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BOOK NOTE

THE LONG ROAD AHEAD: DISPUTE SETTLEMENT IN THE GATT/WTO

ERNST-ULRICH PETERSMANN, *INTERNATIONAL TRADE LAW AND THE GATT/WTO DISPUTE SETTLEMENT SYSTEM*. The Hague: Kluwer Law International, 1997. xviii + 704 pp.

*Reviewed by Dukgeun Ahn**

Among the many significant developments of the World Trade Organization ("WTO") for the world trading system, arguably the single most important achievement is the development of the new dispute settlement system which is essential to the effective implementation of the Uruguay Round text comprising some 26,000 pages. Mr. Renato Ruggerio, the Director-General of the WTO, has claimed that the WTO's "best achievement is the dispute settlement body, which is working, and which is really the heart of the multilateral trading system."¹ Since the WTO came formally into being on January 1, 1995 with seventy-six member countries,² the dispute settlement system of the WTO has been intensively utilized by both developed and developing countries. As of February 17, 1999, a total of 163 consultation requests on 125 distinct matters had been filed, and eighteen Appellate Body reports had been issued, while thirty cases were settled or inactive.³

The new WTO dispute settlement system, which encompasses a considerably more effective procedure for the adjudication of legal disputes compared to the former procedures under the General Agreement on Tariffs and Trade ("GATT"), is based primarily on Annex 2 of the Agreement Establishing the World Trade Organization (WTO Agreement) entitled, "Understanding on Rules and Procedures Governing the Settlement of Disputes" ("DSU").⁴ The agreements covered by the Un-

* Executive Note Editor, *Michigan Journal of International Law*. J.D., University of Michigan (1999); Ph.D., University of Michigan (1996); B.A., Seoul National University, Seoul, KOREA (1990).

1. *INT'L HERALD TRIBUNE*, July 29, 1996, at 11.

2. *FOCUS* (World Trade Organization, Geneva, SWITZERLAND), Jan.-Feb. 1995, at 5. As of February 10, 1999, the WTO has 134 member countries, along with thirty-four observer governments and seven international organization observers to the General Council.

3. See *Overview of the State-of-Play of WTO Disputes* (visited Feb. 24, 1999) <<http://www.wto.org/wto/dispute/bulletin.htm>>.

4. Understanding on Rules and Procedures Governing the Settlement of Disputes [hereinafter DSU], Apr. 15, 1994, Marakesh Agreement Establishing the World Trade Organization, Annex 2.

derstanding, special or additional rules and procedures contained in the covered agreements, and working procedures are all listed in the Appendix of the DSU. The appellate proceedings of the WTO dispute settlement system have been governed by the detailed "Working Procedures for Appellate Review,"⁵ which was drafted and adopted by the Appellate Body of the WTO.⁶ With some exceptions specified in the Appendix, the DSU is designed to provide a single unified dispute settlement procedure for almost all the Uruguay Round texts.⁷

From the inception of the WTO, commentaries by academics and practitioners on the impact it has had on the development of a more "rule-oriented" system⁸ than existed in the GATT 1947 and on the evolution of international trade law in general have centered mainly around the practices of the WTO dispute settlement system. *International Trade Law and the GATT/WTO Dispute Settlement System*, edited by Professor Petersmann, provides a superb and much-needed guide to numerous contemporaneous issues regarding substantive and procedural aspects of the GATT/WTO dispute settlement system. This remarkable collection of leading scholars and practitioners in the field of international trade covers the whole gamut of relevant issues for the new dispute settlement system, many of which are inherited from the historic experiences under the GATT.

The current volume, Volume 11 of *Studies in Transnational Economic Law*, is in fact the fourth comprehensive effort in that series to address the GATT and now the WTO. It follows *The European Community and GATT*,⁹ *The New GATT Round of Multilateral Trade Negotiations: Legal and Economic Problems*,¹⁰ and *National Constitutions and International Economic Law*.¹¹ Professor Petersmann, who

5. WTO, WT/AB/WP/3, dated on Feb. 28, 1997. Also available at <<http://www.wto.org/wto/dispute/ab3.htm>> and Annex E of the reviewed book. This replaces the earlier version drawn up in early 1996 (WTO, WT/AB/WP/1, dated Feb. 15, 1996).

6. All the relevant rules and decisions for the WTO dispute settlement procedure are compiled in *THE WTO DISPUTE SETTLEMENT PROCEDURE: A COLLECTION OF THE LEGAL TEXTS* (WORLD TRADE ORGANIZATION, 2d ed., forthcoming).

