

Andrew Lang, **World Trade Law after Neoliberalism. Re-imagining the Global Economic Order**. Oxford: Oxford University Press, 2011. Pp. xxix + 385. \$120. ISBN: 9780199592647.

Accounts of trade law usually are written in a technical style or focus on the WTO's legitimacy.<sup>1</sup> Nevertheless, an increasing number of scholars are asking theoretical questions regarding why WTO law is structured as it is and operates the way it does.<sup>2</sup> Some look to political<sup>3</sup> or economic theory<sup>4</sup> to answer the question. Lang, like some others,<sup>5</sup> focuses more on social dynamics.

Lang's contribution is one of the most legally far-reaching, methodologically acute, and socio-logically attentive accounts thus far. Lang's socio-political sensibility is distinguished because he employs an expansive category of social legal actors, thereby situating trade law within the politics of global struggles. His style is also unique because he parses how history informs the present. And most importantly, he studies how different legal theories are created from this context and how those theories affect the practice of trade law.

With the Doha Round at a standstill, the timing of such a book is most prescient. It successfully provides new ways to reconstruct a global consensus that could be the groundwork for future negotiations. Meanwhile, it also provides some analytical tools to re-imagine trade law and practice without necessarily renegotiating the text.

Lang is reacting against two prevalent conceptions of the WTO. The first is that the WTO is a reflection of bargaining power between states. The second is that the WTO is a blueprint for neoliberalism. The problem is that these accounts assume that law has a clear and determinate content. Both these accounts treat law simply as a functional reflection of power and/or ideology. They tell us very little of why WTO law was created in the way it was and how WTO law functions. Lang, in a detailed study of trade practice and doctrine, shows how trade law is in fact ambiguous. This, of course, should not come as a surprise to trade lawyers or anyone well versed in Robert Hudec's writings and John Jackson's early work. Lang rightfully warns us that if we do not appreciate law's ambiguity as a principal feature of contemporary trade law practice and scholarship then we will maintain a very narrow understanding of the WTO.

The examination of how trade law operates is complemented with a historical analysis of why WTO institutional design and practice developed in the way it did. To Lang, the act of interpreting trade law and recounting its history is always an exercise of making and changing it. International trade law is not a thing out there to be discovered. Rather, it is constituted by contested ideas, institutional practices, professional sensibilities, and conceptual assumptions. International trade law is the result of what people say and do. It is the practice of intervening in a debate, and shaping future debates. Thus, Lang argues, answering the question 'what is international trade law?' is not just a descriptive endeavour; defining trade law actually determines its normative stakes.

<sup>1</sup> Fakhri, 'Reconstructing WTO Legitimacy Debates', 2 *Notre Dame J Int'l & Comp L* (2011) 64.

<sup>2</sup> See, e.g., Carmody, 'A Theory of WTO Law', 11 *JIEL* (2008) 527; R.R.F. Yearwood, *The Interaction Between World Trade Organisation Law and External International Law: The Constrained Openness of WTO Law (A Prologue to a Theory)* (2011). For earlier examinations of these questions see Palmetier, 'The WTO as a Legal System', 24 *Fordham Int'l LJ* (2000) 444; Driesen, 'What is Free Trade?: The Real Issue Lurking Behind the Trade and Environmental Debate', 41 *Virginia J Int'l L* (2001) 279.

<sup>3</sup> See, e.g., Von Bogandy, 'Law and Politics in the WTO – Strategies to Cope with a Deficient Relationship', 5 *Max Planck Yrbk UN L* (2001) 609.

<sup>4</sup> See, e.g., Shaffer and Trachtman, 'Interpretation and Institutional Choice at the WTO', 52 *Virginia J Int'l L* (2011) 103.

<sup>5</sup> Hirsh, 'The Sociology of International Economic Law: Sociological Analysis of the Regulation of Regional Agreements in the World Trading System', 19 *EJIL* (2008) 277; Cho, 'Beyond Rationality: A Sociological Construction of the World Trade Organization', 52 *Virginia J Int'l L* (2012) 321.

The broader theoretical argument is that ideas matter. Trade law is defined by the tacit assumptions and beliefs of the wide array of trade lawyers, national diplomats, scholars, and activists all contesting the notion of what trade law is and is for. Lang does not discount the material history of trade, but chooses to emphasize the ideational. Aligned with recent arguments,<sup>6</sup> he suggests that this is because any institutional and material change must arise from an ideational shift.

