

ARTICLES

Saurabh Bhattacharjee, *From Basel to Hong Kong: International Environmental Regulation of Ship-Recycling Takes One Step Forward and Two Steps Back*

Nikolaos Lavranos, *The Brazilian Tyres Case: Trade Supersedes Health*

NOTES AND
COMMENTS

Aditya Gupta, *Border Enforcement of Intellectual Property Rights in India*

Aditya Swarup, *Making a Case for the Imposition of Unilateral Trade Sanctions to Protect Labour and Basic Human Rights*

Fali S. Nariman, *International Arbitration in the Twenty-First Century: Concepts, Instruments and Techniques*

BOOK REVIEW

Raj Bhala *et al.*, *Scrutinizing RTAs: A Comparative Review of David Gantz, Regional Trade Agreements: Law, Policy and Practice (Durham: Carolina Academic Press, 2009)*

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SCRUTINIZING RTAS

A Comparative Review of David Gantz, Regional Trade Agreements: Law, Policy and Practice (Durham: Carolina Academic Press, 2009)

RAJ BHALA,* MATT ODOM, AND BEN SHARP†**

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I. INTRODUCTION

From the close of the Second World War until the mid-1980s, international trade liberalization efforts tended to focus more heavily on sweeping multilateral initiatives to eliminate, or at least reduce, barriers to trade. For America, a shift occurred in 1985, when it and Israel successfully concluded the United States – Israel Free Trade Agreement (Israel FTA). Since that year, regional trade agreements (RTAs) have proliferated around the world. Mongolia is the only Member of the World Trade Organization (WTO) not currently a party to an RTA.¹ RTAs are formed when like-minded groups of states negotiate a trade liberalizing agreement, which excludes third countries, from its benefits. Because of their increasing commonality, RTAs are important topics of study for international lawyers, legal scholars, policy makers, and more generally any observer of international relations.

A great amount of scholarship has been devoted to the study of RTAs. One recent and most welcome addition to this library is *Regional Trade Agreements: Law, Policy and Practice* (hereinafter, *Regional Trade Agreements*) by Professor David Gantz. This book is particularly useful and well-written, which is not surprising given that its author is a distinguished and dedicated international legal scholar with extensive experience in private practice and public service.

Professor Gantz's newest book, *Regional Trade Agreements*, was published by the Carolina Academic Press in 2009.² It provides readers with a comprehensive introduction to sub-global trade agreements, and is intended for scholars, students and practitioners who wish to become better acquainted with the ever-growing phenomena of RTAs. This text most obviously appears to be useful to legal students and scholars. However, no serious observer of global affairs should ignore this book.

That is because RTAs continue to increase in number and scope (*i.e.*, covering an ever-wider variety of substantive issues), and because they are completed by states with differing policy goals and motivations that are not always directly related to trade. RTAs are real world examples of how states interact. Potential parties to an RTA sometimes have complimentary goals, but more usually, their negotiating positions are in conflict. Some RTA negotiations are successful, but in other instances they stagnate and the deal never materializes. Through the study of

¹ DAVID GANTZ, *REGIONAL TRADE AGREEMENTS: LAW, POLICY AND PRACTICE* 7 (2009).

² DAVID GANTZ, *REGIONAL TRADE AGREEMENTS: LAW, POLICY AND PRACTICE* (2009).

RTAs, students become acquainted with the complexity of interacting national agendas, international cooperation, and the reasons for negotiation failures and successes. *Regional Trade Agreements* provides a wealth of information to an audience beyond the community of lawyers and legal scholars.

II. ABOUT THE AUTHOR

Holding a chaired professorship at the University of Arizona College of Law, Professor Gantz also serves as Associate Director of the National Law Center for Inter-American Free Trade, and is a member of the American Arbitration Association. Professor Gantz has authored or co-authored four books, and numerous articles, on international trade issues. He has been both a panelist and arbitrator under the North American Free Trade Agreement (NAFTA), including as an arbitrator in the infamous dispute between the United States and Canada over Softwood Lumber. He has also been a consultant to the Vietnamese Ministry of Justice on Trade Law Issues (2000-2001), a Consultant to the National Law Center for Inter-American Free Trade on Customs and Trade Law Issues (1999-present), and a Judge for the Administrative Tribunal of the Organization of American States (1987-1985).

During his career, Professor Gantz has received many accolades, including a Superior Honor Award in 1974 from the United States Department of State, and a Certificate of Appreciation from the Multinational Force and Observer in 1987 for legal services relating to its peacekeeping mission.

As an educator, Professor Gantz began his teaching career in 1967 as a Visiting Professor of Law at the University of Costa Rica, after having been awarded the Ford Foundation Fellowship for Latin American Legal Studies. He continued his teaching career as an Adjunct Professor of Law at Georgetown University Law Center from (1981-1993), and as a Lecturer in Law at the University of Pennsylvania (1986). Since 1993, he has served at the James E. Rogers College of Law at the University of Arizona as a Professor of Law, and as the Director of its International Trade Law Program. He is a Samuel M. Flegly Professor of Law, and was the recipient of the 2006 Arthur Andrews Distinguished Teaching/Mentoring Award.

III. OUTLINE OF THE BOOK

Regional Trade Agreements is a 507 page hardcover book with margins that leave plenty of room for notes, and a font size large enough not to strain the reader's eyes. Professor Gantz provides the reader not only with the standard contents, table of cases, indexes, and list of abbreviations, but also provides a list of websites useful to students who wish to do additional research. In the indexes Professor

Gantz has provided readers with relevant excerpts from the General Agreement on Tariffs and Trade (GATT), Article XXIV; the Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994; the Transparency Mechanism for Regional Trade Agreements; the General Agreement on Trade in Services (GATS), Article V; and the Enabling Clause.

In this work Professor Gantz successfully combines the benefits of a textbook with the expansive nature of an encyclopedia. Professor Gantz has divided his book into three parts. Part One is comprised of the first four chapters of the text, and provides the reader with an introduction to RTAs. Part Two discusses U.S. RTAs in Chapters Five through Ten. Part Three is titled Other Significant Regional Trade Agreements, and covers the European Union (EU), the Southern Cone Common Market (MERCOSUR), the Central American Common Market (CACM), the Association of South East Asian Nations (ASEAN), and the Southern African Customs Union (SACU).

Professor Gantz discusses many different and important RTAs, thereby providing the reader with an encyclopedia of sorts. This text discusses both major RTAs such as the EU, and MERCOSUR, while also focusing on less widely discussed RTAs like the U.S.-Vietnam Bilateral Trade Agreement (VBIT). It provides an excellent starting place for any student or practitioner who wishes to become better acquainted with one of the covered RTAs. Professor Gantz describes each covered RTA that is in force in varying degrees of detail, but only briefly. Because of the expansive nature of complex agreements a much larger text, which would probably have to consist of multiple volumes, would be needed to thoroughly discuss the intricacies of RTAs such as the NAFTA, and the EU. Instead, Professor Gantz provides readers with a series of introductions to RTAs. He does this in ten chapters, eight of which are specific to a certain agreement.

Gantz's system works well, and provides a thorough introduction to the discussed RTA. For instance Chapter Seven fully discusses the U.S.-Central American-Dominican Republic Free Trade Agreement (CAFTA-DR). Not only does Professor Gantz discuss the policies and motivations of the Parties, but also he fully discusses issues in interpreting and applying CAFTA-DR by providing a brief summary of every chapter of the agreement! Though practitioners will undoubtedly have to research the actual text of the agreement and review relevant disputes, this text provides them with an excellent starting place to conduct such research.

Students, of course, will also benefit greatly by having gained a basic understanding of the policy and substantive issues found in the Agreement. For instance, if a reader were particularly interested in studying the investment provisions of CAFTA-DR he or she would be able to turn to Professor Gantz's

discussion of Chapter Ten of the Agreement, from pages 178 through 189, for a relevant discussion. When discussing dispute settlement, Professor Gantz offers readers a pleasing, easy-to-read summary of the dispute. He thereby eschews complicated, lengthy quotations that can be irritating when simply dumped before the eyes of the bewildered reader.

IV. PART ONE – AN OVERVIEW OF RTAs

Part One of *Regional Trade Agreements* provides readers with a general overview of RTAs. In addition to defining the term “RTA”, and providing a reader with an explanation of his methodology, Professor Gantz also discusses GATT Article XXIV, the history of RTAs, and a discussion of the costs and benefits of RTAs. Chapter Four of the text, which provides a useful index of RTAs, is worth highlighting.

