PART I

Introduction

1

Comparing two trade liberalisation regimes

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1 Aim of the book

Through the combined efforts of 21 contributing authors, this book broadly compares how the liberalised trade regimes of the European Union (EU) and the World Trade Organization (WTO) function, how they manage a wide range of trade and trade-related topics, and how experiences from one system may benefit trade liberalisation in the other system. Comparing trade liberalisation in the EU and the WTO is, of course, hardly a new idea, so a reader's first question might understandably be: what fresh perspective, what new insights, does this book promise to offer?

We write in 2012, and our timing is not accidental. The first wave of studies comparing the two systems came after dramatic changes in their law and institutional frameworks in the 1990s. It is worth briefly recalling, some 20 years later, just how much each system was transformed in those years.

The changes began in the late 1980s as these organisations, then known as the European Communities and the General Agreement on Tariffs and Trade (GATT), responded to rapid globalisation in production and in commercial relationships. The characteristically European approach to trade liberalisation in the twenty-first century began to take shape with the Single European Act in 1987, which aimed at facilitating the 'completion' of the internal market project by the end of 1992. The deepening economic integration was accompanied by a steady expansion of the internal market as new members joined, and an augmentation of the areas of social and economic responsibility at the European level of government. All of this was codified in the Maastricht Treaty along with a restructuring of the European institutions to match the new scale and complexity of this transformed system, now under the banner 'European Union'. Meanwhile,

the Contracting Parties of the GATT, which by that time numbered more than 100, officially launched the ambitious Uruguay Round of trade-liberalisation negotiations at the Punta del Este ministerial meeting in 1986. By the time the Uruguay Round concluded in 1994, not only had the governments greatly expanded the reach of multilateral trade law to encompass many new issues arising from the globalisation and diversification of world commercial transactions, they also gave this much larger system new institutional support. The constitutionally defective GATT[1] was transformed on New Year's Day 1995 into a full-fledged international organisation through the Agreement Establishing the WTO.

The comparative studies of the EU and WTO systems appearing soon after the transformations just described explored the divergent and then re-convergent trajectories of the EU and the WTO.[2] The studies of a decade ago served to enlighten growing cadres of trade lawyers and scholars, mostly steeped in one system, about the counterpart principles and practices of the other system. They analysed the new texts, the newly configured political and judicial structures in each system and the first policy decisions and cases,[3] and bravely essayed some predictions about how the systems might take shape and in what directions the law might evolve. Somewhat more recent work builds on the first studies but typically maintains a scholarly emphasis on analysis of treaties and legal instruments.[4] Individual articles comparing the two systems usually focus on a discrete issue or perspective.[5]

[1] As John Jackson has frequently said, the GATT suffered 'birth defects'. J. H. Jackson, 'History of the General Agreement on Tariffs and Trade Overview and Birth Defects', in R. Wolfrum, P.-T. Stoll and H. P. Hestermeyer (eds.), *WTO – Trade in Goods* (Leiden: Martinus Nijhoff, 2011), pp. 1–24.

[2] J. H. H. Weiler, 'Cain and Abel – Convergence and Divergence in International Trade Law', in J. H. H. Weiler (ed.), *The EU, the WTO, and the NAFTA: Towards a Common Law of International Trade?* (Oxford University Press, 2000), pp. 1–4. See also G. de Búrca and J. Scott (eds.), *The EU and the WTO: Legal and Constitutional Issues* (Oxford: Hart Publishing, 2001).

[3] de Búrca and Scott (eds.), *The EU and the WTO*; J. H. H. Weiler, 'Epilogue: Towards a Common Law of International Trade', in J. H. H. Weiler, *The EU, the WTO and the NAFTA: Towards a Common Law of International Trade?* (Oxford University Press, 2000), pp. 201–32.

[4] F. Ortino, *Basic Legal Instruments for the Liberalisation of Trade – A Comparative Analysis of EC and WTO Law* (Portland: Hart Publishing, 2004); M. Slotboom, *A Comparison of WTO and EC Law: Do Different Objectives and Purposes Matter for Treaty Interpretation?* (London: Cameron May, 2006); J. Wiers, *Trade and Environment in the EC and the WTO* (Groningen: Europa Law Publishing, 2003).

[5] E.g., F. Weiss, 'Transparency as an Element of Good Governance in the Practice of the EU and the WTO: Overview and Comparison', *Fordham International Law Journal*,

More than ten years later, the unusual alignment of economic forces and political interests that brought about the dramatic changes in the trade law of both systems has clearly passed. At this moment in history, neither the EU nor the WTO has the political will or organisational capacity for significant new trade liberalising initiatives. We are, rather, in a period of continuing consolidation of the transformations of the 1990s. The dispute settlement organs of the WTO, especially the Appellate Body, having established their institutional bona fides in the early years, are now focused on the longer term business of articulating and refining a relatively coherent set of guiding principles and textual interpretations on issues that come before them repeatedly. Similarly, the European legislative organs, in tandem with the Court of Justice of the European Union (hereafter the Court), have moved from erecting the edifice of the internal market to the more modest task of making incremental adjustments to its interior details. Today's relative stability of trade liberalisation policy affords the opportunity for a more retrospective, less speculative analysis of the rules of each system and the practices of their constituent political and judicial organs than was possible a decade ago. It is in precisely this sense that we style this volume a comparison of *experiences*.

