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978-1-107-06390-7 - Bilateral and Regional Trade Agreements: Commentary and Analysis

Edited by Simon Lester, Bryan Mercurio and Lorand Bartels

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## BILATERAL AND REGIONAL TRADE AGREEMENTS

The stalling of the Doha Development Round trade negotiations has resulted in bilateral and regional free trade agreements (BRTAs) becoming 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 second edition provides updated and comprehensive analysis of the contents and trends of recent BRTAs. It is unique in that it situates these agreements in their economic, international law and international relations contexts. It also comprehensively reviews the recent agreements in relation to each substantive topic covered (e.g. intellectual property, investment, services, social policy) so as to provide an overview of the law being created in these areas.

SIMON LESTER is President of WorldTradeLaw.net and a trade policy analyst with the Cato Institute's Herbert A. Stiefel Center for Trade Policy Studies.

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# BILATERAL AND REGIONAL TRADE AGREEMENTS

COMMENTARY AND ANALYSIS

Edited by

SIMON LESTER

BRYAN MERCURIO

LORAND BARTELS



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## FOREWORD

A sign of the times in trade is that the scholarship of some of the best thinkers on trade law is focused on new bilateral and regional trade agreements instead of on new multilateral trade agreements. This is not because they no longer care about multilateral agreements. It is because there are no new multilateral agreements. Since the conclusion of the Uruguay Round and the establishment of the World Trade Organization two decades ago, the Members of the WTO have, alas, failed repeatedly in their efforts to reach a consensus and conclude new global trade agreements.

Frustrated with years of endless impasse in the WTO Doha Development Round of multilateral trade negotiations, trading countries have turned increasingly to negotiating bilateral and regional deals, largely outside the legal framework of the WTO. During the past decade, these bilateral and regional deals have proliferated. Where once there were only a few, now there are a few hundred. Recently, these smaller bilateral and regional trade and investment deals have led to negotiations by major trading countries outside the WTO on so-called 'mega-deals' that, if concluded, would be beyond the shelter of the legal umbrella of the WTO.

These proposed mega-deals have drawn widespread support from those who see them as the only practical way forward from deadlocked multilateral WTO negotiations. The mega-deals could add much-needed new rules on many new issues in world trade. They could address a twenty-first century trade agenda ranging far beyond the traditional concerns of customs and tariffs. However, they could also exclude the vast majority of WTO Members, including most emerging and developing countries, from the benefits of these new arrangements. Stopping such discrimination in trade is much of what the WTO trading system is supposed to be about.

Simon Lester, Bryan Mercurio and Lorand Bartels are three of our leading thinkers on trade law. In editing this collection, they have come together to try to make some sense of the significance of this trend toward partial rather than global trade arrangements. The additional trade law thinkers they have chosen as their contributors help the editors succeed. They point to the positives and sound the right cautionary notes. They try to show how all that is happening can be stitched together legally if we should find the will to do so. Above all, they counsel us to study what is actually in these new agreements before rendering judgments.

Clearly, there are positives to partial deals. Historically, they have been shown to be excellent proving grounds for new approaches that have not yet attained a global

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consensus. One example is the provision for investor-state dispute settlement pioneered in Chapter Eleven of the North American Free Trade Agreement and now being considered for inclusion in some of the mega-deals. A more recent example is the arrangement for dealing with the nexus between ‘trade and environment’ concerns in the free trade agreement between the United States and Peru. In these ways, bilateral and regional deals can become models for moving forward. The experiments conducted through them can be tried globally if they are tried bilaterally or regionally and found to be true. The case studies found in the second volume of this collection are all well worth pondering with this prospect in mind.

But how does all of this often worthy experimentation fit within the WTO? All of the countries negotiating these partial deals are Members of the WTO. As such, they each have an obligation to provide ‘most-favoured-nation’ treatment to all other Members by not discriminating in their trade between and among the similar products of other WTO Members. By definition, a decision to give a preference to one country or to a handful of countries in a bilateral deal or a regional deal is a decision to discriminate against other countries. How does this square with the basic rule of non-discrimination that is at the very heart of the WTO treaty and trading system?

Further, as a matter of equity and justice, how can such discrimination be justified when the vast majority of those excluded from the mega-deals most prominent among these proliferating initiatives are the poorer countries, who need better connections to global value chains of the global economy? Representatives of some of the smallest countries in the world have told how they have tried to gain entrée into this new world of bilateral and regional negotiations but have found no takers. They are too small economically to interest any of the larger countries in negotiating a deal with them. How does this square with the professed desire of the leading trading countries in their communiqués at G20 and other global summits to do much more to include developing countries in the mainstream of the global economy?

