

# Introduction

HENRIK HORN AND PETROS C. MAVROIDIS

In this volume we review the case law of 2006 and 2007 in the context of the American Law Institute (ALI) project ‘Principles of World Trade Law: The World Trade Organization’ (WTO). The aim of the project is to provide systematic analysis of WTO law based in both economics and law. Earlier versions of these studies were presented at a meeting at the WTO in Geneva in June 2008. The comments provided by discussants and other participants have been very helpful in the preparation of the final versions of the papers in the volume, and we want to thank the discussants and the other participants for their efforts. We also wish to thank the WTO for providing a venue for the meeting.

This project would not have existed had it not been for the efforts and commitment of Professor Lance Liebman, Director of the ALI. We also have benefited greatly from the support of the Institute’s former President and current Chair of the Council, Michael Traynor, and of Deputy Director Elena Cappella. We wish to thank as well Nina Amster, Judy Cole, Todd Feldman, Sandrine Forgeron, and Marianne Walker of the Institute’s staff for 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.

The disputes discussed by the authors arose under various agreements relating to trade in goods. Once again, disputes regarding contingent protection instruments constituted a substantial portion of the cases submitted for adjudication.

Davey and Sapir discuss the *Mexico–Soft Drinks* case, which arose out of a larger dispute between the United States (US) and Mexico concerning the market for sweeteners in North America. They begin with a bit of background – examining the US regulation of its sweetener market and its effect on the markets for sugar and for an alternative sweetener known as high-fructose corn syrup (HFCS). They next examine the dispute over what NAFTA provided in respect of sweeteners and how Mexico responded to the US refusal to submit its dispute to a NAFTA dispute settlement panel. Following this background section, they briefly consider the substance of the US case under GATT Article III and Mexico’s defense under GATT Article XX(d), in respect of which the Appellate Body’s decision was not particularly controversial or noteworthy. They then turn to the interesting issues raised by the case. First, in what circumstances, if any, can a panel decline to exercise jurisdiction in a matter that is properly before it? Second, to what extent can a panel consider other international agreements? Third, and more generally,

how can the interests of nonparty WTO Members best be protected in disputes between parties to a preferential trade agreement?

**Hoekman** and **Mavroidis** discuss the 2005 dispute between the European Community (EC) and the US regarding the customs classification of two specific products and the ambit of Art. X GATT (*EC–Selected Customs Matters*). The dispute settlement panel and the Appellate Body (AB) essentially upheld the position advocated by the EC, with one exception that is of no practical import because the EC had already modified its regime. While the AB followed prior case law, it added two new findings. First, the WTO-consistency of laws can be challenged under Art. X GATT, if they concern the implementation or application of laws concerning customs administration and enforcement. Second, the obligation included in Art. X.3(b) GATT to establish tribunals or procedures to review and correct administrative actions relating to customs matters concerns courts of first instance only. Thus, it is quite possible, the authors conclude, that their decisions might not be uniform, and absence of uniformity at this level is not a violation of Art. X.3(b).

**Howse** and **Horn** examine the Panel Report in *EC–Biotech*. In this dispute United States, Argentina, and Canada challenged regulatory controls on genetically modified organisms (GMOs), imposed by both the EC and some of its individual member states. The dispute raises a number of fundamental issues. One such question concerns the role of other international agreements for the WTO Agreement – the external agreement of concern in the dispute was primarily the *Cartagena Biosafety Protocol*. The authors here depart from the Panel position that only agreements that have been accepted by the whole WTO Membership are relevant. A second issue is the Panel's treatment of the alleged Art. III.4 GATT violation. The authors put into question the Panel approach, which appears to be introducing a requirement of *prima facie* evidence of discrimination on the basis of national origin as a condition precedent for even considering a claim of a violation of National Treatment. A third question dealt with in the dispute is how to address, within the WTO legal framework, regulations that have multiple (non-protectionist) purposes. For instance, a measure may require scientific evidence under the SPS Agreement, while no such requirement would exist if it also fell under the TBT Agreement. Finally, a central issue in the dispute is the question of the relationship between Art. 5.1 and 5.7 of the SPS Agreement, and in particular the role of a Precautionary Principle in the WTO Agreement. The authors find the Panel's analysis of this conceptually very difficult issue to be based on a flawed perception of the nature and evolution of scientific evidence.