Similar as the EU and the WTO are, earlier hopes for convergence have dimmed, so attention to persistent differences seems appropriate. Whereas previous research comparing the WTO and the EU has often focused on specific elements of the two trade systems, we have attempted to make a broader comparison that includes more fundamental structural issues as well as a range of substantive issues within trade law. From this broader scope, we identify general trends in how the two systems have approached trade liberalisation and draw more general lessons from the separate experiences of one system or the other.

The remainder of this introductory chapter has three sections. First, we explain the theoretical premises of our comparative methodology. Second, we describe the structure of the book and the more specific aim of each of its major parts. Third, we set forth the overarching questions that motivated this book and synthesise some answers to those questions from the separate contributions.

30 (2006–07), 1545–86; J. Scott, 'International Trade and Environmental Governance: Relating Rules (and Standards) in the EU and the WTO', *European Journal of International Law*, 15 (2004), 307–54.

2 Methodology: comparing experiences

This book compares the trade-liberalising *experiences* of the EU and the WTO. Any book about law and legal systems with the word 'comparison' in its title conjures up theoretical, perhaps dogmatic, notions of comparative law. As described below, we think this book as a whole fits within broad bounds of comparative legal study.

The issues that raise the most difficult methodological questions for comparative law study or the comparative method concern the challenge of making meaningful yet value-neutral observations about legal systems that are culturally distinct.[6] For the subject of trade liberalisation in general, and for the study of the EU and the WTO in particular, the question is whether these legal systems are in fact culturally distinct. Substantively, the EU and the WTO are built on the same foundation: the economic theory that mutual welfare benefits accrue to both parties in cross-border exchanges based on comparative advantage.[7] The theory of comparative advantage is, in turn, the economic rationale for their shared legal principle of non-discrimination, around which many of the more detailed rules in each system have been developed. Most of the appointed directors-general of the WTO (and before that, the GATT) have been Europeans who earlier held important offices in the European system. This could only happen because the WTO membership basically believes that the two organisations are manifestations, at different levels of governance, of a common legal tradition. When we compare the two, therefore, we agree that we are not really studying culturally distinct systems as understood in some comparative law theory.

Nevertheless, the fact that the EU and the WTO have common roots in economic theory and associated legal principles should not divert attention from fundamental differences in their essential structure and ambition and relationship with constituent national governments that define their legal and political cultures. We think that these differences give depth and value to a comparative analysis of the two systems. As discussed in section 3 below, the EU has evolved into a much broader and more integrated internal market regime than the WTO, which expressly

[6] E.g., G. Frankenberg, 'Critical Comparisons: Re-thinking Comparative Law', *Harvard International Law Journal*, 26 (1985), 411–55.

[7] It is not our purpose here to explain comparative advantage or to argue for or against the theory in its modern form. There are many descriptions and analyses of comparative advantage. One standard reference is P. B. Kenen, *The International Economy*, 4th edn (Englewood Cliffs: Prentice-Hall, 2000).

maintains its focus on international trade issues. Furthermore, there are systemic differences in the two trading systems, which make it appropriate to focus less on the details of how the law has developed (which type of legislation, which organ is responsible, etc.) and more on the practical implementation of the differences in each system. We noted earlier that the two systems have both been struggling to find the right balance between trade liberalisation and non-trade-related objectives. Given their differences in scope and integration, it is worth examining how the two systems have struck that balance and how the balance has shifted over time, looking for both similarities and differences in finding the balance that is right for each system. The intention is not so much a comparison of the law as it is written but a comparison of how the law is applied and the mechanisms for its enforcement. Different wording may prove to yield similar outcomes,[8] and similar wording may prove to be applied very differently.[9]

Thus, it is our premise that the EU and the WTO fulfil much the same function for trade liberalisation, but do so in distinctly different contexts and through distinctly different institutional structures. As such, the methodology we have adopted for comparing the two fits comfortably within the principle of 'functionality' that is at the heart of contemporary comparative law theory. Functionality, articulated originally and most fully by Zweigert and Kötz,[10] has been pithily described by one commentator who endorses this methodology: 'With regard to defining functionality … all that can be said is that as long as in law things fulfil the same function, then they are normally comparable.'[11] One author writing earlier and 'comparing' EU and WTO trade law, who reflexively discusses his

[8] Marco Slotboom has thus made the observation that WTO trade liberalising obligations are not necessarily interpreted less restrictively by the WTO 'judiciary' than the EU rules dealing with similar issues. See Slotboom, *A Comparison of WTO and EC Law*, p. 52. The same point is made by C.-D. Ehlermann, who however is inclined to doubt that this is the case since it would be more logical that the larger organisation (WTO) has the more flexible rules. See Ehlermann, 'Six Years on the Bench of the "World Trade Court" – Some Personal Experience as Member of the Appellate Body of the WTO', *Journal of World Trade*, 36 (2002), 605–39 at 632–3.