Of course, as all good trade law thinkers know, these partial deals are legal for WTO Members only if they meet the requirements of Article XXIV of the General Agreement on Tariffs and Trade 1994, which is part of the WTO treaty and provides an exception from the MFN obligation for ‘customs unions and free-trade areas’. No one claims that these bilateral, regional and mega-deals are ‘customs unions’. More ominously, no one knows what a ‘free-trade area’ is within the meaning of Article XXIV.8(b) of the GATT – or really wants to know. The GATT/WTO trading system has thrived for more than half a century without knowing the answer to this question. As I have often said, and not entirely in jest, one of my greatest accomplishments as a Member for eight years of the Appellate Body of the WTO was that I was able to get out of Geneva alive without having to answer this question.

The current trend toward bilateral and regional deals makes it harder to avoid answering this question. Eventually some Member of the WTO excluded from one of these partial deals is going to think it ‘fruitful’ (as the WTO Dispute Settlement

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Understanding puts it) to file a legal complaint alleging that the deal in question does not satisfy the requirements of Article XXIV. If the legal issue is then raised on appeal to the Appellate Body, then under the rules the Appellate Body ‘shall address’ that issue. And where will the trading system be then? With this legal eventuality in mind, I particularly commend to readers the thoughts essayed by Nic Lockhart and Andrew Mitchell on the legal requirements for FTAs under the WTO.

By far the better way to move forward partially is within the framework of the WTO through the negotiation of plurilateral agreements by ‘coalitions of the willing’ among the WTO membership as part of the WTO trading system. Such partial agreements within the framework of the WTO are inclusive, because they are open to the membership of all WTO Members willing to be bound by their terms. The Chapter by Krista Nadakavukaren Schefer and Arwel Davies on government procurement illustrates this option, which has also been pursued in information technology and, now, green goods, two of the most important ‘new issues’ in trade.

Some of the most significant trade issues can only be addressed multilaterally. Foremost among these is agriculture. Efforts to discipline agricultural support worldwide have been at the centre of GATT/WTO negotiations from the very beginning. Some aspects of agriculture can be dealt with bilaterally or regionally. But not the extent of overall domestic support that is the core of national agricultural regimes. A deal to discipline such support in any meaningful way can only be as part of a ‘grand deal’ done globally. Tim Josling explains and elaborates issues on the unfolding global trade agenda in his essay on the continuing centrality of agricultural trade.

Lastly, I would be remiss if I did not say a word on dispute settlement. One of the unanswered questions about all of these bilateral and regional deals is: how will their dispute settlement systems work? For the most part, they remain untried. Certainly they cannot compare to the ‘security and predictability’ offered for two decades now by the WTO dispute settlement system. It is worth examining these systems in their context. It is perhaps worth noting more that, in the context of negotiations on the proposed mega-deals especially, it has been suggested that dispute settlement might be entrusted to the WTO. That is an idea deserving of pursuit. But why not simply negotiate these mega-deals as plurilateral agreements within the WTO in the first place? Then they could fall by agreement under the jurisdiction of the WTO dispute settlement system. On this emerging issue, as a final observation, I commend to you the thoughts in these volumes of Simon Lester and Victoria Donaldson.

**James Bacchus**

Former Chair of the WTO Appellate Body



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<i>Argentina–Footwear Safeguards</i>	Panel Report, <i>Argentina–Safeguard Measures on Imports of Footwear</i> , WT/DS121/R, adopted on 12 January 2000, as modified by the Appellate Body Report, WT/DS121/AB/R, DSR 2000: H, 575
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(1) (*cont.*)

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<i>Canada–Periodicals</i>	Appellate Body Report, <i>Canada–Certain Measures Concerning Periodicals</i> , WT/DS31/AB/R, adopted 30 July 1997, DSR 1997:1, 449
<i>Chile–Alcoholic Beverages</i>	Appellate Body Report, <i>Chile–Taxes on Alcoholic Beverages</i> , WT/DS87/AB/R, WT/DS110/AB/R, adopted 12 January 2000, DSR 2000:1, 281
<i>China – Electronic Payment Services</i>	Panel Report, <i>China – Certain Measures Affecting Electronic Payment Services</i> , WT/DS413/R and Add.1, adopted 31 August 2012, DSR 2012:X, p. 5305
<i>EC – Approval and Marketing of Biotech Products</i>	Panel Reports, <i>European Communities – Measures Affecting the Approval and Marketing of Biotech Products</i> , WT/DS291/R/WT/DS292/R/WT/DS293/R/Add.1 to Add.9 and Corr.1, adopted 21 November 2006, DSR 2006:III, 847
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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
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Cartagena Protocol	Cartagena Protocol on Biosafety to the Convention on Biological Diversity	Adopted in Montreal on 29 January 2000; in force 11 September 2003

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	Convention for the Abolition of Import and Export Prohibitions and Restrictions	Signed 8 November 1927, never ratified
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 (UNESCO) on 20 October 2005; in force 18 March 2007
Havana Charter	Havana Charter for an International Trade Organization	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 Constitution	Constitution of the International Labour Organisation	Part XIII of the Treaties of Versailles signed on 28 June 1919, in force 10 January 1920
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

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Short title	Long title	Status
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 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

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(1) (*cont.*)

Short title	Long title	Status
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