

Introduction

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The American Law Institute (ALI) project *Legal and Economic Principles of World Trade Law* aims to provide systematic analysis of World Trade Organization (WTO) law based on both economics and law. This volume contains four reports on the WTO case law of 2010 and a comment on one of the reports. Each report discusses a separate WTO dispute. The authors are free to choose the particular aspects of the dispute that they wish to discuss. The aim is to determine for each dispute whether the Appellate Body's and/or 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 in the law itself.

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This being the eighth volume in this series and the tenth year of the project, it is more than ever appropriate to thank the ALI for all its support during these years. We are particularly grateful to Professor Lance Liebman, Director of the ALI, but also to President Roberta Cooper Ramo, former President Michael Traynor, Deputy Director Stephanie Middleton, and former Deputy Director Elena Cappella. Throughout the years, we have also benefited from the very efficient and helpful ALI administrative staff. For their assistance in producing this year's volume, we thank Nina Amster, Judy Cole, Todd David Feldman, Sandrine Forgeron, and Marianne Walker. Not only are they always very efficient in their various capacities, they are also extremely pleasant to work with. Finally, we thank the Milton and Miriam Handler Foundation and The Jan Wallander and Tom Hedelius Research Foundation, Stockholm, for financial support.

Very few WTO disputes ended during 2010 – we therefore review only four disputes this year. One is *Australia–Apples*, which is discussed by Simon Schropp. The dispute concerns Australian sanitary and phytosanitary measures *vis-à-vis* New Zealand exports of apple fruit, and it focuses on the Australian import risk assessment underlying the import restrictions. The complainant alleged that assessment was riddled with scientific uncertainty. The quality and reliability of the assessment therefore featured prominently in the Appellate Body's discussion. In his comment on the Appellate Body Report, Schropp is concerned with the

standard of review of Members' decisions that are taken in situations of factual uncertainty. The report points to aspects of Members' risk assessments that should be considered 'off limits' for review by Panels, if such assessments are performed in the presence of significant uncertainty about scientific facts. The report also discusses how high degrees of uncertainty affect a Panel's ability to assess alleged less-trade-restrictive alternatives. The report introduces a basic framework for decision making under conditions of uncertainty, drawing on economics, decision analysis, and risk management. A basic observation is the notion that certain types of government decisions necessarily contain subjective trade-offs on the part of the risk assessor and therefore cannot be subject to external review. On this basis, the report proposes recommendations concerning Panels' discretion to review Members' risk assessments, and it also suggests concrete modifications to the standard of review currently applied by the Appellate Body.

Paola Conconi and **Robert L. Howse** address the second dispute, *EC-IT Products*. The dispute concerns the definition of information-technology (IT) products and the question of how to treat increasingly multifunctional high-tech goods. The dispute was triggered by various EU measures that resulted in the imposition of duties of up to 14% on certain multi-functional IT products. In their complaint, Japan, Taiwan, and the United States argued that the duties violated EU obligations under the 1996 Information Technology Agreement. The Panel decided in favor of the complaining parties and ordered the EU to repeal the measures leading to the dutiable treatment of the products at stake. The authors argue that the Panel's ruling enhances the credibility of trade-policy liberalization in the high-tech sector, thus fostering the development of new technologies.

Thomas J. Prusa and **Edwin Vermulst** discuss the third dispute covered this year, *US-Anti-Dumping Measures on PET Bags*, which focuses on methods of calculating anti-dumping duties. In December 2006, after a series of WTO Appellate Body Reports, the United States ceased zeroing in original investigations. The United States implemented the policy change prospectively, that is only for future cases. This dispute stems from a complaint by Thailand concerning the United States' use of such zeroing in calculating anti-dumping duties on polyethylene retail carrier bags from Thailand. The margins in this case remained unchanged because they had been calculated in 2004. But Thailand challenged the United States' use of zeroing in the final determination. Somewhat contrary to normal procedures, the United States did not contest the claim. The Panel confirmed that zeroing was used and, following the long line of Appellate Body rulings, found the United States' practice inconsistent with Article 2.4.2 of the Anti-Dumping Agreement. After the Panel Report was adopted, the United States retroactively applied the policy change to the facts of this case and recalculated the margins without zeroing. The relative simplicity of the panel proceeding and the United States' willingness to amend the calculations following the adoption of the Panel Report may invite other WTO members to pursue a similar course of action in instances where their exporters have been subjected to US zeroing.

The final case – *US–Poultry (China)* – is analysed by **Donald Regan**. This is the first Panel decision to address an origin-specific SPS measure; what the United States referred to as an ‘equivalence regime’. At the outset, the dispute looked highly interesting because, for the first time, the claimed inability of the complainant country to enforce its own food-safety rules was at stake. Unfortunately, as the litigation developed, the very interesting novel issues raised by such a measure were not discussed. In the report, Donald Regan discusses those novel issues – in particular, what sort of scientific justification or risk assessment should be required for a measure like this, and what SPS Article 4 says about equivalence regimes. The essay also criticizes the Panel’s analysis of some of the issues the Panel does discuss, such as the meaning of the ‘appropriate level of protection’ in SPS 5.5 and 5.6 and the relationship between the SPS and GATT XX (b). Donald Regan’s report is commented upon by **Jan Bohanes**.