WTO DISPUTES: ANTI-DUMPING, SUBSIDIES AND SAFEGUARDS by Edwin Vermulst and Folkert Graafsma [2002, Cameron May, London, ISBN 1-874698-78-3, v + 869 pages; hard cover]

In *WTO Disputes: Anti-dumping, Subsidies and Safeguards,* Vermulst and Graafsma present an overview of the procedural concepts of the Dispute Settlement Understanding (DSU) of the World Trade Organization (WTO) and annotate four of the many agreements resulting from the Uruguay Round of GATT Agreements[1] and the 1994 Agreement Establishing the WTO (WTO Agreement). The authors acknowledge in the Introduction that it was the relative infancy of this area that created the need for a "practical handbook" such as this, which ultimately appeared as a reference guide.

The WTO was established in 1995, an outcome of the Uruguay Round. Still a relatively new international organisation, it was intended to provide a "constitutional framework"[2] for the effective and efficient functioning of international trade. The four agreements referred to above are the main commercial agreements, namely:

(a) Anti-Dumping Agreement (ADA);
(b) Agreement on Subsidies and Countervailing Measures (ASCM);
(c) Agreement on Safeguards (ASG); and
(d) Agreement on Textiles and Clothing (ATC).

From 1995-2002, at least 28 cases were adjudicated and 65 gave rise to Panel and Appellate Body[3] reports under these agreements, which was an unprecedented number of cases at the international level. As a

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[1] The General Agreement on Tariffs and Trade (GATT) first appeared in 1994. The Uruguay Round was a series of multilateral GATT trade negotiations that resulted in the WTO. Its creation resulted from the increased "economic interdependence" of all states and the impact of once internal policies on the international community: August R, International Business Law: Text, Cases and Readings (2000, 3rd edition, Prentice Hall, New Jersey) 359.

[2] WTO Agreement Article II(3).

[3] A Panel would be established to settle a dispute where the parties could not reach an understanding through "consultations". An Appellate Body would be established following a request for the appellate review of a Panel decision: 32, 79-80.

preliminary observation one could say that the parts analysed were both technically and sufficiently presented, but unless the reader has some prior knowledge of this area of law the same material could be ambiguous or misleading. This is not a criticism as such but highlights the fact that the book appears to be aimed more at the practitioner, government bureaucrat or academic with some prior knowledge of or interest in this area of law. For example, although Chapter 2 explains the nature of Panel and Appellate Body reports, the uninitiated or less informed reader may find specific aspects of the cases presented to be confusing or out of context without the necessary background.

The book has five chapters, the first of which explores the DSU with emphasis on subject matter while the remaining chapters explain the four commercial agreements and clarify their individual provisions where necessary. Explanations are drawn from Panel and Appellate Body reports to prevent misinterpretation or confusion through restatement. Panel reports are shown in normal font and Appellate Body reports in italics.

The book concentrates on annotations and the bulk of them focus on the purpose of the four agreements and the implications when a WTO member state acts inconsistently with its obligations under the WTO Agreement. This raises issues such as what anti-dumping means or whether a member state has in fact engaged in such acts. Emphasis is on the interpretation of certain words used in the agreements[4] and the chapters end with useful summaries of all cases brought under the agreements to date. The annexes are handy tools providing quick reference guides to the various agreements and treaties dealt with.

Chapter 1 introduces the DSU process described as the WTO's "most individual contribution to the stability of the global economy".[5] Prior to this, there was no structured settlement process because the proposed system under GATT relied on the creation of the International Trade Organization that never came into existence. Hence, the DSU was created in conjunction with the WTO, deemed to be more efficient than most national systems. This chapter outlines the entire DSU process

[4] See for example the examination of "ordinary course of trade" with respect to the definition of anti-dumping: at 94.

[5] WTO, "Settling Disputes: The WTO's Most Individual Contribution" at <www.wto.org/english/thewto_e/whatis_e/tif_e/disp0_e.htm> (visited August 2002).

beginning with the question on whether the exhaustion of local remedies should occur first before a remedy may be sought under the DSU process, a process that begins with the initiation of a case and ends with the adoption and implementation (or non-implementation) of rulings.

