

The Law in Action at the WTO

Defending Interests: Public-Private Partnerships in WTO Litigation, Gregory C. Shaffer
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Reviewed by Spencer Weber Waller*

There has been relatively little written applying the insights of legal realism to international law, particularly international economic law. Professor Gregory Shaffer has admirably filled this gap in his excellent new book, *Defending Interests: Public-Private Partnerships in WTO Litigation*.¹

I. Legal Realism in International Economic Law

There are two reasons, one theoretical and one practical, which account for the failure of legal realism to have much to say about international economic law. Legal realism came of age in the 1920s and early 1930s, first at Columbia Law School and then at Yale Law School.² One branch of the realist project was skeptical that either rules or facts constrained courts or legal decisionmakers and sought to document the indeterminacy of law.³ Other realists sought to apply

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¹ GREGORY C. SHAFFER, *DEFENDING INTERESTS: PUBLIC-PRIVATE PARTNERSHIPS IN WTO LITIGATION* (2003)(hereinafter *DEFENDING INTERESTS*).

² See generally LAURA KALMAN, *LEGAL REALISM AT YALE 1927-1960* (1986); WILFRID E. RUMBLE JR., *AMERICAN LEGAL REALISM* (1968).

³ See e.g., JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* (1949); JEROME FRANK, *LAW AND THE MODERN MIND* (1930); LEON GREEN, *THE LITIGATION PROCESS IN TORT LAW* (2d ed. 1977); KARL N. LLEWELLYN, *JURISPRUDENCE: REALISM IN THEORY AND PRACTICE* (1962).

the insights of social science to legal rulemaking and dispute resolution.⁴

By the time that the principal international economic institutions such as the GATT, World Bank and the IMF were created after World War II, legal realism was somewhat discredited, its adherents either recanting or moving on to other endeavors, and the movement had lost most of its grip on the American legal imagination. The legal process movement was in ascendancy with its emphasis on using reasoned elaboration and neutral principles to define the legitimacy of United States court opinions and administrative decisions.⁵

After World War II, international law as a discipline was also under attack in a way that cut against a strong contribution from the remaining realists. The *political* realists, led by Hans Morgenthau, asserted that international law did not constrain nations' behavior and that only self interest and power governed relations between sovereign states at the international level.⁶ While many in the extreme wing of the legal realist movement would probably agree with that statement, most of the mainstream international law world instead defended international law as an autonomous discipline. This strategy had the effect of further marginalizing the legal realist

⁴ JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* (1995); John Henry Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 BUFF. L. REV. 512 (1979).

⁵ HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (tent. ed. 1958)(edited by William N. Eskridge, Jr. and Philip P. Frickey. New York: Foundation Press. 1994); GARY MINDA, *POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END* 33-43 (1995); Anthony J. Sebok, *Reading the Legal Process*, 94 Mich. L. Rev. 1571 (1996).

⁶ HANS J. MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* (5th rev. ed 1978); Hans J. Morgenthau, *Positivism, Functionalism, and International Law*, 34 Am. J. Int'l L. 260 (1940).

approach. Even the neo-realism of Myres McDougal and the so-called New Haven school had little impact on the central struggle between the international law and the international relations community in the post-War era.⁷ By the time that international economic law became its own discipline in the 1970s and 1980s,⁸ legal realism was legal history.

The other impediment was more practical in nature. The law in action in the WTO, or in most international economic institutions, is simply not very transparent. Many disputes never reach a final public published decision. This is particularly true in the WTO where the members are obligated to consult and attempt to resolve their differences prior to instituting a dispute resolution proceeding.⁹ Even if a dispute resolution proceeding is initiated, it may be resolved long before a published panel or appellate decision, frequently on the basis of political or legal criteria far removed from the specific trade issue at stake in the dispute. Even a published decision may be the basis for post-decision bargaining as to relief or the merits of the dispute. To unravel the broad patterns of the legal, political, and strategic behavior underlying this process requires both access to the key decisionmakers and taking what they say with a grain of salt.

