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### A History of Law and Lawyers in the GATT/WTO. Edited by Gabrielle Marceau.

Meredith Kolsky Lewis

University at Buffalo School of Law, mlewis5@buffalo.edu

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*A History of Law and Lawyers in the GATT/WTO.* Edited by Gabrielle Marceau. Cambridge, UK: Cambridge University Press and the World Trade Organization, 2015. Pp. xxxii, 655. Index. \$155.  
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*A History of Law and Lawyers in the GATT/WTO* has its origins in a World Trade Organization (WTO) conference on the creation of the General Agreement on Tariffs and Trade's (GATT) Office of Legal Affairs. That office was renamed the Division of Legal Affairs in 1989, and is now called the Legal Affairs Division (LAD). However, the volume is no mere collection of conference papers. Instead, following the conference, Gabrielle Marceau, a long-time counselor in LAD, conferred with Cambridge University Press and agreed to a volume that would provide a longitudinal perspective on law and lawyers throughout the GATT/WTO years, but insisted that the story be told only by insiders (p. xxviii). It is that insiders' perspective that makes this book particularly remarkable. Every contributor worked or works within the GATT and/or WTO, with many serving for fifteen, twenty, or even thirty or more years. The authors represent an impressive array of experience, in the temporal sense—with recollections spanning from 1950s service to the present—but also in

terms of the depth and breadth of their firsthand knowledge. The subject matter includes the myriad types of legal work performed by lawyers throughout the years, as well as the successes and challenges of developing a rule of law ethos from within.

Marceau herself is a consummate insider, having worked at the GATT/WTO for over twenty years, primarily in LAD, but additionally as Legal Adviser in Director-General Pascal Lamy's cabinet from 2005–2010. She is also an Associate Professor at the Faculty of Law of the University of Geneva, and is a prolific scholar who is active in numerous academic and professional international economic law societies and organizations.

The book features forty-three chapters. Following a foreword written by WTO Director-General Roberto Azevêdo and a preface by Marceau, the book features two introductory and overview chapters, followed by four parts. Part I is entitled "The Role of Law and Lawyers in the GATT System: 1948–1992" and contains subparts that begin a narrative of the evolution of lawyers in the international trading system as akin to a human's passage from infancy through to maturity. Part I begins with subparts on infancy, which covers the origins of legislation of the GATT (chapters 3–6), followed by childhood, addressing the Tokyo Round of GATT negotiations and the first GATT legal office (chapters 7–14). Part II is headed "Legal Work Relating to the Entry into Force of the WTO: 1993–95" and comprises two subparts: "Adolescence: Transition from the GATT to the WTO" (chapters 15–18) and "Young Adult: The WTO as a Formal International Organization" (chapters 19–24). Part III is titled "The Changing Legal Character of the Multilateral Trading System: 1996–Today" and contains two further developmental stage-themed subparts—"Adulthood: The Quasi-judicialization of the Panel Process by the Legal Affairs Division and the Rules Division" (chapters 25–30) and "Gaining Maturity: The Appellate Body and the Impact of the Appellate Review on the Development of International Trade Law" (chapters 31–39).

Part IV, entitled "Looking Ahead" and subtitled "New Challenges and Opportunities," is a relatively brief twenty-nine pages, featuring three substantive chapters followed by concluding remarks by Deputy-Director General Karl Brauner.

Although the book features forty-five contributors, Marceau's contribution is evident and substantial. In addition to writing the preface and co-authoring (with Amelia Porges and Daniel Ari Baker) the fifty-nine-page introductory chapter, she also co-wrote (with Daniel Ari Baker) a nineteen-page chapter providing a historical look at the Rules Division (chapter 6) and authored an additional twenty-page chapter (chapter 17) discussing LAD's legal duties beyond dispute settlement. Further, the chapters of Hielke van Tuinen (chapter 7) and Åke Lindén (chapter 8), the first two directors of LAD, were prepared by Marceau (with review and approval by the contributors) on the basis of interviews conducted prior to the 2013 deaths of both men. Marceau's guidance as an able editor is also apparent, with most contributions linking personal experiences to common themes of pragmatism, rule of law, transparency, and collegiality.