Chapter Four is a tabular description of RTAs by which the reader is provided with both “a basic survey of RTA provisions contained in selected RTAs (Table 4.1)”, and “a listing of the RTAs that have been notified to the WTO and are in force (Table 4.2)”.³ For instance, in Table 4.1 an entry is dedicated to the Mexico-Japan RTA. One aspect of this agreement is the agreed upon treatment of immigration between the parties. In this block Professor Gantz has placed the abbreviation TVB. By referencing the explanation of categories section⁴ the reader will know that TVB indicates that this RTA allows for “expedited procedures for temporary visitors for business, to facilitate efforts by nationals of one RTA party to manage investments or market goods or services in the territories of the other parties (“TVB”)”.⁵ Readers are thereby provided with information about many more RTAs than can be specifically addressed in dedicated chapters. However, because of the complexity of RTAs and the sophistication of many of their provisions Professor Gantz acknowledges that Table 4.1 cannot thoroughly describe each covered RTA. However, this table provides an overview of several important substantive areas for about 40 RTAs.

Table 4.2 is a listing of RTAs which have been notified to the WTO, and are in force.⁶ This Table is laid out alphabetically and provides readers with general information about the RTAs. The first two categories listed for each RTA are the

³ DAVID GANTZ, *REGIONAL TRADE AGREEMENTS: LAW, POLICY AND PRACTICE* 57 (2009).

⁴ DAVID GANTZ, *REGIONAL TRADE AGREEMENTS: LAW, POLICY AND PRACTICE* 59-66 (2009).

⁵ DAVID GANTZ, *REGIONAL TRADE AGREEMENTS: LAW, POLICY AND PRACTICE* 63 (2009).

⁶ DAVID GANTZ, *REGIONAL TRADE AGREEMENTS: LAW, POLICY AND PRACTICE* 57 (2009).

date of entry into force, and the date of notification to the WTO. The next category is what GATT/WTO law the agreement is related to, such as the Enabling Clause, or GATT Article XXIV. Then the table specifies which type of an agreement the RTA is.

The agreement might be an FTA, or because of the presence of a common external tariff (CET) it might be a CU, or a different type of agreement. The next category lists the document series of the RTA. The last two categories tell the reader about consideration of the RTA in the Committee on Regional Trade Agreements (CRTA). These categories consist of the status of consideration, and if completed, a reference to its corresponding document. For instance, there are two categories devoted to the Caribbean Communities (CARICOM). Table 4.2 indicates that the second of the two agreements is a CU, with the relevant GATT/WTO document being GATT Article XXIV. The reader is also given the relevant WTO document series, which in this case is WT/REG92. The Table also indicates that the CRTA report was adopted, and indicates that its reference is 24S/68 02.03.77.⁷ Students or practitioners who use this table will be guided by relevant and sometimes difficult to find information. This makes research much easier than is the case when attempting to wade through the complex waters of WTO documents unguided.

V. PART TWO – AMERICA’S RTAS

After Chapter Four, the text transitions into Part Two, which focuses on the U.S., and RTAs it has entered into. Chapter Five discusses the U.S. approach to RTAs, and trade related political, legal and policy considerations with great emphasis being given to the recent history of the U.S. negotiating position, trade related actions, and on its future. For instance Professor Gantz discusses The Food, Conservation and Energy Act of 2008,⁸ which increases farm subsidies possibly to “levels above the United States’ scheduled commitments”, which found support not only in farming states, but also in urban areas because “the Act includes increases in funds available for nutrition programs such as food stamps and school lunches as well as environmental measures such as reducing pollution in the Chesapeake Bay”,⁹ This quote highlights some of the complexities found in the politics and policy of the U.S. trade position. This discussion continues through Chapter Five, and includes information about trade promotion authority (TPA), and the Bipartisan Trade Deal (BTD) of 2007.

⁷ DAVID GANTZ, REGIONAL TRADE AGREEMENTS: LAW, POLICY AND PRACTICE 70 (2009).

⁸ *The Food Conservation and Energy Act of 2008*, Pub. L. No. 110-234.

⁹ DAVID GANTZ, REGIONAL TRADE AGREEMENTS: LAW, POLICY AND PRACTICE 84 (2009).

Beginning in Chapter Six, and continuing throughout the remainder of the text Professor Gantz provides an encyclopedia of information concerning major RTAs present in the world today. Roughly 200 pages are devoted to RTAs the United States has entered into, and covers not only major RTAs in force, but also includes brief discussions of pending agreements. Professor Gantz introduces the highlighted RTA by laying it out either by chapter, in the case of U.S. RTAs, or by substantive area.

However, this text also goes beyond a substantive discussion of RTA provisions, to include the history of the RTA, motivations for completing it, and extra-trade issues, such as human rights concerns or other issues, and the use of RTAs by some countries as a development tool. This compendium provides an encyclopedia of information about the covered RTAs, but as mentioned earlier, a possible criticism of these introductions is their brevity. However, in *Regional Trade Agreements* this is an advantage. Because of the nature of this text as an introduction to many RTAs, more detailed information concerning the sophistication of the EU or another complex agreement, which would likely include a complex history of dispute settlement, might detract from the obvious value of *Regional Trade Agreements*.

For instance, Professor Gantz's goal in Chapter Six is to provide the reader with a "reasonably comprehensive introduction to NAFTA, still by far the most important U.S. FTA, and the most important RTA world-wide in terms of total trade after the European Union",¹⁰ which continues to impact world trade through its influence on both subsequent U.S. RTAs as well as those concluded by many other countries.¹¹ Professor Gantz truly has met his goal. He has provided a discussion of NAFTA's predecessors, mainly the United States-Canada Free Trade Agreement (CFTA), and the influence of the 1965 Auto Pact.¹²

Professor Gantz also discusses the motivations of the parties. He describes the U.S. motivation as "a mix of political, economic and security considerations", as well as a desire to encourage completion of the stalled Uruguay Round,¹³ Canada's motivation as a fear that NAFTA would dilute the benefits it gained through the

¹⁰ DAVID GANTZ, REGIONAL TRADE AGREEMENTS: LAW, POLICY AND PRACTICE 79 (2009).

¹¹ DAVID GANTZ, REGIONAL TRADE AGREEMENTS: LAW, POLICY AND PRACTICE 105, 106 (2009).

¹² DAVID GANTZ, REGIONAL TRADE AGREEMENTS: LAW, POLICY AND PRACTICE 107 (2009).

¹³ DAVID GANTZ, REGIONAL TRADE AGREEMENTS: LAW, POLICY AND PRACTICE 108-109 (2009).

CFTA, and the pressure it feels from being neighbors with the world's largest economy¹⁴ and Mexico's desire to expand the maquiladora program, institute economic reforms, and create jobs, among other goals.¹⁵

After this introduction Professor Gantz briefly discusses each chapter of NAFTA. After discussing the preamble, the objectives found in Chapter One, and the definitions found in chapter two, Professor Gantz provides a comprehensive summary of the chapters in order of ascendancy. In this section Professor Gantz discusses many issues, such as rules of origin and the formulas necessary in determining the "regional value content" of sensitive goods, as well as issues such as Mexico's Pemex, and *Comision Federal de Electricidad*.

The remainder of Part Two discusses other U.S. RTAs, including CAFTA-DR, Israel, Jordon, Morocco, Bahrain, Oman, Chile, Singapore, Australia, Peru, Panama, Colombia, and the Republic of Korea, and the idea of a Free Trade Area of the Americas (FTAA). These discussions vary in their level of detail. By far the most detailed discussion is that of CAFTA-DR, while the discussion of pending agreements such as that between the U.S. and Panama is much less detailed.

Chapter Ten, which discusses the U.S.-Vietnam Bilateral Trade Agreement (VBIT) is very interesting, and provides the reader with much more than a discussion of the VBIT. A discussion of Vietnam is particularly important. That is because of its recent "odyssey" away from strict communism, towards accession to the WTO.

Professor Gantz provides an overview of the economic history of Vietnam beginning with the withdrawal of U.S. forces in 1974, to a discussion of *Doi Moi* and its objective of creating a viable economy in Vietnam by encouraging foreign investment. Next, Professor Gantz discusses the VBIT, its negotiation and relevant chapters, as well as U.S. protection of its textile industry. Included as well is a summary of the antidumping actions initiated against Vietnamese producers of footwear (instituted by the European Union), and catfish (instituted in the United States).¹⁶ Professor Gantz ends the chapter with a discussion of Vietnam's accession to the WTO in 2007 including Vietnam's recent round of bilateral trade agreements with a number of countries, which of course includes the VBIT.

