

# Introduction

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This volume contains eight reports on the World Trade Organization (WTO) case law of 2008, written in the context of the American Law Institute (ALI) project *Principles of World Trade Law: The World Trade Organization* (WTO). The project seeks to provide systematic analyses of WTO law based on both economics and law. Each report is written jointly by an economist and a lawyer, and each discusses a different WTO dispute. The authors are free to choose the particular aspects of the dispute they wish to discuss. The aim is to determine for each dispute whether the Appellate Body's (or occasionally the Panel's) decision seems desirable from an economic and a legal point of view, and, if not, whether the problem lies in the interpretation of the law or the text itself.

Earlier versions of the papers were presented at a meeting in Geneva in June 2009, and we are very grateful for the comments provided by the discussants Kamal Saggi, Joost Pauwelyn, Frieder Roessler, and Marco Bronckers. We would also like to thank the other meeting participants for providing many helpful comments, and the WTO for providing a venue for the meeting.

It deserves emphasis that the existence of the project is due to the efforts and commitment of Professor Lance Liebman, Director of the ALI. We have also benefited greatly from the support of ALI President Emeritus Michael Traynor and ALI Deputy Director Elena Cappella. Moreover, we sincerely thank Nina Amster, Judy Cole, Todd Feldman, Sandrine Forgeron, and Marianne Walker of the ALI's staff for providing, as always, very efficient administrative and editorial help. Finally, we are extremely grateful for financial support from The Jan Wallander and Tom Hedelius Research Foundation and the Milton and Miriam Handler Foundation.

Let us turn to the contents of the volume. **Schropp** and **Palmeter** discuss the Appellate Body (AB) report in *EC – Bananas III (Article 21.5 – Second Recourse)*. The trade dispute over the European Union's (EU)<sup>1</sup> banana-importation regime is one of the longest-standing cases in the history of the WTO. This particular report concerned the second compliance Panel under Art. 21.5 DSU (Dispute Settlement Understanding). The AB was summoned by the EC to assess substantial findings made by the compliance Panel under Arts. II and XIII of the GATT, as well as a

<sup>1</sup> As of 1 December 2009, with the passage of the Lisbon Treaty, the European Community is now called European Union. We refer to its historic name only when necessary (because, for example, it participated in a dispute under the name 'European Communities').

host of procedural issues. For the most part, the AB upheld the Panel's findings against the EC. Overall, the authors find little reason to criticize the findings of the AB. The outcome of the dispute is hardly surprising, given that the contested measure only marginally differed from the measure at issue in the first recourse to a compliance Panel. But the authors still find some facets of the dispute interesting. For practitioners, the role of *estoppel* in WTO litigation, the legal effect of Panel suggestions, and the relevance of Uruguay Round Modalities Papers as interpretative tools should be of interest. The case also raised some more systemic issues concerning, for instance, the economics of tariff quotas, the inherently discriminatory nature of tariff-quota allocation in the WTO, the lack of temporary opt-outs in the WTO legal framework, and the relevance of compliance proceedings for the damage calculation under Art. 22.6 DSU.

**Prusa** and **Vermulst** examine two closely related disputes, *United States—Measures Relating to Shrimp from Thailand* and *United States—Customs Bond Directive*, both of which concerned the United States' enhanced continuous bond requirement for goods subject to antidumping and countervailing duties. Because of perceived problems with its ability to collect antidumping duties, the US amended its bonding requirements in 2004. Under the new rules, importers were required to secure a bond for an amount equal to the cash-deposit rate in effect on the date of entry of the merchandise, multiplied by the importer's value of imports from the previous year, as well as to pay cash deposits equal to the amount of antidumping duties per entry. The US claimed that the additional deposit was reasonable and necessary to guarantee duty payment in case the antidumping duty increased during the administrative review. Thailand and India claimed that the additional deposit was unreasonable and an additional action against dumping, and was therefore impermissible under GATT 1994 and the Anti-Dumping Agreement (AD). The AB upheld the Panel's findings that, while the Ad Note to Arts. VI:2 and VI:3 GATT authorizes the imposition of security requirements during the period following the imposition of an antidumping duty order, the additional security requirement resulting from the application of the bond requirement to shrimp was not 'reasonable' within the meaning of the Ad Note. The AB reversed the legal interpretation by the Panel that there is no obligation under the Ad Note to assess the risk of default by individual importers; however, the AB upheld the Panel's finding that the bond requirement is not 'necessary' within the meaning of Art. XX(d) GATT. As a result, the AB upheld the Panel's conclusion that the application of the bond requirement to shrimp was inconsistent with Art. 18(1) AD because it was inconsistent with the Ad Note to Arts. VI:2 and VI:3 GATT and not justified by Art. XX(d) GATT. The authors consider the AB's legal and economic reasoning to be largely correct. In their view, the US employed a sledgehammer to kill a mosquito, and the AB used the concepts of 'reasonableness' in the Ad Note and 'necessity' in Art. XX(d) GATT to reject what fundamentally was a lack of proportionality, while leaving the door open for more reasonable application of bonding requirements.