Shaffer is well positioned to bring the insights of legal realism to bear on dispute settlement in the WTO. He is a well-regarded international economic law professor at the University of the Wisconsin, which is one of the centers of the law and society movement, and

⁷ See Spencer Weber Waller, *Neo-Realism and the International Harmonization of Law: Lessons from Antitrust*, 42 U. KAN. L. REV. 557, 591-94 (1994).

⁸ See Joel Paul, *The Isolation of Private International Law*, 7 WISC. INT'L L.J.. 149 (1988).

⁹ Article XXII, GATT 1994; Understanding on Rules and Procedures Governing the Settlement of Disputes, available at http://www.wto.org/english/docs_e/legal_e/28-dsu.doc.

thus an heir to the realist legacy.¹⁰ He also has an impressive record of past scholarship in international economic law.¹¹ Most importantly, he has embarked on a lengthy empirical project of interviews with US, EC, LDC trade officials, private sector trade specialists, and WTO staff to closely examine whether the law in action at the WTO matches the formal legal rules of the WTO dispute resolution. In keeping with the realist tradition, Shaffer is also interested in ascertaining the winners and the losers resulting from the operation of the seemingly neutral legal rules.

II. Hybrid Dispute Settlement at the WTO

Shaffer's critical insight is that most WTO disputes involve a type of ad hoc hybrid public-private partnerships that come together in particular disputes. For Shaffer: "The growing interaction between private enterprises, their lawyers, and U.S. and European officials in the bringing most trade claims reflects a trend from predominately intergovernmental decision-making toward multilevel private litigation strategies involving direct public-private exchange at

¹⁰ Much of the current flavor of the scholarship produced at the University of Wisconsin relates back to the influence of the legendary Professor J. Willard Hurst, a pioneer in the law and society movement while on the law faculty at Wisconsin. See http://www.law.wisc.edu/ils/Works_about_Hurst.htm.

¹¹ Transatlantic Governance in the Global Economy (Mark A. Pollack & Gregory C. Shaffer eds. 2001); Gregory C. Shaffer, *The Nexus of Law and Politics: The WTO's Committee on Trade and Environment*, in *The Greening of Trade Law: International Trade Organizations and Environmental Issues* 81 (Richard H. Steinberg ed., 2002); Gregory C. Shaffer, *The World Trade Organization Under Challenge: Democracy and the Law and Politics of the WTO's Treatment of Trade and Environment Matters*, 25 HARV. ENVTL. L. REV. 1 (2001); Gregory C. Shaffer, *WTO Blue-Green Blues: The Impact of U.S. Domestic Politics on Trade-Labor, Trade-Environment Linkages for the WTO's Future*, 24 FORDHAM INT'L L.J. 608 (2000); Mark A. Pollack and Gregory C. Shaffer, *Biotechnology: The Next Transatlantic Trade War?*, 23 Wash. Q. 41 (2000).

the national and international levels.”¹² This phenomenon largely gets ignored in the current literature because international relations specialists tend to focus on the interactions between nation states and international organizations, economists tend to focus on market transactions between private actors, and lawyers tend to focus on the formal rules, institutions, and dispute resolution processes at work. Each thus sees only the tip of its iceberg of how trade disputes get resolved and not the hybrid nature of the emerging process.

In many ways Shaffer’s approach is closest to a version of political choice theory which seeks to analyze markets for political decision making.¹³ As Shaffer notes: “Governments need informational resources that private actors provide.”¹⁴ Even the United States Trade Representative (USTR), which represents the U.S. in the WTO, cannot develop on its own the massive information needed for a successful WTO challenge to an alleged foreign trade barrier without the assistance of the affected industry. At the same time, governments have something that private actors lack, which is the exclusive standing to bring trade disputes within the WTO dispute settlement process. These public-private networks and partnerships evolve most often in trade disputes because fewer domestic actors have countervailing interests and the foreign constituencies protected by the trade barriers being challenged have no political representation in the country initiating the WTO complaint.¹⁵

¹² DEFENDING INTERESTS, *supra* note 1, at 4.