¹⁴ DAVID GANTZ, REGIONAL TRADE AGREEMENTS: LAW, POLICY AND PRACTICE 109 (2009).

¹⁵ DAVID GANTZ, REGIONAL TRADE AGREEMENTS: LAW, POLICY AND PRACTICE 108 (2009).

¹⁶ DAVID GANTZ, REGIONAL TRADE AGREEMENTS: LAW, POLICY AND PRACTICE 292- 293 (2009).

This Chapter easily qualifies as a favorite for the reader. It describes Vietnam's movement from an anti-capitalistic non-market economy through economic and political hardship towards liberalization, finally ending with Vietnam's accession to the WTO. This is an important model to note because of the countries currently seeking membership in the WTO, and the further liberalization of global markets which would be achieved with their accession.

VI. PART THREE – OTHER PROMINENT RTAS

Another important RTA introduced by Professor Gantz, and perhaps the world's most sophisticated RTA, is the EU. Through various treaties and by enlargement the EU has evolved and is now comprised of 27 members. It covers a number of substantive areas, some of which move beyond trade. It has implemented a common external tariff (CET), and has a court system comprised of the European Court of Justice, and the Court of First Instance. A common currency has been proposed and has been accepted by some, but not all Members. Accordingly, in Part III, readers of *Regional Trade Agreements* are introduced to these, as well as many other aspects of the EU, including such topics as the possible eventuality of a security policy common to all Members.

Professor Gantz wisely acknowledges that the EU in particular cannot be covered in a single chapter. The discussion that is provided covers a variety of topics. These include: legal structure, political/administrative institutions, and judiciary; functioning of the EU by substantive area; enlargement; extra-trade issues such as human rights and foreign policy; the EU's future; and preferential trade agreements (PTAs) and RTAs that it has entered into or is considering. As is the case with NAFTA, Professor Gantz has provided readers with a comprehensive introduction to a very sophisticated agreement.

The EU is just one of eight non-U.S. RTAs discussed by Professor Gantz. There are also chapters dedicated to the MERCOSUR; the Central American Common Market (CACM); the Organization of South East Asian Nations (ASEAN); and the Southern African Customs Union (SACU).

VII. POSITIONING THE BOOK IN THE WIDER LITERATURE

One of the goals of any book reviewer, especially in examining a book on a consequential topic like RTAs, written by an esteemed international trade academic like Professor Gantz, is to place the reviewed book within the current library of the field. That is, the reviewer ought to ask how the book fits within the wider literature on the topic. In respect of *Regional Trade Agreements*, it can be positioned in the literature by juxtaposing it with four other well-known works.

Thus, below Professor Gantz's book is considered *vis-à-vis*:

1. Jacob Viner's *The Customs Union Issue* (1950), a text discussing the economics of customs unions, which was published by the Carnegie Endowment for International Peace (New York);
2. James Mathis's *Regional Trade Agreements in the GATT/WTO: Article XXIV And the Internal Trade Requirement* (2002), another legal textbook which discusses GATT/WTO law and the formation of RTAs, published by T.M.C. Asser Press (The Hague);
3. Ralph Nader's *The Case Against Free Trade: GATT, NAFTA, and the Globalization of Corporate Power* (1993), which presents an inflated policy position against NAFTA, published by Earth Island Press (San Francisco) and North Atlantic Books (Berkeley);
4. Jagdish Bhagwati's *Termites in the Trading System: How Preferential Agreements Undermine Free Trade* (2008), a legal text which presents policy arguments against the use of preferential trade agreements, published by Oxford University Press (New York).

However, at the outset, it is important to note one great difference between Professor Gantz's book and these other works. Professor Gantz has chosen to write a legal textbook that comprehensively discusses RTAs. He has not chosen to address a single aspect of RTAs, or to present arguments for or against RTAs, but has written a book that briefly discusses RTAs generally, and certain agreements specifically. He presents RTAs as a fact, which people lucky enough to be involved with international trade will have to deal with for many years to come.

A. *Comparing Jacob Viner, The Customs Union Issue (1950)*

Jacob Viner's classic text on customs unions begins any informed discussion of customs unions (CUs) and preferential trade agreements (PTAs). Written within a series sponsored by the Carnegie Endowment for International Peace, Viner – who started his career as a government official and later as an economics professor at both Chicago and Princeton – sought to explain the continued relevance of CUs and PTAs, although he focused primarily on the former. *The Customs Union Issue*, although quite short, seeks to clarify why CUs may be desirable, including debunking both free traders' and protectionists' arguments for them; the historical development of commercial agreements and the use of customs unions as an exception to the most favored nation (MFN) obligation; and an analysis of the Havana Charter that, at the time of writing, was to be the founding charter of the International Trade Organization (ITO).

By and large, Viner's economic analysis of customs unions is the aspect within this book that is still foundational. It must be noted, first, that this section consists

of perhaps only one-fourth of the book. Furthermore, the economic analysis was motivated by the odd phenomena that both free traders and protectionists were, at the time of Viner's writing, advocating the use of CUs.¹⁷ Viner argues both sides are confused.

Through disentangling these arguments, Viner proposes a model that countries contemplating entering a CU may apply to determine any advantages it might provide. One assumption central to Viner's model, among other minor assumptions, is that the pre-CU tariff is effective at protecting some domestic industries by making the import of certain foreign goods prohibitively expensive.¹⁸ Since the pre-CU tariffs are effective at protecting domestic industries, the establishment of a CU will likely divert trade from a foreign source to a member of the CU, assuming that a CU member produces like goods. However, dismantling trade barriers between the CU members will also stimulate internal trade. Thus, on a macro-economic level, a country that joins a CU will be better off if the dismantling of intra-CU trade barriers and subsequent increases in intra-CU trade is greater than the amount of trade diverted from the rest of the world. Viner puts this point as follows:

Where the trade-creating force is predominant, one of the members at least must benefit, both may benefit, the two combined must have a net benefit, and the world at large benefits; but the outside world loses, in the short-run at least, and can gain in the long-run only as the result of the general diffusion of the increased prosperity of the customs union area. Where the trade-diverting effect is predominant, one at least of the member countries is bound to be injured, both may be injured, the two combined will suffer a net injury, and there will be injury to the outside world and to the world at large.¹⁹

Although this point is often lost, Viner stresses that his analysis is not an *a priori* rationalization for CUs or PTAs.²⁰

Rather, it states that the feasibility of creating a CU is situationally dependent. For instance, a CU that diverts trade from international producers will not be replaced if the intra-CU producer that is eligible for duty-free entry is a high-cost producer.²¹ Such a CU would both divert trade and fail to create any new trade.

¹⁷ JACOB VINER, THE CUSTOMS UNION ISSUE 41 (1950).

¹⁸ JACOB VINER, THE CUSTOMS UNION ISSUE 42 (1950).

¹⁹ JACOB VINER, THE CUSTOMS UNION ISSUE 44 (1950).

²⁰ JACOB VINER, THE CUSTOMS UNION ISSUE 42-43 (1950).

²¹ JACOB VINER, THE CUSTOMS UNION ISSUE 48 (1950).

A more subtle point that is often overlooked in Viner's model is a consideration of the size of the CU being formed. He states that "[t]he greater the economic area of the tariff-levying unit, the greater is likely to be, other things being equal, the improvement in its terms of trade with the outside world resulting from its tariff".²² The larger the CU, the more likely it is that demand for goods will be diverted from imported goods to goods produced by fellow CU members. Therefore, goods exported from the customs territory are comparatively more valuable *vis-à-vis* imported goods. This component should be factored into the comparison of the CU's overall desirability by weighting its trade creating component accordingly. As applied, this weighing task could potentially make a CU worthwhile even though, strictly speaking, it creates less trade than it diverts because that difference is offset by an upswing in terms of intra-CU trade.

