

Book Reviews

Joseph H.H. Weiler (ed.), **The EU, the WTO and the NAFTA – Towards a Common Law of International Trade**, Oxford et al.: Oxford University Press (2000) at pp. 1–238 and i–xx.

The main theme of this book is the convergence of the different regimes dealing with trade at the international or supranational level. While the General Agreement on Tariffs and Trade (GATT) and the European Community (EC) have very different origins and while they developed independently and differently over many decades, the authors show how this is changing and how the problems and the solutions found for them are increasingly similar, if not identical. The North American Free Trade Agreement (NAFTA) is also introduced and found to confirm the picture of convergence.

The book starts with a very brief introduction by Joseph Weiler of Harvard Law School, entitled 'Cain and Abel – Convergence and Divergence in International Trade Law' (pp. 1–4), and outlining some of the main differences of the EC and the GATT, as well as reminding the reader of the key players in international trade and some famous cases.

Chapter 2 on 'EC External Commercial Policy after Amsterdam: Authority and Interpretation within Interconnected Legal Orders' (pp. 5–34) was contributed by Marise Cremona, a Senior Fellow of the Centre for Commercial Law Studies at Queen Mary and Westfield College, London. This chapter was probably meant to introduce those readers who are not specialists on foreign relations powers to the specific problems posed by the distribution of competence in the European Union (EU) legal order, in particular with regard to the Common Commercial Policy, i.e. foreign trade. And while it does provide a rather thoughtful and well-documented summary of the distribution of powers in the EC in the horizontal sense, that is between the institutions dealing with foreign trade – Commission, Council, Parliament, and Court of Justice – and in the vertical sense, i.e. between the EC and its Member States, it seems a bit out of place in the book. Although Cremona covers some of the background which is essential knowledge for an appreciation of her text, in particular on the EC's jurisdiction to conclude and to interpret international trade agreements and the direct effect given – or rather not given – to these agreements by the European Court of Justice (ECJ), the chapter still requires serious prior knowledge of EU law in a broader sense. Furthermore, one could ask whether a profound analysis of the distribution of powers in the EC, including the

impact of the recent modifications brought about by the Treaty of Amsterdam, should feature in a specifically comparative book without any mention, let alone analysis, of the corresponding problems in the legal orders of the US, Canada, Japan, and other important trading partners and World Trade Organization (WTO) players. The explanation probably lies in the fact that the text had previously been written for and published in another book, where it certainly fitted better, namely O'Keeffe/Twomey (eds.), *Legal Issues of the Amsterdam Treaty*, Hart Publishing 1999 (see review below).

Chapter 3 entitled 'Adjudicative Legitimacy and Treaty Interpretation in International Trade Law: The Early Years of WTO Jurisprudence' (pp. 35–69) more than makes up for any irritations over the second part. Robert Howse, a leading scholar on GATT and WTO law based at the University of Michigan, contrasts dispute settlement under the old GATT regime with the emerging practice of the WTO Appellate Body (AB). His findings are most interesting, as well as highly persuasive, and his lucid and well-structured style could serve as an example to many. Howse first shows how the old style dispute settlement, which was technocratic, expert-based and literally hidden from the public eye, led to a one-sided emphasis on free trade and an almost total disregard of other concerns. Based on analysis of the leading cases of the first years of dispute settlement under WTO rules, Howse demonstrates that the system has become responsive to criticism and has achieved remarkable improvement in a number of crucial areas including procedural fairness, coherence in interpretation, and institutional sensitivity to competing values such as protection of the environment and of the health and safety of consumers. As one major driving force, Howse identifies the institutional quest for legitimacy, which had been of no concern to the trade lawyers on the old-style GATT panels. In so doing, the text not only gives us an up-to-date summary and analysis but also reasons to keep an eye on developments in Geneva in future because we may safely expect many more interesting rulings to come out of this procedure.

