

Sugar and the Making of International Trade Law.

By Michael Fakhri. Cambridge, New York: Cambridge University Press, 2014. Pp. xvii, 250. Index. \$99.

The importance of sugar in international trade cannot be overstated. Consider the following news headlines: Last year, the negotiations of the massive Trans-Pacific Partnership (TPP) (nearly 40 percent of global gross domestic product (GDP)) were derailed after Australia demanded, and U.S. negotiators rejected, a better deal for the southern nation's sugar producers.¹ Similarly, the Dominican Republic-Central America Free Trade Agreement almost failed after U.S. legislators complained about reducing import taxes for sugar from these poor countries,² and the North American Free Trade Agreement (NAFTA) had to be "renegotiated" when the U.S. Congress threatened to withdraw support for a signed (yet unratified) treaty because of sugar-related provisions.³

Anyone presented with these headlines would assume that sugar is a huge contributor to the local economy and a substantial source of employment in the United States. Not so. According to the U.S. Department of Agriculture, the total output of U.S. farms engaged in agriculture-related industries as a whole is about 1 percent of the nation's GDP. By some accounts, sugar represents less than 2 percent of the value of all U.S. crop production. Sugarcane and sugar beet farms comprise at most six thousand American farmers.⁴

¹ *Australia Walks Away from Trans-Pacific Partnership Trade Deal Talks*, GUARDIAN, July 31, 2015, at <http://www.theguardian.com/business/2015/aug/01/australia-walks-away-from-trans-pacific-partnership-trade-deal-talks>.

² Paul Blustein, *Sugar Sours CAFTA Hearing*, WASH. POST, Apr. 14, 2005, at <http://www.washingtonpost.com/wp-dyn/content/article/2005/04/13/AR2005041302088.html>.

³ Mary Anastasia O'Grady, *Clinton's Sugar Daddy Games Now Threaten NAFTA's Future*, WALL ST. J., Dec. 20, 2002, at A15.

⁴ USDA Economic Research Service, *Ag and Food Statistics: Charting the Essentials, What Is Agriculture's Share of the Overall U.S. Economy?* (Feb. 17, 2016), available at <http://ers.usda.gov/data-products/ag-and-food-statistics-charting-the-essentials/ag-and-food-sectors-and-the-economy.aspx>.

How is it possible then that the sugar industry can outperform other, more wealth- and job-producing industries in consequential battles over the future of global commerce? The answer may lie in the history and political influence of sugar. The United States has long worked to protect its sugar producers from low-cost producers abroad. Sugar's protected status is enhanced by the hefty donations of the industry's political action committee (PAC), which exceed those of all other crop producers combined. This protection costs American consumers about \$4 billion each year—the entire GDP of Fiji, where sugarcane is thought to have first been found. Most of us pay for it with one or two extra cents here and there when we buy candy or sugary drinks.

Sugar has a similarly protected status in many parts of the world, including the European Union, Mexico, and Brazil. Either because of social, economic, or political structures established around its production and commercialization, or because of the complex industrial organization of the business, the "sugar question" is a topic that has been addressed from different disciplines and perspectives. Compelling stories have been written using sugar as a vehicle—the transformation of the British and Dutch Empires, the indentured servant system of the West Indies, the legacy of native genocide and African slavery, and social revolutions in Central America—representing a robust list of topics.⁵ Many such accounts reveal the long-lasting impact of sugar on today's distribution of economic and political power, the ethnic and social composition of entire regions, the evolution