Lang makes a significant contribution to the institutional history of trade even though the historical material in the book is not new. Lang clearly admits the reference to previously known material, but emphasizes that any historical account is an interpretive and constitutive act (at 12–13). Indeed, he provides a rich and original account.

The history of the GATT and WTO is an often-told story. The common history of the WTO starts with the ambitious International Trade Organization (ITO) collapsing in 1950 before ever coming into existence as a result of US Congress's unwillingness to approve the new trade organization. What remained was the GATT, originally intended to be only one part of the institutional structure of the ITO. In order to pave the way for ratification and enforcement of the broader umbrella of the ITO, negotiating states put the GATT into practice through a Protocol of Provisional Application before they intended to ratify the ITO. With the failure of the ITO, the story goes, the GATT became the *de facto* sole multilateral international trade agreement.

The history of the WTO from this point becomes one of the evolution of the WTO from the GATT—a march of progress. It is a story in which the GATT was a political forum populated mostly by diplomats and the WTO is a more structured institution populated mostly by lawyers with its dispute settlement system, avenues of appeal, and formalized mechanisms of enforcement—a 'politics to law' narrative. Some commentators celebrated this turn to law as a means to overcome power-politics,<sup>7</sup> whereas others were concerned with trade relations being ruled by a technocracy.<sup>8</sup>

The way the story continues is that as GATT membership grew over the years and the world economy changed and became more integrated, it became too unruly to maintain the regulation of trade through political and diplomatic means. The agreed upon notions of 'embedded liberalism' and efficient club nature of the GATT were no longer workable under these new conditions. With the remarkable increase in developing country membership of the GATT, disparities in power became more acute. Moreover, the GATT was considered to have certain institutional 'birth defects' which hindered its ability to function coherently.<sup>9</sup> So, according to the orthodox history, the end of the Uruguay Round of GATT negotiations in 1994 created the WTO to address the shortcomings of the GATT.

First, Lang corrects this teleological account by noting the competing conceptions of the trade regime's function and purpose at different points in history. Secondly, he describes the move from embedded liberalism to neoliberalism to the current moment of post-neoliberalism as different legal projects. Thus, Lang's account is not a 'politics to law' narrative. Nor is it temporally organized according to institutional history. Rather, the relevant time periods are defined by ideational changes where each rupture in the trade regime's history has its own theory of law.

Lang, following the work of John Ruggie, describes embedded liberalism as the post-war commitment by First World countries to free markets combined with 'a belief in the responsibility of

<sup>6</sup> R. Mangabeira Unger, *Free Trade Reimagined: The World Division of Labor and the Method of Economics* (2007).

<sup>7</sup> Early proponents include Hudec, 'GATT or GABB? The Future Design of the General Agreement on Tariffs and Trade', 80 *Yale LJ* (1971) 1299; Jackson, 'The Crumbling Institutions of the Liberal Trade System', 12 *J World Trade L* (1978) 93.

<sup>8</sup> Howse, 'From Politics to Technocracy—And Back Again: The Fate of the Multilateral Trading Regime', 96 *AJIL* (2002) 94.

<sup>9</sup> Jackson, *Restructuring the GATT System* (1990); Jackson, 'Designing and Implementing Effective Dispute Settlement Procedures: WTO Dispute Settlement, Appraisal and Prospects', in A.O. Krueger (ed.), *The WTO as an International Organization* (1998), at 161, 163.

governments to mitigate the social costs associated with free markets' (at 29). Embedded liberalism created a trade regime that was a 'global projection of the welfare state' (at 16). The assumed purpose of the GATT was to manage diverse 'interfaces' within these assumptions.<sup>10</sup> There was an associated notion of legal practice where law was thought to be goal-oriented or purposive. Trade law was also embedded within trade diplomacy. Thus, legal interpretation was based on widely-held assumptions regarding trade law's purpose; trade law's open text was constrained by the trade law community's consensus.

Starting in the 1970s, neoliberal thought became prevalent in all facets of global policy making. While some texts have historically interrogated neoliberalism as institutional transformation<sup>11</sup> and socio-intellectual history,<sup>12</sup> Lang provides a nuanced account of how neoliberal ideas informed but did not dictate institutional design and practice. Lang outlines the relationship between neoliberal ideas and trade institutions through a close reading of trade case law, text, and scholarly literature as well as a detailed case study of the General Agreement on Trade in Services (GATS). Through embedded liberalism the trade regime's supposed purpose was understood to be about world peace and prosperity, whereas through neoliberalism its assumed purpose was to constitute a global marketplace. Under neoliberalism, law was thought to be a way of addressing 'economic actors' needs for certainty and predictability' (at 243). It was a technical language of ideal markets and economic efficiency. Institutionally, the trade regime was driven by a logic of regulatory harmonization. It also broadened its mandate as definitions of 'barriers to trade' and 'unfair trade practices' expanded.

