

Gregory C. Shaffer and Ricardo Meléndez-Ortiz (eds), ***Dispute Settlement at the WTO: The Developing Country Experience***. Cambridge: Cambridge University Press, 2010. Pp. xvi + 355. £60. ISBN: 9780521769679.

As the 10th anniversary of the launch of the WTO multilateral trade negotiations at Doha approaches, this collection of essays serves as a painful reminder that the so-called ‘Doha Development Round’ is far from concluded. It also recalls how the WTO’s dispute settlement system has continued to have an important ‘norm-generating function’.¹ Nowhere is this more so than in disputes involving developing countries. In some instances developing country Members initiate formal dispute settlement proceedings at the WTO precisely to promote wider reforms of their governance and administrative structures. In others the participation of Member governments in formal dispute settlement procedures at the WTO has been supported by industry and the business sector. A few developing country governments have drawn on dialogue with local civil society organizations in bringing or defending complaints with important social implications for their citizens.

Based on original research and pioneered by the Geneva-based International Centre for Trade and Sustainable Development (ICTSD), the book under review provides a unique set of case studies of various low-income and middle-income² developing countries that have been active in WTO dispute settlement over the past decade. Its aim is to share ‘challenges, experiences, and best practices, and to inform deliberation and debate over what is possible’ for developing countries when using the system (at p. xv). The case studies are organized on a regional basis (South America, Asia, and Africa) with selected contributions from each region.

The case study on Brazil in Chapter 1 sets the tone. According to Shaffer, Sanchez Badin, and Rosenberg, the country’s success in WTO dispute settlement is attributable to a professionalised Ministry of Foreign Affairs, a supportive and well-organized business sector, and a networked

¹ See for a discussion of ‘judicial norm-generation’, although within a broader debate about the constitutionalization of world trade, Cass, ‘The “Constitutionalization” of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade’, 12 *EJIL* (2001) 39, at 51.

² This is the World Bank’s classification for developing country economies based on gross national income (GNI) *per capita* and not that of the WTO, which does not classify developing countries except when they fall into the category of least-developed countries (LDCs) in accordance with UN criteria: see, further, <http://data.worldbank.org/about/country-classifications>.

elite of professional lawyers and trade policy specialists. Brazil was one of the first two countries (the other being Venezuela) to bring a case under the Dispute Settlement Understanding (DSU) (*US – Gasoline*). It has been a respondent in several cases (*Brazil – Desiccated Coconut*, *Brazil – Aircraft* and *Brazil – Retreaded Tyres*). Brazil has acted differently from some other developing countries in seeking extensive public–private coordination in defence of its trade interests. As a complainant (*US – Cotton* and *EC – Sugar*), Brazil has been successful against contingent protection measures in two of its key export industries. Both cases contributed significantly to its status as a leader of the G20 group of developing countries, giving Brazil certain leverage in the Doha Development Round negotiations and securing its membership of the new WTO ‘quad’ in terms of structural leadership.

According to the authors, the challenges and opportunities that Brazil faced in reaching this status arose from its two-pronged, public–private approach to WTO dispute settlement. The government defended its immediate commercial interests in WTO cases whilst facilitating a broader, national capacity-building exercise in the related fields of law, policy, and dispute settlement. Importantly, the Ministry of Foreign Affairs adopted a ‘three pillar’ structure for WTO dispute settlement participation, consisting of: (i) a specialized dispute settlement unit in the capital, Brasilia, nested in a broader public–private network; with (ii) input from the private sector, the media, think tanks, and civil society organizations; and (iii) coordination of this unit with Brazil’s WTO permanent mission in Geneva.

The diffusion of information and knowledge across a Brazilian epistemic trade network has been a minor ‘revolution’ and has enhanced the development of expertise in handling WTO disputes. Thus, the legalization and judicialization of international trade relations in Brazil have assured its active participation in the WTO system. On the external plane, Brazil’s high rate of early stage negotiations, which are conducted in the shadow of potential WTO proceedings,³ has not gone unnoticed by other WTO developing country Members such as Egypt (Chapter 8).

The final part of the chapter examines the role of local civil society organizations in aiding Brazil in WTO disputes with broader social implications, e.g. *Brazil – Patent Protection* (access to essential medicines protected by patents in the interests of public health) and *Brazil – Retreaded Tyres* (defence of environmental and health risk measures associated with the accumulation of waste tyres). The significance for developing country Members of interventions by domestic NGOs should not be underestimated. Not only, as the authors claim, are developing country Members wary of civil society organizations as they may enhance the transparency of the WTO ‘intergovernmental’ dispute settlement system, but also they perceive them as posing a threat to public authority. However, other WTO developing country Members would do well to take heed of the Brazilian experience with civil society, which has been anything but subversive.