[9] An example is the very similar wording in GATT Article XI and Article 34 TFEU, which has been interpreted very differently by the DSB and the Court of Justice of the European Union, respectively.

[10] K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, 3rd edn (Oxford University Press, 1998), p. 1977.

[11] A. E. Psaltas, 'The Functional and the Dysfunctional in the Comparative Method: Some Critical Remarks', *Electronic Journal of Comparative Law*, 12.3 no. 2 (2008).

methodology, also chose to apply the 'functionality principle'.[12] Because this book emphasises experience with the law over textual analysis of the law, we are drawn even more strongly to the functionality principle as a flexible methodological approach applicable across a wide range of topic areas in systems that are certainly different but serve essentially the same functions with respect to trade liberalisation.

In sum, the comparative analysis in this book is built on the same foundation as any comparative law study: an examination of differences between two legal systems with respect to very similar, and thus comparable, functions. We strive throughout to achieve a balance of our own between, on the one hand, a full appreciation of the fundamental similarities in objectives and core principles in the two systems and, on the other hand, a critical and, we hope, illuminating focus on points of differentiation and even potential legal conflict between them. To help maintain this balance, the book focuses on the trade liberalisation core of both systems: trade in goods and services and the associated intellectual property rights. Our ultimate objective, as described in section 3 below, is to draw a map of points for implicit and explicit harmonisation to promote a constructive coordination of policies for the benefit of the many private enterprises, governments and policy-makers that must live and work in both systems simultaneously.

3 Structure of the comparison of the two systems

It is by now a commonplace observation that the GATT and the germ of the EU both originated in the desire of political leaders after the Second World War to promote mutual economic benefit and international cooperation through liberalisation of trade to prevent recurrence of the autarkical economic competition leading to political and ultimately armed conflict during the 1930s.[13] Frequently recounted, too, are the diverging trajectories of the two trade-liberalising clusters in the ensuing decades. The GATT, while successful in important parts of its trade-liberalising mission,

[12] Ortino, *Basic Legal Instruments for the Liberalisation of Trade*, p. 5, adopting the principle of 'functionality' and further suggesting that 'the comparative method is principally a means for the attainment of knowledge'.

[13] E.g., J. H. Jackson, *Restructuring the GATT System* (London: RIIA, 1990), pp. 9–10; S. Ostry, 'Looking Back to Look Forward: The Multilateral Trading System after 50 Years', in WTO, *From GATT to the WTO: The Multilateral Trading System in the New Millennium* (The Hague: Kluwer Law Intl., 2000), pp. 97–112 at pp. 97–8; D. A. Irwin, P. C. Mavroidis and A. O. Sykes, *The Genesis of GATT* (Cambridge University Press, 2009), pp. 9–12.

confirmed itself as an essentially commercial organisation embedded in a system of national control of economic policy and in which international political affairs and social initiatives among the contracting parties were pursued, if at all, only obliquely.[14] Meanwhile, the visionary leaders of the European enterprise, determined to suppress the international conflicts characterising their common history and further motivated by the geopolitical imperatives of the Cold War, steadily steered the European Economic Community toward a status as a quasi-national, even while supra-national, political union. That is, the EU now operates not merely as a trade-liberalising regional association of independent states, but also as the central government of a single market. Thinking of the EU as a national government underscores the enduring Cain-and-Abel differences between the EU and the WTO that Weiler emphasised,[15] differences that make it worthwhile to compare how trade liberalisation is influenced by the institutional structures and avowed missions of the EU and the WTO respectively.

At the same time, of course, the Member States of the EU remain independent nations, each a member of the WTO in its own right. The individual Member States maintain autonomy and sovereign control over essential elements of economic, fiscal and social policy. The EU, like the WTO, must therefore find a balance between the 'free' movement of goods and services in the Europe-wide 'internal' market and the sovereign prerogatives of the constituent national governments to constrain such 'free' trade when it impinges upon – or is seen by citizens and their political leaders to impinge upon – important national social and economic values determined through national political processes.

This duality in the essential attributes of trade liberalisation in the EU and the WTO presents a formidable challenge when trying to lay out a coherent framework for comparison of their trade law and policy, especially where trade policy overtly intersects or interacts with other policy arenas. Our solution to this challenge is to put the comparative analysis into two frames.

