

Rufus Yerxa and Bruce Wilson (eds).

***Key Issues in the WTO Dispute Settlement: The First Ten Years.***

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This volume of essays about the World Trade Organization (WTO)<sup>1</sup> dispute settlement system<sup>2</sup> distinguishes itself from other volumes by presenting an insiders' perspective. The volume is edited by the WTO Deputy Director General, Rufus Yerxa, and the Director of the Legal Affairs Division, Bruce Wilson, and contains contributions from an extraordinary group of WTO law practitioners and scholars.

The editors' stated goal for the volume is to reflect over the first decade of the dispute set-

tlement system and to take stock of the lessons to be learned. The volume is not intended to be a series of essays of high scholarly value and deep academic analyses. This may seem an obvious consequence of the fact that the majority of the 22 essays are written by practitioners rather than scholars. The group of practitioners is, however, not the average group of practitioners – many of them regularly publish academic articles, hold academic degrees, teach at law schools, have formerly held positions as professors – or are currently doing both. The editors, with the same group of contributors, could just as well have chosen to focus on one or two WTO issues, producing a volume of in-depth legal analyses. The editors, instead, have created a highly interesting book by giving space to this experienced group of practitioners to examine a broad range of WTO dispute settlement issues. Moreover, the essays are not purely descriptive, but are given depth by the contributors' individual reflections over the past decade. Finally, some of the essays take stock of some *de lege ferenda* issues that are pertinent in the review of the DSU – which could also be called 'lessons to be learned'.

The volume is divided into three parts: Part I consists of the introduction and general considerations; Part II is about processes and institutions; and Part III addresses systemic and other issues. Although as many as 24 authors penned the 22 essays, the contributions read well consecutively without too many repetitions. However, the volume would have been more useful for further research had it contained more footnotes pointing to the relevant sources.

Part I comprises just two essays, which nevertheless equip the reader with sufficient knowledge about dispute settlement in the WTO to proceed with the rest of the volume.

Part II is organized in such a way as to mirror the actual chronological steps in a 'WTO case'; i.e. each phase, from initiation of the complaint through to the request for suspension of concessions. This part can especially be recommended as teaching material. I will, in particular, draw the readers' attention to Gabrielle Marceau's article, which is very

<sup>1</sup> The World Trade Organization was established in 1995 by the founding act – Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, 15 April 1994, 33 I.L.M. 1143 (1994). The WTO Agreement establishes the WTO, and all other agreements are annexed to this agreement. See the Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, 33 I.L.M. 1143 (1994), into force 1 January 1995 [hereinafter the WTO Agreement].

<sup>2</sup> The dispute settlement system is regulated by the Dispute Settlement Understanding, the WTO Agreement Annex 2 [hereinafter the DSU].

informative for any outsider or for law students as their first – and perhaps only – essay to read in order to understand and find their way around the realm of the WTO dispute settlement system. However, the article also contains valuable information for the more experienced scholar as a type of road-map regarding many difficult topics, such as non-violation complaints, rules of conduct, including confidentiality, and the use of experts.

Bruce Wilson's article includes a description of the WTO Secretariat's role in proceedings. For the outsider, this type of information is invaluable, but its brevity (little more than two pages) does not completely satisfy the reader's curiosity (particularly those that are more familiar with the system).

Jesse Kreier's essay on 'Contingent trade remedies' is more difficult to understand for the beginner. However, with a little knowledge of remedies, the essay is quite instructive in relation to such peculiarities as standard of review, confidentiality and implementation of a report finding that a procedural mistake was made in the initial investigation. It may be useful for the reader who wants to understand more about standard of review to consult Matthias Oesch's essay in Part III of the volume at this stage. For the non-expert, the issue of standard of review is usually puzzling – at least my law students find the concept irritating and frustrating to deal with. Matthias Oesch manages to explain the concept in a straightforward manner.