The next paper in the volume, written by **Bown** and **Meagher**, analyzes the Panel Report in *Mexico–Olive Oil*, a report that was not appealed. The case involved a countervailing-duty measure imposed by Mexico on imports of olive oil from the EU (in particular, Spain and Italy). In the authors' view, while the *Mexico–Olive Oil* dispute was neither particularly complicated nor very controversial, the decision raised several issues that gave rise to new interpretations of the relevant agreements or that illustrated some of the recurring problems in challenging anti-dumping or countervailing-duty measures in WTO dispute-settlement proceedings. In the case at hand, the Panel did not give much credence to evidence that the main complaint of the domestic industry was the loss of a distribution agreement and brand-name rights with a Spanish exporter. The authors first analyze as potentially problematic the manner in which the Panel addressed the question of whether Mexico sufficiently ruled out 'any known factors' aside from the impact of the subsidy on the injury suffered by its domestic olive-oil industry. Second, the authors describe the quandary of how to implement findings of procedural violations associated with the Agreement on Subsidies and Countervailing Measures (SCM) and the AD. Finally, they discuss some examples of important 'nonissues' that were present in the dispute but were surprisingly noncontentious. They emphasize in particular how an issue such as 'pass-through' – one that has proven to be quite divisive in earlier WTO jurisprudence on subsidies and countervailing measures – was not controversial in this dispute, given the context of the market and policies at issue in the case.

**Crowley** and **Howse** discuss the *US–Stainless Steel (Mexico)* dispute. It concerned a Mexican complaint that the US method of calculating dumping margins by using 'zeroing procedures' leads to calculated margins that do not fully reflect export prices above normal value. The authors see two interesting issues being addressed in the dispute. First, what role does and should *stare decisis* (precedent) play in the WTO dispute-resolution system? Here the authors agree with the US that there is no formal *stare decisis* in the WTO. But they nevertheless argue that, overall, the institutional structure and foundational norms of the WTO imply the need for panels to be bound by the prior decisions of the AB. Their economic analysis describes the costs and benefits of legal systems with and without precedent. The second interesting issue in the case is the circumstances under which exceptional methodologies, i.e. 'zeroing', can better achieve the stated objectives of the agreement than the standard methodologies explicitly stated in the agreement. Regarding methodology, it is argued that any analysis of the suitability of a methodology (i.e. 'zeroing') must be undertaken jointly with an analysis of the underlying objective of the agreement (i.e. remedying injury). The authors consider a simple example of 'ordinary dumping' and a simple example of 'targeted dumping'. Both examples involve at least one episode of dumping in which the export price is below normal value and there is evidence that the domestic industry is injured by dumping in the sense that it receives a level of producer's surplus that is lower than it would have been if the exporter had not dumped. The

targeted-dumping example is constructed so that the legal requirements of the exceptional method of Art. 2.4.2 AD, the weighted-average-to-transaction method (W-T), are satisfied. It is shown that zeroed antidumping duties are excessive under ordinary dumping, but they are necessary to fully remedy the injury caused by a stylized, yet highly plausible, case of targeted dumping. However, in the example of the latter type of dumping, the foreign pricing strategy of the new-customer discount is a practice that economists widely regard as a normal and fair aspect of market competition. Normative welfare economics recognizes this more intense competition as the source of improved aggregate welfare in the importing country. Economically speaking, the concern thus lies not in the application of the law, but in the law itself. As the example illustrates, the AD could be construed to deter pro-competitive pricing. A normative analysis of economic welfare would find that the use of the exceptional method in the targeted-dumping example presented here reduces the welfare of both the importing country and the world.

In their analysis of the Appellate Body determination in *Canada/United States – Continued Suspension of Obligations in the EC – Hormones Dispute* ('*Continued Suspension*'), Hoekman and Trachtman discuss the relationship between the National Treatment obligation in Article III GATT, and the requirement under the Agreement on Sanitary and Phytosanitary (SPS) Measures that such measures be based on a risk assessment that takes into account available scientific evidence. In their view, the AB's reasoning makes it clear that the primary purpose of the SPS Agreement is to discipline discriminatory regulation, and not the level of protection. The case also clarifies in their view the fact that *de facto* protection created by an SPS measure must be motivated by demonstrating that the measure is addressing a market failure that stems from the existence of a scientifically based health or safety concern. The latter requirement is effectively a means for determining the intent of an SPS measure. But while intent is a factor that is ostensibly not relevant in Art. III GATT cases, the emphasis on intent still does not constitute a deviation from the basic concern with preventing illegitimate discrimination against imported products.

