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Book Review

Book Review: Negotiating the Review of the WTO Dispute Settlement Understanding

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Thomas A. Zimmermann (2006):
Negotiating the Review of the WTO Dispute Settlement Understanding
Cameron May Ltd., London, 2006
350 pages, ISBN 1 905017 170, £ 125.00 / US\$ 238.00

I

The Dispute Settlement Understanding (DSU) of the WTO celebrated its tenth anniversary last year. Since its entry into force in 1995, the DSU has been applied to more than 330 complaints and resulted in more than 130 panel and 75 Appellate Body reports – more cases than the GATT 1947 dealt with in nearly 50 years. Dispute settlement in the WTO has become a judicialized process which operates independently from the dynamics of the political process in the ongoing multilateral trade negotiations. The first years of the system have produced important cases, many of which have attained the status of *causes célèbres* and are known well beyond the governmental and international trade communities. Albeit formally binding only between the parties to a dispute, many panel and Appellate Body reports have further significant implications in that their reasoning clarifies the legal disciplines, resolves systemic uncertainties and brings the full dimension of substantive WTO law to the attention of a wider public.

The dispute settlement system is perceived, by the majority of WTO members, practitioners and academics, to work generally well. The Consultative Board concluded that “the operation of the dispute settlement system has been a remarkable success”.¹ However, the system has also revealed a number of serious deficits. Some of the practical shortcomings have been, over time, remedied by evolving panel and Appellate Body practice. In parallel, the WTO membership agreed to review and improve the DSU, and negotiations have been taking place since 1998 (‘DSU Review’). They have not yielded successful results so far as several deadlines lapsed without a substantive agreement. Currently, the negotiations form part of the ongoing *Doha Round*, and the mandate to continue the DSU Review has been formally renewed in the Hong Kong Ministerial Declaration, but without a new deadline being set.²

II

The monograph by THOMAS A. ZIMMERMANN takes stock of the DSU Review. It presents a fascinating insight into the system of GATT 1947/WTO dispute resolution, analyses the negotiations on its improvement so far and discusses the individual reform proposals in their broader context. The book offers a comprehensive analysis of the DSU Review, including the reasons for its lack of success so far and the prospects of an agreement in the near future. It consists of three parts. In part I, ZIMMERMANN introduces the economic, legal and political aspects of the GATT 1947/WTO dispute settlement system by tracing its evolution and its working in practice from the early GATT 1947 years to the fully-fledged mechanism under the WTO today. He describes the development as a gradual and very cautious one, “from a rather diplomacy-oriented towards a more adjudication-oriented mechanism” (p. 56). In its infancy, the GATT 1947 system, as well as its dispute settlement mechanism, mainly lived from normative pressures and strong political will, as the GATT 1947 was a club of like-minded nations and country repre-

1 Consultative Board, The Future of the WTO: Addressing Institutional Challenges in the New Millennium, Report to the Director-General SUPACHAI PANTICHPAKDI, Geneva 2004, para. 254. – All references cited in this review are accessible through www.wto.org.

2 Ministerial Declaration, adopted on 18 December 2005, WT/MIN(05)/DEC, para. 34.

sentatives. ZIMMERMANN then turns to two particular disruptions with which the foundations of the GATT 1947 system were seriously shaken, namely the consolidation of the European Communities, being anxious to build a politically coherent block and a counterweight to the so far dominant United States, and the accession to the GATT 1947 of many developing countries in the 1960s, believing more in political interventionism and import-substitution policies than in the benefits of free trade (p. 48–50). As a consequence, an erosion of substantive GATT disciplines took place which also affected dispute settlement activities. It could only be restored by the addition of new treaty texts, first in the Tokyo Round in 1979 and, more comprehensively, in the Uruguay Round in 1994. Not surprisingly, the dispute settlement rules of today combine both political and legal elements. They constitute “something of a ‘middle-ground’ between political/diplomatic negotiations and third-party adjudication” (p. 70). Overall, the evolution reflects the major concerns of the membership, being torn between the desire for an effective, rules-based dispute settlement system and the desire for trade policy flexibility. ZIMMERMANN concludes that many of these concerns are still present in the current DSU review and decisively shape the ongoing discussions on how to improve the system.

Part II gives an overview of the different stages of the negotiations. The first review efforts were made in 1997 and 1998, mandated by the 1994 Ministerial Declaration. They did not materialise, nor did the negotiations in the run-up to the Seattle Ministerial Conference in 1999. ZIMMERMANN reveals how the negotiations evolved amidst emerging issues of on-going dispute settlement practice. Major trade disputes (such as EC – Bananas and EC – Hormones and the issue of prompt implementation of adverse rulings) and systemic difficulties (such as the handling of *amicus curiae* briefs) stood at the forefront of the discussion (pp. 93–99). After the failure in Seattle, the negotiations remained in limbo until the Doha Ministerial Conference where a new negotiating mandate was agreed upon. However, the deadline of May 2003, which resulted in the so-called “Balas Text” consisting of a major compilation of less controversial and potentially consensusripe proposals, could not be met (p. 111–118).³ The next deadline of May 2004 was equally missed. ZIMMERMANN then turns to the analysis of the negotiating proposals which have been submitted on virtually all provisions of the DSU. He divides them into stage-specific issues (i.e. consultation, panel stage, appellate review and implementation) and horizontal issues concerning several or all stages of the procedure (such as transparency, special and differential treatment of developing countries and third-party rights), and traces their background, their contents and their potential implications. Such background information relates to specific national experience with the use of a certain provision or to domestic policy pressures. This part is a unique compilation of all the proposals which have been tabled under the Doha-mandated DSU Review up to the missed deadline of May 2003. Moreover, a tabular overview in the annex lists all these proposals in a systematic manner.

