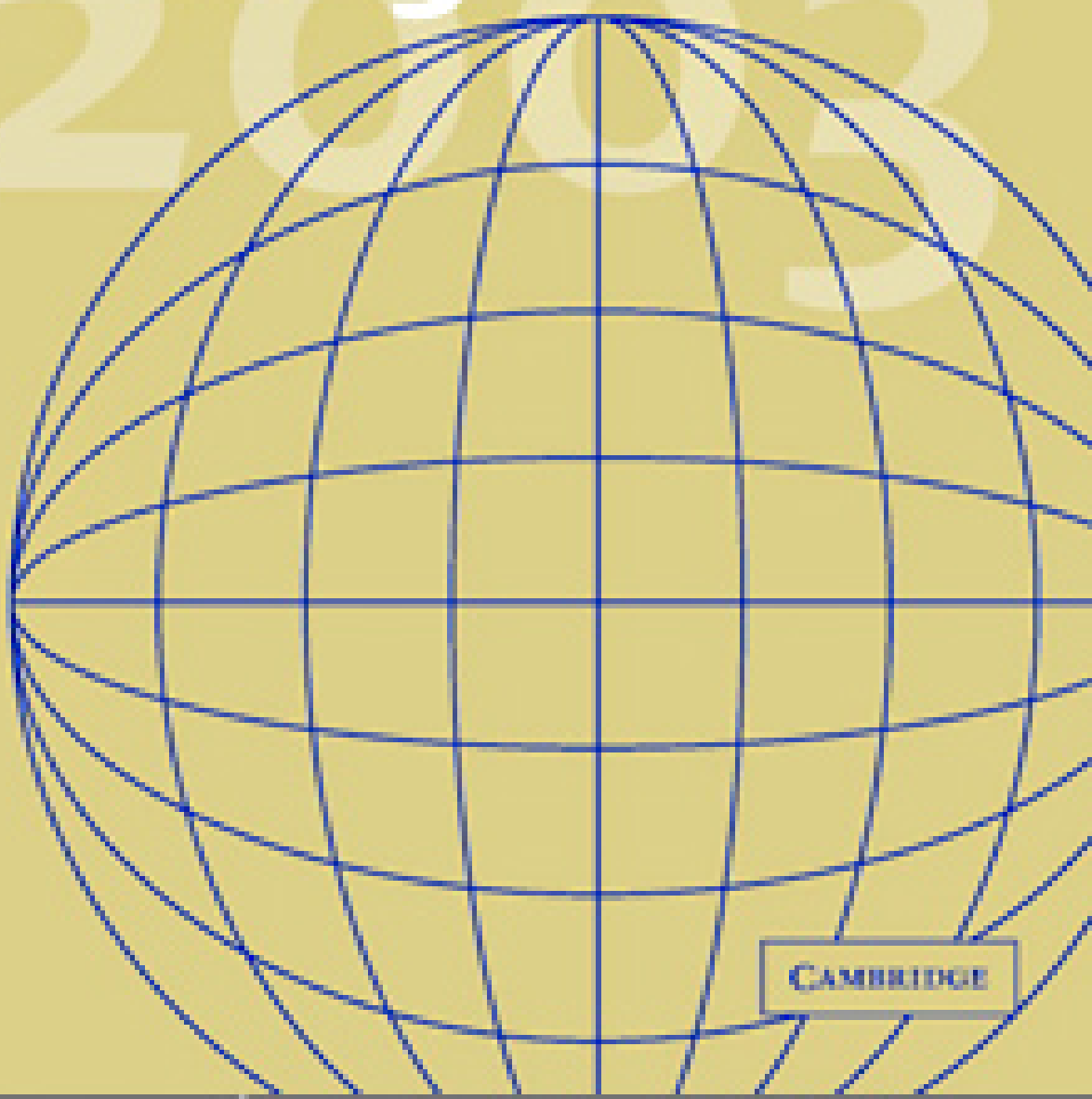
The American Law Institute Reporters' Studies

Edited by Henrik Horn and Petros C. Mavroidis

THE WTO CASE LAW OF 2003



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THE WTO CASE LAW OF 2003
THE AMERICAN LAW INSTITUTE
REPORTERS' STUDIES

This book is the third in a series of annual volumes that will be utilized in the development of an American Law Institute (ALI) project on World Trade Organization (WTO) Law. The volumes undertake a yearly analysis of the case law from the adjudicating bodies of the WTO. The Reporters' Studies for 2003 cover a wide range of WTO law from trade in goods to trade in services. Each case is jointly evaluated by an economist and a lawyer, both well-known experts in the fields of trade law and international economics. The Reporters critically review the jurisprudence of WTO adjudicating bodies and 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 interpretation of the law or the law itself. The Studies do not always cover all issues discussed in a case, but they seek to discuss both the procedural and the substantive issues that form, in the Reporters' view, the ''core'' of the dispute.

HENRIK HORN is Professor of International Economics at the Institute for International Economic Studies, Stockholm University. He is a member of the Editorial Board of the *World Trade Review* and is a member of the Centre of Economic Policy Research. He has previously worked for the Economic Research and Analysis Division of the World Trade Organization, and has been a judge in the Swedish Market Court (supreme court for competition law).

PETROS C. MAVROIDIS is Edwin B. Parker Professor of Law at Columbia Law School, Professor at the University of Neuchâtel, and a member of the Centre for Economic Policy Research. He was previously Chair of Competition Law, EUI, Florence, and a member of the Legal Affairs Division of the World Trade Organization.

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The American Law Institute
Reporters' Studies

Edited by
HENRIK HORN
AND
PETROS C. MAVROIDIS

CAMBRIDGE
UNIVERSITY PRESS

cambridge university press
Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, São Paulo

Cambridge University Press
The Edinburgh Building, Cambridge cb2 2ru, UK

Published in the United States of America by Cambridge University Press, New York

www.cambridge.org
Information on this title: www.cambridge.org/9780521834230

First published in print format 2006

isbn-13 978-0-511-26627-0 eBook (Adobe Reader)
isbn-10 0-511-26627-8 eBook (Adobe Reader)

isbn-13 978-0-521-83423-0 hardback
isbn-10 0-521-83423-6 hardback

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FOREWORD

This is the third volume in the American Law Institute's effort to analyze decisions rendered in disputes before the World Trade Organization.