The other upper middle income case study from South America is on neighbouring Argentina (Chapter 2) where there has been a relatively high percentage use of the DSU, but with a less impressive outcome than in Brazil. The starting point for the government in handling early WTO cases was its previous experience under the GATT, where it brought six complaints, of which *EC – Oilseeds* and *US – Tobacco* provided an informal building block process for the development of legal and trade policy expertise in the Argentinian public sector.

Where Argentina’s experience differs from that of Brazil is in the early years of the WTO when it largely sought to handle claims on an ‘in-house’, *ad hoc* basis, with little involvement of the private sector. The government’s relative inexperience as respondent in *Argentina – Textiles and*

³ For an earlier description and analysis of this phenomenon see Busch and Reinhardt, ‘Bargaining in the Shadow of the Law: Early Settlement in GATT/WTO Disputes’, 24 *Fordham Int’l LJ* (2000) 158.

Apparel, brought by the US, and *Argentina – Footwear Safeguards (EC)* signalled an important change of direction. As Gabilondo explains, both claims ‘triggered a government capacity-building process in human resources devoted to WTO litigation’ (at 114).

It resulted in the institutionalization of the *de facto* structure of handling WTO disputes, beginning with the internal restructuring of the Ministry of Foreign Affairs and Trade in 2000 and closer cooperation with its permanent mission in Geneva. The change in approach was a turning point for Argentina. It moved from defending cases to challenging trade barriers in cases such as *Chile – Price-Band*, *US – Oil Country Tubular Goods* (for which it hired private sector law firms), and *EC – Biotech*. According to Gabilondo, the chief lessons for Argentina are the need for greater multi-stakeholder involvement and the development of a more structured framework to handle WTO cases.

The first case study in the Asian section concerning China (Chapter 3) is potentially the most interesting one, but sadly it disappoints. While Liyu and Gao provide an excellent analysis of the slow development of WTO expertise against a background of major institutional reforms and a revised approach by the Chinese government to litigation, foreign relations, and the rule of law, the timing of the book’s publication is against them. China has become a more active complainant and respondent following the end of its five-year transition period post-accession. There has been a substantial increase in the number of WTO disputes in which it has been involved from 2007/2008 onwards, some of which are still ongoing but are not covered here due to the 2009 deadline for the inclusion of case studies.

Noteworthy too is the fact that since 2002 China, like other major trade partners, has acted as third party in more than 62 WTO disputes, which have implications for its trade policy including, but not limited to, contingent protection cases. In particular, China has learnt from the US and the EU regarding the involvement of private firms in trade remedies disputes, even establishing its own Trade Barrier Investigation (TBI) mechanism at the Ministry of Commerce of the People’s Republic of China (MOFCOM). This development notwithstanding, there still remains a lack of: direct access to the government by private firms; industry representation, and political support from other ministries. Additionally, there is a general reluctance by the government to use the DSU.

China’s first real foray into WTO dispute settlement was in 2002 as one of the complainants in *US – Steel Safeguards*, in which it participated from the initial consultations through to the adoption of the Appellate Body decision. The authors note that in this case, and others like it, the Chinese government initially relied mostly on foreign law firms, but later MOFCOM brought domestic law firms on board. However, it has not all been plain sailing due to the continued language and technical legal barriers that the DSU poses for many domestic Chinese lawyers.

More critical perhaps is the lack of inter-governmental coordination between various ministries, including with respect to implementation of WTO obligations. This is compounded by the fragmented and uncoordinated relationship that the Chinese government has with both enterprise and industry, the underdeveloped role of civil society in accompanying claims with a socio-economic or an environmental element, and the singularly Confucian tradition of non-litigation that permeates Chinese society.

The remaining three chapters in the Asian section on India, Thailand, and Bangladesh address the experience with WTO dispute settlement by a lower-middle income, an upper-middle income, and a low-income developing country respectively. All three focus on a case that was of particular importance to the WTO Member concerned.

