BOOK REVIEW

Key issues in WTO Dispute Settlement: The first ten years.
Rufus Yerxa and *Bruce Wilson* (ed.), Cambridge University Press, 2005, 289 pp., £55.00, ISBN 0521861594

The WTO dispute settlement system is an amazing field of legal research. The functioning, the problems and achievements of this hybrid between court and arbitration form the subject of Yerxa's and Wilson's collection of articles, which is published in the reviewed book.

For those not initiated: The World Trade Organization (WTO) was established in 1994 as a development of the structure which had evolved around the 1947 General Agreement on Tariffs in Trade (GATT). The WTO surrounded the GATT 1947 with a full functioning international organisation and was a major step from a purely political to a more legalistic approach. Its main substantive agreements encompass the GATT 1994 (an updated version of the GATT 1947), the General Agreement on Trade in Services (GATS) and the Agreement on Trade-related Intellectual Property Rights (TRIPS). GATT and GATS ban (too a large extent) non-tariff barriers to trade in goods and services while the TRIPS (a rather short text which complements other international treaties in the field) protects a number of different intellectual property rights. A wealth of supporting agreements concerns, inter alia, subsidies, dumping and anti-dumping and technical issues of trade. All of these agreements can be signed by an entering member state only as a package and all of the rules are binding, even if some agreements, including notably the GATS, leave room for exempting certain areas from their application.

Unlike other international organisations or treaties, the WTO system has also an integrated scheme for settling disputes. During the last ten years, this system, despite considerable (and appropriate) criticism, has developed into the world's best functioning system for the peaceful conciliation of international conflicts. Regarding the fact, that the WTO has a broad and diverse membership of over 150 states, this achievement cannot be over-evaluated.

The system is founded on an integrated agreement, the Dispute Settlement Understanding (DSU). Its roots lie in the panel practice for the discussion – and arbitration – of trade disputes which developed in almost 50 years from 1947 on under the GATT. The system has become much more legalistic since the establishment of the WTO. It allows applications by member states against other member states, if benefits from the treaty are impaired or nullified. In practice, states only attack infringements of other states. After compulsory consultation, there is a first instance in which an ad hoc built panel reviews the case. After two rounds of written submissions the panel submits an intermediate report. The parties are invited to comment and thereafter, a final report is issued. The report – if not appealed – becomes binding after a political body, the Dispute Settlement Body, adopts it. In so-called violation cases, which form the vast majority of cases, there is automatic adoption, unless the DSB rejects it unanimously.

The parties have the right to an appeal in law. The second instance is set before a standing Appellate Body which consists of seven members. The appeal can be only

brought against the legal interpretations and findings of the first instance panel. But, in the *Wheat Gluten* decision (WT/DS166/AB/R), the Appellate Body considered the panel's review of the facts to have been an error in law. That way some control over the collection and assessment of the facts is exerted by the Appellate body.

The implementation of decisions is also foreseen in the DSU. According to Article 22 DSU, the winning party may "suspend concessions". That means that, for example, tariffs for certain products imported from the losing state can be raised. The level of concessions suspended shall not exaggerate the level of trade which is subject to detriment due to the measure found to be illegal in the decision. Article 22.6 DSU provides for a procedure to set this level. Article 21.5 DSU installs a procedure in which a dispute over the correct implementation of a decision can be resolved.

Yerxa's and *Wilson's* book, is neither an introduction into the WTO dispute settlement law, nor is it a comprehensive volume for reference by practitioners. It is rather a collection of articles, which, sometimes by means of legal argumentation, sometimes by means of rather political views, sheds light on certain aspects of the DSU. The book, hence, presupposes basic knowledge of the system. Some of its articles are very helpful for the issues discussed.

The subtitle "the first ten years" evokes certain expectations in the audience. One would expect at least one or two articles, which try an in-depth overall analysis of the DSU system over the last 10 years, an intermediate facit. Yet, *Wilson's* article on that issue, despite it is very well written and full of knowledge, does not extend to more than ten pages. *Evan's* And *De Parso Pereira's* article and *Yerxa's* introduction as well as *Mueller-Holyst's* article on similar issues can neither meet up with the expectations raised by the subtitle.

What the book does well is to let experts comment on bits and pieces of the DSU. *Marceau* describes in general the consultation procedure, *Sacerdoti's* note on lawyers is certainly worth mentioning and so are *Prost's* point on confidentiality, *Andersen's* point on evidence and *McGivern's* study of implementation. However, the reader is sometimes missing a link between the different articles, an organisational structure within the edition, a more comprehensive approach to the issue. Nevertheless, this does not question the quality of some of the contributions to the collection.

If there is a general comment on the diverse articles, it is probably that most of them are not very critical, not even in areas where the WTO would deserve criticism. This may be due to the fact that many of the contributors are involved with the WTO as an organisation. In any case, it is not very surprising, because the WTO is co-editing the volume.

One example for a very optimistic view of the DSU is *Van den Bossche's* point on the historic development of the system. He concludes that the DSU forms a "World Trade Court". He does so, however, without mentioning the criteria he wants to employ to test the DSU's capacity as a court. He brushes away the fact, that hearings are not public (even if members as the USA; the EC and Canada have voluntarily held public hearings in one case). He also does not discuss that the facts are established by panels, which have not a standing character, and that the appeal instance does only deal with the law. One would have expected a little more scientific criticism in that regard. Nevertheless, his historical analysis proves to be very interesting.

As a result, the book deals with a hot topic. The debate in which it engages is characterised by a gap, a dilemma: The people involved with the WTO find the DSU

procedure wonderful; opponents of globalisation describe it as *Kafkaesque.* The book at hand, supports more or less the former way of thinking. What is missing in the discussion as well as in most of the articles, is an independent view on the issue which criticizes without demonizing. Such a view might reveal that the DSU is functioning well in technical terms.

It is a procedure to conciliate trade disputes. It has a number of problems, however. One of the more important ones, which should be named here for illustration, is the question how to deal with issues which reach further than trade. A number of good books have been written about individual topics in that respect. The subsequent passage, hence, is itself optimistic in trying to have a very short overview on this problem, but it tries it anyway: In the Appellate Body's jurisprudence, there are, undisputedly, good efforts done to take care of values such as environmental protection, which find an anchor in the text of the substantive agreements. Yet other values, such as consumer protection, (see the *Hormones* case) have no such anchor and hence are difficult for the Appellate Body to deal with. The culture of 150 member states is so divers, that common values which could fill that gap, are hard to find. The EU Courts, facing similar substantive issues, can solve these problems by reference to values common to the constitutions of member states. This is impossible in the WTO. There are many more problems like this which needed a critical stance. Unfortunately, many of the articles in the reviewed collection do not dare to address such problems with an outside view.

However, there is also room for technical improvement of the WTO, and some of the articles in the book reviewed deal very well with the task of naming remaining problems and providing solutions. Apart from the two major points of criticism on the book – its closeness to the WTO and the lack of a coherent overall structure – it has to be acknowledged that it provides a wealth of details on certain aspects of the DSU. Most of the articles are very well researched from a technical point. The book, hence, can be recommended to those interested in the details of this procedure.

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DOI: 10.2966/scrip.040307.298