Viner does not limit his analysis, and the applicability of his model, to CUs; rather, it also applies to PTAs. Since a CU creates a single, economic market, it typically eliminates all internal trade barriers amongst its members. However in a PTA, restrictions on trade are often times piecemeal, allowing duty-free entry for some, but not all, goods from the other members of that agreement. This muddles the application of the economic model by requiring an analysis of the preferences granted and their respective trade creating and diverting effects, which must then be aggregated to determine the net effect. Although a more arduous computation, this model may be employed to ascertain the desirability of a PTA. The problem, though, that this uncovers is immediate: how do the countries choose preferential rules of origin for specific goods that have a net trade creating effect? Viner has little faith in the ability of governments to perform this task. "Preferential arrangements... can be, and usually are, selective, and it is possible, and in practice probable, that the preferences selected will be predominantly of the trade-diverting or injurious kind."²³

While the lasting impact of Viner's text always seems to derive from the illuminating model he proposed, the advances that *The Customs Union Issue* makes to international relations and economic history must not also be overlooked. Published in 1950, this book was written at a critical juncture in the development of the new world trade order. One overarching concern of this book is whether a CU or PTA presents a valid exception to the MFN obligation. A fundamental feature of any CU or PTA, whether it was a valid exception had not been explicitly considered in any authoritative manner, although it was widely practiced. Article 44 of the Havana Charter put this question to rest, at least for ITO Members.²⁴ Informatively Viner presents a compelling historical account that such agreements

²² JACOB VINER, *THE CUSTOMS UNION ISSUE* 55 (1950).

²³ JACOB VINER, *THE CUSTOMS UNION ISSUE* 50-51 (1950).

²⁴ JACOB VINER, *THE CUSTOMS UNION ISSUE* 112-19 (1950).

may be a valid exception in terms of public international law, though not expressed in these exact terms. The wide usage that is documented therein provides a persuasive argument for it.

Viner also considers the political nature of a CU or PTA, three factors of which are notable in his analysis. First, he articulates the problem of forming a CU or PTA amongst countries of varying size. Using the France-Monaco trade agreement as an example, Viner argues that the larger country will likely be able to exert an inordinate amount of control over the internal affairs of the smaller country.²⁵ Second, a CU is a more powerful bargaining force in terms of international relations than its countries would be acting individually or combined as a PTA.²⁶ And third, the economic integration of a CU is often subject to the political necessities prevailing between the countries which are parties to it. If tariff unity is no longer profitable for a country, its citizens and government will no longer want to abide by it. In such a case, the elimination of all international trade barriers may not be sustainable. "Relaxation of the tariff unity may then serve to strengthen the political union, or even be an essential requirement if the union is not to dissolve."²⁷

Some readers may question whether Viner's analysis, especially his insights that were not of an economic nature, is applicable today given that the ITO never came into existence and his book is more than a half-century in age. However, the crossroads in 1950 regarding multilateral trade liberalization may not be that different than the current impasse in the Doha Round:

In the international economic field, as in the field of international politics, this is a period of crisis. Effective solutions for crises are rarely easy to adopt or to execute. But if one looks only to the day, an apparently promising path to a solution can often be found whose first stages, if token in character, are fairly easy to pursue and whose later stages are pleasant to contemplate, though what is at its ultimate end is but a mirage. This, I fear, is the present-day role of customs union. Whether used as mere incantation against the evils resulting from present-day economic policy or vigorously prosecuted, it will in either case be unlikely to prove a practicable and suitable remedy for today's economic ills, and it will almost inevitably operate as a psychological barrier to the realization of the more desirable but less desired objectives of the Havana Charter – the balanced multilateral reduction of trade barriers on a non-discriminatory basis.²⁸

²⁵ JACOB VINER, THE CUSTOMS UNION ISSUE 82-84 (1950).

²⁶ JACOB VINER, THE CUSTOMS UNION ISSUE 56 (1950). For instance, the United States, under the Articles of Confederation, could not effectively bargain for effective trade concessions since each state had separate tariff regimes. *Id.*

²⁷ JACOB VINER, THE CUSTOMS UNION ISSUE 101 (1950).

²⁸ JACOB VINER, THE CUSTOMS UNION ISSUE 139 (1950).

The lasting impact of Professor Viner's work is his economic analysis of CUs and PTAs.

In comparison, Professor Gantz has not devoted a chapter or series of chapters to an economic discussion of RTAs. To be sure, economics are a factor important throughout *Regional Trade Agreements*, but economic theory is not discussed in so in-depth a manner as in *The Customs Union Issue*. Likely, the reason for this is that law students and practitioners, Professor Gantz's intended audiences, have already advanced beyond an introduction to international trade law course in which they should have gained a basic understanding of the economic effects of tariffs, and trade diversion. Charts and graphs, which show supply and demand curves, are absent, as that sort of theoretical economic analysis is not intended. A thorough discussion of economic analysis, in the form of dedicated chapters is beyond the scope of this work, but does not detract from the value of *Regional Trade Agreements* because of its many other virtues.

B. *Comparing James H. Mathis, Regional Trade Agreements in the GATT/WTO: Article XXIV and the Internal Trade Requirement (2002)*

If the intention of James Mathis was to create a comprehensive resource for Article XXIV of the GATT, he has succeeded admirably. In this book, Mathis presents an in-depth discussion of the development of most-favored nation (MFN) treatment, and how RTAs became exceptions to it; the exercise by CONTRACTING PARTIES of Article XXIV, and later Members utilizing that Article and its accompanying *Understanding* to form RTAs; the timidity of the WTO's response – both in dispute settlement and by the Committee on Regional Trade Agreements – to this rapid expansion; and suggestions for restraining RTAs to the limited purpose that the drafters' intended. Although the analysis contained in this book should not be minimized, there is an absence of any attention to RTAs that liberalize trade in services under Article V of the GATS and of agreements amongst developing countries which have been notified under the Enabling Clause. If included in a second edition, such an updated version of Mathis' book could rightfully claim to be the authoritative legal treatise on RTAs and CUs.

Picking up from the inter-war period, Mathis starts his tome by providing ample historical evidence of the discriminatory preferences of trade agreements prior to the GATT. Although focused on legal analysis, Mathis convincingly shows the origin of the regional preference in Article XXIV of the GATT by arguing that MFN status was previously restricted to bilateral agreements between regional

nations.²⁹ As a result, it was natural to confine this preference since bilateral or regional agreements that were already in existence were likely the sort contemplated by the CONTRACTING PARTIES.

After the GATT became effective, the first substantive test under Article XXIV occurred through the working group review of the European Economic Community-Overseas Association in 1958. The arrangement of the underlying agreement – six European countries granting eighteen free-trade areas to former colonies – effectively encapsulated the most difficult interpretive issues in this Article.³⁰ The method of analysis employed by the working group carried on and was, in part, a contributing factor to some systemic problems with Article XXIV scrutiny.

While there were problems of legal ambiguity within Article XXIV, the institutional review mechanism highlighted further practical hurdles. For instance, “Working Group members are said to be placed in the problematic position of objecting to a formation when it discriminates against only a portion of their external trade, but nevertheless be compelled to support it when discriminating against substantially all of their trade.”³¹ In the early 1990s, two GATT panels were formed to provide hopeful clarity to these issues in *Bananas I & II*. Although neither report was adopted, each clarifies key issues, especially establishing that the responding party (*i.e.*, the parties who formed the RTA) has the burden to prove that they have complied with Article XXIV since it is an exception to Article I MFN treatment.³²

With the aid of the *Understanding on Article XXIV* that was a product of the Uruguay Round, a Committee on Regional Trade Agreements (CRTA) was established in 1996.³³ The CRTA reviews new and existing RTAs, as well as

²⁹ See JAMES H. MATHIS, REGIONAL TRADE AGREEMENTS IN THE GATT/WTO: ARTICLE XXIV AND THE INTERNAL TRADE REQUIREMENT 13-29(2002).

³⁰ JAMES H. MATHIS, REGIONAL TRADE AGREEMENTS IN THE GATT/WTO: ARTICLE XXIV AND THE INTERNAL TRADE REQUIREMENT 55-68 (2002).

³¹ JAMES H. MATHIS, REGIONAL TRADE AGREEMENTS IN THE GATT/WTO: ARTICLE XXIV AND THE INTERNAL TRADE REQUIREMENT 84 (2002) (citing F.A. Haight, *Customs Unions and Free Trade Areas Under GATT: A Reappraisal*, 6 J. OF WORLD TRADE L. 391, 394 (1972)).

³² JAMES H. MATHIS, REGIONAL TRADE AGREEMENTS IN THE GATT/WTO: ARTICLE XXIV AND THE INTERNAL TRADE REQUIREMENT 87-100 (2002).