There is now a widespread general familiarity with the WTO, particularly its dispute settlement system which is often referred to as "the jewel in the crown." Many will be familiar with the narrative of the WTO ushering in a more legalistic and rules-based system than its predecessor, the GATT, and be aware that the WTO's dispute settlement system includes an Appellate Body as well as panels of first instance; that decisions are binding; and that retaliatory measures are possible in the event of noncompliance.

The fact that the WTO dispute settlement system is well-regarded and has been used actively, coupled with the failures of the legislative and, to a lesser extent, executive branches of WTO governance to, *inter alia*, conclude the Doha Round of trade negotiations, has meant that the bulk of scholarly commentary focuses on aspects of WTO law and dispute settlement. However, only a small fraction of this literature draws upon historical materials, and even that

has mostly derived from commentators who have observed the GATT and WTO from the outside looking in. For all of the scholarship about GATT/WTO law, very little has been written about the lawyers serving within the GATT/WTO or the roles they have played in the institutions' evolution. To the extent the staff is considered at all, it is often in broad brush references to the three main divisions that currently house the dispute settlement lawyers: the Appellate Body Secretariat, which assists the Appellate Body with appeals; the Legal Affairs Division; and the Rules Division, the latter two of which service all dispute settlement panels.<sup>1</sup> Little is known or said about the inner workings of these divisions with respect to dispute settlement, much less the tasks performed in other realms, such as assisting with committee work and negotiations, and even less about the roles played by legal officials not involved in dispute settlement. This book fills in many of these missing pieces of GATT/WTO history.

The book provides firsthand accounts of working within the GATT/WTO as lawyers, and contributing to the creation and implementation of more formalized rules and a fidelity to the rule of law, while maintaining a pragmatic approach to problem-solving. Most of the chapters are written in the style of personal recollections and reflections, with all the charm of a memoir but the rigor of a careful accounting. The volume is full of facts and revelations that only insiders could provide, documented in many cases with citations to primary source documents, and it is therefore a tremendous resource, particularly for anyone interested in GATT/WTO history.

The substantial "Introduction and Overview" (chapter 1) is an especially rich contribution, including close to two hundred footnotes that reference sources from the 1940s to the 2010s. These include a 1949 *Harvard Law Review* article identifying flaws in the draft International Trade

<sup>1</sup> The Rules Division services panels hearing disputes relating to trade remedies (antidumping, subsidies and countervailing measures, and safeguards), state trading, trade-related investment measures, and civil aircraft, and LAD services panels implicating all agreements not covered by the Rules Division.

Organization (ITO) Charter (an entity proposed at Bretton Woods that never came into existence)<sup>2</sup> and numerous United Nations and GATT documents dating back to the 1940s that are not easily accessible but are on file with the authors.<sup>3</sup> This chapter also reveals fascinating, little-known information. As but one example, many will know that Ernst-Ulrich ("Ulli") Petersmann was the first GATT lawyer hired to serve under the title "Legal Officer" in 1981, but likely would be unaware of the 1961 hiring of Noel Torres, an African-American lawyer, to perform a range of non-dispute-related legal work under the title "Economic Affairs Officer (Legal)." The documentation for Torres's title is a GATT Administrative memorandum on file with the authors (p. 19 and n. 77). The EEC (as the EU was then known) saw the GATT as a forum for negotiation rather than sharing the U.S.'s view of it as primarily a treaty, and were not in favor of hiring lawyers: "Torres's one-year contract was not renewed" (p. 20).

The introduction draws upon the individual contributions and provides significant additional commentary to present a coherent narrative of GATT negotiators, diplomats, and staff being simultaneously wary of lawyers and formal legal regimentation while having a strong regard for, and commitment to, creating and maintaining a system based on the rule of law (p. 7).

Parts I and II, which cover the GATT years and the transition to the WTO, are particularly valuable as they contain the recollections of individuals at the forefront of significant changes, about which there are few published firsthand

<sup>2</sup> S.J. Rubin, *The Judicial Review Problem in the International Trade Organization*, HARV. L. REV. 63, 78–98 (1949) (cited in footnote 9, page 5).