⁵ See, e.g., RAMIRO GUERRA & JOSE ANTONIO GUERRA Y DEBÉN, *SUGAR AND SOCIETY IN THE CARIBBEAN: AN ECONOMIC HISTORY OF CUBAN AGRICULTURE* (Majority M. Urquidi trans., 1964); FRANCISCO ANTONIO SCARANO, *SUGAR AND SLAVERY IN PUERTO RICO: THE PLANTATION ECONOMY OF PONCE* (1981); Antonio Benítez-Rojo, *Nicolás Guillén and Sugar*, 31 CALLALOO 329 (1987); JOHN TUTINO, *FROM INSURRECTION TO REVOLUTION IN MEXICO: SOCIAL BASES OF AGRARIAN VIOLENCE, 1750–1940* (1989); HILARY MCD. BECKLES, *BRITAIN'S BLACK DEBT: REPARATIONS FOR CARIBBEAN SLAVERY AND NATIVE GENOCIDE* (2013); JAMES LANG, *PORTUGUESE BRAZIL: THE KING'S PLANTATION* (2013).

and performance of rituals, dances, and other cultural practices, the degradation of entire ecologies, etc. *Sugar and the Making of International Trade Law* should be placed among this compelling list of absorbing tales told through this palatable (and addictive) commodity.

The main thesis of Michael Fakhri, a professor of international trade and food law at the University of Oregon, is that international law fundamentally contributed to the transformation of a simple plant into a global product. With a fine use of history, he explores the role of three international treaties in the expansion of sugar-related industrial interests: the Brussels Sugar Convention of 1902 and two international commodity agreements—the International Sugar Agreements (ISAs) of 1937 and 1977. Each case study is revealing in and of itself, but combined the three complement each other to tell a compelling narrative of the creation of a modern trading system as a tale of industrial-versus-agricultural interests and North-versus-South perspectives. It leaves us with a better appreciation of trade law's history beyond the conventional account told around the World Trade Organization (WTO), a perspective that tends to ignore "that modern trade law has its origins at the end of the nineteenth century within the context of imperialism—a context most relevant to developing countries" (p. 11).

Unlike other books on the role of international law in world politics, Fakhri's does not rely on the decisions of international tribunals or on the doctrinal treatment of a particular legal issue across time or space. Most court or issue-centric descriptions fail to account for how social actors organize economic and political power by relying on international law and its institutions. Rather, Fakhri tells the tale of sugar as the locale of intellectual battles over the conceptions of free trade, its institutional forms, and political and economic justifications. He uncovers international law as an evolving tool used by powerful interests to effectuate directly the preferences of social organizations (as opposed to a more conventional public-choice account that understands law as a taming force of domestic politics and interests). The evolution of sugar's trading rules sets the framework for the three main elements of modern trade law:

integrated markets as a cultural project, multilateral institutions as the preferred organizational form of trade politics, and free trade and legal harmonization as dominant (if oft-contested) functional paradigms.

With the historical description of the changes in the configuration of global commerce, *Sugar and the Making of International Trade Law* seeks alternatives that are more attentive to so-called "developing" countries and disenfranchised agricultural workers. Instead of a normative work of finicky recommendations, the book should be seen as an intellectual plea for a new vocabulary for discussing the relationship of trade with the natural world and as a call for a more inclusive and sustainable international trading system.

This broad academic undertaking is not without limitations. Mainly, the author faces the challenge of inferring general lessons for today's global problems from an intricate account of matters involving multiple actors across time and space. Hence, in a way, the shortcomings are the direct consequence of the strength of the book: a critical attempt to make sense of change over time using three case studies to explore one product in detail.

The first case study is Fakhri's discussion of the Brussels Sugar Convention of 1902.⁶ The analysis is the product of remarkable archival work and describes how this unassuming and oft-overlooked treaty established the first-ever permanent multilateral trade institution. This organization discouraged the governments of member states from subsidizing sugar production by authorizing the imposition of special duties to "bounty-fed" sugar (p. 53). According to Fakhri, the Brussels Convention institutionalized the once imperial economic model of moving "raw material from the peripheries to the industrialized center" (p. 39) and championed the interests of processing and refining industrialists over cane and beet planters and cutters. It paved the way for the current notion of subsidies as "unnatural" interventions into the market and countervailing duties as an adequate remedy against them—two controversial features of the current international trading system.

