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

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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.