Trade Law is in its infancy as a body of legal doctrine. In two prior volumes, the ALI sponsored analyses of decisions issued in 2001 and 2002. This book presents an examination of decisions rendered in 2003. As before, the work has been accomplished by teams consisting of a lawyer and an economist, each a distinguished expert on the world trading system. Early drafts were criticized by the various participants, and then redrafts were presented to an international group of experts at a meeting in April 2005 at the WTO headquarters in Geneva.

Having studied three years of WTO decisions in this "bottom-up" manner, we will now begin to draft the general principles of trade law. We also hope to continue with the analysis of individual decisions.

We are immensely grateful to the two leaders of this project, Henrik Horn of Stockholm University and Petros Mavroidis of the University of Neuchâtel and Columbia University. We also appreciate the work of the economists and lawyers who wrote the studies in this volume. And we appreciate the generous financial support for our project from Jan Wallander's and Tom Hedelius' Research Foundation, Svenska Handelsbanken, Stockholm, and the Milton and Miriam Handler Foundation.

Lance Liebman
Director
The American Law Institute

A Note on the American Law Institute

The American Law Institute was founded in 1923 and is based in Philadelphia. The Institute, through a careful and deliberative process, drafts and then publishes various restatements of the law, model codes, and other proposals for legal reform "to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work." Its membership consists of judges, practicing lawyers, and legal scholars from all areas of the United States as well as some foreign countries, selected on the basis of professional achievement and demonstrated interest in the improvement of the law. The Institute's incorporators included Chief Justice and former President William Howard Taft, future Chief Justice Charles Evans Hughes, and former Secretary of State Elihu Root. Judges Benjamin N. Cardozo and Learned Hand were among its early leaders.

The Institutes's restatements, model codes, and legal studies are used as references by the entire legal profession.

The American Law Institute's website is http://www.ali.org

AMERICAN LAW INSTITUTE REPORTERS

KYLE BAGWELL is Professor of Economics, Columbia University.

GENE M. GROSSMAN is Jacob Viner Professor of International Economics, Princeton University.

HENRIK HORN is Professor of International Economics, Institute for International Economic Studies, Stockholm University.

ROBERT L. HOWSE is Professor of Law, University of Michigan Law School.

PETROS C. MAVROIDIS is Edwin B. Parker Professor of Foreign and Comparative Law, Columbia Law School, and Professor of Law, University of Neuchâtel.

DAMIEN J. NEVEN is Professor of Economics, Graduate Institute for International Studies, University of Geneva.

ROBERT W. STAIGER is Professor of Economics, University of Wisconsin.

ALAN O. SYKES is Frank and Bernice Greenberg Professor of Law, University of Chicago Law School.

JOSEPH H. H. WEILER is Joseph Straus Professor of Law and Jean Monnet Chair, New York University School of Law.

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Introduction

HENRIK HORN
PETROS C. MAVROIDIS

1 The project

This is the third volume of the Reporters' Studies undertaken 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 a systematic analysis of WTO law based in both Economics and Law. This year's focus has mainly been on disputes that came to an administrative end during the year 2003, either because they were not appealed or because the appeal process concluded. Each dispute has been evaluated jointly by an economist and a lawyer. The general task of this two-person team is to evaluate whether the ruling "makes sense" from an economic as well as a legal point of view and, if it does not, whether the problem lies in the legal text or in the interpretation thereof. The authors do not always cover all issues discussed in a case, but they seek to discuss both the procedural and the substantive issues that form the "core" of the dispute, as they see it.

The Reporters' Studies have, this year, been drafted by the following persons, who have been appointed Reporters for the project by the ALI:

Gene M. Grossman, Jacob Viner Professor of International Economics, Princeton University, USA.

Henrik Horn, Professor of International Economics, Institute for International Economic Studies, Stockholm University, Sweden.

Robert L. Howse, Alene and Allan F. Smith Professor of Law, University of Michigan Law School, USA.

Petros C. Mavroidis, Professor of Law, University of Neuchâtel, Switzerland, and Edwin B. Parker Professor of Law at Columbia Law School, USA.
Damien J. Neven, Professor of Economics, Graduate Institute for International Studies, University of Geneva, Switzerland.
Robert W. Staiger, Professor of Economics, University of Wisconsin, USA.
Alan O. Sykes, 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 were initially scrutinized in an October 2004 meeting of all of the Reporters in Princeton. After revisions, the Studies were presented and discussed in a meeting held in Geneva on April 12, 2005, with the following group of lawyers and economists:

Richard Baldwin, Graduate Institute of International Studies, Geneva, Switzerland.
Armin von Bogdandy, Max Planck Institut, Heidelberg, Germany.
Claus-Dieter Ehlermann, Wilmer Cutler, Brussels, Belgium.
Wilfred J. Ethier, Department of Economics, University of Pennsylvania, Philadelphia, USA.
Gary Horlick, Wilmer Cutler, Washington DC, USA.
Gabrielle Marceau, World Trade Organization, Geneva, Switzerland.
Mitsuo Matshushita, Seikei University School of Law, Tokyo, Japan.
Niall Meagher, Advisory Centre for WTO law, Geneva, Switzerland.
Håkan Nordström, National Board of Trade, Stockholm, Sweden.
Donald Regan, University of Michigan School of Law, Ann Arbor, USA.
Delissa Ridgway, US Court of International Trade, New York, USA.
Frieder Roessler, Advisory Centre for WTO law, Geneva, Switzerland.
André Sapir, Université Libre de Bruxelles, Brussels, Belgium.
Arun Venkataraman, World Trade Organization, Geneva, Switzerland.
Jasper Wauters, World Trade Organization, Geneva, Switzerland.
Eric White, EC Commission, Brussels, Belgium.
Claire Wright, Thomas Jefferson School of Law, San Diego, USA.
Werner Zdouc, World Trade Organization, Geneva, Switzerland.