³³ JAMES H. MATHIS, REGIONAL TRADE AGREEMENTS IN THE GATT/WTO: ARTICLE XXIV AND THE INTERNAL TRADE REQUIREMENT 131 (2002).

systemic issues that may become apparent.³⁴ A more exacting scrutiny, though, by the CRTA is yet to be realized. Article XXIV, Mathis argues, has been exploited as a legal loophole to MFN treatment, not as a mechanism to fully liberalize trade between parties to an RTA but to conceal disguised discrimination.³⁵ A major culprit to this aim is the use of preferential rules of origin.³⁶ Another culprit is regional safeguard as applied in an RTA, such as safeguards employed by the United States, against Canadian softwood lumber.³⁷

Given the exploitation of Article XXIV, what is the future of regionalism, and how must the WTO respond to it? Mathis opines that regionalism may be further solidified, especially if a regional Asian trading bloc is successfully formed and the Free Trade Agreement of the Americas is established.³⁸ If that occurs, the WTO may have to battle to defend its continued relevance. One way that such relevance could be demonstrated is if the internal trade requirement is subject to GATT obligations.³⁹ Although such an enactment would require a subsequent multilateral modification of the WTO *Understanding* and, thereby, be very difficult to accomplish, it represents a legal avenue, which would more effectively enforce trade liberalization.

Although not so in-depth as the work by Mathis, *Regional Trade Agreements* also provides readers with a relevant overview of the relationship between GATT, Article XXIV and RTAs. If by chance (a very small chance) an RTA is comprised exclusively of non-WTO members, Article XXIV retains its importance because of the likelihood that at least some of those countries are or will be seeking accession to the WTO. Therefore, a discussion of Article XXIV is vital to any discussion of RTAs, and has not been overlooked by Professor Gantz.

Professor Gantz discusses the substantive and procedural requirements found in Article XXIV, shortcomings in the GATT/WTO system of oversight, as well as the history and development of Article XXIV, including a discussion of the *Understanding to GATT 1994*. Professor Gantz also briefly discusses the *Enabling*

³⁴ JAMES H. MATHIS, REGIONAL TRADE AGREEMENTS IN THE GATT/WTO: ARTICLE XXIV AND THE INTERNAL TRADE REQUIREMENT 131 (2002).

³⁵ JAMES H. MATHIS, REGIONAL TRADE AGREEMENTS IN THE GATT/WTO: ARTICLE XXIV AND THE INTERNAL TRADE REQUIREMENT 134-43 (2002).

³⁶ See JAMES H. MATHIS, REGIONAL TRADE AGREEMENTS IN THE GATT/WTO: ARTICLE XXIV AND THE INTERNAL TRADE REQUIREMENT 148-70 (2002).

³⁷ JAMES H. MATHIS, REGIONAL TRADE AGREEMENTS IN THE GATT/WTO: ARTICLE XXIV AND THE INTERNAL TRADE REQUIREMENT 183-88 (2002).

³⁸ JAMES H. MATHIS, REGIONAL TRADE AGREEMENTS IN THE GATT/WTO: ARTICLE XXIV AND THE INTERNAL TRADE REQUIREMENT 259-62 (2002).

³⁹ JAMES H. MATHIS, REGIONAL TRADE AGREEMENTS IN THE GATT/WTO: ARTICLE XXIV AND THE INTERNAL TRADE REQUIREMENT 265-85 (2002).

Clause, which is provided for the reader in the index; the scope of the Article XXIV exception; conflicts between the dispute settlement mechanisms found in RTA provisions and the WTO's Dispute Settlement Understanding, as well as GATS Article V. This discussion provides readers with a solid introduction to, and understanding of the many issues of GATT/WTO law in relation to the formation of RTAs, and fits nicely into this text, which is meant to provide readers not only with an introduction to Article XXIV, but also to provide them with a more comprehensive discussion of RTAs.

Professor Gantz provides a short discussion of the substantive requirements of Article XXIV. He discusses the Article XXIV requirement that valid RTAs must in fact cover "substantially all trade", a term used in the GATT, and a legal requirement for RTAs which remains ambiguous. He then moves on to discuss the "reasonable period of time requirement", which was also open to interpretation under GATT, but further defined in the *Understanding*.

Regional Trade Agreements then discusses the requirement that RTAs must not create duties or other regulations which are "higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free-trade area."⁴⁰ A case-by-case analysis is required when considering the effects of an RTA on third countries. Applied tariff rates and the volume of trade affected are considered. Professor Gantz discusses the *Understanding*, which in fact resolved issues in determining whether an RTA in fact violated this provision of Article XXIV. "[*The Understanding*] confirms that an overall assessment is required, provides guidance for the methodology, and affirms that the applied (effective) rates of duty should be used for the calculations", while leaving the meaning of "other regulations of commerce" ambiguous.⁴¹ Procedural requirements, including transparency and the *Transparency Mechanism* of 2006, notification, consultations and negotiations are also discussed. Professor Gantz also briefly considers GATS Article V and RTA formation, including its weaker standard of "substantial sectoral coverage," as opposed to the GATT requirement of "substantially all trade".⁴²

Professor Gantz has dedicated an entire chapter to a discussion of GATT/WTO law in relation to the creation of RTAs. He also discusses such issues as the scope of the exception found in Article XXIV, the *Enabling Clause*, and conflicts that have arisen between Article XXIV and some dispute settlement

⁴⁰ GATT, Art. XXIV (5).

⁴¹ DAVID GANTZ, REGIONAL TRADE AGREEMENTS: LAW, POLICY AND PRACTICE 39 (2009).

⁴² DAVID GANTZ, REGIONAL TRADE AGREEMENTS: LAW, POLICY AND PRACTICE 44 (2009).

mechanisms found in the provisions of RTAs such as NAFTA. Gantz provides a high level of detail in his discussion of RTAs in the GATT/WTO system, and readers will leave this section with the ability to intelligently address problems associated with this system of law, its development, and shortcomings.

C. *Comparing Ralph Nader, et al., The Case Against Free Trade: GATT, NAFTA, and the Globalization of Corporate Power (1993)*

The Case Against Free Trade presents a forceful, if not polemical, attack against NAFTA and the anticipated advancements of the Uruguay Round. This book consists of fifteen essays written by, what Ralph Nader dubs, "leading citizen-oriented trade experts".⁴³ In reading these essays, it is clear that the authors are more comfortable wearing their citizen advocate hat, than one of a trade expert. Even though the technical discussion of trade law or economics leaves something to be desired at times, lack of formal training and practice in trade law should not be equivocated with a lack of argumentation. The criticisms levied herein question, *inter alia*, the rollback of more stringent labor, environmental and safety standards within a country subject to more lax international requirements; the lack of transparency, and democratically disenfranchising effects of trade negotiations and dispute settlement; and exploitation by transnational corporations of such agreements in manners that may not respect the environment or employment of locations to which these agreements enable them to relocate.

Ralph Nader both introduces the volume and states the bulk of the arguments in the opening essay. He has three principal arguments, all of which recur throughout *The Case Against Free Trade*. First, the decision-making process establishing trade agreements and their maintenance, especially concerning dispute resolution, is shrouded in mystery. Negotiated by bureaucrats behind closed doors, these agreements leave little room for input from affected citizens. "Every element of the negotiation, adoption, and implementation of the trade agreements is designed to foreclose citizen participation or even awareness."⁴⁴ Furthermore, disputes arising under such agreements, the vast majority of which concern the consistency of a party's laws with it, are similarly void of the greater public. If such a tribunal determines that a party's law is in violation of an agreement, that country is obligated to reform it accordingly.

⁴³ Ralph Nader, *Introduction: Free Trade and the Decline of Democracy, in THE CASE AGAINST FREE TRADE: GATT, NAFTA, AND THE GLOBALIZATION OF CORPORATE POWER* 1, 12 (1993).

⁴⁴ Ralph Nader, *Introduction: Free Trade and the Decline of Democracy, in THE CASE AGAINST FREE TRADE: GATT, NAFTA, AND THE GLOBALIZATION OF CORPORATE POWER* 1, 3 (1993).

