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Review of The World Trade Organization: Law, Practice and Policy

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flexibility (politics), and between efficiency (in case of the WTO, through liberalized trade) and legitimacy, contestation, and participation.¹⁶ As Cass herself points out, “the language of constitutionalization is likely to obfuscate the debate, diminish the more quotidian achievements of the WTO, and deflect scholarly attention from other, less glamorous aspects of its functioning” (p. 23). Would it not therefore be better to shelve the C-word and to move to mapping out the specifics of the WTO’s own *Sonderweg*?

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The World Trade Organization: Law, Practice and Policy. 2d ed. By Mitsuo Matsushita, Thomas J. Schoenbaum, and Petros C. Mavroidis. Oxford, New York: Oxford University Press, 2006. Pp. cvii, 989. Index. \$235.00, £140, cloth; \$79.50, £40, paper.

The much expanded second edition of *The World Trade Organization: Law, Practice and Policy* by Mitsuo Matsushita, Thomas Schoenbaum, and Petros Mavroidis is a welcome addition to the growing collection of treatises, textbooks, and handbooks on WTO law and trade regulation generally. The authors of this handbook (and I will say more about the term shortly) are accomplished trade scholars with vast experience in both academic and policy settings, including within the WTO (Matsushita, for example, is a member of the WTO Appellate Body). They are uniquely qualified to present this exposition of WTO law and policy.

This book fits well into the small, but bright, constellation of reference works on international trade and the WTO system. The book is more systematic and up-to-date than John Jackson’s 1997 “reference monograph,” *The World Trading System*, while sharing the latter’s predominantly doctrinal approach and comfortable blend of law and policy. The book is similar in topical coverage to Michael Trebilcock and Robert Howse’s *The Reg-*

ulation of International Trade, but differs in that it lacks the latter’s sustained intellectual argument (a “law and economics” approach to trade policy), unless one considers the book’s implicit pragmatism to be an indicator of the authors’ intellectual position, which it well might be. Peter Van den Bossche’s admirable treatise, *The Law and Policy of the World Trade Organization*, is by nature more of a textbook—which highlights the current work’s value as what I would term a handbook-style reference: it is quicker to use and refreshingly direct in presentation. If one feels constrained by the necessary brevity of a handbook-style approach to such a complex topic, one can always supplement it by consulting, for example, Raj Bhala’s excellent *Modern GATT Law*, which is narrower but deeper.

Turning to the substance of this newly published second edition, the authors’ stated goal is to offer an updated overview of WTO law, including recent developments in dispute settlement as well as the increasingly important agriculture and government procurement areas. In this context, the book is a spectacular success. The range of topics is comprehensive without being ponderous, the prose is quite lucid, and the discussion well-organized. I found it a wonderful and refreshing review course, despite my having taught trade law for thirteen years.

Contrary to standard practice, I suggest that one begin by reading the book’s final chapter, on future challenges facing the WTO. Three of the four fundamental challenges listed by the authors are carried over from the first edition (published in 2003, only three years earlier): institutional reform, particularly on the norm-creating side; managing the global social issues linked to trade; and integrating developing countries. The fourth challenge, added in the second edition, involves the recent surge of regional and bilateral free trade agreements. I agree wholeheartedly with this list; indeed, I think it would only have improved the book if the authors had incorporated these challenges into the organization of the entire treatise. In my view they are not merely “future” challenges, but present, systemic issues affecting the WTO’s legitimacy and effectiveness on a daily

¹⁶ For a full discussion, see Joost Pauwelyn, *The Transformation of World Trade*, 104 MICH. L. REV. 1 (2005).

basis.¹ Following the authors' lead, I will organize this review around their discussion of these core issues, emphasizing the challenge of more fully integrating developing countries into the WTO, and turning the WTO into a more effective vehicle for development.

The authors' collective experience with the WTO as an international organization is perhaps most evident in their chapters on institutional issues—which are masterful. For example, their discussion of sources of WTO law is trenchantly informed by comparisons to public international law doctrines, practices, and institutions. Their section on dispute resolution effectively summarizes the procedures and key doctrines, as well as some of the contentious issues (for example, *amicus* briefs and judicial activism), facing the WTO as an institution.²

Although the book's concision is one of its chief strengths, it may also account for some of its shortcomings—as in their somewhat truncated treatment of the institutional challenges facing developing countries. For example, the authors mention a key weakness in the WTO's dispute settlement system—namely, that not all states, especially developing ones, can effectively retaliate against each other, due to asymmetric market size. In the second edition, there is an added, but brief, discussion of how developing countries ought to have the right to auction off their countermeasures for compensation, as well as of several alternatives that are currently being considered in the literature, such as fines and suspension of membership. Nevertheless, readers would have been well served by a much fuller discussion—especially from a

developing country perspective—of the alternatives that the authors mention and of the others that are currently being debated, such as pooling markets for retaliation and assessing punitive damages.

