*World Trade Review (2011), 10: 1, 1–4*
 doi:10.1017/S1474745611000073

# Introduction

HENRIK HORN AND PETROS C. MAVROIDIS

This volume contains five reports on the World Trade Organization (WTO) case law of 2009, written in the context of the American Law Institute (ALI) project *Legal and Economic Principles of World Trade Law*, which aims to provide systematic analysis of WTO law based on both economics and law. Each report in the volume is written jointly by an economist and a lawyer, and each discusses a separate WTO dispute. The authors are free to choose the particular aspects of the dispute they wish to discuss. The aim is to determine for each dispute whether the Appellate Body's (or occasionally the Panel's) decision seems desirable from both an economic and a legal point of view, and, if not, whether the problem lies in the interpretation of the law or the law itself.

Earlier versions of the papers included in this volume were presented at a meeting in Geneva in June 2010, and we are very grateful for the comments at the meeting provided by Robert L. Howse and Frieder Roessler. We would also like to thank all of the other meeting participants for providing many helpful comments, and the WTO for providing a venue for the meeting.

Our sincere thanks also go to The American Law Institute, particularly to Director Lance Liebman, President Roberta Cooper Ramo, former President Michael Traynor, Deputy Director Stephanie Middleton, and former Deputy Director Elena Cappella, all of whom have been instrumental in bringing this project about. We would further like to express our gratitude to Nina Amster, Judy Cole, Todd David Feldman, Sandrine Forgeron, and Marianne Walker of the ALI's staff for providing very efficient administrative and editorial help. Finally, we are extremely grateful for financial support from the Milton and Miriam Handler Foundation, The Jan Wallander and Tom Hedelius Research Foundation, Stockholm, and the WTO Secretariat (especially Alejandro Jara and Patrick Low) for helping us with the organization of the meeting at the WTO headquarters.

Turning to the content of the volume, the year of 2009 saw relatively few disputes being adjudicated and then coming to an end. As always, anti-dumping was a common theme among those that did, and the zeroing issue was raised again in these disputes. In their paper, **Hoekman** and **Wauters** review the WTO Appellate Body (AB) Reports on *United States–Zeroing* (*Article 21.5 DSU – EC*), and *United States–Zeroing* (*Article 21.5 DSU – Japan*). The AB found that the United States had not brought its anti-dumping measures into compliance with the WTO Anti-Dumping Agreement as it continued to use zeroing in annual reviews of

anti-dumping orders. The authors argue that this conclusion – based on a complicated discussion of what constitutes a 'measure taken to comply' – could have been reached through a much simpler and more direct argument. Continued noncompliance by the United States generates costs to traders targeting the United States and the trading system more generally. They further argue that, from a broader WTO compliance perspective, consideration should be given to stronger multilateral surveillance of anti-dumping practice by all WTO members and to more analysis and effective communication by economists regarding the costs of zeroing and anti-dumping practices more generally.

The zeroing methodology is also discussed in the contribution by **Prusa** and **Vermulst** in their comment on *United States – Continued Existence and Application of Zeroing Methodology*. They note that this is the eighth AB Report in which some aspect of zeroing was adjudicated. As in the prior cases, the AB again found the US practice inconsistent with several aspects of the WTO Anti-Dumping Agreement. The authors point out that the novelty in this dispute was the EC attempt to broaden the concept of what constitutes an appealable measure. The EC challenged whether a WTO decision regarding zeroing could apply to subsequent proceedings that might modify duty levels, and it asked the AB to decide whether the United States' continued use of zeroing in the context of a given case was consistent with WTO obligations. The AB stated that in its attempt to bring an effective resolution to the zeroing issue, the EC was entitled to frame its challenge in such a way as to bring the ongoing use of the zeroing methodology in these cases under the scrutiny of WTO dispute settlement. The AB then cautiously applied the new perspective to US zeroing practice.

Other disputes raised more novel issues. For instance, the Panel Report on *China–Intellectual Property Rights* was the first Report focusing on China's policies with respect to enforcement of intellectual property rights. The Report, discussed by **Saggi** and **Trachtman**, addressed three main issues: first, the relationship between China's censorship laws and its obligations to protect copyright under the WTO Agreement on Trade Related Intellectual Property Rights (TRIPS); second, China's obligations under TRIPS to ensure that its customs authorities are empowered to dispose properly of confiscated goods that infringe intellectual property rights; and, third, whether China's volume and value-of-goods thresholds for application of criminal procedures and penalties with respect to trademark counterfeiting or copyright piracy comply with TRIPS requirements for application of criminal procedures and penalties. In the authors' view, international trade agreements are generally intended to cause states to internalize policy externalities. The policy externalities that arise from domestic decisions regarding intellectual property protection may deprive foreign intellectual property owners of the monopoly profits that they would otherwise derive from intellectual property protection. In connection with intellectual property protection, even a state that lacks 'traditional' market power on world markets may be able to impose terms-of-trade externalities on other states by reducing its protection