**Bown** and **Trachtman** provide a legal–economic analysis of the AB decision in *Brazil–Retreaded Tyres*. They develop a simple economic model that they use to analyze the market structure and environmental externalities that were most relevant to this case. They start by analyzing Brazil's policies in a model in which tyre retreading generates a positive production externality by means of the delay it provides before a used tyre becomes a waste product with the potential to harm

society through its adverse impact on human health and the environment. They examine the different welfare implications of: (i) a production subsidy for re-treading of once-used Brazilian tyres, (ii) a tariff on imports of retreaded tyres, and (iii) a ban on imports of retreaded tyres. While a production subsidy is the first-best instrument to address this type of externality, there are reasons to believe that it might be infeasible. The welfare implications of the other measures depend greatly on the magnitude of the positive production externality. From the lens provided by this economic analysis, the authors draw three primary insights. First, they identify the critical piece of empirical information that the Panel and AB require to make a rational judgment of the utility of the Brazilian policies contested in the dispute – i.e., the size of the underlying externality associated with retreading. Second, if the justification for the original import ban on retreaded tyres was based on the argument that it was a second-best Brazilian policy designed to combat a large externality, then Brazil's failure to enforce a ban on used-tyre imports has the troubling result of eroding those potential welfare gains through a reduction in equilibrium production (and consumption) of Brazilian retreaded tyres. Third, the Brazilian policy that exempted from the ban retreaded imports from MERCOSUR partners also has the same troubling feature. The second and third points are congruent with the reasons for the AB's determination that the Brazilian policy did not qualify under the chapeau of Article XX. Bown and Trachtman examine the WTO jurisprudence of Article XX(b), comparing the methodology developed under this jurisprudence to that which most economists would follow: an examination of changes to total welfare from implementing one policy relative to a postulated alternative policy. They find that the WTO jurisprudence in this area is internally incoherent and also fails to evaluate the kinds of concerns that an economic welfare analysis would evaluate.

**Gantz and Schropp** discuss the panel report on *Turkey–Rice*. At face value, the authors argue, *Turkey–Rice* is not the most complex or important WTO dispute ever litigated. The facts of the case give strong reason to believe that Turkey's restrictions on rice imports from the United States were not GATT-consistent. Turkey's steadfast refusal to provide exonerating evidence in its defence and the Panel's drawing of appropriate inference were probably the most remarkable issues of the case. Nevertheless, *Turkey–Rice* raises at least one interesting legal and economic question: How 'activist' are dispute panels today, and how interventionist should they be during the litigation process? The authors discuss the justification and role of activist panels and assess the consequences for parties' strategic behavior and incentive to provide accurate information.

**Prusa and Vermulst** examine issues that came before the AB in two disputes, *US–Zeroing (EC)* and the *US–Zeroing (Japan)*. The core issue in both the disputes involves the US Department of Commerce's practice of zeroing. The scope of the claims in both cases was considerably broader than in the previous WTO disputes involving zeroing. The two arguments in support of the practice were that: (a) the practice of zeroing has been a standard administrative practice for many years,

and (b) the Anti-dumping Agreement does not clearly prohibit it, and thus deference must be given to national authorities. While the AB was arguably correct in prohibiting the use of zeroing under the main methods of Article 2.4.2 AD Agreement as well as in various reviews, Prusa and Vermulst believe that it overreached in considering zeroing to be in violation of Article 2.4 AD Agreement and possibly inconsistent with Article 2.4.2, the exceptional method. Finally, while the AB found that zeroing in reviews violated Article 2.4.2 AD Agreement, the authors believe that it would have been preferable for the AB to have limited its findings of inconsistency to Article 9.3 AD Agreement.

**Crowley and Palmetier** analyze the decision of the WTO's AB in the dispute between Japan and Korea over Japan's imposition of countervailing duties on DRAMs imported from Korea (*Korea-DRAMs*). The legal analysis comments on the analysis of evidence, the lack of remand authority in the WTO system, and the meaning of a 'direct transfer of funds'. The economic analysis discusses several issues related to determining the magnitude of the benefit to a firm of a financial bailout and the appropriate duration of a countervailing duty to offset the injury caused by a nonrecurrent subsidy. They offer legal and economic criticisms of the AB's conclusion regarding the relationship between subsidies and injury to the domestic import-competing industry. They conclude that the AB's decision weakens the requirement of a causal link between subsidies and injury and, consequently, may open the door to protectionist abuse of the Subsidies and Countervailing Measures Agreement.