7. JOHN H. JACKSON, *THE WORLD TRADE ORGANIZATION: CONSTITUTION AND JURISPRUDENCE* 73 (1998).

8. JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 109-12 (2d ed. 1997).

9. *THE EUROPEAN COMMUNITY AND GATT* (Meinhard Hilf et al. eds., 1986; 4 *STUD. TRANSNAT'L ECON. L.*).

10. *THE NEW GATT ROUND OF MULTILATERAL TRADE NEGOTIATIONS: LEGAL AND ECONOMIC PROBLEMS* (Ernst-Ulrich Petersmann & Meinhard Hilf eds., 2d ed. 1991; 5 *STUD. TRANSNAT'L ECON. L.*).

11. *NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC LAW* (Meinhard Hilf & Ernst-Ulrich Petersmann eds., 1993; 8 *STUD. TRANSNAT'L ECON. L.*).

served as an editor in each of the three preceding volumes, now provides us with another excellent tome that presents the thoughtful perspectives of the leading contributors in the field.

The book is divided into three parts with twenty articles and is supplemented with five annexes. Part I, "The GATT/WTO Dispute Settlement Law and Procedures," analyzes such fundamental issues of the GATT/WTO dispute settlement system as its historical evolution, the concept of nullification and impairment, non-violation complaints, standard of review, third-party intervention, and the appellate review process of the WTO.

In the introductory chapter, Petersmann himself provides a fairly comprehensive overview of dispute settlement procedures under the GATT and the WTO, as well as a discussion of unresolved problems under the GATT/WTO dispute settlement system.¹² In the second chapter, Roessler examines the concept of "nullification and impairment" under Article XXIII of the GATT, which encompasses so-called violation complaints, non-violation complaints, and situation complaints. While Roessler reviews this concept as a whole, the contribution by Cottier and Schefer concentrates on specific issues regarding non-violation complaints. The next chapter addresses the standard-of-review question, prominent under Article 17.6 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, which has long been controversial in cases where GATT/WTO panels review a national government's actions or rulings for consistency with the various WTO agreements. Croley and Jackson, observing that the standard-of-review question has become something of a touchstone regarding the relationship of "sovereignty" concepts to the GATT/WTO rule system, point out the limitation for the deference of the type that is established under the Chevron doctrine in the U.S. jurisprudence to the GATT/WTO panels. Footer addresses several issues regarding third party intervention, governed mainly by Article 10 of the DSU that restricts its scope to Members.¹³ Finally, Sacerdoti examines the procedures for appellate review, a process noted by its absence under the old GATT system.

12. Most of the content of this chapter is reproduced from his earlier book. See generally ERNST-ULRICH PETERSMANN, *THE GATT/WTO DISPUTE SETTLEMENT SYSTEM: INTERNATIONAL LAW, INTERNATIONAL ORGANIZATIONS AND DISPUTE SETTLEMENT* (1997).

13. Private parties such as individuals, corporations, or non-governmental organizations ("NGOs") are not permitted to intervene in the GATT/WTO dispute settlement proceedings as a third party. However, in *United States-Import Prohibition of Certain Shrimp and Shrimp Products* (WT/DS58/AB/R, dated Oct. 12, 1998), the Appellate Body of the WTO ruled that WTO panels can examine amicus briefs by environmental NGOs in dispute settlement proceedings with substantial discretion.

Part II, "International Trade Law and GATT/WTO Dispute Settlement Practice," examines practical issues that occur in relation to the application of GATT/WTO dispute settlement systems in various areas of international economic law, including anti-dumping measures, trade-related environmental measures, the agriculture and textiles trade of developing countries, restrictive business practices, trade in services, commercial aviation disputes, intellectual disputes, and the Plurilateral Trade Agreements, particularly that on government procurement.

Bourgeois examines several issues related to anti-dumping laws, such as the rule requiring exhaustion of local remedies, terms of reference, remedies, and procedural rights, while Horlick and Clarke focus on specific issues of burden of proof and causation in anti-dumping cases. Mattoo and Mavroidis discuss links between trade and environment, particularly the environmental exception under Article XX of GATT 1994. Chaytor reviews various aspects of two agreements under the WTO that have traditionally been of substantial concern to developing countries: the Agreement on Agriculture and the Agreement on Textiles and Clothing. Matsushita examines conditions under which restrictive business practices may be a subject matter of the existing WTO dispute settlement process and concludes that a government measure initiating restrictive business practices can be made a subject of the dispute settlement procedure if it has the effect of impeding market access of foreign products or entry of foreign enterprise, although a restrictive business practice as such may hardly be challenged. Morrison discusses procedural and substantive aspects of dispute settlements in relation to the General Agreement on Trade in Services ("GATS"), which is included for the first time under the aegis of the WTO system. Abeyratne undertakes a comparative analysis of dispute resolution for commercial aviation under the GATS and the International Civil Aviation Organization. Abbott examines dispute-settlement issues related to the Agreement on Trade-Related Aspects of Intellectual Property Rights, which is also a new addition under the WTO system. Weiss treats dispute settlement with regard to the Agreement on Government Procurement under the Plurilateral Trade Agreements, Annex 4 of the WTO Agreement, which remains the exception to the "single package" approach of the Uruguay Round.