⁶ Brussels Sugar Convention, 95 BRIT. & FOREIGN STATE PAPERS 6 (1902) (in French), *abrogated*, Sept. 1, 1920, 1 LNTS 400 (1920).

Some may take Fakhri's inferences of this important treaty with a grain of salt. For one, the categorical distinction between industry and agricultural interests that leads to the main implication is somehow contrived. In his classic *Sweetness and Power*, anthropologist Sidney Mintz took a different approach, arguing that sugarcane *plantations* were "an industrial enterprise," a combination of agriculture and processing efforts, labor division (skilled and unskilled), and efficiency considerations.⁷ Second, though countervailing duties predated the Brussels Convention, it was around the same time that governments used the Hague Peace Conferences of 1899 and 1907⁸ to promote measures limiting coercion by once imperial powers. Hence, instead, one could see the clarification of the conditions for the imposition of special duties as part of a more general trend of constraining arbitrariness in reprisals. Third, it is true that, in today's debates over global economic justice, some subsidies are seen as permissible yet unfair mechanisms of wealth redistribution that tend to depress market prices to the detriment of cash-starved agriculture-dependent economies. However, apart from the occasional aside, *Sugar and the Making of International Trade Law* is silent over what to do (or not to do) about subsidization. Instead, Fakhri argues for the involvement of "agricultural workers more directly in the development of international trade law and practice" as a necessary precondition to finding sustainable solutions to this problem (p. 213). How such participation could confront the imbalance created by subsidies is an intriguing idea that unfortunately is left unaddressed.

The 1937 ISA is the second case study discussed. This short-lived yet apparently very successful commodity agreement was a mechanism for Cuba to negotiate an "imperial relationship with the US" (p. 95). It describes how Cuban elites used the sugar treaty to stabilize prices, increase financing, and ultimately achieve economic sovereignty. The treaty institutionalized a hard-to-

⁷ SIDNEY W. MINTZ, *SWEETNESS AND POWER: THE PLACE OF SUGAR IN MODERN HISTORY* 51–53 (1985).

⁸ See JAMES BROWN SCOTT, *THE HAGUE PEACE CONFERENCES OF 1899 AND 1907* (1909).

monitor "gentleman's pact" (the Chadbourne Agreement⁹) among some producers and their governments to control quantity. Today, these arrangements are seen as anticompetitive collusions and prohibited by several provisions against "voluntary export restraints" under the WTO multilateral system.¹⁰

This case study shall be of great interest for international lawyers not only because it shows the League of Nations as an effective *economic* international organization (as opposed to a lethargic legal bureaucracy) but also because lawyers central to the history of the American Society of International Law played an important role. These lawyers were of a different generation than the early twentieth-century founders of the Society, like Elihu Root or James Brown Scott, who believed strongly in international law as a source of stability with just a "minimum" of coercion and who argued over Latin-American objections on the content of its rules. Rather, this new generation of international lawyers worked *with* Latin-American countries to champion multilateralism and reciprocity as fundamental features of international law. Today, a medal commemorates Manley O. Hudson, who fought "to bring the [sugar] negotiations through the League" (p. 117). Philip C. Jessup, a recipient of the medal and namesake of the famous moot court competition that today shapes the careers of many international lawyers,

⁹ See Clifford L. James, *International Control of Raw Sugar Supplies*, 21 AM. ECON. REV. 481, 486 n.14 (1931) (in part discussing the Chadbourne Agreement of 1931, a trading arrangement "applied to the beet and cane sugar producers of the continental United States and the cane sugar producers of the territorial United States—Philippines, Hawaii, and Porto Rico"); see also Leslie A. Wheeler, *Agricultural Surpluses in the Postwar World*, 20 FOREIGN AFF. 87, 92 (1941).