The essays in Part III deal with individual issues in the dispute settlement system and appeal to the more advanced scholars. One of the best examples is probably the thorough analyses of the concept of jurisdiction by Joel Trachtman, in which he enumerates issues to be analysed: 1. jurisdiction over claims; 2. jurisdiction to apply law (including the often puzzling issue of what applicable law is within the WTO-system); 3. deference to other fora; 4. ripeness, mandatory and discretionary legislation, claims against legislation 'as such', and exhaustion of local remedies; 5. jurisdiction over persons; 6. jurisdiction of the Appellate Body, and 7. compliance and remedies. This type of systematic analysis, or outline

of issues regarding jurisdiction, will perhaps not assist the senior researcher, but will undoubtedly assist more junior researchers in structuring their 'approach' to jurisdiction in international dispute resolution systems, in particular that of the WTO. Professor Trachtman's essay is, moreover, one of those that makes use of the most references. Another very good example is Andrew Mitchell's fascinating analysis of due process – leading back to the roots of this principle in the common law system in the UK, but also in Australian and American law.

The volume is full of insiders' stories. Peter Van den Bossche introduces the fascinating historical background on how nobody foresaw that the Appellate Body would become 'The World Trade Court' as we know it today. And who is better equipped to tell these tales than those present at the time? Van den Bossche explains everything from the line-up of the original Appellate Body members, to how WTO law was understood to be part of public international law, and how the Appellate Body clarified its style of interpretation and adherence to the Vienna Convention of the Law of Treaties – to more practical points, such as the notion of 'collegiality' (i.e. that although the Appellate Body operates in rotating panels of three – and never *en banc* – all the Members of the Appellate Body 'exchange views' and this has ensured the consistency, quality and authority of the Appellate Body).

Valerie Hughes' article on the *US – Steel Safeguards*<sup>3</sup> proceedings is also valuable for its insider's perspective. Her article provides a lot of practical information about how appellate proceedings take place in the WTO. Her small anecdotes about practicalities are particularly invaluable: she describes the practical problem of finding meeting rooms to fit approximately 100 people that were supposed to be present during the *US – Steel Safeguards* hearing, as well as other logistical issues. I attended the panel hearings, but if I had not been there I

<sup>3</sup> United States – Definitive Safeguard Measures on Imports of Certain Steel Products, WT/DS248, WT/DS249, WT/DS251, WT/DS252, WT/DS253, WT/DS254, WT/DS258, WT/DS259.

would not have understood the implications of the volume of this case. Valerie Hughes, however, gets her point across very effectively when she describes how the US opening statement read out loud lasted one hour; which is the time it usually takes to complete *all* opening statements.

The WTO has improved its external transparency greatly by de-restricting documents much more quickly than was previously the case. Therefore, not only do government officials have access to the latest minutes of the meetings, but also the general public. But it is one thing to read the minutes of the meetings, it is another to attend the meetings; sensing the atmosphere – as well as attending the informal meetings for which minutes are not taken. In his piece on the implementation of panel and Appellate Body rulings, Brendan McGivern's clear and concise opinion on the way in which surveillance of implementation in the DSB has become almost a ritual without providing the results one might have hoped for is an excellent example of how it makes a difference whether you are present or not. McGivern has attended many DSB meetings in his capacity as counsellor for Canada and there is no doubt in his mind that this feature of the DSB does not function as well as it should.

The review of the Dispute Settlement Understanding, which started in 1998 and has not yet been concluded,<sup>4</sup> is also introduced in this volume. Werner Zdouc, who is now the Director of the Appellate Body, offers insights into different Member proposals regarding the 'Reasonable Period of Time', after having introduced this requirement generally. Other

good examples of DSU-review issues are presented by Brendan McGivern, who explains what sequencing is and how it became a problem during the *EC – Bananas III* dispute. Read together with David Evan's and Celso de Tarso Pereira's description of the same problem, the volume equips the reader to understand the 'basics' of the sequencing issue, and how it has been temporarily solved. Evans and de Tarso Pereira also introduce the reader to the issue of remand – or lack thereof in the DSU. The lack of a remand procedure has become such an obvious flaw in the DSU that most Members would probably be in agreement. As the authors point out, the procedure was obviously needed in the *Canada – Dairy* proceedings,<sup>5</sup> which had to start over again because of the insufficient factual basis established by the panel. However, the authors do not point to a much 'easier' case to understand this problem: the *EC – Asbestos* case which was decided under the GATT 1994, but *should* have been decided under the TBT Agreement – the panel simply chose the 'wrong' agreement altogether!<sup>6</sup>