The final versions, as published in this volume, have been subjected to yet another round of revisions derived from the advisory meeting. Despite these collective efforts, each pair of authors remains solely responsible for the Studies it has authored.

This project would not have existed had it not been for the efforts and commitment of Professor Lance Liebman, Director of the ALI. We have also benefited greatly from the support of the President of the ALI, Michael Traynor, the ALI Deputy Director, Elena Cappella, and the former ALI Deputy Director, Michael Greenwald. The ALI has also provided excellent assistance with the administration of our meetings. We are extremely grateful for the generous financial support the project has received from Jan Wallander's and Tom Hedelius' Research Foundation, Svenska Handelsbanken, Stockholm, and the Milton and Miriam Handel Foundation. Without their support, this project would not have materialized.

2 The Reporters' Studies on the WTO Case Law of 2003

We here provide a brief summary of this year's Studies in the order of their appearance in this volume.

A main theme in this year's Studies has been contingent protection. Grossman and Sykes discuss the compliance dispute between India and the European Community (EC) in which India alleged lack of compliance by the EC with an earlier WTO ruling on antidumping duties for cotton-type bed linen. India raised issues relating to the EC treatment of ''other factors,'' that is, issues regarding the manner in which an investigating authority should treat factors, other than those mentioned in the body of the Agreement, that cause injury. India had briefly noted such factors in the original proceedings but had not argued them fully. Although, in their view, Grossman and Sykes can imagine cases where the failure by a panel to investigate factual aspects of a case might in and of itself warrant a reversal of its eventual finding, they decline to pronounce on the existence of such grounds in this dispute, lacking an effective demonstration by India that the Panel's omission led to abuse or a biased outcome. The authors go one step further, however, and suggest that this issue raises interesting questions regarding the proper scope of *res judicata*, issue preclusion, and waiver in WTO jurisprudence. To highlight these questions, they develop an analytical model to compare expected litigation costs in a judicial system with a rule of waiver to those in a system in which litigants can bring multiple claims. They show that a rule of waiver need not minimize litigation costs, because some disputes can be resolved at lower costs if a claimant is not forced to bring all of its arguments at once. India also claimed that the EC violated WTO rules when

conducting its revised injury analysis, by treating all imports from firms not individually investigated as if they had been dumping, despite the fact that some of the firms individually investigated were found not to be dumping. On this score, the authors conclude that the Appellate Body's (AB) decision has some economic appeal, but rests on shaky legal foundations.

In their paper on *Corrosion Steel*, Howse and Staiger deal with the legal benchmark to be applied by an investigating authority when evaluating whether to retain antidumping duties beyond the original five-year period (the sunset review). The current law is quite open-ended and requires WTO Members to demonstrate the likelihood of continued or renewed dumping before agreeing on the extension of duties in place. In the authors' view, a meaningful assessment of the likelihood of continued or renewed dumping requires an understanding of the conditions that led to dumping in the first place, and a determination of whether these conditions have changed in a way that removes the original reason for dumping. In their opinion, neither of these two elements appears to have played any real role in the US investigating authority's methodology for determining likelihood, or in the AB's assessment of the legitimacy of this methodology. The authors note that Art. 9.1 of the Antidumping Agreement (AD) does not require an assessment of the conditions that have led the companies named in an antidumping order to dump; the authors maintain, however, that a different criterion should be applied in Art. 9.1 AD compared to that applied in Art. 11.3 AD. They see no necessary inconsistency in this: while a requirement *could* have been included in the AD that the particular reasons for dumping must be articulated as a condition for imposing antidumping duties under Art. 9.1 AD, there is no logical necessity that such a requirement must be included. By contrast, Howse and Staiger argue that an understanding and articulation of the conditions that led to dumping is logically necessary to assess the likelihood of continued or renewed dumping, and therefore, is an implied condition for extending definitive antidumping duties beyond the five-year termination date that Art. 11.3 AD otherwise dictates. In light of their preferred benchmark for the adjudicating of such cases, the authors conclude that the AB erred by not requiring the United States to provide such an assessment as part of its sunset review.

The "*Byrd*" litigation between the United States and a number of WTO Members over the *US Continued Dumping and Subsidy Offset Act*

of 2000 (CDSOA) is discussed by Horn and Mavroidis. This United States law reserves disbursement of collected antidumping and countervailing duties exclusively to those economic operators that have backed a petition to open a dumping (or countervailing) investigation. The AB, in part modifying the Panel's findings, concluded that the law was WTO-inconsistent in that it constituted an impermissible action against dumping (and subsidization). In the authors' view, the AB erred both in terms of its reasoning and in terms of its findings: the AB's treatment of the reasons advanced by the Panel to support its finding that the *Byrd* legislation violated Art. 18.1 AD and Art 32.1 of the Agreement on Subsidies and Countervailing Measures (SCM) was inconsistent; the AB, in striking down the legislation, used an economic theory that was inadequately motivated and of doubtful validity, if meant to describe the legislation's typical impact on various industries, and it failed to explain how general it believed the theory to be; the AB struck down the legislation on much weaker grounds than those it had previously established as a requirement in its case law; and finally, the AB should have undertaken a more comprehensive discussion of the claims under Art. 5.4 AD and 11.4 SCM, since an illegality could more naturally have been established under these provisions.