In part 4, entitled 'The European Court of Justice and the WTO: Problems and Challenges' (pp. 71–123), Jacques Bourgeois, a well-known Brussels-based trade lawyer, provides the bread and butter for a solid understanding of the effects of WTO law in the EU legal order. He discusses the status of the EC in the WTO alongside its Member States who are also contracting parties, and the main problems resulting from the shared powers with respect to some areas covered by the WTO Agreements. In particular, this concerns the jurisdiction of the European Court of Justice over areas that (partly) fall under Member State powers, as well as the question of direct effect of WTO law, i.e. the question whether WTO rules can create rights and obligations which must be enforced by national courts of the Member States and by the European Court. So far the ECJ has been able to avoid a clear answer to the first issue and has been very restrictive in relation to the second. After thoughtful analysis of the existing case law and its reception in literature, Bourgeois carefully advocates a more proactive approach at the ECJ. Several cases are currently pending in Luxembourg and it will be interesting whether the Court will affirm its jurisdiction over all parts of the WTO, even those that concern Member

States' powers, in an effort to preserve a uniform approach throughout the Member States, and whether the Court will adopt some kind of reciprocity-based approach to direct effect.

In part 5, under the headline 'On Kith and Kine (and Crustaceans): Trade and Environment in the EU and WTO' (pp. 125–167), Joanne Scott, also of Queen Mary and Westfield College, further develops certain issues related to the protection of the environment, animal welfare and public health under EU and the WTO law. The author analyses three exemplary cases, namely the *Compassion in World Farming*, an ECJ ruling concerning exports of live calves from the UK, the *Shrimp/Turtle* rulings of the WTO, and the *Beef Hormones* issue decided both at the EU and WTO levels. On the basis of these cases, Scott demonstrates first, how the WTO panels and the AB differ in their approach, yet less so in result. Second, it becomes evident that the AB still favours free trade over democratic and cultural 'soft' values in what can safely be called an excessive reliance on scientific analysis in a technocratic sense. Third, the comparative approach provides certain insights as to what extent, and why, the ECJ is more nuanced in balancing the competing interests. While this analysis is generally persuasive, the text is not nearly as well structured and readable as Howse's. The headlines, which are not numbered, provide more confusion than guidance, in particular since it is unclear whether there are different main and sub-chapters and 'Case Study 1' appears twice. Similarly, the analysis of the *Hormones* dispute can only be fully appreciated by readers who are familiar with the SPS Agreement and the original panel and AB decisions. Nevertheless, the text is well-worth reading and would have deserved somewhat firmer editing.

Part 6 was contributed by Frederick Abbott of Chicago Kent College of Law. Under the title 'The North American Integration Regime and its Implications for the World Trading System' (pp. 169–199), Abbott succeeds in providing at the same time something like a general course on the NAFTA and much more specific analysis of certain issues of particular interest. The introduction to the NAFTA is done by comparison to the EU, the regional integration system most readers will be more familiar with, and by placing it into the framework of the WTO, which provides the 'higher' law. The more specific parts deal with some questions where the NAFTA agreement is deliberately (?) ambiguous and leaves open questions. The focus here is on the relationship between the NAFTA and the WTO law and the choice of dispute settlement under either system or under both. Can a NAFTA panel apply the WTO law? Can a WTO panel apply the NAFTA in a dispute concerning only NAFTA Member States? And what is the relationship between the two regimes in case of conflict? Since these questions have not been finally answered, Abbott carefully avoids presenting his opinion as 'the solution' and rather sensitises the reader to the problem as such and the need for future panel decisions to provide the answers. The chapter closes with a look at general economic and social effects of the NAFTA and leaves the reader with a general feeling of satisfaction.

Part 7 was written by Joseph Weiler himself. It is entitled 'Epilogue: Towards a Common Law of International Trade' (pp. 201–232). In his usual style, where he takes up well known judgments of the European Court and very persuasively shows

some new perspectives, Weiler recounts the evolution of the EU's approach towards the free movement of goods. He distinguishes five phases:

1. The 'foundational period' began with the *Statistical Levies* case, in which the ECJ made it clear that there would be no *de minimis* exception to the prohibition of customs duties and equivalent charges. It 'culminated' in the famous *Dassonville* judgment, where the Court decided that the Common Market was about the removal of obstacles to trade, rather than the mere prohibition of discrimination and protectionism. By contrast, the GATT essentially aimed at securing national treatment and thus the absence of any discriminatory barriers, except at the very point of entry, where the customs duties and equivalent charges could not exceed the bindings in the concession schedules;
2. The central case in Weiler's second period is *Cassis de Dijon*, which deals with the problem that Article 30 (formerly Article 36) of the EC Treaty provides a static list of exceptions to free trade. It was written in the 1950s and to this day does not include 'modern' concerns such as the protection of the environment and of consumers. *Cassis* introduced the concept of 'mandatory requirements' which can justify derogations from free trade, provided they are applied in a non-discriminatory manner and do not exceed what is necessary to protect these non-economic concerns.;
3. The third period was written in Brussels, rather than in Luxembourg, and is seen by Weiler in the so-called 'New Approach' to harmonization of Member State laws. This change from the more detailed earlier approach leaves more discretion to the Member States by delegating part of the harmonization work to their standardization bodies, while at the same time providing transparency via information requirements;
4. The fourth period brings the focus back to the European Court and in particular its judgments in the *Sunday Trading* cases and culminating in the famous *Keck* ruling. Here, Weiler first elaborates on the possible reasons for the Court to take such a clear turn and then he advocates a broad reading of 'certain selling arrangements'. According to his proposal, in future only those rules that prevent market access and those that are discriminatory in law or in fact need to be justified under Article 30 or mandatory requirements and the proportionality test;
5. Finally, the fifth period is what Weiler sees as the next generation of cases and solutions. He comes back to the theme of the convergence of the EU and the WTO approaches. While *Keck* shows that the EU is leaning to the national treatment approach taken under the GATT, the *Hormones* decision by the AB is leaning towards the obstacles-oriented approach taken by the EU. For the future, Weiler predicts more cases like *Hedley Lomas*, *Dolphins* and *Turtles*, as well as a development of something like a doctrine of mutual recognition or recognition of functional parallelism in the WTO.

While in his lucid style Weiler can certainly convince many of his readers, it remains to be seen what will happen in Luxembourg and Geneva.

David O’Keeffe and Patrick Twomey (eds.), **Legal Issues of the Amsterdam Treaty**, Oxford and Portland: Hart Publishing (1999) at pp. 1–425 and i–xli.

This book is the follow-up to the 1994 *Legal Issues of the Maastricht Treaty* by the same editors. The general format and about half of the authors are also the same as five years earlier. And, as in 1994, the book is based in essence on papers presented at a conference held at King’s College London under the auspices of the UK Association for European Law.

The section on constitutional issues is opened by Joseph Weiler’s contribution entitled ‘Amsterdam and the Quest for Constitutional Democracy’. Weiler is critical of the new Treaty, not so much because it did not really resolve the issues to be resolved before the next enlargement, but because it failed to make real steps towards more democratic accountability. In particular, he sees a need for reform in the current comitology system. He identifies the quest for non-contentious ratification as the chief reason for the absence of bolder reforms.

Stephen Weatherill’s title concerning the provisions on closer co-operation in the Amsterdam Treaty needs little further explanation: ‘If I’d Wanted You to Understand I Would Have Explained it Better’. Nevertheless, he sees the advantages of allowing simultaneous widening and deepening, even if there is a price to be paid as regards uniformity and transparency.

In the next contribution, Ian Ward writes about ‘Amsterdam and the Continuing Search for Community’. He picks up on Weiler’s criticism and admonishes that Amsterdam has done little, if anything, to promote the EU’s (political) legitimacy. Ward sees an over reliance on law in the integration process and claims that with Amsterdam it has reached the limit of what law can do for integration. From now on, progress would depend on the development of a political morality with ‘community’ (that is inclusion and mutual respect) at its core.

Ward is followed by Laurence Gormley’s ‘Reflections on the Architecture of the European Union after the Treaty of Amsterdam’. Again critical, Gormley outlines the ‘*grandes lignes*’ of the treaty and calls it a facelift rather than an edifice, minor works that have done nothing to strengthen the foundations.

Deidre Curtin from Utrecht is next. In her contribution on ‘The Fundamental Principle of Open Decision-making and EU (Political) Citizenship’, she responds to some of the earlier criticism by outlining the elements of individual and group participation in the EU’s decision making system, such as public access to documents, and by drawing up a ‘reform agenda’ for widespread and effective participation of interested private actors in the policy making processes.

The section on constitutional issues is completed by Franklin Dehousse and his account of the inter-governmental conference (IGC) process. Dehousse was one of the negotiators for Belgium and provides inside knowledge, as well as suggestions for reform, on the treaty amendment procedure.

The second section of the book is quite short and deals with the institutions.

Anthony Arnall is first: 'Taming the Beast? The Amsterdam Treaty and the Court of Justice'. While Arnall finds steps 'in the right direction', he is overall rather critical of the reforms or rather the lack of them. In particular, the problem of the ever increasing case load has yet to be addressed seriously.