<sup>3</sup> See, e.g., General Agreement on Tariffs and Trade, Dispute Settlement Procedures, June 15, 1976, NRR/jp (cited in several footnotes beginning with footnote 55, page 14); General Agreement on Tariffs and Trade, Allocation of Staff, Administrative Memorandum, Apr. 10, 1961, 158/GATT Office Circular 106 (cited in footnote 77, page 19); General Agreement on Tariffs and Trade, Comments on Procedures Suggested by Professor Jackson for Settlement of Disputes, with Particular Reference to Disputes Between Developed and Developing Countries, Mar. 18, 1976, NRR/jat (cited in footnote 81 on page 20).

accounts. In some cases, even the individuals themselves had not been recognized previously for their roles. In the Preface (p. xxvii), Marceau remarks that in the course of preparing for the “LAD at Thirty” conference, she and other long-serving officials learned to their surprise that Hielke van Tuinen, with whom no one had any familiarity, had been the first Director of LAD, not Åke Lindén, as had previously been understood. This led her to locate and speak with van Tuinen, by then nearly ninety, and his recollections (chapter 7), as well as those of Lindén (chapter 8), are valuable to have captured. While more has been written about the WTO years, Part III is nonetheless an excellent resource, particularly for the proposals for reform offered by its contributors.

The book has remarkably broad coverage in a number of areas. Not only did Marceau obtain contributions from the first LAD directors, van Tuinen and Lindén, but also from every subsequent director (Frieder Roessler, chapter 11; Bill Davey, chapter 25; Pieter Jan Kuijper, chapter 26; Bruce Wilson, chapter 27; and Valerie Hughes, chapter 28) and the first lawyer hired into a role called “legal officer,” Ulli Petersmann (chapter 13). The subpart on the Appellate Body is also impressive: it includes chapters by Debra Steger, the first director of the Appellate Body Secretariat (chapter 31), followed by eight past and present members of the Appellate Body (chapters 32–39), including the four members of the original seven-person Appellate Body who are still alive (James Bacchus, Claus-Dieter Ehlermann, Julio Lacarte, and Mitsuo Matsushita). Two additional past and present Appellate Body members (Jennifer Hillman and Ricardo Ramírez) and another former director of the Appellate Body Secretariat (Valerie Hughes) contribute elsewhere in the book. These contributions from LAD and Appellate Body insiders include the back stories behind various dispute settlement panel and Appellate Body processes and enrich the available scholarship on GATT/WTO dispute settlement.

A further example of thoroughness lies in the inclusion of a contribution by Yves Renouf (chapter 23), who serves as legal counsel to the

Administration in the WTO Office of the Director-General, a role created in 2009 (p. 336). Renouf’s activities involve legal advice unrelated to the WTO Agreement, akin to those of a general counsel within a company (p. 337).

Given the otherwise comprehensive representation of the contributors across decades and divisions, it is striking that there is not a single chapter written by a Rules Division lawyer about the Rules Division, and no chapter at all devoted to the workings of the Rules Division in the WTO era.<sup>4</sup> This omission is notable, particularly since over half of all WTO disputes fall within the remit of this division (p. 127). A number of individuals with lengthy backgrounds in the Rules Division are thanked for reviewed draft chapters for the book (pp. 112–13) but it would have been welcome to hear directly from them.

The book has been closely curated, with themes of pragmatism, rule of law, collegiality, and transparency emphasized throughout the volume. It has also been carefully edited, with most chapters reading smoothly notwithstanding the large number of authors, many of whom are of an advanced age and/or are not writing in their native languages. However, a contribution that reads somewhat less well is that of a former Appellate Body member wherein a number of sections are disjointed or end abruptly. This section also includes a statement—that Jennifer Hillman “did not want to be reappointed” to the Appellate Body (p. 563)—that could perhaps have been corrected in the editing process. It is well-known that Hillman *did* wish to be reappointed, but due to unhappiness within the U.S. Office of the Trade Representative with certain Appellate Body rulings against the United States, particularly relating to the U.S. Department of Commerce practice of using zeroing in various antidumping calculation

<sup>4</sup> The sole chapter devoted to the Rules Division, “A Short History of the Rules Division” (chapter 6), was written by Marceau and a junior colleague from LAD, Daniel Ari Baker (albeit with consultation with those with personal experience in the division (p.113)) and focuses almost exclusively on the GATT years, with slightly over one page devoted to the past twenty years (pp. 127–28).

methodologies, the United States did not support her reappointment.

The overall book progression from infancy to adulthood is logical and works well. However, the contributions in the final Part, “Looking Ahead,” are not all focused on the future, while many of the contributions in Part III do include suggestions for reform. It thus may have made sense to either include other chapters in Part IV or to have omitted that Part.

