCE	Treaty Establishing a Constitution for Europe
TDCA	EC-South Africa Trade and Development Cooperation Agreement
TMB	WTO Textiles Monitoring Body
Tul L Rev	Tulane Law Review

TWQ	Third World Quarterly
U Chi L Rev	University of Chicago Law Review
U Ott Law & Tech J	University of Ottawa Law and Technology Journal
U Pa J Int Econ L	University of Pennsylvania Journal of International Economic Law
UN	United Nations
UNCED	United Nations Conference on Environment and Development
UNCITRAL	United Nations Commission for International Trade Law
UNCLOS	United Nations Convention on the Law of the Sea
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNTS	United Nations Treaty Series
US	United States of America or United States Supreme Court Reports
Vanderbilt J Transnatl L	Vanderbilt Journal of Transnational Law
VCLT	Vienna Convention on the Law of the Treaties
VER	Voluntary Export Restraint
Whittier L Rev	Whittier Law Review
WHO	World Health Organization
WTO	World Trade Organization
WTR	World Trade Review
Yale J Int L	Yale Journal of International Law

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