1

Introduction

HENRIK HORN AND PETROS C. MAVROIDIS

This volume includes the Reporters' Studies emanating from the American Law Institute (ALI) project *Principles of 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. Such an interdisciplinary approach is, in our view, necessitated by the fact that the WTO Agreement has inherently economic objectives, which is not to deny that it may have other objectives as well. A thorough analysis of the appropriate design of trade law therefore inevitably has to take into account how well the interpretation of the law affects the achievement of this purpose, and consequently the law cannot be interpreted from a legal perspective only.

A fundamental methodological problem facing the project is the lack of a "manual" for how to perform a joint economic and legal analysis of the WTO contract; there is no field, "The Economics of Trade Law," that can be relied upon for the purpose of the project. The relevant specialized fields, such as International Trade Law and International Economics, instead differ widely, both in terms of aims and in terms of method, and lawyers and economists are typically too specialized in their respective fields to be able to undertake a legal-*cum*-economic analysis of the law by themselves. Instead, such an analysis requires the joint efforts of economists and lawyers. The main idea behind this project is to develop such collaboration.

The project has two legs. In the first leg we regularly analyze the case law from the adjudicating bodies of the WTO. This volume reports such work, containing studies of the disputes that came to an administrative end, either because they were not appealed or because they went through both the panel and the Appellate Body (AB) stages, during the years 2001–2003. Each dispute is evaluated jointly by an economist and a lawyer. The general task is to evaluate whether the ruling "makes sense"

from an economic as well as legal point of view, and if not, whether the problem lies in the legal text or in the interpretation thereof. The teams of lawyers and economists will not always cover all issues discussed in a case; they will however seek to discuss both the procedural and the substantive issues that form the "core" of the dispute.

The Reporters' Studies are initially scrutinized in a meeting of all of the Reporters. After revisions resulting from that meeting, the Studies are next presented and discussed in a meeting with an external advisory group, comprising both lawyers and economists. The final versions, as published in this volume, have been subjected to still another round of revisions derived from the advisory meeting. But despite these collective efforts, each pair of authors remains solely responsible for the Studies it has authored.

The case-law studies in the first-leg phase of the project serve two purposes: First, given the central role of the Dispute Settlement system in the WTO (and the lack of accountability of its adjudicating bodies seen by some observers), it is of vital importance that the system is constantly and carefully scrutinized. Our yearly independent analysis of the emerging case law will, it is hoped, contribute toward this end. Second, the work on the case law is meant to serve as a steppingstone toward the second leg of the project. It analyzes the core provisions of the WTO contract itself, and will eventually take the form of an articulated set of *Principles of WTO Law*. Over the years to come, the work on this second leg will be done in parallel to case-law analysis, which will be reported in biannual volumes discussing the WTO case law of the previous years.

The Reporters' Studies in this volume have been drafted by the following persons, who have been appointed Reporters for this work by the ALI:

Kyle Bagwell, Kelvin J. Lancaster Professor of Economic Theory, Columbia University, USA.
Gene Grossman, Jacob Viner Professor of International Economics, Princeton University, USA.
Henrik Horn, Professor of International Economics, Stockholm University and Research Institute of Industrial Economics, Stockholm, Sweden.
Robert Howse, Alene and Allan F. Smith Professor of Law, University of Michigan Law School, USA.
Merit Janow, Professor, Columbia University, USA.
Petros C. Mavroidis, Edwin B. Parker Professor of Law at Columbia Law School, New York and Professor of Law, University of Neuchâtel, Switzerland.

Damien J. Neven, Professor of Economics, Graduate Institute for International Studies, University of Geneva, Switzerland.
Robert W. Staiger, Professor of Economics, Stanford University (formerly at University of Wisconsin), Madison, USA.
Alan O. Sykes, Professor of Law, Stanford University (formerly Frank and Bernice Greenberg Professor of Law, University of Chicago Law School, USA).
Joseph H. H. Weiler, Joseph Straus Professor of Law and Jean Monnet Chair, New York University School of Law, USA.