Davey and Sapir address the AB determination in the *US–Upland Cotton (Article 21.5–Brazil)* dispute. Two of the four issues in this AB report concerned the proper scope of Art. 21.5 DSU compliance panel proceedings; the other two issues concerned the AB's review of the Panel's use of evidence. On the Art. 21.5 DSU issues, the AB essentially ruled that a compliance panel could evaluate the WTO consistency of (i) the entirety of an implementation measure (including parts of the measure that did not specifically implement DSB recommendations and rulings) and (ii) new subsidy grants made under a program in respect of which prior subsidy grants had been found to cause serious prejudice so as to determine whether the new grants also resulted in serious prejudice. On the evidentiary issues, the AB upheld the Panel's conclusions, although it modified certain parts of the Panel's reasoning. The authors find that the most interesting aspect of the case was the substantial deference showed by the AB to the Panel's consideration of

causation and nonattribution issues. This deference was striking compared to the lack of deference that the AB has given to national authorities on those issues. But the authors also welcome what they interpret as an interest on behalf of the AB to require the use of analytical tools on the part of panels evaluating serious-prejudice cases.

**Wauters** and **Vandenbussche** review the AB report on *China–Auto Parts*. This dispute concerned a set of regulatory measures imposing a 25% ‘charge’ on imported automobile parts used in the manufacture of motor vehicles in China. The main legal question in this case concerned the nature of this charge: should it be viewed as a border charge (tariff concession) or an internal charge, and then be subjected to the nondiscrimination requirement of Art. III GATT? The authors examine the reasoning of the AB relating to the difference between these two types of charges. They discuss the role and relevance of this distinction in the GATT/WTO legal system in general, and for the purposes of resolving this dispute in particular. They also address the important systemic question relating to the review of a WTO Member’s domestic laws for purposes of determining their GATT/WTO consistency. This was an important issue in this case, as China claimed that the Panel misunderstood the meaning of the relevant (Chinese) Decree and requested the AB to review the Panel’s erroneous reading of this Decree. The authors express concern over the distinction drawn by the AB between legal and factual elements of relevance in the interpretation of domestic laws. The ‘economic bone’ in this case is less straightforward: it is not clear if the AB’s decision is desirable from a welfare point of view. The main reason is that many questions relevant to the case were left unaddressed by the AB. Due to the lack of factual evidence to substantiate its findings, the Panel’s ruling remains rather speculative on certain accounts. For this purpose the authors engage in their own examination of the facts, using mainly a unique dataset of Chinese firm-level data. Among other things, the authors interpret the data to suggest that the import duties on complete car vehicles or car parts would mainly affect Chinese customers, given that domestic sales are more important than exports. On the other hand, the data suggests that an import-competing industry for car parts existed at the time of the measure, and also that it seems to have grown substantially over time at a higher pace than the car-assembly industry during the period the circumvention duty applied; these latter facts tend to substantiate the claim made by the Panel that the local industry was favored by China’s trade policy, and that the policy could probably better be seen as an industrial policy than as an intentional circumvention of China’s trade liberalization commitments.

Finally, **Conconi** and **Wouters** critically review the main findings of the AB in the case *India–Additional Import Duties*. This ruling sheds light on the interplay between two core provisions of the GATT, namely Art. II (Schedules of Concessions) and Art. III GATT. The question on the allocation of the burden of proof was central in this dispute. In its ruling, the AB considered that charges inconsistent with Art. II:2(a) GATT fall within the scope of Art. II:1(b) GATT, and hereby

underscored the distinction between ‘border charges’, covered under Art. II GATT, and ‘internal charges’, covered under Art. III GATT. In the authors’ view, it was unfortunate that the AB failed to reveal the substantive obligation imposed on these charges under Art. II:1(b) GATT. In their opinion, such charges should be covered under ‘ODCs’ (other duties and charges) and therefore only be deemed consistent with Art. II:1(b) GATT in the unlikely case that they were explicitly recorded. The AB also held that the burden of formulating a *prima facie* case under Art. II:2(a) GATT rests on the complainant where the potential for application of Art. II:2(a) GATT is clear from the face of the challenged measure. At the same time, the AB also stressed the respondent’s responsibility of underpinning any alleged justification under Art. II:2(a) GATT. This could also be induced from the AB’s strong criticism of India’s refusal to answer the Panel’s written question regarding the operation of the internal charges. The authors are less critical of the AB decision from an economic point of view. What its ruling on *India–Additional Duties* clearly establishes is that Art. II:2(a) GATT can be used as an exception to Art. II:1(b) GATT, implying that WTO Members can impose border taxes above their market-access commitments. However, they can only do so in a way that is consistent with Art. III GATT, implying that border taxes cannot be in excess of domestic taxes. The authors maintain that these rules may help to internalize both terms of trade and domestic externalities and to increase global efficiency.