¹³ DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (1991); MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965).

¹⁴ DEFENDING INTERESTS, *supra* note 1, at 14.

¹⁵ DEFENDING INTERESTS, *supra* note 1, at 18.

Once he establishes his theoretical framework, Shaffer applies it first to the United States and then the European Union. For the United States, his principal focus is on Section 301 of the Trade Act of 1974 “as a mechanism within a broader informal process of public-private coordination behind U.S. challenges to foreign trade barriers.”¹⁶

Shaffer’s examination of the use of Section 301 and the formulation of U.S. trade cases before the WTO is a sophisticated one. It does not fall prey to the notion that private interests simply dictate trade policy or use their governments as tools of private interest. The USTR has multiple trade disputes going on at the same time, some of which as petitioner, some of which as respondent, and a host of other governmental interests to represent. If the USTR needs the information and other resources that the private sector can offer, the private sector is equally dependent on the government to select and prioritize its issues over the many others on the government’s agenda. Only when those two sets of interests are aligned do cases get raised in the WTO rather than shunted to the side through the various modes of discretion embodied in Section 301.¹⁷

Shaffer then illustrates how trade associations in the United States are critical to a successful public-private collaboration to challenge foreign trade barriers. They become the focal point for the intense coordination, exchange of information between public authorities and private firms, strategic use of leverage points against foreign governments, and harnessing of political clout needed for this process. The author uses examples from the Kodak-Fuji, EC Beef Hormones, intellectual property, Foreign Sales Corporation, and numerous other trade disputes to

¹⁶ DEFENDING INTERESTS, *supra* note 1, at 20. See 19 U.S.C. § 2411 *et seq.*

¹⁷ DEFENDING INTERESTS, *supra* note 1, at 27.

show how neither the government nor the private sector dictate policy to the other, but instead create fluid and shifting ad hoc partnerships to bring and defend US trade policy.¹⁸

He then turns to the more nascent public-private partnerships used by the European Union in this area. In contrast to the bottom up approach prevalent in the United States, the EC historically has formulated its trade policy from a more hierarchical top-down perspective with little direct input from the private sector. However, Shaffer sees the development of similar public-private partnerships for EC trade policy, but with a distinctive European flavor based on the complicated dynamic between the member states and the European Commission in the conduct of EC foreign affairs and trade policy. He notes:

EC public-private partnerships operate quite differently from those in the United States. The EC's more convoluted policymaking process and more fragmented market slow the development of EC public-private trade networks. Directly or indirectly, the European Commission seeks approval of its trade policy initiatives by the EC's fifteen member states,¹⁹ often by consensus. Individual member states can impede the Commission's endeavors. Moreover, many European firms remain predominately nation-based, even though European market integration has progressed significantly. European firms traditionally have had fewer contacts with the Commission in Brussels than U.S. firms have with officials in Washington. At times, the Commission has proactively sought contact with

¹⁸ DEFENDING INTERESTS, *supra* note 1, at 31-64.

¹⁹ The number of member states increased to 25 on May 1, 2004 with the accession of Latvia, Lithuania, Estonia, Hungary, the Czech Republic, Slovakia, Poland, Malta, Cyprus, and Slovenia.

private firms, lobbying firms to lobby it.²⁰

The more aggressive U.S. market access strategy is attributed to the “more aggressive role of U.S. private interests in trade policy.” The differences between the US and the EC which produce these differences are attributed to four categories: political structures, business-government relations, use of lawyers and adversarial litigation, and administrative culture.²¹

Shaffer also examines the handful of cases where the US and EC cooperate in cases against trade barriers in third countries, but concludes that the structural and behavioral differences outlined above will make anything other than occasional collaboration all but impossible.²²