The Reporters' Studies in the volume have benefited from very helpful discussions with the following participants in the context of invitational conferences organized on a yearly basis:

José E. Alvarez, Hamilton Fish Professor of International Law and Diplomacy, Columbia Law School, New York, NY, USA.
Richard E. Baldwin, Professor of Economics, Department of Economics, Graduate Institute of International Studies, Geneva, Switzerland.
George Bermann, Walter Gellhorn Professor of Law, Columbia Law School, New York, NY, USA.
The Rt. Hon. Lord Brittan, UBS Warburg, London, England.
Steve Charnovitz, Counsel, Wilmer, Cutler, Washington, D.C., USA.
William J. Davey, Guy Raymond Jones Professor of Law, University of Illinois College of Law, USA.
Claus-Dieter Ehlermann, Senior Counsel, Wilmer, Cutler, Brussels, Belgium.
Susan G. Esserman, Senior Counsel, Steptoe & Johnson, Washington, D.C., USA.
Wilfred Ethier, Professor of Economics, Department of Economics, University of Pennsylvania, Philadelphia, PA, USA.
Bernard Hoekman, Director, International Trade Group, The World Bank, Washington, D.C., USA.
Gary N. Horlick, Wilmer, Cutler, Washington, D.C., USA.
David Leebron, University President, Rice University, Houston, TX, USA.
Patrick Low, Director, Economic Research and Statistics Division, World Trade Organization, Geneva, Switzerland.
Andreas F. Lowenfeld, Herbert & Rose Rubin Professor of Law, New York University School of Law, New York, NY, USA.
Niall Meagher, Counsel, Advisory Centre for WTO Law, Geneva, Switzerland.

Mitsuo Matsushita, Professor of Law, Department of Law, Seikei University, Tokyo, Japan.
Patrick Messerlin, Professor of Economics, Institut d'Etudes Politiques, Paris, France.
Håkan Nordström, Chief Economist, National Board of Trade, Stockholm, Sweden.
David Palmeter, Senior Counsel, Sidley Austin, Washington, D.C., USA.
Thomas J. Prusa, Professor of Economics, Department of Economics, Rutgers University, New Brunswick, NJ, USA.
Donald Regan, William W. Bishop Jr. Collegiate Professor of Law, University of Michigan Law School, Ann Arbor, MI, USA.
Frieder Roessler, Executive Director, Advisory Centre for WTO Law, Geneva, Switzerland.
André Sapir, Professor of Economics, European Centre for Advanced Research in Economics and Statistics, Université Libre de Bruxelles, Belgium.
Joel P. Trachtman, Professor of International Law, The Fletcher School of Law and Diplomacy, Tufts University, Medford, MA, USA.
Jasper Wauters, Associate, White & Case, Geneva, Switzerland.
Eric White, European Commission, Legal Service.
David A. Wirth, Professor of Law, Boston College Law School, Newton, MA, USA.
Diane P. Wood, Judge, U.S. Court of Appeals, Seventh Circuit, Chicago, IL, USA.
Claire Wright, Professor of Law, Thomas Jefferson School of Law, San Diego, CA, USA.

Before turning to the Reporters' Studies, we would like to emphasize the fact that this project would not have been possible without the help and support of many individuals and institutions. We would in particular like to express our gratitude to The American Law Institute. Its Director, Professor Lance Liebman, has been instrumental in taking the project to where it is today. We have also benefited greatly from the support of Michael Traynor, the President of the ALI, Elena Cappella, the ALI Deputy Director, and Michael Greenwald, the former ALI Deputy Director, and from the very efficient administrative aid by other ALI staff members. We are also extremely grateful for financial support from the Jan Wallander's and Tom Hedelius' Research Foundation, Svenska Handelsbanken, Stockholm, from the Milton

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The following is a brief summary of the Studies in order of their appearance in the volume:

Horn & Weiler discuss the Appellate Body (AB) report on *EC – Asbestos*. The dispute concerned a French health-motivated ban of asbestos-containing construction materials. Canada argued that the French decree was an impermissible discrimination between two otherwise like products (asbestos- and non-asbestos-containing construction material), which operated to the disadvantage of imported products and thus constituted a violation of Art. III.4 GATT. The AB dismissed Canada's claim, essentially arguing that the two products were not like products due to their different impacts on human health. The authors do not put into question the outcome, that France had not violated their obligations under the GATT. They disagree, however, with the reasoning underlying the AB's findings, arguing that it lacks logical coherence, and that it adds to the existing uncertainty surrounding what is and what is not a legitimate motive for government intervention. They also find the AB report overly focused on the burden-of-proof issue, and they provide several examples of situations where the reasoning of the AB in the *Asbestos* case, if replicated elsewhere, might yield unwarranted outcomes. In their report they identify three separate methods of interpreting the non-discrimination provisions in the GATT, and discuss the pros and cons of each.

Howse & Neven discuss the AB report on *US – Shrimp (Art. 21.5 DSU – Malaysia)*. This AB report is the final step in the long *Shrimp – Turtle* saga. Very briefly, the United States enacted legislation banning imports of shrimps that were caught in a manner leading to a high incidental taking of sea turtles. At the same time, the United States had negotiated with some, but not all, WTO Members, treaties aiming to ensure that the incidental taking of sea turtles would be at acceptable levels. Such treaties, in return, allowed WTO Members that had adhered to them to continue to export shrimps in the United States. A number of countries (Malaysia playing a key role) complained about the US practice. The AB, reversing the original Panel's findings, upheld the US practice as WTO-consistent but found that the United States had applied it in a discriminatory manner by not offering negotiations to other Members. They also requested the United States to show flexibility in the application of its legislation

and to accept forms of fishing shrimps other than those used by US fishermen, as equivalent to the US method to the extent that they led to a comparable amount of incidental taking of sea turtles. The AB requested the United States to bring its measures into compliance within the implementation period. To this effect, the United States offered negotiations with a view to signing an agreement with the exporters of shrimps that had had not initially been offered such negotiations (that is, when the legislation was first introduced). Negotiations were unsuccessful and Malaysia complained to the WTO, arguing that the United States had not implemented its obligations in good faith, since no international agreement between them and interested exporters was concluded at the end of the day. The AB dismissed the claim stating that the United States did not have to guarantee a successful outcome of the negotiations offered. It simply had to ensure (to respect nondiscrimination) that it entered into good-faith negotiations with those countries that had not been initially offered this possibility. The AB report also finds that the United States, by adopting a flexible approach towards certification of exporters (that is, that exporters do not have to use the same abatement technology used by US fishermen in order to be permitted to export to the US market), complied with the requirement of the chapeau of Art. XX GATT to provide flexibility. The authors find that, from a strictly legal perspective, the AB's ruling is correct: the United States indeed cannot unilaterally guarantee the success of international negotiations. By offering in good faith this possibility to Malaysia (as it had done vis-à-vis other WTO Members before), it complied with its obligations under the WTO. On the other hand, in order to conform to the flexibility requirement, the United States would have to accept imports of shrimp from countries with different but equally efficient (when it comes to incidental taking of sea turtles) abatement technology, which the United States did. From an economic perspective however, the issue is more complicated. The authors observe that to make imports contingent on the adoption of an abatement standard can be a very effective means of addressing external effects across jurisdictions, at least when efficient abatement technologies are available. In the view of the authors however, it would have been appropriate for the AB to clarify what is meant by "comparable in effectiveness" when discussing flexibility. Furthermore, it should have indicated that comparable effectiveness does not imply that different jurisdictions should reach similar standards, but rather that the marginal

effectiveness of resources invested in abatement should be comparable across countries.