Read individually, these accounts reflect a high degree of pride in the roles lawyers have played, and strong affection and respect for many of the contributors’ colleagues and superiors. However, reading the contributions collectively reveals more nuanced pictures. I will touch upon two such nuances that caught my eye based on my own research interests, but what will jump out to any given reader will likely be unique because there is so much interesting content in this collection.

One narrative that is not spelled out but can be deduced is a significant level of tension between LAD and the Appellate Body Secretariat on the one hand and the Rules Division on the other. Some enmity likely stems from incidents in the 2000s, when a number of panels served by the Rules Division reached conclusions that were contrary to Appellate Body jurisprudence on the subject of zeroing, a methodology used in calculating antidumping duties. While the WTO has no formal system of precedent, it has been the norm and expectation that panels would follow previous decisions of the Appellate Body. From the outside, these may have appeared to casual observers as one-off “rogue” panels. However, those with some knowledge of the influence divisions have in servicing panels may have seen this as a battle between at least some in the Rules Division and at least some in the Appellate Body Secretariat. Former LAD Director Bill Davey (chapter 25) alludes to the tension: “there were never serious problems in the panel-Appellate Body relationship in the early years, nor significant difficulties between LAD and the Appellate Body Secretariat, which enjoyed a good working relationship. It was only later in the zeroing cases that panels attempted to challenge the Appellate Body” (p. 372).

However, resentments may have been simmering for twenty-five years or longer. Former Deputy Director-General Alejandro Jara (chapter 41) explains the enduring role of the Rules Division in dispute settlement as resulting from a powerful personality: “[T]he truth is that the director in charge of trade remedies when LAD was being established proved to be the most formidable negotiator and was able to prevail against all odds and retain that role for his division” (p. 608). Responsibility for negotiations involving trade remedies and a few other matters were assigned to the Rules Division upon its creation in 1992, which merely gave a new name to staff who had previously been performing these functions as part of the Tariff Division (p. 125). However, while LAD and Rules Division staff previously had advised panels in tandem, Marceau and Baker suggest Jan Woznowski (director of the Rules Division from inception until 2008) insisted successfully upon primacy for his division for disputes involving Rules (p. 125). A number of contributors critique this divide. Petros Mavroidis (chapter 16), who served in LAD from 1992–1996, suggests only one division advise panelists (p. 243) to “minimise the potential for detrimentally irreconcilable views expressed at the panel level.” Kuijper (pp. 387–88) and Jara (p. 608) make similar suggestions. More provocatively, Mavroidis—presumably alluding to the Rules Division—proposes vertical coordination between panel divisions and the Appellate Body: “so we avoid repetitions of unfortunate events where the Appellate Body explains three or four times what it actually meant when laying out a case law that was misunderstood by panels that subsequently dealt with the same issue” (p. 243).

A second subtext that stood out to me relates to the book’s themes of pragmatism and rule of law. The contributors and their colleagues through the years seem to have had varying views about the relationship between law and pragmatism and the extent to which disregarding or steering the former should be seen as exemplifying the latter. Those who were amongst the earlier lawyers to work in the GATT paint a picture of officials

who viewed pragmatism as a positive, and saw law as the enemy of pragmatism.

Frieder Roessler, who served as director of LAD from 1989–1995 after many years in the GATT Secretariat, recounts one of his first staff meetings after joining the Secretariat in 1973. He asked GATT Director-General Olivier Long why the GATT did not have a legal affairs division; to his bewilderment, everyone in attendance laughed. After the meeting, Stuart Robinson (a contributor of a short chapter in this volume (chapter 5)) told him, “You know, Frieder, people here do not believe in law. They believe in pragmatism” (p. 161).

Pieter Jan Kuijper, director of LAD from 1999–2002, describes a continued cautiousness toward LAD and lawyers on the part of others within the WTO (chapter 26). He invokes Joseph Weiler’s seminal article “The Rule of Lawyers and the Ethos of Diplomats”<sup>5</sup> to bemoan a continual disdain for lawyers on the part of “an organization where ineffective diplomacy over the years has reduced negotiated rulemaking to near zero and the judicial branch has often been more successful at cutting difficult knots than the diplomatic organs” (p. 377). Kuijper identifies examples of “failure” resulting from declining to consult with lawyers within the WTO, including, “A Director of technical cooperation demoted overnight by the Director-General without any decent procedure to become head of an as yet non-existent unit. . .” (pp. 378–79). While lacking Kuijper’s bitter tone, Renouf, the legal counsel to the Administration (chapter 23), subtitled his chapter “A Legal Adviser Who Should Not Look Like One” and describes ongoing concerns within management that certain WTO members “were suspicious of lawyers and—it is suspected—did not view the application of the rule of law within the Secretariat as an absolute priority” (p. 337).