By the end of the 20th century, and ironically during the advent of the WTO, neoliberalism began to wane. It is therefore not surprising that this is a time when the trade regime is defined by a legitimacy crisis. Lang explains this legitimacy crisis as the reaction of civil society groups and national governments in the face of the trade regime's expanding mandate and influence upon domestic regulation. As a response to the crisis, the WTO has become more deferential to domestic regulation. In this current post-neoliberal moment of trade, legal interpretation is no longer as focused on correcting market distortions as much as it is about balancing interests and applying standards of review. The current trade orthodoxy is technical, much like neoliberal legal thought. But it is a language of legal procedural scrutiny as opposed to a market-oriented approach.

Not only does Lang provide a fresh interpretation of historical material contextualized within legal doctrine and practice, he identifies a wide array of relevant social actors. He does this by examining the history of the trade and human rights debate through a comprehensive account of the antecedents to contemporary debates, the social history of the global justice movement, and the institutional dynamics between trade and human rights regimes. His social history of the global justice movement is an excellent example of telling the history of international trade law 'from below'.<sup>13</sup>

Lang focuses on the trade and human rights debate because it has been one of the most significant challenges to the trade regime. Yet, as he astutely outlines, this debate has also restricted our ideational capacity to understand how the trade regime actually operates. The trade and human rights debate is often framed as a problem of coherence. The working assumption by many human rights activists is that trade law's deleterious effects could be significantly overcome or ameliorated if it were somehow formally integrated with human rights law. One suggestion is to modify trade law by adding human rights annexes or social clauses. Lang rightfully points out that this does little to change how trade policy is decided; instead, it just tacks on

<sup>10</sup> Jackson, *Restructuring*, *supra* note 9, at 82–84.

<sup>11</sup> D. Harvey, *A Brief History of Neoliberalism* (2005).

<sup>12</sup> P. Mirowski and D. Plehwe (eds), *The Road From Mont Pèlerin: The Making of the Neoliberal Thought Collective* (2009).

<sup>13</sup> B. Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (2003).

another set of (separate) policies that must accompany trade policies. Another suggestion is hierarchization through formal conflict rules which act as meta-rules to define the relationship between trade law and human rights law. To Lang, this is not politically and practically feasible. Another proposal is to include human rights law in the WTO dispute settlement system. Lang points out that this is not tenable because the Appellate Body has little appetite to do so and is wary about overextending its own legitimacy. More generally to Lang, framing the relationship between trade and human rights as a problem of coherence is limiting because this takes for granted the meaning of the goals and objectives of trade and human rights. It reifies trade law and human rights into things we know in advance and then balance.

Lang does not write off human rights as a progressive project. Instead, by exposing how the trade regime is far more internally contested and ambiguous than human rights activists suspect, he provides a way for progressive activists to find inroads into the trade regime. But Lang seems also to be open to consider how other regimes and narratives interact with trade law.<sup>14</sup> For example, in the discussion of the social history of the global justice movement Lang first identifies the social actors that had the greatest influence in challenging the trade regime: Canadian activists (which included economic nationalists, the labour movement, the women's movement, environmental groups, farmers' groups, and religious communities), Central and South American activists (mainly national and transnational peasant networks and rural social movements), and aid and development NGOs. Lang carefully chronicles how there was a difference between the liberal tradition of the human rights movement and how the multifaceted global justice movement used 'human rights specifically to contest economic liberalism' (at 83). The global justice movement employed a human rights discourse that emphasized social and economic rights as well as so-called third generation collective rights. This meant that the use of human rights was a choice by each one of those social actors, leaving a variety of options other than human rights available to transform or challenge the trade regime.

Pieces of another narrative – a development narrative – can actually be found within the book itself (which attests to its richness). Lang rightfully explains that development was a challenge to GATT from the very beginning. He highlights how developing countries increased in numbers within GATT during the late 1950s, the Haberler Report in 1958 brought development into the mainstream of trade politics, and the inclusion in 1964 of Part IV on Trade and Development significantly challenged GATT during its time (at 45–46). He notes how UNCTAD acted as a forum for developing countries to solidify their position in relation to GATT (at 276). He also explicates how GATS was the result of a North–South compromise (at 279). Furthermore, Lang points to how neoliberalism in practice has largely been associated with post-import substitution trade policies in developing countries (at 2). What remains unclear is how development relates to embedded liberalism and neoliberalism.