Parts II and III of the book have a 'big picture' frame – viewing the general landscape from above, if you will. The chapters of Part II set out, in comparative perspective, the essential structures and modalities

[14] See J. G. Ruggie, 'International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order', *International Organization*, 36 (1982), 379–415.

[15] See Weiler, 'Cain and Abel – Convergence and Divergence in International Trade Law'.

of legislative and judicial decision-making for the EU and the WTO as they affect trade liberalisation in its core economic dimension and in its interaction with other domains of social and political affairs. Amin Alavi explores decision-making in the two systems; Jan Wouters, Dominic Coppens and Dylan Geraets compare the influence of general principles of law in each system; Bugge Daniel looks at their different systems for ensuring compliance with governing law; and Pieter Jan Kuijper evaluates the similar but distinct roles of the judicial bodies in the EU and the WTO.

Still in the 'big picture' frame, Part III addresses, again in broad terms, some of the key substantive principles and essential questions that shape trade liberalisation in both systems. The comparisons in this part aim to identify the similarities and the differences in the operation of the frameworks and principles that have formed the cornerstones of the effort to liberalise trade in the two systems, with conceptions of discrimination playing a critical role. Thomas Cottier and Matthias Oesch tackle the principle of discrimination head on and address the pressures for relaxation of its application or exceptions to it; the contribution by Sanford Gaines and Birgitte Egelund Olsen on trade and social objectives, and the one by J. W. van de Gronden on provision of services, resonate with similar concerns about discrimination in fact or in law. Karsten Engsig Sørensen examines how the law has developed beyond discrimination to eliminate certain non-discriminatory restrictions to trade. In each instance, without assuming that the approach to trade restrictions in one system may be usefully applied in the other, the comparison between the approaches of the EU and the WTO nevertheless give a better understanding of how the two systems operate and may give insight into whether they are likely to converge or diverge in their future development.

In Part IV we shift from analysis of the systems as a whole to focus more closely on specific topics in trade policy. The studies in Part IV thus serve a different aim from those in Parts II and III. For each of the topic areas in Part IV we suppose that one system can learn from the other, so we use harmonisation of the EU and WTO systems as an organising theme. Let us explain what we have in mind. We use 'harmonisation' as a broad term covering the process of two systems of laws and practices approaching each other or accommodating each other. We also intend something different from 'harmonisation' as it is often understood in EU law, where it suggests or requires the adoption of very similar, often detailed rules in the EU Member States. Rather, we use 'harmonisation' in its more open-ended general sense of a search for principles, rules or solutions in which

both systems use the same overall approach or apply a similar solution to a specific problem. It can be a harmonisation of substantive law, a harmonisation of procedures in trade regulation, or some combination of the two. When the rules or solutions in one system could be advantageously applied in the other system, we identify that as a case when there is value in harmonisation.[16]

The value of harmonisation – the need for it, if you will – can be either explicit or implicit. Explicit harmonisation covers the situation where WTO law requires EU law to be in accordance with the WTO agreements and their interpretation by the Dispute Settlement Body (DSB). The authority of the WTO to legally bind the EU applies in several areas of law, including anti-dumping, safeguards, state aid, intellectual property rights and customs law. Since the harmonisation needs in these areas are more or less undisputed from a legal point of view, one aim of comparisons in these areas is to evaluate whether EU law needs to be changed to comply with the rules formulated by the WTO. But even explicit harmonisation needs are not necessarily unambiguous. For example, the specific methodologies and administrative practices for EU adoption of anti-dumping duties may allow for certain autonomous choices by the EU. We include such grey areas in the areas explicitly needing or benefitting from harmonisation.

Areas of implicit harmonisation needs cover areas of law where there is no explicit obligation for a harmonisation, but where harmonisation may make sense for other reasons. Topics for implicit harmonisation between the EU and the WTO specifically include topics where the two systems operate in parallel but essentially independently. The rules applying in one system are not subject to the rules of the other, but differences between the systems in the details of law and its application may create significant difficulties for national governments, local governments or private commercial actors engaged in cross-border trade. Implicit harmonisation also includes areas where a solution to a liberalisation problem in one system seems clearly superior to the solution in the other. When discussing the need for an implicit harmonisation it could be that there are arguments for preferring the solution in the WTO in some cases or the one in the

[16] J. H. H. Weiler uses the term 'convergence' for the process through which the same rules are adopted or where the jurisprudential analysis and application lead to similar results. See Weiler, 'Cain and Abel – Convergence and Divergence in International Trade Law', p. 4. These same processes are covered by what is here termed 'harmonisation'; we prefer that term over 'convergence' since the question we raise is whether the two systems should work actively towards similar solutions.