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978-0-521-87827-2 - Bilateral and Regional Trade Agreements: Commentary and Analysis

Edited by Simon Lester and Bryan Mercurio

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BILATERAL AND REGIONAL TRADE AGREEMENTS

As the Doha Development Round trade negotiations have stalled, bilateral and regional free trade agreements have become an important alternative. These agreements have proliferated in recent years, and now all of the major trading countries are engaging in serious bilateral trade negotiations with multiple trading partners.

This book provides a comprehensive study of recent bilateral and regional trade agreements. There are two main aspects. First, it situates bilateral and regional trade agreements in the context of economics, international law and international relations. Second, it surveys the most important recent agreements in relation to each substantive topic covered (e.g. intellectual property, investment, services and social policy) and provides an overview of the law being created in these areas.

SIMON LESTER is the co-founder and President of www.WorldTradeLaw.net.

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COMMENTARY AND ANALYSIS

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SIMON LESTER

BRYAN MERCURIO



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Simon Lester thanks his family, in particular his wife and business partner Kara Leitner for her continued personal support and willingness to provide substantive comments on all of his writing endeavours.

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FOREWORD

This two-volume book provides a critical addition to the literature on international trade law. In chapters that carefully describe and analyse a complex web of multilateral regional and bilateral trade agreements, this collection shows how, why, when and to what extent states have negotiated and signed regional and bilateral trade agreements in recent years.

It is well recognised by now that the landscape of international trade agreements has changed dramatically over the past decades – from bilateral agreements in the early nineteenth century to the growth of multilateralism and regionalism under the GATT and its successor, the WTO. Until fairly recently, the focus of international trade law was, for the most part, the GATT/WTO, the European Community, the NAFTA and MERCOSUR. However, following the 1999 Seattle Ministerial Conference of the WTO, we have now entered a period that has resurrected bilateralism and created a new form of ‘loose’ regionalism. As a result of the proliferation of such agreements, international trade law now consists of hundreds of new agreements, usually between just two countries, although sometimes more.

Illustrating the changing cycle of such agreements, this collection identifies the multi-faceted evolution of trade agreements and provides the first comprehensive look at the ‘law and policy’ of this recent wave of ‘preferential’ trade agreements (PTAs). The first volume explores different kinds of PTAs, situating each in its particular social, political, economic and cultural context, and offering an assessment of the substantive law of these agreements. The second volume consists of various case studies, which not only analyse the results of each particular trade agreement, but also show the practical side of how the agreements are negotiated. In both volumes, the authors have drawn on their own specialised knowledge of these topics, and the editors should be commended for assembling such an impressive team of contributors. Not only have the editors selected well-credentialed contributors, but they have also been careful to include contributors from academia, practising lawyers and government officials, so as to strike an appropriate balance and appeal to a wide-ranging audience.

The book is important, not simply because it identifies an assortment of trade agreements, but because it demonstrates the manner in which and extent to which they work differently and to different ends. Recognising that trade agreements vary from little more than ‘treaties of friendship’ to agreements supporting significant

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economic integration, the contributors explore the extent to which such agreements are used to enhance domestic interests, promote foreign policy and build ever more inventive economic, political, social and cultural alliances. Demonstrating that trade agreements once were centrally preoccupied with the reduction of tariffs, the book shows how trade agreements often transcend tariffs, how they govern investment, intellectual property, labour, the environment, human rights and, ultimately, the domestic policies of states. As the scope of the agreements has expanded from formulaic tariff reductions, the legal and policy issues have become much more complicated. Whereas the previous debate involved mostly the question of how high tariffs should be, the law of today's PTAs asks diverse questions such as: how strongly should intellectual property be protected; how should intellectual property protection relate to access to medicines in poor countries; what impact does trade liberalisation have on labour rights, human rights, and environmental protection; and how should the rights of foreign investors be balanced with the ability of states to regulate. This two-volume set provides a high level of discussion of these issues in the context of the growing body of PTAs.

Nor do the essays in this book avoid controversy. Challenging the perception that free trade agreements are invariably 'free', several chapters reveal the extent to which trade agreements are used to both regulate and constrain trade. They also demonstrate why trade agreements are often appropriately referred to as 'preferential trade agreements'.

Finally and significantly, the editors will undertake in the future to supplement this two-volume collection in response to changes in the continually evolving trade environment. As the landscape grows, the editors will continue to survey it, tracing the path of the evolving field of international economic law. In this way, they will make a lasting contribution to the interdisciplinary landscape that will mark the Twenty First Century trade agreement.

