

# The Jurisprudence of WTO Dispute Resolution (2008)

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## I. Introduction

This chronicle summarises the jurisprudence of WTO dispute resolution in 2008. It comments on the most relevant WTO panel and Appellate Body reports from a Swiss perspective.<sup>1</sup> Two cases have attracted particular attention. The dispute in *India – Additional and Extra-Additional Duties* turned on the protection of tariff concessions pursuant to Article II of the GATT 1994. The *United States – Zeroing (Mexico)* case concerned the role of Appellate Body precedents in WTO dispute resolution. These two cases will be dealt with in turn. Furthermore, a series of ‘compliance’ panel and Appellate Body reports on the correct implementation of recommendations as set out in previous reports (Article 21:5 DSU cases)<sup>2</sup> were issued as well as some reports on trade remedy matters.<sup>3</sup>

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<sup>1</sup> Switzerland did not actively participate in any dispute in 2008 either as complainant, as defendant, or as third party. All WTO panel and Appellate Body reports are accessible online at [www.wto.org](http://www.wto.org) (click the link for disputes).

<sup>2</sup> Panel and Appellate Body Reports in *United States – Subsidies on Upland Cotton (21:5)*, adopted on 20 June 2008 (WT/DS267/AB/RW); Panel and Appellate Body Reports in *United States – Continued Suspension of Obligations in the European Communities – Hormones Dispute and Canada – Continued Suspension of Obligations in the European Communities – Hormones Dispute*, adopted on 10 November 2008 (WT/DS320/AB/R, WT/DS321/AB/R); Panel and Appellate Body Reports in *European Communities – Regime for the Importation, Sale and Distribution of Bananas (Art. 21:5)*, adopted on 11 December 2008 (WT/DS27/AB/RW2/ECU, WT/DS27/AB/RW/USA).

<sup>3</sup> Panel and Appellate Body Reports in *United States – Measures Relating to Shrimp from Thailand and United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties*, adopted on 1 August 2008 (WT/DS343/AB/R, WT/DS345/AB/R); Panel Report in *Mexico – Definitive Countervailing Measures on Olive Oil from the European Communities*, adopted on 21 October 2008 (WT/DS341/R).

These are not discussed in this chronicle. Lastly, the *China – Auto Parts* case was the first since the accession of China to the WTO in late 2001 in which a WTO panel determined that China had violated WTO law.<sup>4</sup> The panel report was appealed, and the Appellate Body is expected to issue its final verdict in early 2009.

## II. Protection of Tariff Concessions

### Introduction and Facts

The imposition of taxes upon importation of products is perhaps the oldest instrument to regulate trade. It has been convenient both for fiscal reasons, i.e. to generate income for monarchs and states, and for interventionist and sometimes purely protectionist reasons, i.e. to grant privileges to domestic producers by keeping prices of imported products artificially high. Under WTO law, tariffs remain the basic trade policy instrument at the disposal of governments. Unlike quantitative restrictions, which are essentially banned, tariffs are neither excluded nor abolished within the framework of the WTO. Still, the great achievement of the era after the Second World War was placing tariff policies, which were up to that time primarily domestically determined and unilaterally applied by states, on the agenda of multilateral trade negotiations. Unlike before, this made it possible to include exporters' interests in foreign policymaking and stopped the field from mainly being dominated by domestic producers and by their prime interest in protecting local markets. The principal aim of multilateral trade policy over the past 50 years has been to reduce tariffs; the GATT 1947 has largely achieved this goal for industrial goods. The average tariff rate for industrial goods was reduced, among industrialised countries, from 40% to 3.9 % between 1947 and 1995.<sup>5</sup> The results of the tariff reduction negotiations have been inscribed into the schedule of tariff concessions of each Member. Any tariff applied above the bound rate violates a Member's obligation to 'accord to the commerce of the other contracting parties treatment no less favourable' than that provided for in its schedule pursuant to Article II of the GATT 1994.

Nonetheless, this rule does not apply without an important relativization. Article II:2 of the GATT 1994 permits specific types of charges to be applied to imported products, including 'a charge equivalent to an internal tax imposed

<sup>4</sup> *China – Measures Affecting Imports of Automobile Parts*, currently before the Appellate Body (WT/DS339/R, WT/DS340/R, WT/DS342/R).

<sup>5</sup> See THOMAS COTTIER/MATTHIAS OESCH, *International Trade Regulation: Law and Policy in the WTO, the EC and Switzerland (Cases, Materials and Comments)*, London/Berne 2005, at 74.