While most, if not all, dispute settlement systems are flawed especially regarding the length of time taken to settle disputes, the DSU process operates as a "high-speed pressure cooker".[6] Every step is subject to a stringent time limitation to permit cases to be settled as quickly as possible.[7] The authors note that this efficiency may cause imbalances when state parties have to submit and respond to complaints within the relatively tight time limits allocated. However, the practice and statistics indicate that the system has worked "remarkably and extra-ordinarily well and can serve as an example for many jurisdictions where court cases drag on for years before leading to judgements."[8] The authors show that the disputes are usually settled in the first stage of "consultations"[9] and although the facts and information exchanged or obtained during the consultation merely serve a *probative* purpose and are not *constitutive* in nature,[10] the consultation stage provides a "safety stop"[11] preventing the escalation of the dispute in cases where the disputants cannot reach a mutually acceptable solution.

It is interesting that the sudden influx of applications under the four commercial agreements is due to developing states using the process in an unparalleled manner. In fact, the first complaint came from a developing state against a developed state.[12] Therefore, it may be observed that despite such use by developing states to protect their local economies against their more developed counterparts, they still face barriers such as the low level or non-availability of legal and technical expertise including in-house representation. To address this,

[6] At 46.

[7] A dispute may be settled within a year and three months with an appeal: WTO, "Settling Disputes: The WTO's Most Individual Contribution" at <www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm> (visited August 2002).

[8] At 46.

[9] At 31.

[10] At 31-32.

[11] At 30.

[12] Malaysia – Prohibition of Imports of Polyethylene and Polypropylene, complaint by Singapore (WT/DS1).

two key aspects of the DSU are the choice of representation and use of external advisors, which acknowledge that developing states should have access to non-governmental expertise.[13] For example, the authors refer to *EC-Bananas,*[14] which "clarified that it is the sovereign right of a WTO member to determine the composition of its delegation in WTO dispute settlement proceedings".[15] However, the Appellate Body did not rule technically on whether private representatives could partake in such hearings,[16] which has left this issue open to interpretation.

Chapter 2 is an annotation of the ADA. Anti-dumping as governed by this agreement operates in conjunction with Article IV of 1994 GATT. To establish anti-dumping, a state should demonstrate that (a) a product was dumped, (b) the dumping caused or threatened to cause injury, and (c) the injury was material.[17] Dumping itself is determined when the "export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country."[18] In other words, dumping exists where a seller exports products at a price that is lower in the importing state than in the exporting state. The price in the home market is known as "normal value" and provides the dumping margin when compared against the export price.

The authors explore the ADA and examine the words used. They explain what they believe to be the more complex substantive and procedural issues, since it is important to distinguish between sales made in the ordinary course of trade and those that are not when trying to determine if dumping has occurred. However, sales not made in the course of ordinary trade cannot constitute anti-dumping.

It is seen that Article 2.1 of the ADA does not establish any test to determine whether or not sales are made in the ordinary course of

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[13] At 47.
[14] WT/DS27/AB/R.
[15] Ibid.
[16] At 47 note 109.
[17] Burnett R, Law of International Business Transactions (1999, 2nd edition, Federation Press, New South Wales) 229.
[18] ADA Article 2.1.

trade.[19] As a result, the Panel and Appellate Bodies have discretion to interpret the words and give them effect. The Panel in *US – Hot Rolled Steel*[20] stated that it was necessary to distinguish such sales when determining normal value because it was this value that would be used ultimately to ascertain whether a product was dumped.[21] On appeal, the Appellate Body held that WTO member states could determine normal value and ensure that the correct sales were included. However, the authors identify some of the limits that may arise. For example, the Appellate Body had rejected the United States' interpretation of Article 2.1 and use of the "arm's length" test, caused by the latter's application of the prices of sales to affiliated and unaffiliated companies that could result in an unfair determination of normal value.

The authors expand on dumping and its determination and provide their analysis in the annotations. For example, the ADA requires a "fair comparison" between the export price and the normal value.[22] Article 2.4.2 qualifies Article 2.4 and states "the existence of margins of dumping during an investigation shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions".[23] The Appellate Body in *EC-Bed Linen*[24] clarifies this requirement by explaining how domestic investigating authorities should proceed when establishing whether margins of dumping existed.[25] Thus, when calculating such weighted averages for normal value and price, comparisons with export transactions have to be made.