Horn and Mavroidis also discuss the *Pipe Fittings* litigation between Brazil and the EC. In this dispute, Brazil raised a series of issues concerning the lawfulness of the EC imposition of antidumping duties against imports of pipe fittings originating in Brazil. Chief among the issues raised were questions relating to the treatment of a devalued currency, the conditions under which low-volume imports should be considered imports in the ordinary course of trade, and the scope of information that should go into a final notice advising interested parties as to the extent of an antidumping imposition. In the authors' view, the AB's conclusions with respect to the first two issues are hardly supported by a contextual understanding of the various obligations laid down in the AD. Disregarding the implication of a devaluation (and its effect on pricing decisions) would lead the investigating authorities to practice antidumping against its very purpose: antidumping measures are not available to provide injured parties with a lump-sum payment, but, instead, to offset dumping occurring in future transactions (i.e. after the conclusion of the investigation). Additionally, the AB's understanding of the discretion conferred upon the investigating authorities when constructing the normal value would lead, as it did in the present case, to logically incoherent outcomes. Finally, the authors

argue that the transparency obligations should be read in light of their purpose, which is to inform uninformed parties the basis of decisions made during the investigation and thus to ensure that due process has been adhered to throughout the whole administrative procedure, otherwise these obligations will be reduced to mere procedural requirements that do not perform their assigned function.

The *Softwood Lumber IV* litigation between Canada and the United States is also examined by Horn and Mavroidis. This dispute is part of the long-standing conflict between Canada and the United States concerning the forestry sector. A main issue in the present dispute concerns the benchmark that a WTO Member can use in order to calculate the amount of subsidization. In this dispute, the Panel concluded that there was a problem with the current text of the SCM Agreement in that it does not include sufficient flexibility to allow WTO Members to use alternative benchmarks when confronting a factual situation not envisaged by the law itself; accordingly, the Panel indirectly argued for some form of legislative amendment. The AB did not agree with the Panel's reading, however, concluding that the existing text reflects sufficient flexibility to allow WTO Members to deal with situations such as the one in the present dispute. The authors, however, find it hard to interpret Art. 14(d) SCM so as to allow for alternative benchmarks, such as the benchmark proposed by the United States. In their view, the AB here effectively took on the role of legislator, thus contravening the discipline laid down in Art. 3.2 of the Understanding on Dispute Settlement.

Grossman and Sykes discuss the steel disputes between the United States and a host of complainants that challenged the consistency of safeguards in the steel sector imposed by the United States against imports from a variety of sources. The authors take the position that the AB's decision in this dispute is one more link in a line of unsatisfactory decisions in the safeguards area. In their view, the underlying problem stems from the fact that the treaty text regarding the preconditions for the use of safeguard measures is seriously deficient. The AB, with its usual emphasis on textual interpretation, has done little to resolve the puzzles that the text creates. As a result, WTO members are still left with little guidance concerning the proper use of safeguards beyond some confusing and sometimes incoherent standards, notwithstanding the sizeable amount of jurisprudence in this field. The authors review these issues as they have arisen, not only in the instant decision, but in prior decisions as well, and then discuss the details of the steel

dispute. They place more emphasis on the Panel report than the AB report, as the latter breaks little new ground. In the authors' opinion, although it is probably difficult to quarrel with the outcome in this particular case (in light of the procedural deficiencies they observe), it is high time to reverse the tide in the safeguards area by breaking with the current line of jurisprudence.

Some of the reports discussed in this year's volume deal with issues other than contingent protection. Neven and Mavroidis discuss the first "genuine" services litigation in the WTO context, the dispute between the United States and Mexico concerning the rates charged by the Mexican monopolist, Telmex, for terminating calls originating in the United States (*Mexico — Telecoms*). The Panel, whose findings were never appealed, found that Telmex was charging rates unrelated to its cost structure, thus violating its obligations under the *General Agreement of Trade in Services* (GATS). The authors critically distance themselves from both the Panel's reasoning and its findings: in the authors' opinion, the Panel mischaracterized the facts before it, and, moreover, applied the wrong law. In their view, Mexico had made no commitment regarding the factual situation as presented by the complaining party (and was hence not bound by the relevant legal framework). Furthermore, even if it had made such commitments, the relevant framework did not address the situation before the Panel (cross-border supply of termination services), but rather addressed only the mode-3 supply of telecoms services (commercial presence of the supplier in the market of the country terminating incoming calls). The authors conclude that the Panel's findings constitute an impermissible extension of the existing legal framework to transactions that the founding fathers did not intend to cover. They also take a critical stance with respect to the pure competition-law component of the dispute, where they argue that it was an overly bold move for the Panel to pronounce on whether the rates charged were cost-oriented, in light of the information presented before it. The Panel's approach is, from the authors' perspective, at odds with the approaches of numerous competition authorities on the same score.

Grossman and Sykes deal with the *Generalized System of Preferences* (GSP) dispute between India and the EC, where, for the first time, the legality of practices by donor countries under the terms of the Enabling Clause was being discussed. In this case, India complained against the EC practice of making distinctions among developing countries, and, based on such distinctions, granting additional

preferences to some developing countries (those that had engaged in combating drug production and trafficking). The AB, overturning in part the Panel findings in this respect, condemned the specific EC practice (because the list of beneficiaries was closed), but accepted the principle that the making of distinctions among developing countries was perfectly compatible with the WTO legal order, to the extent that objective criteria had been established *ex ante*. The authors disagree with both the reasoning and the outcome of this litigation. In their view, the EC scheme could, at least theoretically, lead to trade diversion, with less efficient developing countries increasing their exports at the expense of the exports of more efficient developing countries. Moreover, in the authors' opinion, beyond the original distinction between developing and least developed countries that is enshrined in the WTO legal framework, and the graduation from developing to developed country status, there is no justification for schemes such as the one contested in this case. Finally, from a policy perspective, there is no reason to believe that such schemes are to the benefit of the countries receiving preferences.