of intellectual property below the global optimum. For this reason, and because of the international public-goods aspects of intellectual property, states have incentives to undersupply intellectual property protection. At least in part, TRIPS seems to be an attempt to reduce these policy externalities. All contracts, and all international treaties, are incomplete. This case involves, in the authors' view, some good examples of treaty incompleteness. Incompleteness can arise from circumstances of uncertainty regarding the possible tradeoffs, and the optimal balance, between different goals, including state autonomy in censorship on the one hand and internalizing policy externalities in intellectual property protection on the other. The authors analyze the possibility that it might be efficient to allow states broad discretion over censorship. Alternatively, in connection with the requirement for criminal penalties, incompleteness can arise from uncertainty regarding the particular industry structure that might be involved, and what would constitute production of 'commercial scale' for that industry. The authors also question the rationale for the limitation on the use of nonviolation complaints in connection with the TRIPS, since nonviolation complaints may be used to reduce the possibility that states will use discretion, such as that granted with respect to censorship, in a manner that is inconsistent with the rationale for that discretion – so as to defect from the general commitment to provide copyright or other intellectual property rights.

Another highly interesting dispute was *China–Publications and Audiovisual Products*, where a series of Chinese restrictions on the importation and distribution of certain 'cultural' or 'content' goods and services were found to violate GATT, GATS, and China's Accession Protocol. The AB Report in this dispute is analyzed by **Conconi** and **Pauwelyn**. The authors review the definition of what is a 'good' (is a 'film' a good or a service?) and the extent to which GATT Article XX exceptions can justify violations under WTO instruments other than the GATT itself. In the case at hand, the issue was whether this GATT provision could serve as an exception justifying deviations from obligations assumed under the Chinese Protocol of Accession. This was the first time that WTO adjudicating bodies had to address this particular issue. The authors argue that trade volumes are unlikely to rise significantly as a result of this ruling, as it does not affect China's right to keep out foreign films and publications if China finds them objectionable. However, foreign producers of audiovisuals can now gain potentially large economic rents by being able to export and distribute their products into the Chinese market. Finally, the authors discuss the issue of the protection of cultural goods and review the recent literature on trade and culture that has put forward economic arguments to justify, under some conditions, the protection of cultural goods. The authors include in their comment an extensive discussion of the AB findings regarding violations of China's Protocol of Accession, an issue that is gaining pace in WTO dispute-settlement practice.

**Grossman** and **Sykes** discuss the Report on *United States – Subsidies on Upland Cotton* (*Recourse to Arbitration by the United States under Article 22.6 of the*

https://doi.org/10.1017/S1474745611000073 Published online by Cambridge University Press

*DSU and Article 4.11 and Article 7.10 of the SCM Agreement*). In the authors' view, the case raises a range of interesting issues regarding the rationale for retaliation in the WTO system and the proper approach to its calibration. The authors entertain the following questions in this context: Should the approach to retaliation differ in cases involving prohibited or actionable subsidies? When should cross-retaliation be allowed? Should retaliation be based only on the harm to the complaining nation, or to other nations as well? And, most importantly, what economic content can be given to the standard of countermeasures 'equivalent to the level of nullification or impairment'? Grossman and Sykes point to a number of puzzling features of the DSU. For instance, the fact that the DSU allows WTO members to maintain illegal measures for an extended period of time without suffering any formal sanction suggests that the system is designed neither to 'ensure compliance', nor to ensure 'efficient compliance' (and its corollary 'efficient breach'). Furthermore, they see no economic rationale in using the amount of the subsidy as a basis for determining the amount of retaliation; nor do they see any valid economic reason why the approach to retaliation should differ in subsidies cases generally, or in prohibited-subsidies cases in particular. But Grossman and Sykes identify certain restrictive assumptions under which it makes economic sense to allow the retaliator to reduce the value of its imports by an amount equal to the value of its lost exports due to the violation. At the same time, the authors note that the use of prohibitive tariffs for purposes of retaliation is puzzling, as these tariffs cannot in general restore lost welfare for the complainant – nonprohibitive tariffs that enhance the terms of trade seem to make more sense. Their analysis suggests that the same information required to compute the nonprohibitive tariffs that will produce an equal trade-volume effect could instead be used to compute the tariffs that would offset the terms-of-trade loss due to the violation. Such an approach seemingly holds more promise as a way to approximate the level of retaliation that would restore the welfare of the complainant.