Part III, "Settlement of International Trade Disputes in Regional Free Trade Agreements and Domestic Courts," addresses itself to dispute settlement procedures in regional trade agreements such as the European Community ("EC"), the North American Free Trade Area ("NAFTA"), and the South American Common Market ("Mercosur"). This Part also addresses issues concerning the interrelationships of those

regional trade agreements with the GATT/WTO dispute settlement rules and procedures.

Oppermann and Cascante examine dispute settlement in the EC and jurisprudence of the European Court of Justice in the domain of international trade, and they make several suggestions for the WTO dispute settlement based on the experience of the EC. Marceau conducts a comparative analysis of dispute settlement rules of the NAFTA and the WTO and provides a comprehensive study of the interrelationship between the two systems. The development of dispute resolution under the Mercosur is the subject of the contribution by Etcheverry, which is complemented by a similar study by Casella. Hilf examines the recent trends in judicial review and goes on to address relevant issues on the role of national courts in international trade relations, particularly within the WTO.

The Annexes of this volume contain useful summaries of previous panel reports under the GATT and the WTO, as well as the texts of the DSU and of the Working Procedures adopted by the Appellate Body of the WTO. Annex A shows the tabular list of ninety-one panel reports issued under Article XXIII of the GATT 1947, including information on applicants, adoption dates of panel reports, brief summaries of the cases, and references for each case.¹⁴ The same kind of information for twenty-four panel reports issued under the Tokyo Round Codes of 1979 is summarized in Annex B. The sixty-five dispute settlement procedures initiated pursuant to the DSU of the WTO during the period of January 1995 through January 1997 are listed in Appendix C along with a brief summary of each case.¹⁵ These summary lists will provide an indispensable reference source for future research on GATT/WTO dispute settlement.

Without a doubt, this book is among the most significant academic achievements in the area of international trade law, examining a wide variety of contemporary issues under the GATT/WTO dispute settlement system. It has been argued that the WTO panel reports, and particularly the Appellate Body reports, appear far more willing than their GATT predecessors to refer to the "teachings of highly qualified

14. This table lists only the cases for which a panel report has been issued. A more exhaustive list, but without case briefs, is provided in WORLD TRADE ORGANIZATION, ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE 771-87 (6th ed. 1995).

15. The more updated list for the period of Jan. 1, 1995 to Oct. 31, 1998 is available at the *Dispute Settlement Body—Annual Report (1998)* (WT/DSB/14 and WT/DSB/14/Add.1, dated Nov. 27, 1998), although this list does not provide ancillary information such as case summaries. Instead, they provide a fairly comprehensive procedural information regarding the WTO disputes.

publicists" in justifying their positions.¹⁶ Insofar as this tendency reflects the recognition of the increasing importance of law to the world trading system,¹⁷ we should anticipate that the work of scholars in this field will be more carefully considered in future proceedings of the GATT/WTO dispute settlement system as the system continues to grow. Doubtless many of the contributions in this volume will be among the writings thus consulted.

The Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes mandates that

ministers . . . invite the Ministerial Conference to complete a full review of dispute settlement rules and procedures under the World Trade Organization within four years after the entry into force of the Agreement Establishing the World Trade Organization, and to take a decision on the occasion of its first meeting after the completion of the review, whether to continue, modify or terminate such dispute settlement rules and procedures.¹⁸

Pursuant to this requirement, the Dispute Settlement Body of the WTO is currently working on several proposals from its Member countries regarding modification and improvement of the dispute settlement system. Regardless of the actual outcome of such multilateral efforts under the aegis of the WTO, this volume of scholarly contributions will remain as a milestone in the long road ahead.

16. David Palmeter & Petros C. Mavroidis, *The WTO Legal System: Sources of Law*, 92 AM. J. INT'L L. 398, 408 (1998).

17. *Id.*

18. Ministerial Decisions and Declarations adopted by the Trade Negotiations Committee on December 15, 1993, in WORLD TRADE ORGANIZATION, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 465 (1995).