Howse and Staiger discuss the arbitration on the *1916 Antidumping Act*, which addresses the meaning of equivalence between a violation of international law and the countermeasures applied to respond to the violation. In this case, the EC proposed countermeasures that "mirrored" the US WTO-inconsistent behavior (the availability of a private right of action for treble damages against a foreign firm engaging in certain kinds of dumping). Based largely on previous rulings, the Arbitrator held that, while the central purpose of countermeasures under DSU Art. 22 was to induce compliance and exclude punitive purposes, it could not endorse the proposed countermeasures of the EC, unless it had evidence that the trade or economic effect of the EC mirror-reaction on the United States would not exceed the trade or economic effect of the United States' original action on the EC. The authors reject the Arbitrator's approach for several reasons: *first*, in their view, the Arbitrator focused on the word "level" without also considering its immediate context—the notion of "equivalence." The word "equivalence" implies proportionality between two things that are not entirely commensurate or reducible in value to a common metric. *Second*, "normative countermeasures," where equivalence or proportionality is achieved by suspending a symmetrical obligation, have often been recognized as consistent with the principles of state responsibility. *Third*, the Arbitrator confused the issue of the limits

on countermeasures with the issue of whether the purpose of countermeasures was to re-establish the pre-breach equilibrium between the parties, to achieve compliance, or to punish. The authors also advance in their paper some normative thoughts on the placement of efficient breach of contract inside the current WTO legal regime. They argue that the Arbitrator's focus on trade effects has some merit from an economic point of view, and they also propose how the trade foregone should be measured.

Neven and Weiler review the decision by the AB in the *Japan – Apples* dispute, which concerns measures affecting the importation of apples in Japan. The authors emphasize that a crucial aspect of the Sanitary and Phytosanitary (SPS) agreement is that it imposes a discipline on risk-reducing measures even in the absence of discrimination in favor of domestic products. Their discussion on the evaluation of risk-reducing measures focuses on two issues, namely the scope of the mandate given to the adjudicators and the standard of review that they should apply. Neven and Weiler emphasize the difficulty that adjudicators face in distinguishing between the level of risk that a country will find it optimal to support (which cannot be challenged), and the question of whether the risk-reducing measures are necessary to achieve the chosen level of risk. They further observe that the common methodology used by panels, evaluating the existence of risk in the absence of risk-reducing measures, has limited applicability. The authors also discuss how the Panel's approach can be abused, leading the adjudicators to slip from the evaluation of whether a measure is necessary to achieve a given level of risk to an implicit challenge of the level of risk itself (which should remain the preserve of the Members). Regarding the standard of review, they argue that a lower standard should be applied to measures that do not threaten fundamental principles like nondiscrimination. Finally, the authors also consider the Precautionary Principle in the context of the SPS Agreement. In their view, the provisions of the SPS Agreement reflect the distinction between risk and ambiguity: whereas the former would cover the provisions that concern science-based SPS measures, the latter would extend to cover precautionary measures. The authors consequently call into question the Panel's and the AB's unwillingness to apply the Precautionary Principle in the context of this dispute.

This year, we will not attempt to classify the papers according to whether the authors see the rationale provided by the adjudicating bodies, or the outcome, as correct. Nevertheless, we observe that,

in basically all the disputes discussed, the authors raise serious concerns about the adjudicators' reasoning in support of the final outcome. Whether the outcomes of the disputes make sense from an economic point of view is more difficult to judge this year, since the Studies to a large extent address antidumping issues, and, as is well known, it is difficult to reconcile antidumping measures with standard economic reasoning.

2

European Communities — Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India (AB-2000-13, WT/DS141/AB/R:DSR 2003: III, 965): Recourse to Article 21.5 of the DSU by India

GENE M. GROSSMAN*
Princeton University
ALAN O. SYKES*
University of Chicago

1 Introduction

This chapter addresses the dispute brought to the World Trade Organization (WTO) by India concerning anti-dumping duties imposed by the European Communities (EC) on cotton-type bed linen. An earlier complaint brought by India challenged the anti-dumping duties on a number of points, including the EC practice of "zeroing" for the computation of dumping margins (which had the effect of assigning a negative dumping margin a weight of zero when computing a weighted average dumping margin).[1] India prevailed in that dispute,[2] and the EC responded with Council Regulation (EC) No. 1644/2001, amending the original anti-dumping measure on bed linen from India. India was of the view that the amended measure did not comply with EC obligations under the WTO Anti-dumping Agreement, and brought

* This chapter was prepared for the American Law Institute project on "The Principles of WTO Law." We thank Kathy Spier for thoughtful assistance.

[1] The decision in the earlier proceeding is the subject of an earlier chapter in this series. See Janow and Staiger (2003).

[2] See European Communities — Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India, WT/DS141/AB/R, adopted March 12, 2001.

the proceeding under Art. 21.5 of the DSU that is the subject of this chapter.

Several issues were raised before the Art. 21.5 Panel, but only three issues reached the Appellate Body. First, India argued that although the EC had corrected the "zeroing" problem, it had failed to ensure that injury attributable to "other factors" had not wrongly been attributed to dumped imports, in violation of Art. 3 of the Anti-dumping Agreement. Second, India argued that in conducting its revised injury analysis, the EC violated Art. 3 when it presumed that all imports from exporters not individually investigated were "dumped," even though 53% of the imports from exporters that were individually investigated were found not to have been dumped once the "zeroing" method of calculation was abandoned. Finally, India argued that the EC had not properly considered certain factors bearing on injury that it was required to consider under Art. 3.

The Appellate Body ruled in favor of the EC on the first issue, holding that it had been resolved definitively in the original proceeding. It ruled in favor of India on the second issue, however, concluding that imports from producers not individually investigated could not be presumed to be dumped for purposes of injury analysis when some of the individually investigated exporters were not dumping. On the third issue, the Appellate Body upheld the finding against India by the Panel, deferring to its resolution of what the Appellate Body considered an essentially factual issue.

From a legal perspective, the Appellate Body's decision on the first issue raises some interesting questions about the proper scope of *res judicata*, issue preclusion, and waiver in WTO jurisprudence, but provides few answers. The case breaks new ground with respect to the second issue noted above as well, and we quibble somewhat with the Appellate Body's legal and logical reasoning there. Finally, the Appellate Body's deference to the Panel on the third issue seems appropriate, as best we can determine.