Leon Trakman

Professor and Immediate Past Dean

University of New South Wales, Faculty of Law

NAFTA Arbitrator

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<i>US-Shrimp</i>	Appellate Body Report, <i>United States–Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755

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<i>Short title</i>	<i>Full title and citation</i>
<i>EEC (Member States)–Bananas I</i>	GATT Panel Report, <i>European Economic Community–Member States’ Import Regimes for Bananas</i> , 3 June 1993, unadopted, DS32/R
<i>Italy–Agricultural Machinery</i>	GATT Panel Report, <i>Italian Discrimination Against Imported Agricultural Machinery</i> , adopted 23 October 1958, L/833, BISD 7S/60
<i>Norway–Trondheim Toll Ring</i>	GATT Panel Report, <i>Panel on Norwegian Procurement of Toll Collection Equipment for the City of Trondheim</i> , adopted 13 May 1992, GPR/DS.2/R, BISD 40S/319
<i>Thailand–Cigarettes</i>	GATT Panel Report, <i>Thailand–Restrictions on Importation of and Internal Taxes on Cigarettes</i> , adopted on 7 November 1990, DS10/R, BISD 37S/200
<i>US–Section 337 Tariff Act</i>	GATT Panel Report <i>United States Section 337 of the Tariff Act of 1930</i> , adopted on 7 November 1989, L/6439, BISD 36S/345

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(1) *International Conventions and Treaties*

Short Title	Long Title	Status
Basel Convention	Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal	Signed at Basel on 22 March 1989; in force 5 May 1992
Berne Convention	Berne Convention for the Protection of Literary and Artistic Works	Adopted in Berne on 9 September 1886; completed at Paris on 4 May 1896; revised 13 November 1908 (Berlin); completed 20 March 1914 (Berne); revised 2 June 1928 (Rome); revised 26 June 1948 (Brussels); revised 14 July 1967 (Stockholm); revised 24 July 1971 (Paris); amended 28 September 1979
Brussels Sugar Convention	Brussels Sugar Convention of 1902	Signed at Brussels on 5 March 1902; in force 1 September 1903
Cartagena Protocol	Cartagena Protocol on Biosafety to the Convention on Biological Diversity	Adopted in Montreal on 29 January 2000; in force 11 September 2003
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora	Signed at Washington, DC, on 3 March 1973; in force 1 July 1975
CCAMLP	Convention for the Conservation of Antarctic Marine Living Resources	Signed at Canberra on 20 May 1980; in force 7 April 1982
Cultural Expressions Convention	Convention on the Protection and Promotion of the Diversity of Cultural Expressions	Adopted in Paris by the United Nations Educational, Scientific and Cultural Organization

(1) (cont.)

Short Title	Long Title	Status
Havana Charter	Havana Charter for an International Trade Organization	(UNESCO) on 20 October 2005; in force 18 March 2007 Signed at Havana on 24 March 1948; never ratified
IATTC	Convention for the Strengthening of the Inter-American Tropical Tuna Commission	Signed at Washington, DC on 31 May 1949; in force 3 March 1950; Protocol of Amendment adopted on 11 June 1999, not yet in force; Convention for the Strengthening of IATTC adopted on 23 July 2003, not yet in force
ICJ Statute	Statute of the International Court of Justice	Established by the UN Charter, signed 26 June 1945; in force 24 October 1945
ILO Declaration	International Labour Organization on Fundamental Principles and Rights at Work	Adopted in Geneva by the General Conference of the International Labour Organization (ILO) during its 86th Session on 18 June 1998
London Convention	Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter	Signed at London on 13 November 1972; in force 30 August 1975
Montreal Protocol	Montreal Protocol on Substances that Deplete the Ozone Layer	Signed at Montreal on 16 September 1987; in force 1 January 1989
Paris Convention	Paris Convention for the Protection of Industrial Property	Signed at Paris on 20 March 1883; revised at Brussels on 14 December 1900, at Washington on 2 June 1911, at The Hague on 6 November 1925, at London on 2 June 1934, at Lisbon on 31 October 1958, and at Stockholm on 14 July 1967 and as amended on 28 September 1979 Substantive provisions (Articles 1–12) in force generally on 26 April 1970 (for countries recognising the accession of the

(1) (*cont.*)