Transparency is a topic discussed throughout *Regional Trade Agreements*, which includes recent developments such as the *Transparency Mechanism* of 2006. Nader argues that more powerful interests have trumped the ordinary citizen's place at the trade-negotiating table, and have also clouded the negotiations to a point at which the ordinary citizen is not able to influence, or even know what developments are taking place. Professor Gantz does not specifically discuss the citizen's place in negotiations. However:

The American political system itself is unique when it comes to trade negotiations. As one prominent foreign negotiator has observed, "[W]hen you negotiate with the U.S., you have no choice but to negotiate not only with the administration but also with the United States Congress, U.S. business and industry and the civil society."⁴⁵ The same diplomat noted that it takes time for the U.S. to reach consensus at the inter-agency level, to conduct necessary consultations with Congress and business and to reflect the views of a vibrant civil society.⁴⁶

Professor Gantz makes it apparent that American citizens are important factors in the negotiating process, even when not directly participating. This is provided for readers by the excerpt in which *Regional Trade Agreements* quotes a foreign diplomat who has participated in such negotiations. This is in contrast to Activist Nader, who believes that ordinary Americans have become completely disenfranchised from international trade negotiations.

Although the lack of transparency of these institutions is well documented and a worthy target of criticism, Nader and some other authors in this volume likely diminish valid points of contention by their tone and exaggerated statements. Although assuredly Nader must not believe this, he refers to the United States Trade Representative – a Presidential appointee – as an autocrat.⁴⁷ Frustration with the NAFTA and Uruguay Round of negotiations is apparent from Nader's essay, and perhaps likely given his founding role in Public Citizen, a consumer advocacy group that enjoyed great successes through petitioning federal, state, and local governments. However, extreme claims only serve to dissuade readers that are not predisposed to accept Nader's argument full stop prior to reading. Professor Gantz

⁴⁵ DAVID GANTZ, *REGIONAL TRADE AGREEMENTS: LAW, POLICY AND PRACTICE* 83 (2009), citing Tommy T.B. Koh, *The USSFTA: A Personal Perspective*, in *THE UNITED STATES SINGAPORE FREE TRADE AGREEMENT: HIGHLIGHTS AND INSIGHTS* 3, 10 (Tommy Koh & Chang Li Lin, eds., World Scientific publ., 2004).

⁴⁶ DAVID GANTZ, *REGIONAL TRADE AGREEMENTS: LAW, POLICY AND PRACTICE* 83 (2009).

⁴⁷ Ralph Nader, *Introduction: Free Trade and the Decline of Democracy*, in *THE CASE AGAINST FREE TRADE: GATT, NAFTA, AND THE GLOBALIZATION OF CORPORATE POWER* 1, 1 (1993).

has no such problem. His goal is neither to condemn nor to praise RTAs, but is an acknowledgement of both the problems and benefits of RTAs, and that they are likely to be prominent features of global trade for the foreseeable future. As such RTAs will continue to be factors that must be dealt with by international lawyers, business people, and citizens for long to come.

Second, Nader *et al.*, argue that there is one exception to the mystery surrounding the negotiation of free trade agreements; namely, input by supranational corporations. In referring to the drafting of the NAFTA, Nader puts it this way:

American Express, Cargill, Imperial Chemical and their allies have managed to turn trade talks into a debate over whether nations may retain their sovereign right to protect their citizens from harm. Global commerce without commensurate democratic global law may be the dream of corporate chief executive officers, but it would be a disaster for the rest of the world with its ratcheting downwards of workers, consumer, and environmental standards.⁴⁸

Nader suggests that in seeking the ability to potentially maximize profit, corporations influence the negotiation of these agreements. Edmund Brown notes that the American textiles industry was able to put a yarn-forward preferential rule of origin into NAFTA to protect its fledgling market share.⁴⁹ Similarly, Lori Wallach argues that preferential rules of origin and other international trade rules are all infiltrated with an inherent pro-corporate bias.⁵⁰ More pointedly, “NAFTA is a guide to political and economic clout in North America. The agreement favors multinational corporations and big investors at the expense of workers, farmers, small businesses, and the environment”.⁵¹

Third, environmental, labor, and safety standards are often reduced through the operation of trade agreements. The countries that enter into these agreements endeavor to subjugate their laws to the international standards found within them. However, the commitments contained in these agreements are often the least

⁴⁸ Ralph Nader, *Introduction: Free Trade and the Decline of Democracy*, in *THE CASE AGAINST FREE TRADE: GATT, NAFTA, AND THE GLOBALIZATION OF CORPORATE POWER* 1, 2 (1993).

⁴⁹ Edmund G. Brown, Jr., *Free Trade is Not Free*, in *THE CASE AGAINST FREE TRADE: GATT, NAFTA, AND THE GLOBALIZATION OF CORPORATE POWER* 65, 68 (1993).

⁵⁰ Lori Wallach, *Hidden Dangers of GATT and NAFTA*, in *THE CASE AGAINST FREE TRADE: GATT, NAFTA, AND THE GLOBALIZATION OF CORPORATE POWER* 23, 27 (1993).

⁵¹ Thea Lee, *Happily Never NAFTA: There's No Such Thing as a Free Trade*, in *THE CASE AGAINST FREE TRADE: GATT, NAFTA, AND THE GLOBALIZATION OF CORPORATE POWER* 70, 70 (1993).

common denominator, diminishing whatever protections may have been codified in domestic legislation.⁵² For instance, environmental restrictions on the production of a certain product may very well be held invalid as a non-tariff barrier.⁵³ In this wake, corporations seize the moment. The current hyper-mobility of capital, factors of production, and even corporate charters have led to the strategic relocation of the mechanisms of profit maximization in these newly “free” markets.⁵⁴

In his discussion of NAFTA, Professor Gantz specifically addresses its relationship to labor and environmental standards, just as he does in his discussion of other RTAs. Professor Gantz reports that NAFTA itself discourages an environmental race to the bottom in an effort to attract investment. It does this by establishing “a hierarchy in which in the event of conflicts between NAFTA and three major environmental agreements (‘MEAs’) and two regional agreements the provisions of the environmental agreements prevail” (footnotes omitted).⁵⁵ Professor Gantz acknowledges that there are problems with these environmental agreements.

For instance, the North American Agreement on Environmental Cooperation (NAAEC) cannot prevent a Party from weakening its environmental standards, but at the same time it requires NAFTA Parties to enforce whatever environmental standards are currently enacted. Along with the North American Development Bank, and the Border Environment Cooperation Commission, NAFTA “represents what was at the time the most significant effort to incorporate environmental concerns into a multilateral agreement”.⁵⁶ Professor Gantz has provided the reader with both the problems, and advancements that NAFTA provided for environmental protection. Because of this Professor Gantz has presented information in a truly scholarly manner, unlike Nader’s blunt condemnation of such agreements.

⁵² Ralph Nader, *Introduction: Free Trade and the Decline of Democracy*, in *THE CASE AGAINST FREE TRADE: GATT, NAFTA, AND THE GLOBALIZATION OF CORPORATE POWER* 1, 6 (1993).

⁵³ Lori Wallach, *Hidden Dangers of GATT and NAFTA*, in *THE CASE AGAINST FREE TRADE: GATT, NAFTA, AND THE GLOBALIZATION OF CORPORATE POWER* 23, 40 (1993).

⁵⁴ See Edmund G. Brown, Jr., *Free Trade is Not Free*, in *THE CASE AGAINST FREE TRADE: GATT, NAFTA, AND THE GLOBALIZATION OF CORPORATE POWER* 65, 65-66 (1993).

⁵⁵ DAVID GANTZ, *REGIONAL TRADE AGREEMENTS: LAW, POLICY AND PRACTICE* 146 (2009).

⁵⁶ DAVID GANTZ, *REGIONAL TRADE AGREEMENTS: LAW, POLICY AND PRACTICE* 146 (2009).

Regional Trade Agreements also addresses the issue of labor under NAFTA. The Agreement mentions labor only in its preamble. It has no provisions directly related to the topic,⁵⁷ but rather deals with it through a side agreement. Professor Gantz discusses the North American Agreement on Labor Cooperation (NAALC), and the Commission for Labor Cooperation created by it, as well as the presence in each Party of a National Administrative Office. Professor Gantz acknowledges that the NAALC is a weaker institution than the NAAEC. Its weaknesses include that “each Party retains the right to set and apply its own labor standards”.⁵⁸ Because of its problems, no labor arbitration has occurred. However, ministerial consultations have taken place, and include issues such as the “protection of migrant workers, freedom of association, protection of the right to organize and to collective bargaining”⁵⁹ among others.