From an economic perspective, we find the procedural issue to be an interesting one. Little analytical work has been done by economists on the proper scope of *res judicata* and the related notions of issue preclusion and waiver. We develop some simple points about these issues below, which provide some basis for questioning the refusal of the compliance Panel to entertain India's arguments on "non-attribution." Regarding the second issue, the Anti-dumping laws make so little economic sense in general that it is difficult to offer any guidance as to

their "proper" administration. The ruling in favor of India on the presumption of dumping issue seems reasonable from a statistical standpoint, however, although it is less clear that it is right as a legal matter. Finally, the Appellate Body's deference to the factual conclusion of the Panel on the third issue raises no economic issues of note.

We lay out the legal issues and their resolution by the Panel and the Appellate Body in Section 2. Section 3 offers a critical analysis of the case from a law and economics perspective.

2 Factual and legal issues and their disposition

2.1 Non-attribution of injury caused by "other factors"

Article 3.5 of the Anti-dumping Agreement provides that investigating authorities must "examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports." In the original proceeding, India challenged the EC's duties, *inter alia*, on the grounds that the EC had failed to ensure that injury attributable to "other factors" was not attributed to dumped imports from India, although it did not pursue the issue very actively. The original Panel dismissed the one substantive point raised by India under this rubric, and otherwise said that India had failed to make out a *prima facie* case on the issue. That finding was not appealed.

The EC did not conduct a new analysis of "other factors" as part of its revised injury analysis when it promulgated Regulation No. 1644/2001, and had simply relied on its previous discussion of the matter. India then argued again that the EC had failed to ensure that injury caused by "other factors" was not attributed to dumped imports. In particular, it pointed to various "other factors" that had not been a subject of discussion before the original Panel, including rising input costs for European firms and the failure of output prices in the EC to keep up with inflation.

The EC requested a preliminary ruling from the Panel to the effect that such matters could not be raised in an Art. 21.5 proceeding, and the Panel agreed: "To rule on this aspect of India's claim under Article 3.5 in this proceeding would be to allow India a second chance to prevail on a claim which it raised, but did not pursue, in the original proceeding. We cannot conclude that such a result is required by

Article 21.5 of the DSU, or any other provision. The possibility for manipulative or abusive litigation tactics that would be opened by allowing Members an opportunity to obtain a ruling in an Article 21.5 proceeding that they could have sought and obtained in the original dispute would, in our view, be inestimably harmful to the effective operation of the dispute settlement system.''[3] Although the Panel did not use these terms, its reasoning invokes notions of *res judicata*, issue preclusion, and waiver.

The Appellate Body affirmed the Panel's ruling on this issue. In doing so, it emphasized that new claims *can* at times be raised before an Art. 21.5 Panel. It noted that the purpose of such Panels is to review the WTO consistency of measures taken to comply with prior rulings, and that many such measures will differ significantly from the measures originally challenged, and may be inconsistent with WTO obligations in ways that the original measures were not. Although the Appellate Body made clear that new inconsistencies of this sort were the proper subject of discussion before an Art. 21.5 Panel, it stated: ''[h]ere, India did not raise a *new* claim before the Art. 21.5 panel; rather, India reasserted in the Art. 21.5 proceedings the *same* claim that it had raised before the *original* panel in respect of a component of the implementation measure which was the same as the original measure. The *same* claim was dismissed by the original Panel, and India did not appeal that finding.''[4] The Appellate Body went on to hold that when the original Panel report was adopted by the Dispute Settlement Body (DSB), it became a final resolution of the dispute on the ''other factors'' issue.[5]

Like the Panel, the Appellate Body relied for its ruling not so much on any treaty text that addressed the issue, but on policy considerations and on its earlier decision reviewing a similar issue that had arisen before the *Shrimp—Turtle* compliance Panel. The Appellate Body emphasized that India had raised the ''same'' claim earlier and lost, and put less emphasis than the Panel had on the notion that the particular issues raised by India could have been raised before but were not.

2.2 Injury due to exporters not individually investigated

In the second investigation, as in the first, the EC did not investigate every Indian exporter of cotton-type bed linen. Article 6.10 of the Antidumping Agreement allows importing nations to investigate only

[3] Panel Rep. ¶6.43. [4] AB Rep. ¶80. [5] AB Rep. ¶99.

a sample of all exporters in cases where an individual investigation of all of them would be "impracticable." Accordingly, the EC conducted individual investigations of five of the larger Indian exporters, and applied a weighted average anti-dumping duty to exports from other exporters as is allowed by Art. 9.4 of the Anti-dumping Agreement.

The most important change between the original investigation and the second was to eliminate the practice of "zeroing" in the computation of weighted average dumping margins. When zeroing was eliminated, two of the five exporters subject to individual investigation, accounting for 53% of the imports from the five individually investigated importers, were found not to be dumping at all. The issue before the compliance Panel was how this new finding should affect injury analysis by the EC.

Article 3.5 requires that the importing nation establish a causal link between the dumped imports and injury. In purporting to establish this link when promulgating Regulation No. 1644/2001, the EC assumed that all imports from Indian exporters not individually investigated had been dumped, even though 53% of the imports from the exporters individually investigated had not been dumped. India argued that the EC thereby violated Art. 3.1, which requires that the determination of injury be based on "positive evidence," including an "objective examination" of the "volume of dumped imports." India argued that the EC should presume that dumping was occurring by exporters not individually investigated in the same proportion as imports from exporters who were individually investigated (47%). This would suggest a smaller volume of dumped imports than the EC had presumed were present, and might reverse the conclusion that dumped imports were causing material injury.