Part III offers conclusions and recommendations, based on the preceding parts. ZIMMERMANN identifies a number of central reasons why the negotiations have failed so far. Firstly, the traditional voting system in the WTO, requiring consensus among the membership, sets high hurdles for any amendment to the DSU. Secondly, many issue-specific divides are identified, in particular those running between the European Communities

3 The so-called “Balas Text” was named after the Chairman of the DSU Review at that time, PETER BALAS, and was annexed to document TN/DS/9.

and the United States, but also those running between developed and developing countries. Thirdly, the most prominent of the unresolved issues concerns the general direction of the DSU; it is controversially argued whether the system should continue its journey towards a more rules-based approach or whether the diplomatic, negotiatory element should prevail. Fourthly, reforming a system, which is currently in use, leads almost automatically to systemic difficulties. This holds in particular true as there is no urgent need to change the mechanism which is considered to function, overall, well. ZIMMERMANN concurs with the Consultative Board which advises “not ‘to do any harm’ to the existing systems since it has so many valuable attributes” (pp. 216–217).⁴ Fifthly, the system has proven to be flexible enough, as it stands, to adapt to changing circumstances. ZIMMERMANN illustratively lists some elements of such a “DSU Review in practice” (p. 217–218). This has further reduced the pressure urgently to arrive at an agreement. Based upon these findings, ZIMMERMANN offers some policy recommendations. He proposes a more modest approach to the DSU Review than has been pursued in the last years. In particular, a focus on technical improvements, rather than systemically significant changes, appears to be the only way susceptible of consensus. ZIMMERMANN doubts whether a review aiming at resolving major issues such as a permanent panel body, increased external transparency and the partial adoption procedure could in fact materialise. Moreover, the participation of developing countries in the system, as well as generous transition periods, should be essential elements to overcome the current difficulties in the negotiation process. On a more general and overall systemic level, a new balance between the relatively efficient adjudication system and the often inefficient, consensus-based decision-making process in the WTO needs to be found if tensions in the DSU practice are to be reduced. ZIMMERMANN advises to continue a middle way; members shall assume their systemic responsibility by exercising restraint in bringing politically sensitive cases to adjudication. At the same time, panels and the Appellate Body should continue to avoid “sweeping statements” which might provoke strong political reactions from members (p. 228). The book concludes with an outlook and predicts that the conclusion of the DSU Review as part of the Doha Round final package seems to be, from a political viewpoint, the most likely option, as the prospect of an ‘early harvest’ for the DSU Review is not realistic.

III

ZIMMERMANN adds a fascinating monograph to the already quite extensive amount of academic literature on the DSU. He has chosen a research approach which has been unique so far. This holds true in a twofold manner: On the one hand, the book traces, in its first part, the evolution of multilateral trade dispute settlement from the early years of the GATT 1947 up to the entry into force of the WTO and the DSU. This outline shows how the system has ever been torn between diverging orientations that still underlie the current debate about the ‘perfect’ DSU. This historical account offers a basis for a finely-tuned evaluation of the DSU Review which would not be possible without this background. On the other hand, the book is not limited, in exploring the various DSU review proposals, to discussing the contents of the individual country submissions. Rather, it analyses the background of major proposals where pertinent information has been available. It puts the proposals in context, reveals specific national experience and motivation for certain proposals as well as domestic policy pressures to pursue a certain negotiating goal. The book succeeds in ‘decoding’ the unclear official diplomatic language which normally accompanies the presentation of new proposals, and enables to pro-

4 Consultative Board, *supra* fn. 1, para. 254.

perly evaluate and understand them. Thus, the reading of ZIMMERMANN's book not only gives an interesting insight into, and comprehensive overview of, the negotiating process as such, but also enables the reader to understand the functioning of the current system, as well as its potential clarifications and improvements, from a different angle.

Moreover, most general literature on the DSU has been written by lawyers who traditionally emphasise the judicialized nature of current dispute resolution under the DSU – normally put in stark contrast to the power-oriented dispute settlement procedures under the GATT 1947. The present book marks a joyful exception. ZIMMERMANN, an economist by education, has again broadened the horizon. He critically questions the current functioning of the DSU and the various proposals to remedy the deficiencies not only from a legal but also from an economic and political scientist's viewpoint. The reasons, why the negotiations have failed so far, and the policy recommendations, with which the book concludes, are appropriate. The writer of this review, having represented Switzerland in the DSU Review from mid-2003 to mid-2005, concurs with all of them. ZIMMERMANN rightly points to the fact that the system has worked remarkably well during its first ten years of existence. Against this background, it is not surprising that the practical need, as well as the political will, to come to a substantive agreement is marginal – the negotiators being well aware of the danger that even small changes may negatively affect the carefully balanced system. Contrary to other negotiation dossiers in the Doha Round, the DSU Review is not driven forward by real 'demandeurs'. The negotiations in 2003 and 2004 appeared at times to take place in a political vacuum with no real sense of engagement. In short, the DSU seems to be entangled in a vicious circle: It functions too well for a comprehensive remake but not perfectly enough for the members' delegates to leave their fingers completely from review activities.

The book is carefully researched, adequately structured and very well written. It is easily accessible, and the quality and stringency of its reasoning are impressive. An extensive annex contains a full synopsis of all country proposals that have been submitted during the Doha-mandated DSU Review, allowing the reader to locate proposals on any specific issue and to briefly review an entire country submission. Undoubtedly, the book will serve as relevant point of departure for any further research efforts in the field. It is warmly recommended to all practitioners, diplomats and scholars interested in international dispute resolution in general. Of course, it will be a fundamental reading for all those interested in the DSU Review, in particular for the country delegates directly involved in the negotiations. There is currently no better reading on the DSU Review available on the market.

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