Defending Interests concludes with a look at the social, political and legal implications of these developments. Perhaps the most important of these conclusions is that : “[T]he extensive resources deployed by public-private networks in the United States and Europe in WTO litigation exacerbates power asymmetries in the use of the WTO legal system to the detriment of developing countries and their constituents. The WTO legal system has become increasingly costly, favoring legally astute U.S. and EC public-private networks with ample resources.”²³

The growth and success of public-private partnerships thus has important ramifications for the other players in the WTO dispute resolution system, particularly lesser developed countries (LDCs) which is the subject of ongoing work by Shaffer. The United States is a party or third party in the new DSU system 97% of the time, the EU 81% of the time. Most LDCs do

²⁰ DEFENDING INTERESTS, *supra* note 1, at 66.

²¹ DEFENDING INTERESTS, *supra* note 1, at 103-04.

²² DEFENDING INTERESTS, *supra* note 1, at 126-42.

²³ DEFENDING INTERESTS, *supra* note 1, at 148.

not participate at all. However, LDCs participate more than before and their success rate is up in comparison to the prior GATT consensus-based system. The fact remains that in most cases brought by LDCs, the respondents are LDCs as well. Where the defendant is the US or EC, the LDCs are more often than not, bringing a “me too” type case, tagging along on the work and the complaint brought by one of the developed countries. Under the new system, when the petitioner is the US or the EC, an LDC is five times more likely to be the respondent than before. The success rate for LDCs is highly skewed by the increasing use of the WTO DSU by large LDCs such as India and Brazil.²⁴

There are only a limited number of strategies that LDCs can utilize to counter the public-private partnerships that now drive the DSU process. The most effective appears to be forming the same kind of public-private partnerships used by the US and the EC. There will be opportunities where multinationals are harmed by the operation of unlawful trade barriers, by even their so-called “home” jurisdiction, and can work with LDCs for their mutual benefit. Larger LDCs may have a sufficiently developed private sector to create indigenous public-private partnerships of their own on particular issues. There may also be opportunities for LDCs to partner with each other to pool resources and expertise. Technical assistance from the WTO and the private sector may also help allow LDCs to come to the table more often as petitioners and defend themselves more effectively as respondents. But Shaffer is clear that these are the special cases and not the norm, and that the hybrid nature of dispute resolution in the WTO primarily serves to allow the US and EC to settle disputes among themselves or attack the barriers to trade,

²⁴ Presentation by Gregory C. Shaffer, *The WTO and the Rule of Law: Do the Haves Come Out on Top?*, American Bar Foundation, May, 2004 (notes on file with author).

investment, and services maintained by LDCs in contravention of the rules of the WTO.

III. Legal Realism and the Future for International Economic Law Scholarship

Shaffer's book bodes well for the future of scholarship in this area. It is lucid, to the point, and illuminates much of what was previously little more than Washington insider gossip about how things actually worked in Geneva.²⁵ It does not fall prey to either a Pollyannaish view that the WTO is a panacea for the world's ills or a conspiratorial take on a New World Order between corporations and elites. It is instead a first rate example of what modern realist scholarship can offer.

There is some evidence that this approach is spreading within the international economic law community.²⁶ The notion of public-private hybrid networks is a powerful one that can and is being applied in a variety of international economic law settings beyond just WTO dispute resolution. The very notion that law is being produced through a hybrid process is itself a welcome continuation of the legal realist project in showing the false distinction between public and private power in law. But there are so many areas of international economic law (and indeed law generally) where the rule/fact skepticism of the realists and the devotion to social science to show us the law in action versus the law on the books can illuminate the present and better shape the future. We can only hope that more will pick up the challenge presented by Shaffer and bring

²⁵ It also offers a variety of useful appendices summarizing the requests for consultations by the United States and the EC since the creation of the WTO.

²⁶ For example, Susan Sell's well-received recent book on the origins of the TRIPS agreement uses a similar approach. SUSAN K. SELL, *PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS* (2003). *See also* Waller, *supra* note 7 (laying out neo-realist agenda for international law).

to fruition the long deferred promise of a legal realist perspective on the issues of international economic law.