The EC argued that the presumption of dumping by exporters not investigated individually is permissible under the Anti-dumping Agreement. Its principal argument was based on Art. 9.4 of the Anti-dumping Agreement, which permits an anti-dumping duty to be imposed on exporters not individually investigated as long as it does not exceed "the weighted average margin of dumping established with respect to the selected exporters." The EC contended that because it was allowed to impose an anti-dumping duty on those exports, it had to also be allowed to consider them "dumped" for purposes of injury analysis. Next, it argued that the group of exporters that it had chosen to investigate individually were not selected to be a statistically valid sample, but rather represented the "largest percentage of the volume

of the exports . . . which can reasonably be investigated,'' one of the options under Art. 6.10. Thus, the percentage of exports found to be dumped by the individually investigated exporters could not be assumed to reflect the amount of dumping by exporters not individually investigated.

The Panel agreed with the EC. ''We can find no textual obligation in the AD Agreement to separate out the unexamined producers' imports into dumped and not-dumped for purposes of the injury analysis . . .''[6] It also found India's position to be logically flawed, given the fact that all non-investigated imports could be subjected to a positive anti-dumping duty under Art. 9.4: ''Under India's approach, only a portion of imports from producers subject to that anti-dumping duty could be considered as 'dumped' for injury purposes. This effectively treats the imports from the same producers as dumped for purposes of duty assessment, and not dumped for purposes of injury analysis. In our view, this is an unacceptable outcome, suggesting that the analysis which leads to it is untenable.''

The Appellate Body reversed. It emphasized the requirement for an ''objective examination'' of the volume of dumped imports, and noted that imports not sold at dumped prices were specifically enumerated in Art. 3.5 as one of the ''other factors'' which may cause injury and should not be attributed to dumped imports. It was also unpersuaded that imports from exporters not individually investigated could be presumed to be dumped simply because Art. 9.4 permits them to be subjected to an anti-dumping duty – ''[w]e do not see why the volume of imports that have been found to be dumped by non-examined producers, for purposes of determining *injury* under paragraphs 1 and 2 of Article 3, must be *congruent* with the volume of imports from those non-examined producers that is subject to the *imposition of anti-dumping duties* under Article 9.4.''[7] The Appellate Body stopped short of endorsing India's proposed method for calculating the volume of dumped imports from exporters not individually investigated, however, allowing for the possibility that ''positive evidence'' of that volume might be based on something other than the percentage of exports dumped by the individually investigated exporters.[8]

Along the way, the Appellate Body was mindful of the standard of review under the Anti-dumping Agreement. Article 17.6(ii) of the

[6] Panel Rep. ¶6.139. [7] AB Rep. ¶126. [8] Id. ¶146.

Agreement provides that "[w]here the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests on one of those permissible interpretations." The EC argued that its interpretation of the injury provisions was at least a "permissible" interpretation that was entitled to deference, but the Appellate Body disagreed: "[W]hatever methodology investigating authorities choose for calculating the volume of 'dumped imports,' that calculation and, ultimately, the determination of injury under Article 3, clearly must be made on the basis of 'positive evidence' and an 'objective examination.' These requirements are not ambiguous, and they do not 'admit of more than one permissible interpretation' within the meaning of the second sentence of Article 17.6(ii)."[9]

2.3 Consideration of all "relevant factors" bearing on injury

Article 3.4 of the Anti-dumping Agreement requires importing nations to base their injury analysis on an examination of "all relevant economic factors . . . having a bearing on the state of the (domestic) industry." It then provides a non-exhaustive list of such factors. India asserted that the EC failed to gather data on and to evaluate two "relevant factors" — stocks and capacity utilization — when it promulgated Regulation No. 1644/2001. The EC asserted that such data had been presented before the investigative authorities, and had been properly considered. The Panel ruled for the EC on this point, and India argued that the Panel abused its discretion in doing so by, in effect, accepting the EC's unsupported assertions on the matter rather than conducting a more thorough investigation.

The Appellate Body upheld the Panel, which had "concluded that it was clear that the European Communities had 'in its record' information on stocks and capacity utilization — the two factors India had focused on — and that 'unlike the original determination, the EC's consideration of these factors [was] clearly set out on the face of the redetermination.' "[10] While India wished to characterize the Panel's conclusion as an abuse of its discretion, the Appellate Body saw it as a factual conclusion by the Panel that was within its proper discretion and should not be disturbed on appeal.

[9] AB Rep. ¶118. [10] AB Rep. ¶154.

3 Critical analysis

3.1 Non-attribution and the procedural issue

One can quibble with the willingness of the Appellate Body to permit the EC to rely on its original "other factors" analysis. In light of its resolution of the second issue in the case, discussed below, the EC is required to restate its assessment of the quantity of dumped imports, revising the estimate downward. The quantity of fairly traded imports, an "other factor" that might cause injury, must be revised upward. One might thus argue that the EC should redo both its analysis of harm attributable to "dumped imports" *and* its analysis of harm due to "other factors." The Appellate Body does not reach this conclusion, however, perhaps because India's arguments focused on EC input and output prices as the "other factors" to be considered.

The much more interesting aspect of the ruling on this issue, however, is its procedural implications. The WTO treaty text does not specifically address *res judicata* and related issues, leaving to Panels and to the Appellate Body the task of evolving sensible principles in the area. In this case, the Appellate Body insisted that "India did not raise a *new* claim before the Article 21.5 panel; rather, India reasserted in the Article 21.5 proceedings the *same* claim." At some level, it is difficult to quarrel with the proposition that parties to WTO disputes should not be permitted to relitigate the *same* claim over and over again. What the Appellate Body masks with this language, however, is that the concept of "sameness" can be interpreted broadly or narrowly.

Recall the facts: India had raised the "non-attribution" issue in its original complaint, but did not advance factual arguments in relation to that issue sufficient to make out a *prima facie* case. Then, before the compliance Panel, it sought to make those arguments seriously for the first time, pointing to "other factors" such as high EC input prices and low EC output prices. Here, to say that India had lost the *same* claim earlier is to imply that all arguments relating to a particular legal issue are part of the "same" claim, and are waived if they are omitted from the first round of litigation in which that issue appears. The Panel opinion hinted at an even broader principle when it stated that it would not afford India "an opportunity to obtain a ruling in an Article 21.5 proceeding that they could have sought and obtained in the original dispute." This language suggests that all legal issues that could have been raised in an earlier proceeding, but were not, are waived. For terminological simplicity, we refer to these principles as rules of waiver,

although the reader should be aware that civil procedure treatises often attach the labels *res judicata*, issue preclusion, or claim preclusion to these types of rules.