Short Title	Long Title	Status
		German Democratic Republic); 19 May 1970 (for countries not recognising the accession of the German Democratic Republic)
		Administrative provisions (Articles 13–30) in force generally on 26 April 1970
Ramsar Convention on Wetlands	Convention on Wetlands of International Importance, especially as Waterfowl Habitat	Signed at Ramsar on 2 February 1971; in force 21 December 1975
UN Charter	Charter of the United Nations	Signed at San Francisco on 26 June 1945; in force 24 October 1945
UNCLOS	United Nations Convention on the Law of the Sea	Signed at Montego Bay, Jamaica, on 10 December 1982; in force 16 November 1994
Vienna Convention	Vienna Convention on the Law of Treaties	Signed at Vienna on 23 May 1969; in force 27 January 1980
1986 Vienna Convention	Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations	Signed at Vienna on 21 March 1986; not yet in force
WCT	WIPO Copyright Treaty	Adopted in Geneva by the Diplomatic Conference on 20 December 1996; in force 6 March 2002
WPPT	WIPO Performances and Phonograms Treaty (1996)	Adopted in Geneva by the Diplomatic Conference on 20 December 1996; in force 20 May 2002
Whaling Convention	International Convention for the Regulation of Whaling	Signed at Washington, DC, on 2 December 1946; in force 10 November 1948; Protocol revising the Convention signed 19 November 1956

(2) *GATT/WTO Agreements*

Short Title	Full Title	Status/Source
Agriculture Agreement	Agreement on Agriculture	Annex 1A of the WTO Agreement
Anti-dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994	Annex 1A of the WTO Agreement
Customs Valuation Agreement	Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994	Annex 1A of the WTO Agreement
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes	Annex 2 of the WTO Agreement
GATT 1947	General Agreement on Tariffs and Trade 1947	Signed 1 January 1948; in force 29 July 1948
GATT 1994	General Agreement on Tariffs and Trade 1994	Annex 1A of the WTO Agreement
GATS	General Agreement on Trade in Services	Annex 1B of the WTO Agreement
GPA 1994	Agreement on Government Procurement 1994	Annex 4(b) of the WTO Agreement
Safeguards Agreement	Agreement on Safeguards	Annex 1A of the WTO Agreement
SCM Agreement	Agreement on Subsidies and Countervailing Measures	Annex 1A of the WTO Agreement
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures	Annex 1A of the WTO Agreement
TBT Agreement	Agreement on Technical Barriers to Trade	Annex 1A of the WTO Agreement
TRIMs Agreement	Agreement on Trade-Related Investment Measures	Annex 1A of the WTO Agreement
TRIPS Agreement	Agreement on Trade-Related Aspects of Intellectual Property Rights	Annex 1C of the WTO Agreement
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization	Signed 15 April 1994; in force 1 January 1995

(3) *Preferential Trade Agreements*

Short Title	Long Title	Current Parties (or membership immediately prior to extinction) (unless otherwise indicated)	Status
ALADI/LAIA	Latin American Integration Association (Asociación Latinoamericana de Integración)	Argentina, Bolivia, Brazil, Chile, Colombia, Cuba, Ecuador, Mexico, Paraguay, Peru, Uruguay, Venezuela	Signed 12 August 1980; in force 18 March 1981
Albania–Bosnia and Herzegovina FTA	Albania–Bosnia and Herzegovina Free Trade Agreement	Albania, Bosnia and Herzegovina	Signed 28 April 2003; in force 1 December 2004
AFTA	ASEAN Free Trade Area	Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, Vietnam	Signed 28 January 1992; in force 28 January 1992
ANZCERTA (also referred to as CER)	Australia–New Zealand Closer Economic Relations Trade Agreement	Australia, New Zealand	Signed 28 March 1980; in force 1 January 1983
AP (currently known as CAN)	Andean Pact <i>known since 1996 as the</i> Andean Community of Nations (Comunidad Andina de Naciones)	Bolivia, Columbia, Ecuador, Peru, Venezuela	Signed 26 May 1969; in force 16 October 1969 Official codified text of the CAN signed 25 June 2003
Armenia–Kazakhstan FTA	Armenia–Kazakhstan Free Trade Agreement	Armenia, Kazakhstan	Signed 2 September 1999; in force 25 December 2001
ASEAN–China Framework Agreement	Framework Agreement on Comprehensive Economic Cooperation Between the Association of South East Asian Nations and the People’s Republic of China	ASEAN states, China	Signed 4 November 2002; in force 1 July 2003 Agreement on Trade in Goods (ASEAN–China Goods Agreement) signed 29 November 2004; in force 1 January 2005