In Chapter 4, Dhar and Majumdar rely on the case of *EC – Tariff Preferences*, or *EC – GSP*, to explore India’s participation in WTO dispute settlement. What is left unexplained but lurks behind this dispute is the bitter political and trade rivalry between India and neighbouring Pakistan arising from the latter’s preferential access to the EU market for textile and clothing. As in the case of Argentina, the weak link in the chain for India when it comes to WTO dispute

settlement is the lack of adequate stakeholder participation, particularly where business and industry are concerned. However, links with Indian civil society organizations fare better. The government's statist model of development continues to hamper effective trade negotiations, combined with its disjunctive decision-making processes and a failure to re-orientate itself to the DSU. It means that the Government of India often participates on an *ex post facto* basis when bringing or defending a claim. However, the authors do point out that in some cases, like the *EC – GSP* case, industry may provide some of the evidence in a dispute, although in that case the Geneva-based Advisory Centre for WTO Law (ACWL) provided legal support.

This stands in contrast to Thailand's experience, analysed in Chapter 5, which concentrates on the country's challenge to export subsidies on sugar, as co-complainant alongside Australia and Brazil in *EC – Sugar*. In light of the country's experience in this case, Danvivathana discusses the government structure for handling WTO dispute settlement, which until recently relied largely on in-house lawyers, with coordination through its permanent mission in Geneva. Faced with various impediments, such as the limited number and experience of in-house lawyers in bringing a large complaint, combined with the high cost of litigation, the government of Thailand changed its strategy.

In *EC – Sugar* it made extensive use of the ACWL's services and, despite there being no formal channel of communications between the government and the private sector, allowed the Thai Sugar Association to be involved in the dispute. This participation even extended to the sugar industries of its co-complainants, Australia and Brazil, as well as the Global Sugar Alliance. In turn, the relevant sugar producer associations worked closely with all three governments in bringing the complaint.

Another user of the ACWL's services has been Bangladesh. Chapter 6 contains a case study of the first least-developed WTO Member to bring a complaint against its powerful neighbour, India. *India – Batteries from Bangladesh* concerned anti-dumping measures imposed by India on imports of lead acid batteries from Bangladesh. Whilst the Ministry of Commerce and Bangladeshi Trade Commission (BTC) were the key agencies involved in managing the dispute, the costs were borne almost entirely by the affected Bangladeshi exporter.

As in the case of Thailand, the Bangladeshi government relied on support from the ACWL in resolving the dispute at the consultation stage, and at a fraction of the normal costs of pursuing a complaint under the DSU. The BTC was instructed to prepare the case, whereupon it was moved to the formal consultations stage in Geneva. However, India, faced with a relatively weak case, indicated immediately after the first meeting that it no longer wished to proceed with the dispute. It provides a further example of the value for developing country Members of negotiating in the shadow of the litigation.⁴ Some of the lessons that Bangladesh can draw from this experience, which Ali Taslim highlights, include the need for a single statutory authority to deal with trade complaints, the need for greater public–private cooperation, local expertise, political will, and adequate funds to finance a WTO dispute from beginning to end.

The final section of the book contains three case studies from the African continent involving an upper-middle income, a lower-middle income, and a low-income country (South Africa, Egypt, and Kenya). All of them have been more or less active in WTO dispute settlement. As Brink explains in Chapter 7, South Africa has been mostly involved in trade remedies disputes for which it has established a specialist unit within its International Trade Administration Commission (ITAC), as part of a complex institutional structure within the Ministry of Trade and Industry. Despite this, South Africa has not necessarily followed formal procedures in its trade remedy practice, as is evident from the six complaints in which it has been active as respondent or complainant, and one dispute (*US – Zeroing (Japan)*) where it almost intervened as a third

⁴ *Ibid*; see also Busch and Reinhardt, 'Developing Countries and the General Agreement on Tariffs and Trade/World Trade Organization Dispute Settlement', 37 *J World Trade* (2003) 719.

party. What emerges from the review is that while South Africa may not have the necessary in-house expertise to deal with initial complaints, such capacity and skills do exist in the private sector, although it is unclear whether the South African government is willing to use them. Additionally, Brink notes that there is a need for greater private sector involvement and public awareness about the role of the South African government in WTO dispute settlement.

The chapters on Egypt and Kenya deviate to some extent from the previous case studies because they both examine their governments' experience against the broader plight of developing countries in WTO dispute settlement. In Chapter 8, former Egyptian ambassador, Shahin, records the fact that Egypt has been a respondent in four complaints brought by other WTO Members, three of which were resolved at the consultation stage, i.e., by means of negotiations in the shadow of potential litigation. *Egypt – Steel Rebar* 'represents a landmark in Egypt's DSU participation' (at 288) in that it went to a panel in which Egypt successfully defended the imposition of anti-dumping measures on imports of steel rebar from Turkey.