In dumping cases, the margins referred to above should only be established for the product under investigation and not for different variations of models or types. However, Article 2.4 provides that allowances should be allowed for physical differences in products and if it is shown that the products are "like" products they should be deemed comparable. To illustrate, in *EC-Bed Linen* the European Communities (EC) attempted to argue that the differences in various

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[19] At 94.
[20] WT/DS 184/R.
[21] ADA Article 2.1.
[22] Ibid Article 2.4.
[23] Ibid Article 2.4.2.
[24] WT/DS141/R.
[25] At 125.

types and models of cotton bed linen were "so substantial that they cannot be eliminated by making adjustments for differences in physical characteristics".[26] The Appellate Body held that the different types of cotton bed linen were comparable not only because the EC had identified cotton bed linen as the relevant market but because the various models had virtually the same physical characteristics and use.[27] This raises the question on where a line should be drawn between products that are or are not capable of a "fair comparison", but the authors leave this unanswered by not providing an opinion on this blurred distinction.

It is noted that there is another tier to the explanation of Article 2.4.2, namely, the emphasis on the practice of "zeroing" that is prohibited when applied inconsistently with the ADA.[28] The discussion here is interesting because the ADA does not explicitly prohibit zeroing. Instead, it is left to the Panel and the Appellate Bodies to interpret and find if certain practices should be prohibited as zeroing.[29] Zeroing occurs where dumping margins with a negative figure are "zeroed" with the effect of altering the results and perhaps even damaging the chance for "fair comparison". This means that the practice may treat "those export prices as if they were less than what they were, which in turn inflates the result from the calculation of the margin of dumping" as well as preventing a "fair comparison" from happening.[30]

To establish dumping, injury has to be shown. The examination on injury is directed at the importing state and based on positive evidence evaluated objectively.[31] Article 3.4 provides a non-exhaustive list of factors that may be referred to stating that one or more of the many factors may not necessarily give decisive guidance. Nonetheless, both the Panel and the Appellate Bodies agree that the factors "must be considered in all cases".[32] On this issue, the authors note that even if a particular factor is irrelevant in a case it should still be evaluated[33] and

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[26] At 127.
[27] EC-Bed Linen, WT/DS141/R.
[28] At 123.
[29] At 123-130.
[30] See generally ibid.
[31] ADA Article 3.1.
[32] At 141.
[33] At 145, 148.

they refer to the Panel Report in *Guatemala-Cement II*[34] that states:[35]

> Article 3.4 establishes a rebuttable presumption that those factors listed are relevant in giving guidance on whether dumped imports have had an effect on the domestic industry. It is only after consideration of the listed factors that the investigating authority may dismiss some of them as not being relevant for the particular industry...

The ADA establishes that the DSU applies to anti-dumping and implements a standard of review in Article 17. The authors emphasise that in the review performance, there is no *de novo* review as the cases show.[36] Accordingly, when reconsidering a complaint on a question of fact or law, the reviewer is limited to the evidence and materials presented during the initial investigation, which Article 17 reinforces by stating that "the panel is to determine first, whether the investigating authorities' establishment of the facts was proper and, second, whether the authorities' evaluation of those facts was unbiased and objective". In this sense, a review cannot be a rehearing in disguise.[37]

Chapter 3 presents the annotated ASCM and notes that this agreement "as a whole establishes disciplines on subsidies".[38] This chapter pays special attention to the above definition on subsidies and to the words of Article 1.1 in particular. The remainder of the chapter discusses the various types of subsidies, namely, prohibited, actionable, and non-actionable.[39]

A subsidy is a financial contribution by a government or a public body that confers a benefit on an enterprise, industry or a group of enterprises or industries. The financial contribution may come in several forms such as: (a) a direct or potential transfer of funds, (b) the foregoing of government revenues, (c) the provision of goods or services or any form of income or price support, and (d) a government

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[34] WT/DS156/R.
[35] At 144.
[36] See for example Thailand-H-Beams, WT/DS122/R.
[37] At 272.
[38] At 343.
[39] See generally 307-375.

funding a private body to carry out the above financial contributions.[40] Article 1.1(a)(1)(ii) characterises this as revenue that is "otherwise foregone or not collected."[41]

When interpreting the words, there should be a comparison with the tax regime that the member state should have applied. For example, the Panel Body in *Indonesia – Certain Measures Affecting the Automobile Industry*[42] found that exemptions from both luxury taxes and import duties resulted in the foregoing of revenue that was otherwise due.[43] Consequently, Article 1.1(a)(1)(ii) cannot be interpreted by applying the "but for" test where the relevant authorities examine what the situation would be like "but for" the measure in question. However, care should be taken when applying this test and the authors note that there are "particular misgivings about using a 'but for' test if its application were limited to situations where there existed alternative measures" by which the revenue would be otherwise taxed.[44]