Horn & Mavroidis discuss the AB report on *US – Lamb*. In this case, New Zealand and Australia complained that imposition of safeguards by the United States on imports of lamb violated various provisions governing safeguards in the WTO. The AB found that the United States indeed had failed to show that the increase of imports was the result of unforeseen developments and that the United States did not properly attribute injury to its various sources. Due to these findings, the AB found the safeguard to be illegal. The authors do not disagree with the final verdict when it comes to attribution. Indeed, in their view, the US safeguard investigation did not comply with the requirements for attribution as specified in the WTO contract. However, they point out that the AB could have been clearer as to the use of quantitative evidence in this respect. In their view, some form of quantification is typically necessary in order to attribute injury, and to demonstrate the necessity of the measure, in a reasonable manner. **Horn & Mavroidis** also see a weakness in the text of the Agreement: imports should be seen as the result of the interaction between more fundamental economic forces, such as foreign supply and demand and domestic supply and demand. An import surge may stem from changes in any of these. To put the blame of injury on imports thus begs the question of who or what is actually responsible for an import surge. The authors also argue that an "unforeseen developments" requirement should be interpreted as an obligation for national authorities entrusted with the administration of safeguards to respect a due-diligence standard. This standard should not exonerate them from responsibility for actions that their own government has provoked.

Janow & Staiger comment on *EC – Bed Linen*. In this case, India complained about the methodology employed by the European Community with respect to anti-dumping duties on imports of cotton bed linen. The latter had based its calculation of the "normal value" for all Indian exporters on sales data for a single company, although the sales at hand were outside the ordinary course of trade (as defined in the WTO Antidumping Agreement). India complained about this EC practice and also about the defendant's practice of "zeroing," whereby dumping margins are calculated on the basis of dumped transactions and all non-dumped transactions are zeroed. The AB found fault with these practices. **Janow & Staiger** agree with the finding that "zeroing" can exaggerate the margin of dumping contrary to the letter and

the spirit of the WTO Antidumping Agreement (Art. 2). They further agree with the finding that a weighted average of dumping margins for all Indian exporters based on data from one exporter only can be problematic as well. In their view, however (and in this respect they distance themselves from the formalistic findings of the AB), this is the case because such a procedure is likely to introduce a large element of "noise" into the cost calculation. Finally, the authors point out that, from an economic perspective, the foundations of the Antidumping Agreement as such are highly problematic.

The *Mexico – Corn Syrup (Art. 21.5 DSU – US)* compliance panel decision is examined by **Howse & Neven**. In this case, Mexico was initially condemned for issuing an antidumping order in contravention of various provisions of the Antidumping Agreement. Mexico agreed to implement the findings, but, in the view of the United States, this did not occur. The United States requested a compliance panel to evaluate whether Mexico failed to comply with its obligations under the WTO Agreement by improperly analyzing factors of injury laid down in Art. 3.4 and 3.7 of the Antidumping Agreement. At issue in this dispute was also the appropriate standard of review to be applied by panels when adjudicating disputes under this Agreement (Art. 17.6). The authors conclude that the correct understanding of the standard of review laid down in the Antidumping Agreement requires WTO panels to accept the determination of national investigating authorities as such and thus avoid entering into a de novo review. In this respect they are in agreement with the final decision by the AB. But they also point to an error by the Panel that was not corrected by the AB, the failure to take into account market segmentation. Isolating the appropriate segment of the market may, in the authors' view, well enhance the accuracy of an analysis of injury.

Howse & Neven also discuss the *Argentina – Ceramic Tiles* panel decision. In this case, the European Community complained that Argentina, when imposing antidumping duties on imports of ceramic tiles, did not respect its obligations under Arts. 6.8 and 6.9 of the Antidumping Agreement, which regulate the legitimate recourse to "facts available." The complainant also maintained that Argentina violated its obligations under Art. 6.10 of the same Agreement by failing to calculate individual dumping margins for each exporter. Finally, it was argued that Argentina violated Art. 2.4 of the Antidumping Agreement as well by not taking into account differences in physical characteristics when making price comparisons. The Panel agreed