ASEAN–India Framework Agreement	Framework Agreement on Comprehensive Economic Cooperation Between the Republic of India and the Association of Southeast Asian Nations	ASEAN states, India	Agreement on Dispute Settlement Mechanism (ASEAN–China DSM) signed 29 November 2004; in force 1 January 2005 Signed 8 October 2003; in force 1 July 2004
ASEAN–Korea Framework Agreement	Framework Agreement on Comprehensive Economic Cooperation Among the Governments of the Member Countries of the Association of Southeast Asian Nations and the Republic of Korea	ASEAN states, South Korea	Signed 13 December 2005; in force 1 July 2006 Agreement on Dispute Settlement Mechanism (ASEAN–Korea DSM) signed 13 December 2005; in force 1 July 2006
AUSFTA	Australia–United States Free Trade Agreement	Australia, United States	Signed 18 May 2004; in force 1 January 2005
Benelux	Benelux Customs Union <i>later known as the Benelux Economic Union</i>	Belgium, Luxembourg, Netherlands	Signed 5 September 1944; in force 1 January 1948; Treaty of the Benelux Economic Union signed 3 February 1958; in force 1 November 1960
BFTA	Baltic Free Trade Area	Estonia, Latvia, Lithuania	Signed 13 September 1993; in force 1 April 1994
BLEU	Belgium–Luxembourg Economic Union	Belgium, Luxembourg	Signed 25 July 1921; in force 22 December 1922
Bulgaria–Bosnia and Herzegovina FTA	Bulgaria–Bosnia and Herzegovina Free Trade Agreement	Bulgaria, Bosnia and Herzegovina	Signed 16 October 2003

(3) (cont.)

Short Title	Long Title	Current Parties (or membership immediately prior to extinction) (unless otherwise indicated)	Status
CACM	Central American Common Market	Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua	Signed 13 December 1960; in force 3 June 1961 (Guatemala, El Salvador, Nicaragua), 27 April 1962 (Honduras), 23 September 1963 (Costa Rica)
CAFTA–DR–US	Central America–Dominican Republic–United States Free Trade Agreement	Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, United States	Signed 5 August 2004; in force 1 March 2006 (El Salvador, United States), 1 April 2006 (Honduras, Nicaragua), 1 July 2006 (Guatemala), 1 March 2007 (Dominican Republic)
Canada–Chile FTA	Canada–Chile Free Trade Agreement	Canada, Chile	Signed 5 December 1996; in force 5 July 1997
Canada–Costa Rica FTA	Canada–Costa Rica Free Trade Agreement	Canada, Costa Rica	Signed 23 April 2001; in force 1 November 2002
		Canada–Costa Rica Agreement on Environmental Cooperation (CCRAEC) signed 23 April 2001; in force 1 November 2002	
		Canada–Costa Rica Agreement on Labour Cooperation (CCRALC) signed 23 April 2001; in force 1 November 2002	
Canada–Israel FTA	Canada–Israel Free Trade Agreement	Canada, Israel	Signed 31 July 1996; in force 1 January 1997

CARICOM	Caribbean Community and Common Market	Antigua and Barbuda, the Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, St. Lucia, St. Kitts/Nevis/Anguilla, St. Vincent, Trinidad and Tobago	Signed 4 July 1973; in force 1 August 1973
CARIFTA	Caribbean Free Trade Area	Antigua, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, Montserrat, St. Kitts/Nevis/Anguilla, St. Vincent, Trinidad and Tobago	Signed 15 December 1965; in force 1 May 1968
CARICOM–Costa Rica FTA	CARICOM–Costa Rica Free Trade Agreement	CARICOM states, Costa Rica	Signed 9 March 2004; in force 15 November 2005 (Costa Rica, Trinidad and Tobago), 30 April 2006 (Costa Rica, Guyana), 1 August 2006 (Costa Rica, Barbados)
CARICOM–DR FTA	CARICOM–Dominican Republic Free Trade Agreement	CARICOM states, Dominican Republic	Signed 22 August 1998; in force 1 December 2001 (Trinidad and Tobago, Jamaica, Barbados), 5 February 2002 (Dominican Republic), 6 October 2004 (Guyana), August 2005 (Suriname)
CEAO/WAEC	West African Economic Community (Communauté Économique de l’Afrique de l’Ouest)	Benin (<i>then</i> Dahomey), Burkino Faso (<i>then</i> Upper Volta), Cote d’Ivoire, Mali, Mauritania, Niger, Senegal	Signed 3 June 1972; in force 1 January 1974
CEEAC/ECCAS	Economic Community of Central African States (Communauté	Angola, Burundi, Cameroon, Central African Republic, Chad,	Signed 18 October 1983; in force 18 December 1984