¹⁰ For example, Article 11.1(b) of the 1994 Agreement on Safeguards prohibits any WTO member from seeking, taking, or maintaining "any voluntary export restraints, orderly marketing arrangements or any similar measure on the export or import side." Agreement on Safeguards, Art. 11.1(b), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, in WORLD TRADE ORGANIZATION, *THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS* 315 (1999), available at https://www.wto.org/english/docs_e/legal_e/25-safeg_e.htm.

helped craft the “reciprocity treaty with Cuba” (p. 121).

In an interesting parallel, the author’s perspective of international law can be understood in relation to a second generation of academic lawyers. While Fakhri’s project does not seek to espouse the classic anticolonial critique of international law as a mechanism for normalizing imperial relations, it is not too distant from this tradition.¹¹ He proposes that international law is the result of competing social interests that can also unleash counter-movements and empower interests like Cuban sugar producers. This suggestion is indicative of the author’s position as one of the leading voices of the new generation of Third World Approaches to International Law (TWAIL)—an intellectual approach that emerged as part of the anticolonial movement but that has moved on to more contemporary problems and methodologies for academic inquiry.¹² Fakhri’s claim that the 1937 ISA ensured Cuba’s economic development because it allowed the empowerment of Cuba’s market and social actors for “postcolonial state-building” (p. 138) is credible but not undisputed.¹³ And while most economists would not share Fakhri’s evident nostalgia for agreements that suppress production to raise prices, the study of the 1937 ISA serves as a reminder that a separation of state and market can be more artificial than is often assumed by conventional economic thought and modern trade law.¹⁴

¹¹ ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (2007); see also ARNULF BECKER LORCA, *MESTIZO INTERNATIONAL LAW: A GLOBAL INTELLECTUAL HISTORY 1842–1933* (2015).

¹² James Thuo Gathii, *TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography*, 3 *TRADE L. & DEV.* 26 (2011).

¹³ Cf. HENRY CHRISTOPHER WALLICH, *MONEY PROBLEMS OF AN EXPORT ECONOMY: THE CUBAN EXPERIENCE, 1914–1947*, at 3, 20, 171–73 (1950) (attributing the “exceptional performance” of the Cuban economy prior to the 1940s to the sugar industries predating 1925, but also pointing to the perils of the exclusive reliance on a single commodity).

¹⁴ For a seminal account on this artificial separation, see Karl Polanyi, *The Economy as Instituted Process, in TRADE AND MARKET IN THE EARLY EMPIRES: ECONOMIES IN HISTORY AND THEORY* 243 (Karl

Fakhri’s main message with this second case study is to bring back developmental and state building concerns into trade policy—a breath of fresh air that reminds us that at the core of any set of economic considerations of international economic law should be its human dimension. However, some readers will be left without a clear message about how international commodity agreements could more effectively empower agricultural workers who often not only lack basic protections like minimum wage or health care but also are without access to financing and technology. Moreover, in this day and age, sophisticated agribusinesses take positions around the world and trade commodities futures to insulate themselves from (and manipulate) fluctuations of price and risks.¹⁵ Nothing prohibits rent-seeking industries from capturing international commodity agreements as another means to achieving their ends. Without a better articulation of how the 1937 ISA should inform today’s architecture in more specific ways than “this may be the time to reinvigorate [international commodity agreements] in totally new ways” (p. 212), the insightful analysis runs some risk of being received without much practical utility.

The final case study discussed in *Sugar and the Making of International Trade Law* deals with the 1977 ISA, “the last [commodity agreement] to include economic provisions that purported to regulate the sugar market” (p. 200). It provides insight into the transformation of ideas and the range of international organizations responsible for international trade after World War II. While the General Agreement on Tariffs and Trade (GATT), the WTO’s predecessor, focused on manufactured goods and relied on free-trade goals, the United Nations Conference on Trade and Development (UNCTAD) focused on the developmental goals of unindustrialized states and relied on rationalization—a string of economic theories that argue for controlling economic conditions to ensure efficiency and welfare. Beyond GATT and UNCTAD, the

Polanyi, Conrad M. Arensberg & Harry W. Pearson eds., 1957).