This opaqueness is probably because when Lang hones in on development, he frames it as part of the human rights regime from the 1960s to the 1980s. While the 'right to development' was a component of the human rights regime and was used to challenge the GATT, development as an idea separate from human rights was also a challenge from within the GATT – and remains a challenge from within the WTO. The advantage of focusing on human rights is that we learn much about the core of trade law through human rights' external challenge because, within the trade and human rights debate, human rights have been framed as trade law's 'other'. Yet, development's interrelationship with trade has also always been an important debate within the trade regime that has significantly influenced trade law's form and substance.

Here is a very minor example of how a development story might lead to a different narrative and analysis. Lang surveys and categorizes the bulk of GATT panel reports in its first two

<sup>14</sup> Cf. Bowman, 'Of Haves and Have-Nots: A Review of Donatella Alessandrini, *Developing Countries and the Multilateral Trade Regime: The Failure and Promise of the WTO's Development Mission*', 3 *Trade L & Dev* (2011) 242.

decades. He notes how in GATT disputes the category of government action that was characterized as a trade barrier remained narrow and within the meaning of border measures and internal barriers to trade as defined during GATT 1947 negotiations and within embedded liberalism's ideational purview. This buttresses the argument that the international trade law community understood what was a barrier to trade without having legally to define it. One case brought, however, by Uruguay defied categorization under this study (at 210, footnote 105).

In 1961 Uruguay filed a legal complaint under Article XXIII of the GATT against 15 developed countries;<sup>15</sup> these countries made up the entire developed country membership of GATT at the time. Uruguay listed in its complaint 576 restrictions against its exports in the 15 developed country markets and argued that these restrictions seriously reduced its exports. If development is imagined to be an exceptional theory to trade or embedded within human rights and external to trade, then we can see how some commentators characterized this case as Uruguay's dramatic use of 'show-piece litigation'.<sup>16</sup> If, however, development is thought to be a central concept of the trade regime then this case exemplifies how developing countries actively participated within the boundaries of GATT.<sup>17</sup> Certainly, one can find other examples to build a development narrative from within the trade regime.<sup>18</sup> Even though development is not the book's central concern, it nevertheless opens up the space even wider for multiple narratives such as one focused on development in the future.

Lang writes from the perspective of an international lawyer working from inside the trade system. In writing in the first person plural he addresses the wide range of international lawyers who include 'government officials, NGOs, academics, officials of international organizations, and many others ... working in the disciplinary field of international law and engaging in international legal styles of argument' (at p. vii). His normative position, which holds the book together with a clear and light touch, is to push our thinking about the WTO in a way that explicitly defines its collective purpose. Lang leaves it open to political debate amongst different social actors to determine what should be that collective purpose. The problem with neoliberalism was that it reconceived the trade regime in a way that 'left no clear room for the notion of "collective" purpose at all' (at 235). And the problem with our current post-neoliberal procedural turn is that it avoids clearly debating the substance of trade law practice and interpretation. His other aim is to ensure that within debates regarding international trade, law is treated as a complex and ambiguous idea that 'helps sediment and authorize particular forms of knowledge through the production of a kind of legal common sense, and at the same time enables the possibility of contesting and destabilizing such common sense' (at 19).

Trade lawyers will find this book very useful due to its survey of the field of trade law as well its detailed analysis of the WTO legal architecture and case law. It is very clearly written and weaves together a large amount of material in a very accessible way. There are enough signposts that one can easily dip in and out of different parts of the text which makes it amenable to use as a reference book and teaching tool. Moreover, this book will also be of great interest to international lawyers writ large since it entices us to imagine international trade law as part of a larger moral and institutional universe.

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<sup>15</sup> *Uruguay – Recourse to Article XXIII*, 15 Nov. 1962, GATT BISD 11S/95 (L/1923) (1962).

<sup>16</sup> R.E. Hudec, *Developing Countries in the GATT Legal System* (1987), at 46–47.

<sup>17</sup> Ismail, 'Rediscovering the Role of Developing Countries in GATT before the Doha Round', 1 *L and Dev Rev* (2008) 50, at 57.

<sup>18</sup> See, e.g., D. Alessandrini, *Developing Countries and the Multilateral Trade Regime: The Failure and Promise of the WTO's Development Mission* (2010).