NAFTA’s lack of provisions directly related to labor might be considered a worthy topic of criticism, at least in developed countries, and is a criticism the U.S. has attempted to resolve:

In a major departure from NAFTA, but consistent with other post-NAFTA FTAs such as those with Chile and Singapore, labor (and environmental) provisions are incorporated in the body of CAFTA-DR rather than in separate “side” agreements. In Chapter 16 [of CAFTA-DR], the Parties must “strive to assure” that their laws are consistent with their commitments under International Labor Organization agreements and with “core” labor principles specified in Chapter 16. This language has been criticized because it is not an absolute obligation, i.e., the provisions does not say “shall assure...” as in the provisions of the Peru Trade Promotion Agreement and other very recent U.S. FTAs (footnotes omitted).⁶⁰

Professor Gantz has acknowledged, albeit in a different method, some of the same shortcomings complained of by Nader; the allowance of parties to weaken their current labor standards, and the absence of any labor provisions within the Agreement. However, in subsequent agreements the U.S. has in fact incorporated labor provisions into the body of texts, and has made advancements towards creating more stringent labor obligations within them.

⁵⁷ DAVID GANTZ, REGIONAL TRADE AGREEMENTS: LAW, POLICY AND PRACTICE 149 (2009).

⁵⁸ DAVID GANTZ, REGIONAL TRADE AGREEMENTS: LAW, POLICY AND PRACTICE 150 (2009).

⁵⁹ DAVID GANTZ, REGIONAL TRADE AGREEMENTS: LAW, POLICY AND PRACTICE 151 (2009).

⁶⁰ DAVID GANTZ, REGIONAL TRADE AGREEMENTS: LAW, POLICY AND PRACTICE 194 (2009).

Professor Gantz also addresses the criticism that NAFTA is a source of job loss within the United States:

The studies do not support widespread allegations that NAFTA has resulted in net U.S. job losses, although accurate estimates are difficult to make. Job losses are relatively easy to document (since factory closings are public knowledge), while incremental job gains added by U.S. firms when exports of goods and services grow are seldom publicly discussed. Much of the public criticism of NAFTA originates with consistently anti-NAFTA, anti-trade, anti-globalization groups such as the Economic Policy Institute, which alleges that NAFTA has cost the United States more than a million jobs, and denounced the quality (although not the numbers) of jobs created in Mexico and Canada. Separating the effects of NAFTA from the growth of Chinese exports to the United States and the “offshoring” of service jobs to India and elsewhere seems virtually impossible.⁶¹

Throughout *Regional Trade Agreements* Professor Gantz addresses concerns with agreements that have also been addressed by activists such as Nader and others. There is no single location in the text that discusses these issues. Rather they are spread throughout the text, and are found in sections dedicated to a particular agreement, and to its particular provisions. *Regional Trade Agreements* has therefore moved beyond a theoretical discussion of RTAs, and addresses real world problems and controversies that have arisen because of them.

D. *Comparing Jagdish Bhagwati, Termites in the Trading System: How Preferential Agreements Undermine Free Trade (2008)*

Jagdish Bhagwati’s latest book, *Termites in the Trading System: How Preferential Agreements Undermine Free Trade*, seeks to update his initial metaphor of PTAs as a spaghetti bowl.⁶² This work does not intend to carve out novel arguments, either policy-wise or in terms of economic theory, but instead revisits previous ideas Professor Bhagwati has put forth and responds to contemporary commentary. Long on praise for his own foresight, Professor Bhagwati uses this opportunity to point out times where he has cautioned against the use of PTAs. As a “Council on Foreign Relations Book”, its intended audience seems to be policy-makers and elected official who seek a deeper understanding of international trade, not scholars or academics. To this end, it is an admirable introduction to some problems inherent in PTAs. Most generally, Professor Bhagwati appears to have two main objectives in this book, namely: to explain the explosion of PTAs; and,

⁶¹ DAVID GANTZ, REGIONAL TRADE AGREEMENTS: LAW, POLICY AND PRACTICE 152-153 (2009).

⁶² Professor Gantz uses Professor Bhagwati’s metaphor in *Regional Trade Agreements*.

to argue that the recent explosion in their usage has undermined the world trading system.

The recent explosion of PTAs can best be understood by considering how they may be legally justified, and their economic desirability, at least as understood by those who have not read or do not understand Professor Bhagwati's work. As an exception to MFN treatment, Article XXIV of the GATT was intended to govern when bilateral or regional trade agreements could be legitimately formed. Evoking this exception, at least in the drafting of the Havana Charter, was intended to be restricted to customs unions.⁶³ The United States was a proponent of this restriction, out of fear that allowing other preferential agreements could undermine the preferential treatment of MFN status. This support quickly fell by the wayside as the U.S. realized that in the trade agreement being simultaneously negotiated with Canada, it did not want to take the economically unifying steps required to form a customs union.⁶⁴

Although a laxer version of GATT Article XXIV likely resulted as the U.S. withdrew its insistence on limiting this exception to customs unions, it was not until the 1960s that PTAs began to flourish. In this period, which Professor Bhagwati calls the "First Regionalism", there were unsuccessful attempts to form regional trading blocs in East Africa and Latin America.⁶⁵ More importantly, it was during this period the European Common Market was first established. Although it did not technically comply with Article XXIV's strictures, the United States – which was the only other power within the GATT system that could have successfully challenged this arrangement – did not press the point, because it was "[seeking] a potential counterweight to the Soviet Union and its looming threat to Western Europe".⁶⁶

With the Generalized System of Preferences (GSP) and the *Enabling Clause*, developing countries were provided another route to form PTAs amongst themselves. Although an overstatement in legal principle but perhaps not practice, Professor Bhagwati asserts that this alternative avenue for PTA formation eviscerates all of the requirements of Article XXIV.⁶⁷ As the "Second

⁶³ JAGDISH BHAGWATI, *TERMITES IN THE TRADING SYSTEM: HOW PREFERENTIAL AGREEMENTS UNDERMINE FREE TRADE* 19 (2008).

⁶⁴ JAGDISH BHAGWATI, *TERMITES IN THE TRADING SYSTEM: HOW PREFERENTIAL AGREEMENTS UNDERMINE FREE TRADE* 20 (2008).

⁶⁵ JAGDISH BHAGWATI, *TERMITES IN THE TRADING SYSTEM: HOW PREFERENTIAL AGREEMENTS UNDERMINE FREE TRADE* 29-30 (2008).

⁶⁶ JAGDISH BHAGWATI, *TERMITES IN THE TRADING SYSTEM: HOW PREFERENTIAL AGREEMENTS UNDERMINE FREE TRADE* 22 (2008).

⁶⁷ JAGDISH BHAGWATI, *TERMITES IN THE TRADING SYSTEM: HOW PREFERENTIAL AGREEMENTS UNDERMINE FREE TRADE* 11 (2008).

Regionalism” took full effect in the 1990s, it may be argued that cover under *the Enabling Clause* may not have any effect of lowering the threshold for PTAs because powerful players within GATT/WTO have already diminished it. In this period the United States reversed course by pursuing trade liberalization through multilateral, regional, and bilateral means, not just the former.⁶⁸ Consequently with the explosion in usage of PTAs, scrutiny under the ill-drafted Article XXIV has significantly waned.

Professor Bhagwati then turns his attention to examining exactly how the ubiquity of PTAs undermines multilateral trade liberalization. Recounting Jacob Viner’s seminal work *The Customs Unions Issue*, he argues that policy makers have either forgotten or have always failed to understand that a PTA is only beneficial if it creates more trade than it diverts.⁶⁹ The inability to recognize this fundamental point in economic analysis has led Professor Bhagwati to articulate three systemic concerns for PTAs. First, since a country may be party to multiple PTAs, the same commodity may be subject to tariffs at different preferential levels.⁷⁰ Not only is this a problem for corporations, which wish to make informed decisions regarding investment, locating production, and many other matters, but it also illustrates that MFN treatment has, in essence, become non-preferential. For instance, Professor Bhagwati states that “[t]he European Union . . . applied its MFN tariff to only six countries – Australia, New Zealand, Canada, Japan, Taiwan, and the United States – with all other nations enjoying *more favorable* tariffs”.⁷¹

Second, preferential rules of origin, which are both ambiguous and unique to each PTA, protect industries and corporations with powerful lobbies, thereby undermining the trade creating effects such agreement might have.⁷² Third, powerful countries (referred to by Professor Bhagwati as “hegemon”) are forcing non-trade related aspects into these agreements. While Professor Bhagwati criticizes labor and environmental standards, his main target is intellectual

⁶⁸ JAGDISH BHAGWATI, *TERMITES IN THE TRADING SYSTEM: HOW PREFERENTIAL AGREEMENTS UNDERMINE FREE TRADE* 35-39 (2008).