The part on the European Parliament is provided by Kieran Bradley and talks about 'Building Blocks and Stumbling Blocks'. In this text, Bradley traces Parliament's role in the system of checks and balances and the impact it has on democratic decision making. As is well-known, the beginnings were modest and it took a long time for Parliament to truly outgrow the role of a purely advisory assembly. The most positive changes are noted in the legislative procedures, where Parliament managed to increase its input via the co-operation and co-decision procedures. In contrast to this success story, Bradley describes Parliament's futile fight against comitology. Similarly, Parliament's own electoral procedure, and the inability of the Member States to date to agree to any of several proposals for a uniform approach tabled by Parliament over the years, is presented as a setback. Finally, Parliament's input in the IGC procedures leading to treaty reform has seen some, but hardly impressive, progress.

The third section of the book is devoted to internal market issues. Erika Szyszczak opens it with her text on 'The New Parameters of European Labour Law'. This is one of the few primarily positive articles about changes made at Amsterdam. Szyszczak places great hopes on the more wholistic approach, which now seems possible after the Social Policy Protocol and Agreement have been integrated into the main corpus of the Treaty in the new Title XI on Social Policy, Education, Vocational Training and Youth. She reads the new legal base in Article 137 as broader and clearer than old Articles 118 and 118a and welcomes the possibility of qualified majority voting.

In her complementary contribution on 'The Employment Title in the Amsterdam Treaty: A Multi-Language Legal Discourse', Silvana Sciarra first describes the genesis of this new chapter. In her substantive evaluation, Sciarra sees useful potential but lack of clarity and legal enforceability. In her view, the citizens and workers (and those seeking employment) are once more left 'looking around with many uncertainties in a very noisy Tower of Babel'.

'The Amsterdam Treaty: An Environmental Perspective' by Richard Macrory is next. 'Consolidation of existing themes rather than wholesale innovation' is his analysis in a nutshell. Prior to the IGC, the Commission had identified three priorities for reform of the treaty chapter on environment:

1. simplification of the decision making processes and more possibilities for qualified majority voting;
2. amendments in chapters on sectoral policies such as agriculture or transport in favour of environmental goals; and
3. an explicit right to a clean environment to be included in the Treaty.

As it is, only the first of these goals saw at least some progress.

Since the provisions on competition law in the treaties have remained largely

unchanged since their first adoption, Leo Flynn focuses on what he sees as a gradual shift in the position of competition law in the constitutional order of the EU in his piece on 'Competition Policy and Public Services in EC Law after the Maastricht and Amsterdam Treaties'. Flynn contrasts the ECJ's well-known case law on Article 86 (formerly Article 90) and contrasts it with the new Article 16. While the effects remain to be seen, this new provision could lead to a retransfer of authority over public services to the political actors.

The fourth section of the book deals with external relations. Alan Dashwood's text on the 'External Relations Provisions of the Amsterdam Treaty' gives a differentiated evaluation. On the one hand, the 'special machinery of the CFSP' was strengthened and possibilities for qualified majority voting were expanded under the TEU, even if at the price of what Dashwood calls a 'Luxembourg Compromise Mark II' (see Article 23 (2) of the TEU). On the other hand, Amsterdam has still not resolved the dichotomy between decision-making and mixed agreements in the areas of application of the ECT and has clearly failed to consolidate the various external powers of the Community.

Marise Cremona focuses on 'External Economic Relations and the Amsterdam Treaty'. She gives a very detailed account of the Community's powers under Article 133 (formerly Article 113) over time and criticises the new fifth paragraph as a half-hearted solution.

Dominic McGoldrick asks another important question: 'The European Union after Amsterdam: An Organisation with General Human Rights Competence?' However, after analysis of various aspects how human rights considerations have become relevant to EU affairs, such as membership requirements, internal and external competences, CFSP and JHA, he chooses to leave the question unanswered. Subsequent adoption of the EU's Charter of Fundamental Rights may still not have provided definite answers but a trend is clearly there.

The penultimate section of the book deals with the Area of Freedom, Security and Justice. It is opened by David O'Keefe and his text entitled 'Can the Leopard Change its Spots? Visas, Immigration and Asylum following Amsterdam'. O'Keefe puts the new Title IV into historic perspective and welcomes the progress made in respect to communitarization of much of the former third pillar. Seeing chances rather than solutions, he calls for re-enforcements beyond those that will follow automatically after the five year transition period. O'Keefe reminds us that some guiding values have yet to be clarified, namely that a coherent immigration policy requires an unambiguous commitment to legitimacy, respect for human rights, as well as resources and mechanisms to integrate immigrants and refugees.