Another aspect of the interpretation concerns the meaning of "benefit". Generally speaking, there has to be an advantage and the question on whether it places the recipient in a better or more advantageous position than otherwise "but for" the financial contribution, should be asked. Although "benefit" should be construed broadly it cannot be examined in the abstract because it should have been received and enjoyed in fact.[45]

The authors highlight the issue on whether the domestic legislation of a member state may be challenged. They assert that it is possible if the classical test is applied, namely, relevance is not to be placed on whether the legislation in question is mandatory or discretionary but on whether the provisions are inconsistent with WTO obligations.[46]

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[40] ASCM Article 1.1

[41] Article 1.1(a)(1)(ii) states that a subsidy shall be deemed to exist if there is a financial contribution by a government or any public body within a territory of a member state where government revenue that is otherwise due is foregone or not collected (for example, fiscal incentives such as tax credits).

[42] WT/DS103/113/R.

[43] At 286.

[44] At 288.

[45] At 301.

[46] At 291.

The ASCM forbids "prohibited subsidies", as the name suggests. They are subsidies that are contingent either in law or fact on export performance or on the use of domestic goods over imported goods. The discussion of this topic clarifies at some length the difference between subsidies prohibited *"De Jure* and *De Facto"*,[47] which means a prohibition in law and fact. The essence of the distinction rests on how to determine the nature of the prohibition. As a result, if a law prohibits a subsidy, the wording of the legislation or regulation will require interpretation.[48]

As stated earlier, developing states may face obstacles when instituting a complaint. It is noteworthy that the authors draw attention, albeit briefly, to the ASCM's provisions on subsidies involving such states that exempt them from the prohibitions in Article 3.1(a) unless Article 27.4 is satisfied. Article 3.1(a) prohibits subsidies that are contingent either in law or fact on export performance. On the other hand, Article 27.4 provides that if a developing state cannot phase out subsidies within eight years it may be granted an extension if the relevant committee determines that it is justified after examining all the relevant economic, financial and developmental needs of the state.

A more difficult exercise is the determination of the types of subsidies prohibited in fact. This is because no single legal document can demonstrate this and no general rule exists to facilitate it. Instead, it has to be inferred from a "total configuration of the facts constituting and surrounding the granting of the subsidy."[49] As a result, the authors establish three pre-conditions to assist this determination: (a) an inquiry should be held into the granting of a subsidy, (b) a relationship of conditionality or dependence should exist between the granting of a subsidy and the actual or anticipated exports, and (c) an examination should be conducted on whether exports were anticipated or expected as ascertained by objective evidence.[50]

When dealing with prohibited subsidies and the available remedies, the Panel and Appellate Bodies agree that the withdrawal of such subsidies

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[47] See generally at 310.
[48] At 310-315.
[49] At 318.
[50] At 318-319.

has to be both prospective and retroactive. Australia and the United States had contended in previous proceedings that where a Panel or Appellate Body found a measure to be inconsistent and therefore should be withdrawn, this meant that only the prospective portion of a subsidy was being referred to. The Panel rejected this contention by referring to the ordinary meaning of the words in Article 4.7 suggesting that retroactive effect is also intended.[51]

It is finally observed in this chapter that while the authors have commented comprehensively on prohibited subsidies they do not offer annotations on non-actionable or permissible subsidies despite the ASCM providing an extensive list of non-actionable subsidies.[52] Also, the authors do not distinguish between the different types of subsidies the ASCM covers and neither do they consider their characteristics.

Chapter 4 presents the ASG and shows that this agreement is not meant to replace Article XIX of 1994 GATT[53] as there is no conflict between the two agreements.[54] For example, when deciding on whether to instigate a safeguard measure, the authorities should "examine...the existence of unforeseen developments and come to a reasoned conclusion in this regard."[55] However, Article 3.1 of the ASG applying to investigations does not help to determine "unforeseen developments", which leaves it to Article XIX:1 for its meaning. This, according to the authors, is a "prerequisite that must be demonstrated."[56]

The ASG permits a member state to take emergency measures where it can demonstrate that increased quantities of an imported product are causing or threatening to cause serious injury in the domestic industry involving like products. In assessing injury, the authors focus on the "threat" of injury. Their discussion warn that the term "threat" should not be understood loosely because Article 4.1(b) requires it to be clear

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[51] For the examples see 340-346.
[52] ASCM Article 8.1-2.
[53] Before the ASG, Article XIX of 1994 GATT provided that emergency actions could be taken on imports of particular products. The ASG elaborated on this framework: at 463-464.
[54] At 466.
[55] At 481.
[56] At 482.