⁶⁹ JAGDISH BHAGWATI, *TERMITES IN THE TRADING SYSTEM: HOW PREFERENTIAL AGREEMENTS UNDERMINE FREE TRADE* 52 (2008). In an entertaining passage, Bhagwati says that he confronted Larry Summers, who was then the Vice President of the World Bank, with this point. Predictably, persuasion had little effect on either party, leading to Bhagwati putting his point as follows: “If I was asked to advise the Treasury in Washington, D.C., and argued that all taxes were equally acceptable, would you not summarily ask me to return to Columbia, where I could do less damage?” *Id.*

⁷⁰ JAGDISH BHAGWATI, *TERMITES IN THE TRADING SYSTEM: HOW PREFERENTIAL AGREEMENTS UNDERMINE FREE TRADE* 61 (2008).

⁷¹ JAGDISH BHAGWATI, *TERMITES IN THE TRADING SYSTEM: HOW PREFERENTIAL AGREEMENTS UNDERMINE FREE TRADE* 14 (2008) (emphasis original).

⁷² JAGDISH BHAGWATI, *TERMITES IN THE TRADING SYSTEM: HOW PREFERENTIAL AGREEMENTS UNDERMINE FREE TRADE* 66-70 (2008).

property. For instance, Bhagwati notes that in the United States' negotiation of a PTA with the South African Customs Union (SACU), it demanded that U.S. domestic standards that were far in excess of TRIPS be incorporated.⁷³

Professor Bhagwati sees no easy solution to solving the problems presented by PTAs. He offers that a solution might be found in a continued reduction of MFN rates. Because preferential rates are determined proportionally, having a lower baseline rate upon which they are based will diminish the effect of these agreements.⁷⁴ But, Professor Bhagwati is dubious, perhaps correctly so, as to the prospects for a solution as politically untenable as this.

Professor Bhagwati recognizes problems with RTAs and presents us with valid arguments against their continued proliferation. In comparison, Professor Gantz also addresses problems associated with the increasing use of RTAs, and in fact cites Professor Bhagwati several times throughout his book. However, because Professor Bhagwati intends for *Termites in the Trading System* to be read by policy makers and trade negotiators he has not presented the flip side of the coin; there are advantages to be gained through the negotiation of RTAs.

Professor Gantz discusses both advantages and costs of RTAs, both of which must be acknowledged by students of international trade law in order to fully understand the complexity of competing policies in global and regional trade negotiations. Although these works are intended for different audiences, Professor Gantz easily provides the superior work. That is because he acknowledges both the costs and advantages of RTAs. Professor Gantz dedicates about equal space to each, albeit with slightly more space dedicated to the disadvantages present with increased regionalism.

An advantage discussed by Professor Gantz is the fact that some RTAs, like NAFTA have in fact eliminated virtually all tariffs between its parties. This is a goal that has not even come close to realization in Geneva. Another advantage is the greater ease with which negotiations can be conducted when they are between smaller numbers of countries, contrasted with the complexity of negotiations between all WTO Members in Geneva. A third possible advantage is the liberalization of markets between the parties, and continued protection from the threat of damage that might be done to domestic industries by non-party countries. Also, in contrast to Professor Bhagwati, Gantz addresses the possibility that by allowing the discussion of globally unpopular issues such as the environment,

⁷³ JAGDISH BHAGWATI, *TERMITES IN THE TRADING SYSTEM: HOW PREFERENTIAL AGREEMENTS UNDERMINE FREE TRADE* 72-73 (2008). Professor Bhagwati also argues the only thing trade-related about TRIPS is its name. *Id.*

⁷⁴ JAGDISH BHAGWATI, *TERMITES IN THE TRADING SYSTEM: HOW PREFERENTIAL AGREEMENTS UNDERMINE FREE TRADE* 97-100 (2008).

human rights, and intellectual property an advantage is actually gained rather than a disadvantage.

Because RTAs are a threat to global rounds of negotiations, they may also serve as a stimulus for the completion of those negotiations, and might also discourage moves towards protectionism:

There is also a persuasive argument that a nation that makes internal reforms as required by a regional trade agreement is less likely to revert to protectionist policies, even with regime change. Such regressions would likely violate the agreement and trigger either retaliatory acts or requests for dispute settlement by other agreement parties. Some may criticize this loss of sovereignty, in part because RTAs do restrict the flexibility of members to take unilateral action, as do the WTO agreements. NAFTA was effectively tested in this manner early on, in December 1994, when Mexico drastically devalued its currency and raised tariffs for virtually all of its trading partners except those with which it had free trade agreements (footnotes omitted).⁷⁵

Because *Regional Trade Agreements* is a textbook, Professor Gantz also discusses the many disadvantages of RTAs. Professor Gantz specifically discusses the inherently discriminatory nature of RTAs in relation to MFN status.

The proliferation of RTAs has caused an explosion in treatment that is more preferential than that of MFN status. Professor Bhagwati has complained of this result. Professor Gantz notes that this leads to an environment of discrimination rather than to an environment of non-discrimination, which is the intended result of MFN status. The complex rules of origin generally found within RTAs, and their problems are also discussed. Rules of origin are necessary in RTAs to ensure that preferential treatment granted by them is not also granted to non-parties. However, this creates problems for officials and businesses, which have to understand a complex set of rules in order to apply the RTAs preferential rules correctly.

Regional Trade Agreements further addresses the costs of regionalism by considering the possibility that negotiating imbalances might exist between potential parties to an RTA. Imbalances are often present when one party to the proposed RTA is much more economically powerful than the other potential parties. This allows the stronger party to force certain unpopular provisions into the RTA. Among other problems, this may in fact erode the sovereignty of the weaker party. Professor Gantz also discusses Professor Bhagwati's metaphor of the

⁷⁵ DAVID GANTZ, *REGIONAL TRADE AGREEMENTS: LAW, POLICY AND PRACTICE* 19 (2009).

overlapping system of RTAs as a spaghetti bowl, with many different preferences and rules, which serve to confuse officials, and businesses alike.

In brief, Professor Gantz introduces readers to both potential advantages gained through the use of RTAs, and to the costs associated with increasing regionalism. Discussing all aspects of an issue is important in any analytical text, especially so if the text is meant to educate the world's next generation of trade attorneys. Professor Gantz does an admirable job of presenting both the costs and benefits of regionalism, and cites renowned academics like Professor Bhagwati. He does all this in sharp contrast to the style adopted by some academics, like Professor Bhagwati.

VIII. CONCLUSION – A FINE POSITION THAT ADDS VALUE

Each of these five works on RTAs is substantively related, and together they form a veritable collection of thought on the subject. Professor Mathis discusses GATT Article XXIV. Professor Viner analyzes and discusses the economics of RTAs and notes problems which may occur, even before RTAs came to be widely used. Professor Bhagwati argues against the continuation of movement towards increased regionalism, by addressing problems it causes. Activist Nader presents an anti-free trade policy argument which is not academic in nature, but is important to address for many reasons, the primary one being that he influences American Citizens who vote and own businesses. *Regional Trade Agreements* addresses all of these issues, to a greater or lesser degree, and more.

In other words, Professor Gantz's book not only fits nicely into this library, but adds value to it. His discussion of RTAs is not restricted to policy orientation, as is the treatment in the works by Professor Bhagwati and Activist Nader. Professor Gantz discusses many more aspects of RTAs than just Article XXIV, unlike Professor Mathis. And, he moves beyond the economics of RTAs, which is the focus of Professor Viner.

By presenting a comprehensive introduction both to RTAs in general, and by providing comprehensive introductions to many RTAs that are in force throughout the world today, Professor Gantz has written a text that should be used by both practitioners and students who wish to gain an understanding of RTAs and their relationship with international trade and foreign relations.

Is there, then, a shortcoming of *Regional Trade Agreements*? Indeed, there are – as there is of any book. First, *Regional Trade Agreements* leaves the reader wanting more. By design, the book provides a brief introduction to RTAs. Arguably, restricting the work to 507 pages is actually the greatest of advantages. Within that page constraint, the introduction is very thorough, and many important agreements

are reviewed. Second, there is the inconvenience of the occasional typo, which might break the otherwise breezy flow of the prose. However, most readers appreciate that typos happen, particularly in a first edition book. All-in-all, *Regional Trade Agreements* has been a very worthwhile read, and the next edition, should there be one, will be even better.