with all claims advanced by the European Community. The authors do not put into question the Panel's findings on Art. 6.8 as such. They would have preferred, however, that the Panel saw Argentina's recourse to facts available in the wider context of the investigation (this is, in their view, the appropriate understanding of the standard of review imposed on panels when discussing antidumping litigations as laid down in Art. 17.6 of the Antidumping Agreement). Viewed in this perspective, they find nothing wrong with Argentina's due-diligence standard. The authors disagree with the Panel's understanding of Art. 6.9: in their opinion, this Article does not oblige authorities to explain why a final decision will not be based on information supplied by the exporters. The authors further disagree with the Panel's interpretation of Art. 6.10. In their view, this provision clearly allows investigating authorities the possibility of not calculating individual margins when the number of exporters appear to be too large and the provision at the same time offers no specific guidance as to what constitutes a "large number." This element was overlooked because the Panel failed to apply the appropriate standard of review. Finally, the authors find the Panel's conclusions with respect to Art. 2.4 sound.

Grossman & Mavroidis comment on the *US – Lead & Bismouth II* dispute. In this case, the European Community complained about the US practice of imposing countervailing duties (CVDs) on exports of steel products of EC companies that had received state aid before they were privatized. The heart of the dispute concerns to what extent an arm's-length privatization of a previously subsidized company suffices to eliminate all subsidies previously paid. The AB concluded that the United States did not demonstrate in its determination to impose CVDs why a benefit (in the sense of Art. 1 Subsidies and Countervailing Measures (SCM) Agreement) survived the arm's-length privatization. By not doing that, the United States illegally imposed CVDs on EC exports. The authors agree with the outcome in this respect: the United States indeed did not demonstrate why subsidies survived privatization. They do disagree however with the opinion expressed by the AB that nonrecurring subsidies are always extinguished whenever the company that benefited from them is privatized at arm's length. In their view, this is not necessarily always the case. The question that the AB should have asked is whether the original investment would have taken place under market conditions (the private-investor test). If the answer is no, then there is at least a possibility that the original subsidy has survived the privatization. To rule otherwise would be tantamount to

stating that any time shares of subsidized companies change hands in stock-market operations all benefits are ipso facto extinguished.

The *US – Export Restraints* decision is commented upon by **Janow & Staiger**. The case concerns a long-standing disagreement between the United States and Canada as to the treatment under the GATT/WTO of export restraints by the former. Canada was here attacking the propriety of the legislation itself and not a particular measure. The Panel, by considering both the language of the disputed US statute (the US Statement of Administrative Action) and its practice, concluded that the US measures at hand could not be characterized as mandatory legislation. Following previous case law, the Panel thus concluded that the legislation could not be the subject of a complaint independently of its application. The Panel further ruled that the aforementioned export restraints could not be characterized as subsidies either, since they did not constitute a financial contribution (as required by Art. 1.1 SCM). The authors do not question the soundness of the Panel's approach. In fact, they offer additional reasons why export restraints should not be accepted as tantamount to subsidies: in their view, the specificity requirement is missing. Moreover, if such an expansive interpretation of the term "subsidy" were adopted, then even legal import tariffs could be put into question, since import tariffs implicitly subsidize the consumption of the comparable domestic product. The authors also point to the fact that that the SCM Agreement is sometimes hard to reconcile with economic principles, essentially since it does not address in a comprehensive manner the overall welfare implications of subsidies.

Janow & Staiger also discuss *Canada – Dairy*. The United States and New Zealand complained that Canada, by using a target-prices system in its domestic market and allowing for exports of over-quota milk (which did not benefit from domestic support schemes), was in fact granting an export subsidy prohibited by Arts. 3 and 9 of the Agreement on Agriculture. They also held that the import tariff quota imposed by Canada was inconsistent with its obligations under Art. II.1b GATT. The AB narrowed down the findings of inconsistency by the Panel but still found some aspects of the Canadian measures to constitute export subsidies (by using average cost as benchmark) and upheld the finding on Art. II.1b GATT. The authors voice their concern with aspects of the AB's findings. Although they point to, as in their comment on *Export Restraints*, the lack of an economic basis for parts of the SCM Agreement, they nevertheless make the point