

Book Review

A History of Law and Lawyers in the GATT/WTO: The Development of the Rule of Law in the Multilateral Trading System (Edited by Gabrielle Marceau)

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“The life of the law has not been logic; it has been experience.”

- Oliver Wendell Holmes Jr.

The international trading system has undergone a major transformation since the second half of the twentieth century. What began as an interim arrangement with the General Agreement on Tariffs and Trade (GATT) in 1948 has now metamorphosed into a full-fledged multilateral regime embodied in the World Trade Organisation (WTO). While there is no dearth of scholarly work tracing this development, the role that law and lawyers have played in the entire process has been overlooked to a large extent, especially in the pre-WTO era. Evolving from a 2012 conference celebrating 30 years of the WTO’s Legal Affairs Division, Gabrielle Marceau from the WTO Secretariat brings out a unique collection of 43 essays from 44 current and former GATT and WTO staff, as well as Appellate Body Members. These essays, grouped chronologically, are a personal, anecdotal, legal and, at times, a philosophical account of the authors’ experiences during their time at the GATT/WTO. The book, divided into four parts, and tied together by a comprehensive introduction by Marceau, Porges and Baker makes for a highly invigorating, nostalgic and refreshing read.

The book touches upon a number of issues, viz. – the institutional changes in the GATT/WTO over the years; the evolution of the dispute settlement mechanism and other related aspects like panel composition, expert consultation; the role of the Dispute Settlement Body; the various non-dispute related work performed by lawyers, especially relating to negotiations; establishment of the Appellate Body (AB); publication of the Analytical Index; interaction of the GATT/WTO law with the larger body of public international law; and the accession procedures, to name a few. It is beyond the scope of this review to look into each of these issues in detail, and I will, hence, only attempt to draw attention to the broad theme of the book.

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The first part of the book traces the GATT from 1948-1992, which is perhaps the least documented period of the history of law and lawyers, meriting a slightly more detailed discussion here. With many of the GATT's negotiators being "ambivalent or even hostile to attempts to 'judicialize' international trade"¹, it is no surprise that the GATT had no dedicated legal team or formal guidance on how disputes were to be resolved in its early years. This despite the first two heads of the GATT Secretariat being, in fact, lawyers by training. Diplomacy or pragmatism was preferred over an overtly legalised system. Roessler provides a frank criticism of the so called "management" approach which shrouded trade issues into secrecy with no mechanism to ensure that decisions were made taking into account interest of the public at large.² With increasing complexity of trade disputes, a series of panel decisions considered legally unsound, and the growth in the size and agenda of the organisation - the European Economic Community (EEC), which had traditionally opposed the creation of a legal office, softened its position. These factors together contributed to the creation of an Office of Legal Affairs, GATT in 1981 - marking an important milestone in the history of GATT. Contributions by Tuinen, Lindén, Roessler and Petersmann, who played a pioneering role in this phase, provide a window into the struggles faced by the early lawyers of GATT.³

The second part of the book looks into the legal work relating to the entry into force of the WTO from 1993-1995. The lawyers during this period had to tackle a number of interesting issues besides disputes, especially pertaining to the transition from the GATT to the WTO⁴ and the various Uruguay Round negotiations, including the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). The third part of the book captures the changing legal character of the multilateral trading system from 1996 till date. The first years of the WTO dispute settlement were instrumental in putting the DSU into operation, establishing the quasi judicial panel system that we are familiar with today, along with launching the brand-new Appellate Body. It is striking that despite the establishment of a Legal Affairs Division and as late as in 1999 – almost 50 years since the inception of GATT – the clash between the "rule(s) of lawyers and the ethos of diplomats" had not completely disappeared from the WTO, with LAD lawyers being advised to stick to helping panels and "nothing else".⁵

A number of contributions by former and current Appellate Body (AB) Members and Debra Steger, the first Director of the AB Secretariat, reflect upon some of the daunting challenges that the newly established Appellate Body faced after its inception, primary among them being - building reputation, legitimacy and respect for the newly established body. Not all authors agree on every issue, and it is this diversity of views that makes the book extremely engaging. For instance, an interesting aspect of AB procedures – collegiality through "exchange of views" that takes place among all seven members in every appeal has been considered to be a contributing factor in maintaining the consistency and coherence of the AB decisions by Steger⁶ and Lacarto-Muró⁷. Matsushita, on the other hand, suggests that given the costs involved in the process in terms of

1 Marceau, Porges and Baker, Chapter 1, 7.

2 Roessler, Chapter 11, 163.

3 See Tuinen, Chapter 7; Roessler, Chapter 11; Linden, Chapter 8. Petersmann, Chapter 13.

4 See Porges, Chapter 17.

5 Kuijper, Chapter 26, 377.

6 Steger, Chapter 31, 457.

7 Lacarto-Muró, Chapter 33, 479.

time and financial resources, the DSU should be amended to make the views of the AB Members who are not part of the Division deciding a particular dispute more relevant.⁸

The fourth and last part of the book looks into new challenges and opportunities that lie ahead for lawyers at the WTO. Innovative suggestions for tackling the increasing workload of the WTO panels and Appellate Body is one of the themes touched upon in this part.

To sum up, the book is a rare gem for those interested in the multilateral trading system, especially law students and legal professionals working in the area. It lucidly captures how the presence of lawyers, was gradually accepted at GATT, “first as unavoidable, then as useful, and finally as indispensable”⁹. By addressing a wide range of issues through insider’s reflections, the book provides a rare glimpse into the GATT/WTO as an organisation, together with the people who make it – without being self-laudatory. The multitude of authors, each with his/her own distinct style of writing - sharing their personal history along with the organisations’ – add a certain charm to the book, making it extremely enjoyable and a delight to read. It is also extremely heartening to note the important role women have played in the history of GATT/WTO at various legal positions, as captured in their contributions to this book. Despite the diversity in experiences, style, and the period of association of the authors with GATT/WTO, a sense of camaraderie between them is palpable in the writings. But what, perhaps, leaves a lasting impression on the reader is the commitment, effort and contribution of the authors in ensuring a rule-based multilateral trading system.

8 Matsushita, Chapter 37, 552-553.

9 Roessler, Chapter 11, 169.