Similarly, with respect to decision making and rule creation, the authors could make clearer reference to one of the WTO's most glaring defects—namely, that while the rules may be enforced by “rule-oriented diplomacy” (to borrow Jackson's term),³ they are negotiated in the first place through power-oriented diplomacy. The preeminence of power at the norm-creating stage renders the official consensus model and “one state, one vote” approach to decision making misleadingly democratic in appearance, to the systemic detriment of weaker countries.

The second challenge identified by the authors is that of managing trade's link to global social policy issues. The authors devote several chapters to this discussion, including chapters on the environment, investment, and competition. Here the book benefits greatly from the particular depth of experience that Schoenbaum brings to the subject of trade and social policy. The chapter on the environment, for example, is the single best forty-five page overview of this significant, controversial field I have come across. The introductory material effectively briefs the reader on the contours of the debate and the rationale for considering the environment a trade subject. The balance of the chapter reviews case developments, policy changes, and discrete issues such as eco-labeling and environmental taxes.

The chapters on investment and competition follow this same pattern. With regard to competition, there is still not much concrete trade law, though the policy debate has been lively. The authors do an effective job of summarizing this debate and argue persuasively in favor of negotiating a WTO competition agreement. My only wish is that the authors could have given the trade and human rights linkage the same treatment, rather than giving it only a mention in the final chapter. As with competition law, human rights is

¹ One general suggestion along these lines is that, if the authors contemplate a third edition, they consider adding a trade scholar from the developing world with direct experience of the problem of trade and development, although the authors are by no means insensitive to the situation of developing countries in the WTO (indeed, Mavroidis's work as a WTO legal adviser involves assisting developing countries in their disputes).

² The authors are similarly effective in their presentation of core WTO disciplines in chapters on tariff rules, national treatment, most-favored-nation, safeguards, dumping, and subsidies. Their discussion offers a very clear and succinct summary of key doctrines and cases.

³ See, e.g., JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 109 (2d ed. 1997).

an area of global social policy as yet not fully integrated into the WTO agenda, but of indisputable importance (and controversy).

Turning to the third challenge—the problem of trade and development (the subject of chapter 19)—the authors' overview of the relevant issues and doctrines is quite good and has itself been cited by other reference works in the field.⁴ The authors show a deft hand here (and throughout the book) in integrating only well-excerpted portions of key primary sources, such as the Enabling Clause of GATT, into the text, thereby providing essential references while maintaining readability and keeping the text of manageable length. As with the institutional issues, my only quibble is that in a few places the authors stopped a bit short of giving the reader access to the full range of the policy debate. Taking as an example the authors' discussion of special and differential treatment—the cornerstone of the WTO's development policy, such as it is—they offer a helpful overview and summary, but no reference to the highly contentious issues surrounding the question of the empirical effectiveness of special and differential treatment.

On the central issue in the trade and development debate—namely, the role of free trade in development policy—the authors follow the orthodox view that liberal trade is better than protection for developing countries. They include only minimal citations in support of this view, however, and none for its various criticisms. To be fair, eschewing almost all references to scholarly literature is doubtless one of the key techniques that authors employ to maintain readability. Nevertheless, since in this chapter the authors do cite some of the literature in support of their position on a controversial issue, I would have welcomed some citations to the opposing views, especially since the heated scholarly debate has brought to light the theoretical disarray within economics on this basic issue of trade policy and development.

This brings me to the fourth fundamental challenge, the proliferation of regional trade agreements. The authors correctly note the theoretical tension between multilateral versus regional approaches to trade liberalization, as well as the

pragmatic concession (within current doctrine) to permit regional integration despite the risks. In one important respect, the issue of regional trade brings together all of the fundamental challenges in trade law today since the majority of regional trade is negotiated between powerful markets and those that are significantly smaller and less powerful. This type of asymmetry is especially acute when, as is typical with regional trade agreements, the parties involved are developing countries. The consequences are serious and systemic—potentially affecting institutional design, civil society and social welfare, and even more broadly the long-term economic health of the weaker parties. A fuller discussion of this aspect of regional trade would have been a valuable complement to the authors' brief, though succinct, overview.

None of the above concerns should obscure that this book succeeds admirably in its primary goal of offering an accessible overview of WTO law and policy, and as such is a model of clarity and brevity, even in its much expanded second edition (no small feat!). This book belongs on the shelf of every trade lawyer, trade scholar, and trade policy professional. Perhaps in the next edition, though, the authors will integrate problems of development more fully into their text, and thus more effectively deliver on the manifest promise of their project.

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International Crimes and the Ad Hoc Tribunals. By Guénaél Mettraux. Oxford, New York: Oxford University Press, 2005. Pp. xxxii, 428. Index. \$145, £85, cloth; \$55, £29.99, paper.

In 1993, the UN Security Council took the bold, unprecedented step of creating an international criminal tribunal under Chapter VII of the UN Charter. The Council created the International Criminal Tribunal for the Former Yugoslavia (ICTY) in an attempt to stanch the serious and persistent violations of humanitarian law that plagued the former Yugoslavia as it disintegrated.¹ Similarly, in 1994, the Council acted to establish

⁴ RAJ BHALA, *MODERN GATT LAW* 1025 n.3 (2005) (citing the first edition).

¹ S.C. Res. 827 (May 25, 1993).