In conclusion, the book finds its strength in presenting the stories of true insiders – as well as constituting excellent teaching material and a useful introduction to the system for the outsider. It can, nevertheless, also be recommended for the more experienced WTO lawyer or researcher due to its rare nature and interesting blend of research, analysis and description of practical experiences with the dispute settlement system. The volume is a pleasure to read, and some insiders' stories do indeed – as stated by the editors – amount to fascinating reading.

### **Individual Contributions:**

Part I. Introduction and General Considerations:

*Rufus Yerxa*, The Power of the WTO Dispute Settlement System;

<sup>5</sup> See *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103 and WT/DS113.

<sup>6</sup> See *European Communities – Measures Affecting Asbestos and Asbestos Containing Products*, WT/DS135/AB/R.

<sup>4</sup> The DSU Review is not part of the single undertaking. See Doha Ministerial Declaration, WT/MIN(01)/DEC/1, 20 November 2001, paras 30 and 47. The DSU-Review started in 1998 without a positive outcome. The deadline has been postponed from May 2003 to May 2004 by the General Council on 24–25 July 2003, WT/GC/M/81, paras. 71–75. In July 2004, the deadline was suspended by the General Council, WT/GC/W/535, at 3 (this was also the position in the Hong Kong Ministerial Declaration, WT/MIN(05)/DEC, 18 December 2005, para. 34).

*Georges Abi-Saab*, The WTO Dispute Settlement and General International Law; Part II. The WTO Dispute Settlement System. Its Processes and its Institutions:

*Bruce Wilson*, The WTO Dispute Settlement System and Its Operation: A Brief Overview of the First 10 Years;

*Bozena Mueller Holyst*, The Role of the Dispute Settlement Body in the Dispute Settlement Process;

*Gabrielle Marceau*, Consultations and the Panel Process in the WTO Dispute Settlement System;

*Jesse Kreier*, Contingent Trade Remedies and WTO Dispute Settlement: Some Particularities;

*Peter Van Den Bossche*, The Making of the 'World Trade Court': The Origins and Developments of the Appellate Body of the World Trade Organization;

*Valerie Hughes*, Special Challenges at the Appellate Stage: A Case Study;

*Werner Zdouc*, The Reasonable Period of Time for Compliance with the Rulings and Recommendations adopted by the WTO Dispute Settlement Body;

*Brendan McGivern*, Implementation of Panel and Appellate Body Rulings: An Overview;

*Yves Renouf*, A Brief Introduction to Countermeasures in the WTO Dispute Settlement System;

Part III. The WTO Dispute Settlement System. Systemic and other Issues:

*Giorgio Sacerdoti*, The Role of Lawyers in the WTO Dispute Settlement System;

*Joel Trachtman*, Jurisdiction in WTO Dispute Settlement;

*Matthias Oesch*, Due Process in WTO Disputes Andrew Mitchell; 15. Standards of Review in WTO Panel Proceedings;

*Scott Andersen*, Administration of Evidence in WTO Dispute Settlement Proceedings;

*Olivier Prost*, Confidentiality Issues under the DSU: Fact-Finding Process Versus Confidentiality;

*Mireille Cossy*, Panels' Consultations with Scientific Experts;

*James Durling and David Hardin*, Amicus Curiae Participation in WTO Dispute Settlement;

*Raimund Raith*, Suspension of Concessions and Retaliation under the Safeguards Agreement;

*John Magnus*, Compliance with WTO Dispute Settlement Decisions: Is There a Crisis?;

*Celso de Tarso and David Evans*, DSU Review: A View from the Inside.

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