Shahin also notes that Egypt has been a third party in several cases, most notably *EC – Bed Linen*, where it challenged on behalf of other developing countries EC anti-dumping measures. She concedes that Egypt could use this status more often to build expertise and legal capacity in other potential WTO disputes. One factor that limits Egypt's participation in the DSU is its high costs/low stakes aspect. This could be overcome through public–private partnerships, including involvement of the affected domestic industry, which may absorb the costs of litigation, as happened in *Steel Rebar*. Other factors in the government's reluctance to act in a dispute are political considerations and a lack of sufficient capacity in legal expertise and experience.

In discussing Kenya (Chapter 9), which has been neither a complainant nor a respondent in WTO dispute settlement proceedings, Ouma Ochieng and Majanja make similar observations. They do, however, draw attention to the fact that Kenya's trade policy is mostly conducted under preferential trading arrangements. Despite the erosion of its margin of preference on major tariff lines the Kenyan government is reluctant to engage other Members in WTO dispute settlement notwithstanding potential disputes in the fish, horticultural, and manufacturing (toilet paper) industries. This is borne out by the reaction of the private sector in Kenya following the EU attack on food safety controls in the Nile perch fishing industry, and its continued fear of similar EU challenges under the SPS Agreement involving horticultural and agricultural products.

Traditionally the Kenyan Ministry for Trade and Industry has taken the lead on potential WTO disputes, e.g., with Pakistan over tea exports, but it is the normal practice, as in most Commonwealth developing countries, for all legal disputes involving the government to be referred to the Attorney General's (AG's) Office. Trade is no exception, as Kenya's third party intervention in *EC – Sugar* demonstrates. Aside from this, the authors note that when it comes to effective WTO dispute settlement Kenya lacks sound domestic structures and sufficient domestic coordination on trade matters, combined with weak multi-stakeholder participation in the field of external trade.

In their concluding chapter, Evans and Shaffer draw out the main lessons from this individual and collaborative research project. They note the centrality of governments in WTO dispute settlement despite the presence of public-private partnerships in many developing country Members. For such cases they advocate the importance of a dedicated international trade law unit, combined with an inter-departmental process to assess potential WTO disputes, and a central government contact point better to interact with the private sector. They also stress the importance of the Geneva-based mission for many countries, and the role of the ACWL, in enhancing the participation of developing country members in WTO dispute settlement. Finally, they emphasize the fact that many other actors, such as universities, local law firms, economic consultancies, and civil society, have an important role to play through capacity-building, training and other forms of interaction in helping developing

countries to maximize the opportunities, and cope with the challenges, of WTO dispute settlement.

While this publication will be of most interest to those WTO developing country Member governments capable of bringing or defending complaints in the DSU, there are valuable lessons for many other WTO Member governments. The original material provided by the case studies in this volume of essays will also enrich the work of commentators and scholars, who should draw upon them when writing about developing countries' use of the WTO dispute settlement. They too have much to learn.

Individual Contributions

Gregory C. Shaffer and Ricardo Meléndez-Ortiz, Preface: The ICTSD Dispute Settlement Project;

David Evans and Gregory C. Shaffer, Introduction;

Gregory C. Shaffer, Michelle Rattón Sánchez Badin and Barbara Rosenberg, Winning at the WTO: the Development of a Trade Policy Community within Brazil;

José L. Pérez Gabilondo, Argentina's Experience with WTO Dispute Settlement: Development of National Capacity and the Use of In-House Lawyers;

Han Liyu and Henry Gao, China's Experience in Utilizing the WTO Dispute Settlement Mechanism;

Biswajit Dhar and Abhik Majumdar, Learning from the India-EC GSP Dispute: The Issues and the Process;

Pornchai Danvivathana, Thailand's Experience in the WTO Dispute Settlement System: Challenging the EC Sugar Regime;

Mohammed Ali Taslim, How the DSU Worked for Bangladesh: The First Least Developed Country to Bring a WTO Claim;

Gustav Brink, South Africa's Experience with International Trade Dispute Settlement;

Magda Shahin, WTO Dispute Settlement for a Middle-Income Developing Country: Situation of Egypt;

David Ouma Ochieng and David S. Majanja, Sub-Saharan Africa and WTO Dispute Settlement: The Case of Kenya;

David Evans and Gregory C. Shaffer, Conclusion

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