In the next contribution, Martin Hedemann-Robinson follows-up on O'Keefe and examines specifically 'The Area of Freedom, Security and Justice with Regard to the UK, Ireland and Denmark: The 'Opt-in Opt-outs' Under the Treaty of Amsterdam'. This example of '*Europe à la carte*' or multiple speeds was the price that had to be paid for the integration of Schengen and the communitarization of those parts of the third pillar that affect the movement of persons. Sceptical of the growing complexity and heterogeneity of the EU, he sees the risk of a 'constitutional heart

attack' and expresses the hope that subsequent IGCs will provide for less fragmentation and inequity. In the face of further enlargement, his advice may be sound but futile.

Yet another aspect of the new Title VI is analyzed by Monica den Boer. In her article entitled 'An Area of Freedom, Security and Justice: Bogged Down by Compromise', she sees more unpredictability and less transparency and democracy after Amsterdam than ever before. Thus, from the point of view of decision drafting and decision making, she is much more critical of this reform than her predecessors in this book.

Fabio Evangelisti is a member of the Italian Parliament and the President of the Parliamentary Supervisory Commission on Enactment of the Schengen Agreement and Europol Convention. In his contribution on 'The Role of National Parliaments in the Creation of the Area of Freedom, Security and Justice: An Italian Point of View', he – predictably – criticises the virtual exclusion of the national and European parliaments from the development of the third pillar. Even as certain possibilities are now opening up, Evangelisti sees a reluctance on the side of parliamentarians to get involved, due to their widespread lack of competence in this highly technical and complex area.

Tamara Hervey provides the next contribution dealing with the need to address human fears and racial prejudices at a time of ever growing mobility and ever more pronounced distributive competition. 'Putting Europe's House in Order: Racism, Race Discrimination and Xenophobia after the Treaty of Amsterdam' is a first and detailed analysis of the new powers granted by Article 13 ECT for the combat against discrimination. As the EU is climbing faster up this ladder, Hervey calls for a wide ranging assessment of all EU policies to find out how the integration process affects those excluded because of race and how it may implicitly encourage racism. In this way the EU should ensure that its ladder is leaning on the right wall.

'Constructing a Secure Space: The Area of Freedom, Security and Justice' is the last contribution in this context. Patrick Twomey explains how the EU is shifting from merely providing a basket of rights to the europhiles towards a new emphasis on protection. However, Twomey does not welcome this shift. As long as stronger commitments to human rights and freedoms, as well as better transparency are missing, he sees more of a danger of 'law and order', embodied in 'security', and hardly any 'freedom' and 'justice' evidenced in the Treaty and its application to date.

Finally, the sixth section of the book looks closely at non-discrimination and nationality. Catherine Barnard opens this section with another look at 'Article 13', this time 'Through the Looking Glass of Union Citizenship'. She expresses her regrets over the implementation mechanism, which calls for unanimous voting in the Council and grants only non-binding consultation rights to the European Parliament, which has traditionally been a strong motor in the combat of discrimination. While it remains to be seen what will be done with this new legal basis, Barnard also reminds us that the provision cannot possibly replace a comprehensive – and binding – catalogue of human rights.

The very last article is contributed by Hans Ulrich Jessurun d'Oliveira and deals

with 'Nationality and the European Union after Amsterdam'. The author points out the various problems that arise from the fact that, on the one hand, nationality law is still considered part of the hard core of national sovereignty of all (Member) States and that, on the other hand, European citizenship is conditional upon nationality of Member States and most rights under the treaties are also still reserved to the nationals of these Member States. This dichotomy already leads to many forms of exclusion and can only but worsen with the accession of Central and Eastern European countries (CEECs), some of which have among their population large groups of stateless persons and persons with third country nationality. A solution, however, is not in sight as long as the Member States are unwilling to either give up some of their prerogatives in this field or to open up the rights under the European Treaties to include those who lawfully reside in the EU.

The book distinguishes itself not only by its virtually complete coverage of all interesting aspects of the Amsterdam Treaty but also by its very impressive list of contributors. The individual parts are kept short, to the point, and share a kind of constructive criticism. Many of the authors make concrete proposals for future reform, which deserve wider attention and discussion. The editors must be complemented and we can only hope that the 'Legal Issues of the Nice Treaty' are already in the making.

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