¹⁵ Stephen Craig Pirrong, *The Self-Regulation of Commodity Exchanges: The Case of Market Manipulation*, 38 *J.L. & ECON.* 141 (1995).

third organization was the Interim Coordinating Committee for International Commodity Arrangements (ICCICA), a UN institution administering commodity agreements to which “agriculturalists from all over the world turned their attention . . . in order to address global market conditions” (p. 142) and found common ground. With the gradual disappearance of these agreements, such common ground also dissipated, exacerbating the tensions between developed and developing countries within the GATT/WTO.

Through this history of the treatment of sugar and the resulting tensions in the three postwar institutions, Fakhri provides a good lens into the radical transformation (as opposed to a gradual formation) of world trade regulation in the past sixty years.¹⁶ Most international trade law scholars forget that commodity agreements were once prevalent and designed “to ensure the desired domestic socio-economic conditions in different countries” (p. 149). Hence, such scholars usually ignore the potential of commodity agreements to improve global trade imbalances.

This final case study should be particularly appealing to legal scholars, especially those with an interest in intellectual history, as it provides a description of how embedded liberalism—the need for markets to enjoy social legitimacy—was replaced by free trade as the dominant paradigm of international trade law. In this transformation, the 1977 ISA represents one of the last negotiations between the bloc of developed and developing countries before the major shift in global power that led to the WTO—an institution with limited capacity to address “the twin goals of domestic welfare and international cooperation within the context of different national economy systems”

(p. 207). Of course, today’s WTO is much more concerned with effective governance and sustainable development than during its emergence.¹⁷ But the North-South deadlock continues, and Fakhri sug-

¹⁶ Cf. Joost Pauwelyn, *The Transformation of World Trade*, 104 MICH. L. REV. 1 (2005) (recounting a gradual transformation of the world trade system as the result of GATT’s bidirectional interaction between law and politics).

¹⁷ Greg Shaffer, *How the World Trade Organization Shapes Regulatory Governance*, 9 REG. & GOVERNANCE 1 (2015).

gests that a “way out of the deadlock is to no longer privilege the idea of industry, with its attendant values such as mechanical speed and economic growth, and instead use agriculture as an ideational starting point” (p. 214). This proposal is an interesting idea for academics to explore in future projects.

The limited use of recommendations by the author should be seen in context. Fakhri’s search for a more equitable international trade law sensible to the conditions suffered by the oft-starving men and women who produce our food is an unquestionable plea. This quest certainly requires an understanding of the institutional repertoire of international trade law beyond the WTO and hence showcases the value of Fakhri’s descriptive project. Moreover, it also requires addressing, in a concrete fashion, the role of special interests that benefit from the status quo, such as sugar barons from Florida; Veracruz, Mexico; or Pernambuco, Brazil. More importantly, Fakhri’s refreshing methodology of tracing the history of legal institutions using one commodity should be replicated: it is a welcome move at a time of overabundance of dry legal analysis in the literature of international trade. Fakhri could not have chosen a better product than sugar, as evidenced by the role that the industry continues to play in current trade negotiations. Finally, while the beautiful illustration by Frank Newbould (1887–1951) on the cover of the book—depicting sugarcane harvesting in the West Indies—runs the risk of undermining the true hardship of such work, it is a perfect complement to the timely and multifaceted history provided in the book.¹⁸

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BOOKS RECEIVED

International Law—General

Behrens, Paul. *Diplomatic Interference and the Law*. Oxford, Portland: Hart Publishing, 2016. Pp. xli, 493. Index.

¹⁸ Frank Newbould, Poster: Reaping Sugar-Canes in the West Indies (c.1930), available at <http://www.sotherans.co.uk/Catalogue.php?stk=2088908&cat=posters15&type%5B%5D=prints>.