In the dispute settlement context, Roessler’s chapter is an excellent exposé of the tensions in the 1960s to early 1980s between trying to

enforce the rules as written, often seen as unrealistic, and reaching pragmatic outcomes, subject to critique for not being grounded in the legal obligations (e.g., p. 164). Roessler is critical of the pragmatic solutions reached by some panels prior to the creation of the Office of Legal Affairs (p. 165) and in its first years, when the office “was not always able to sway the views of ‘managers’ who were sometimes appointed as panelists” (p. 169). One wonders what Roessler thought of van Tuinen; the Introduction reveals a remarkable memo written by van Tuinen in 1980 shortly before he became the first director of the new Office of Legal Affairs. Van Tuinen instructed the Secretariat, in assisting panelists, to “play a discrete but active role” in providing guidance and to draft both “the descriptive part” and “the conclusions” of panel reports, in order to “ensure findings and conclusions . . . are in line with earlier precedents and interpretations. . .” (p. 31).

Roessler acknowledges that panels had different pressures in the GATT era which likely led to a pragmatic approach; at that time the losing party alone could block the adoption of a panel report, so without an Appellate Body for backup, the lawyers’ goal was to get the reports adopted (p. 170).

Christina Schröder, a long-serving counselor in the Agriculture Division with a legal background, recounts her role (chapter 9), beginning in the 1970s, in assisting numerous GATT dispute settlement panels with agriculture-related disputes in ways that could be seen as “pragmatic.” Although referring to herself in the third person, Schröder does not shy from sharing surprising details, describing two panels for which she appears to have attempted to mask panelist disagreement (pp. 146–47). In the first, there was not unity over an interpretive issue, leading one panelist to draft a dissenting opinion. The disagreement did not lead to a difference in views as to the outcome on the issue, and Schröder appears to have convinced the panelist to drop his dissent: “in the end he agreed to delete his dissenting opinion from the final report” (p. 146). In the second, a panelist disagreed with the majority and apparently rebuffed

<sup>5</sup> J.H.H. Weiler, *The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement* (Harvard Jean Monnet Working Paper 9/00).

Schröder's efforts to omit this fact: "[o]ne member of the panel disagreed and insisted on having his opinion noted in the panel report" (p. 147).

Mavroidis notes the strong influence LAD had over panelists during the transition from GATT to WTO ("its influence in persuading panellists on the status of the law should not be underestimated" (p. 239)) and cites accounts from the 2000s and 2010s to suggest "a substantial rather than minor influence" (p. 240, n. 15) has continued. In his words, "the Secretariat possessed a winning card: it was the guardian of the system; its opinion on the status of the law mattered. Those wanting to differ would carry an important burden of proof" (p. 240).

Contributors who joined the GATT/WTO a bit later paint a more optimistic picture. Valerie Hughes (chapter 28), director of LAD from 2010–2016, defends the role played by the Secretariat, arguing that "[i]t would be wrong to say . . . that the Secretariat exercises undue influence on the decisions made by panels" (p. 406). She offers as proof of this the lack of uniformity in the three panel reports issued in close succession in 2011 interpreting aspects of the TBT Agreement (*US – Clove Cigarettes*, *US – Tuna II*, and *US – COOL*) (p. 406, n. 7, 15). And Marceau argues convincingly that pragmatism has been a positive, complementing rather than contradicting legalism (p. 246). Bill Davey (chapter 25) and Bruce Wilson (chapter 27) who served as directors of LAD from 1995–1999 and 2002–2010 respectively, offer numerous examples of pragmatic decisions taken to address ad hoc procedural issues that have arisen for which no written rules or guidelines existed.

This review has barely scratched the surface of all the valuable contributions contained within this volume. I have already cited nine different chapters in my current research projects, and have discovered dozens of useful references in the footnotes. I highly recommend this book, particularly to those who are already familiar with the contours of the GATT/WTO system.

MEREDITH KOLSKY LEWIS  
*University at Buffalo School of Law*