Rules of waiver have the obvious consequence of encouraging litigants to raise issues sooner rather than later, and can hasten the final resolution of a dispute. Many legal systems have them.[11] It is possible that such rules are economically desirable when all the costs and benefits of the legal system are taken into account, but that is not obvious. We have found no treatment of the issue in the existing law and economics literature on procedure, perhaps because a complete accounting of all the relevant considerations in any particular context is exceedingly difficult to provide. An exhaustive treatment is beyond the scope of this comment as well, but we will sketch some of the pertinent considerations that bear on the design of optimal waiver principles. Before addressing waiver, however, we set forth our understanding of the justification for *res judicata* in its narrower sense.

3.1.1 Res judicata

Compliance with the law generally has a social value, and the prompt resolution of legal proceedings can hasten valuable compliance. This observation seemingly applies as much to the WTO as to other legal contexts. But legal decision makers are imperfect, and may make errors in their findings of law or fact. When litigants are required to comply with erroneous decisions, error costs arise, often of the same nature as the gains from compliance with correct decisions. A desire to avoid errors motivates principles of "due process" in many legal systems. Process itself is costly, however, and so it is unrealistic for most legal systems to avoid error altogether. The task of designing an optimal procedure thus balances competing considerations: the value of resolving legal issues sooner and of reducing process costs on the one hand, against the costs of errors on the other.

Because of concerns about error, it is not uncommon for litigants to be permitted to raise issues more than once. The usual setting for revisiting issues is the "appeal," a common feature in many legal systems, including now the WTO. But there will generally be diminishing returns to reopening issues that have been previously

[11] On the American rules in this area, see generally, Friedenthal, Kane and Miller (1999); James, Hazard and Leubsdorf (2001).

decided — at some point, the likelihood of error becomes sufficiently small that the benefits of ending the dispute and the associated process costs predominate over any concerns about error. Thus, rights of appeal are always limited (and some matters may not be appealable at all).

Res judicata in its narrowest sense simply precludes a litigant raising an *identical* claim in a new proceeding when the claim was previously adjudicated. It can be understood as a presumption that the legal system in question already provides an appropriate error-correction mechanism through its appellate process. Once a litigant has raised an argument, lost, and exhausted all available appeals, no further delays and litigation costs are likely to be justified.

To be sure, scenarios may arise in which concern for error is particularly acute, and the limits on the process available in typical cases may appear too stringent. The usual solution to such problems, however, is for the legal system to add a more extensive appellate process for particular categories of cases rather than to permit tribunals to retreat from *res judicata* in its narrow form. Criminal defendants in the United States, for example, receive additional layers of appellate review not made available to civil litigants and capital defendants — because the costs of error are great and irreversible — are afforded procedural protections not made available to other criminal defendants.

3.1.2 Waiver

The rationale for rules of waiver must be somewhat different. By definition, waiver applies to arguments and issues that were *not* adjudicated previously but that could have been. There can be no presumption that their prior disposition was correct if there was no prior disposition.

But rules of waiver might be based on a related presumption — if a litigant did not bother to raise an argument previously, perhaps the litigant has revealed it to be weak, so that the likely error cost of ignoring it is small. Rules of waiver encourage litigants to bring all potentially meritorious arguments before the court at once so that the dispute can be resolved with dispatch and the gains from compliance with the law can be realized more quickly; any claims "waived" are presumed to be so weak that they need not be addressed.

This simple intuition may have much to do with the justification for doctrines of waiver, but it is incomplete for two reasons. *First*, to the degree that complainants internalize the costs of delay in bringing other parties' behavior into conformity with the law, the legal system

seemingly has no interest in encouraging complainants to pursue compliance at a faster clip. *Second*, litigation becomes more expensive as more claims are brought. Each claim must be researched, briefed, and argued. Factual support must be amassed. Even if the adjudicative body can exercise "judicial economy" to avoid issues that need not be reached to resolve the case, the parties to the proceeding must still bear additional costs as the number of issues and arguments grows. Hence, if a complainant prefers to start with what it believes to be its strongest claims, and to leave others in abeyance should the initial claims fail, some of the costs of litigation (including some that are externalized) will be avoided if the initial claims succeed and resolve the dispute. This consideration, too, seems to argue for allowing the complainant to bring claims at its own pace, in preference to rules of waiver that penalize claimants for failing to bring issues before the dispute process at the outset.

An important countervailing consideration arises, however, if litigation exhibits economies of scale in relation to the number of claims in each proceeding. It seems quite likely that dispute proceedings have considerable fixed costs. For the WTO in particular, panelists must be selected and assembled for hearings. Each panelist will invest considerable time in learning the (often complex) background facts of the dispute. Many of these costs will be the same whether the dispute involves a single legal claim or many. And like other costs of litigation, a complaining nation does not bear all of these fixed costs.

The presence of considerable fixed costs to litigation can supply a positive externality to the consolidation of claims in an initial proceeding. Plausibly, a complainant might prefer to proceed more or less *seriatim* with its claims to save itself the variable costs of litigating matters that may prove unnecessary. But if considerable economies of scale are lost when the complainant proceeds in this fashion and those costs are borne by others, the system may gain by foreclosing such a strategy.

Of course, the mere existence of fixed costs is not sufficient to justify rules of waiver. Their magnitude must be considered in relation to the added variable costs of litigating more claims at once, claims that may prove unnecessary to litigate *ex post*. Roughly speaking, the greater the fixed costs of a proceeding in relation to the variable costs per claim, the stronger the case for insisting that more issues be raised at once.

These points also suggest the possibility of more refined waiver rules. Some types of claims may have very low marginal litigation costs,