and on the verge of crystallising. The words "clearly", "imminent" and, most importantly, "based on facts and not merely allegation", emphasize the need for the threat to be real.[57]

The standard of review under Article 4.2(a) of the ASG requires an objective assessment. The Panel Body has to determine whether all relevant factors[58] have been examined and whether the authorities have given reasons on how the facts have supported their decision. However, while the factors provided in the provision are mandatory, they are non-exhaustive. This means that in carrying out a full and proper examination, other factors may be assessed depending on their relevance to the domestic industry.[59]

Finally, Article 4.2(b) requires a causal link to exist between increased imports and the serious injury or threat thereof.[60] When other factors are causing injury to the domestic industry, the injury must not be ascribed to increased imports. In other words, a member state must demonstrate that the increased imports "*in and of themselves,* cause *serious* injury".[61] Other factors may be considered to cause injury, but ultimately, these *other* factors may only contribute to the threat of injury since the increased imports must be the sole criterion of the serious injury or the threat thereof.[62]

Chapter 5 uses short annotations to present the ATC whose objective is to "secure the eventual integration of the textiles and clothing sector...into the GATT on the basis of strengthened GATT rules and disciplines".[63] However, the agreement itself is "designed to eliminate the current system of special arrangements governing international

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[57] See generally the discussion at 491.

[58] The factors include "the rate and amount of the increase in imports..., the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment": ASG Article 4.2(a).

[59] At 499, 512-513.

[60] ASG Article 4.2(b).

[61] At 517.

[62] At 522.

[63] WTO, "The Agreements: Textiles: Back in the Mainstream" at <www.wto.org/english/thewto_e/whatis_e/tif_e/agrm4_e.htm> (visited August 2002).

trade in these products".[64] Article 6 gives member states the "possibility to adopt new restrictions on products not already integrated into GATT"[65] and Article 6.2 allows safeguard mechanisms to be applied. However, these mechanisms are limited to cases where a particular product is being imported in such quantities as to cause serious damage or actual threat. In fact, Article 6 is the sole provision that the authors consider in some depth, noting that certain conditions should exist in its application, namely:

(a) it should be read in the context of the domestic industry of like and/or directly competitive products;
(b) there should be serious damage or actual threat thereof; and
(c) the damage should not be due to factors such as changes in technology and consumer preference.

In relation to (a), "like and/or directly competitive products" should be compared to the imported products in a product-oriented industry as opposed to a producer-oriented industry[66] and there should also be an element of proximity.[67] On the other hand, "competitive" is related to the products being "commercially interchangeable." In this regard, the Appellate Body has adopted a wide approach to "competitive" and distinguished it from "competing". Thus, as long as it can be shown that there existed the "potential to compete the products need not be competing."[68]

In relation to (b), the Panel in *US-Underwear*[69] examined the words "serious damage or actual threat thereof" and indicated that the use of the word "thereof" referred to "serious damage". In light of this interpretation, the Panel[70] distinguished "serious damage" and "actual threat of serious damage" and determined that the former required the damage to have already occurred whereas the latter required the party to "demonstrate that, unless action is taken damage will not likely

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[64] August R, International Business Law: Text, Cases and Readings (2000, 3rd edition, Prentice Hall, New Jersey) 411.
[65] At 570.
[66] At 576.
[67] At 578.
[68] At 577.
[69] WT/DS24/R.
[70] Ibid.

occur in the near future".[71] In determining damage or the threat thereof the member state should therefore consider all the factors listed in Article 6.3.[72]

In relation to (c), Article 6 has imposed an explicit obligation on member states to consider whether other factors may have been responsible for the damage or threat.[73] The method of assessing what other factors may have caused the serious damage or actual threat thereof is left to the discretion of the Member.[74]

Overall and in conclusion, it may be observed that the authors tend to examine all factors listed in the provisions of the agreements discussed regardless of relevance. Nevertheless, the reader will generally find the book useful when considering the various agreements presented, the most useful feature being the collection of Panel and Appellate Body reports that explain the agreements outlined in Chapters 2-5. The book is not intended to be exhaustive on the subject and the parts selected for comment are straightforward in treatment and content, shedding much light on the complexities of the law governing those areas of international trade identified for discussion. Indeed, this selectivity leaves the impression that they are the important parts, parts that are either sufficiently controversial or difficult to warrant their special treatment.

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[71] At 574.
[72] At 580.
[73] At 574.
[74] Ibid.