consistently with the provisions of paragraph 2 of Article III [principle of national treatment] in respect of the like domestic product'. This provision is designed to guarantee that domestic products are not subjected to internal taxes which are disproportionate to the charges levied on imported products at the border. The *India – Additional and Extra-Additional Duties* case turned on the correct interpretation and application of the term 'a charge equivalent to an internal tax' pursuant to Article II:2 (a) of the GATT 1994.<sup>6</sup> The United States challenged a duty imposed by India on imports of alcoholic liquor for human consumption (beer, wine, and distilled spirits, collectively 'alcoholic beverages') in addition to the basic customs duty ('additional duty'). Moreover, the United States also challenged a duty imposed by India on imports of alcoholic beverages and other products, including agricultural products (such as milk, raisins, and orange juice) and industrial products falling mainly under chapters 84, 85, and 90 of the Harmonized Commodity Description and Coding System (the 'Harmonized System'),<sup>7</sup> again in addition to the basic customs duty ('extra-additional duty'). The United States claimed that both the additional duty and the extra-additional duty are inconsistent with India's obligations under Articles II:1 (a) and II:1 (b) of the GATT 1994 because those duties subject imports to 'ordinary customs duties' or 'other duties or charges of any kind' in excess of those specified in India's schedule of concessions. In response, India contested the characterization of the additional duty and the extra-additional duty as an ordinary customs duty or another duty or charge within the meaning of Article II:1 of the GATT 1994, arguing instead that the additional duty and the extra-additional duty are charges equivalent to internal taxes imposed consistently with Article III:2 of the GATT 1994 in respect of like domestic products and, as such, fall within the scope of Article II:2 (a). India further specified that the additional duty is levied in lieu of state excise duties imposed in respect of like alcoholic beverages produced or manufactured in the state imposing the duty, while the extra-additional duty is imposed to counterbalance sales taxes, value-added taxes (VAT) and other local taxes and charges on like domestic products.

<sup>6</sup> Panel and Appellate Body Reports in *India – Additional and Extra-Additional Duties on Imports from the United States*, adopted on 17 November 2008 (WT/DS360/AB/R). Australia, Chile, the EC, Japan and Viet Nam participated as third parties.

<sup>7</sup> See International Convention on the Harmonized Commodity Description and Coding System of 14 June 1983 (Harmonized System), SR 0.632.11.

## Findings

The panel found that the United States had failed to establish that the additional duty levied on alcoholic beverages and the extra-additional duty levied on alcoholic beverages and some other products are inconsistent with Articles II:1 (a) and II:1 (b) of the GATT 1994. It agreed with India that the controversial duties were to be considered as equivalent to internal state taxes imposed in respect of like domestic products. In conclusion, the panel determined that India had not violated its obligations pursuant to Article II of the GATT 1994.

Upon appeal, the Appellate Body reversed most of the panel's findings. It first reviewed the panel's interpretation of Articles II:1 (b) and II:2 (a) of the GATT 1994 and concluded that the panel 'erred in its interpretation of Article II:1(b) as covering only duties or charges that "inherently discriminate against imports", and of Article II:2(a) as covering only charges that do not "inherently discriminate against imports"' (para. 164). Then, the Appellate Body turned to the term 'equivalent' and, again, reversed the panel's interpretation. It disagreed with the panel's conclusion that this term does not require any 'quantitative comparison' of the import charge and the internal tax. According to the Appellate Body, '[t]his would mean that a border charge that is significantly greater in amount than an internal tax could still be deemed "equivalent" under Article II:2 (a), provided that the two were functionally equivalent. We find that such a result would be incompatible with a proper interpretation of Article II:2 (a)' (para. 171). Lastly, the Appellate Body disagreed with the panel on its interpretation of the requirement pursuant to Article II:2 (a) of the GATT 1994 that a charge equivalent to an internal tax needs to be imposed 'consistently with the provisions of paragraph 2 of Article III'. The Appellate Body found that the panel 'erred in its interpretation that the element of "consistency with Article III:2" is not a necessary condition in the application of Article II:2(a)' (para. 181). On the basis of these findings, the Appellate Body reversed the panel's conclusion that the United States had failed to establish that the additional duty and the extra-additional duty are inconsistent with Articles II:1 (a) and II:1 (b) of the GATT 1994.

Furthermore, the United States appealed the panel's allocation of the burden of proof. The Appellate Body dismissed this claim, stating that 'in order to establish a *prima facie* case of a violation of Article II:1 (b), the United States was also required to present arguments and evidence that the Additional Duty and the Extra-Additional Duty are not justified under Article II:2 (a)' (para. 190). Then, the Appellate Body added that '[i]n the circumstances of this case, both parties had a responsibility, in our view, to adduce relevant evidence at their disposal, both with respect to Article II:1 (b) and Article II:2 (a). Failure of a party to prove the facts it asserts leaves that party at risk of losing the case'

(para. 193). In light of the Appellate Body's earlier determination that the panel relied on an erroneous interpretation of Articles II:1 (b) and II:2 (a) of the GATT 1994, the Appellate Body then noted that the panel could not have properly reached a conclusion as to whether the United States had satisfied its burden of proof or not.

Lastly, the United States requested the Appellate Body to complete the analysis of the case in light of the correct interpretation of Articles II:1 (b) and II:2 (a) of the GATT 1994. In addressing this claim, the Appellate Body stated that it was unable to do so. It held that there was no specific information before the panel that would allow it to establish properly whether India had violated its obligations under Article II of the GATT 1994. The Appellate Body made it clear, though, that 'the Additional Duty would not be justified under Article II:2 (a) of the GATT 1994 insofar as it results in the imposition of charges on imports of alcoholic beverages in excess of the excise duties applied on like domestic products' (para. 214). Equally, it noted that 'the Extra-Additional Duty would not be justified under Article II:2(a) of the GATT 1994 insofar as it results in the imposition of charges on imports in excess of the sales taxes, value-added taxes, and other local taxes and charges that India alleges are equivalent to the Extra-Additional Duty' (para. 221).

Having reversed the panel's findings, and in view of its own conclusions, the Appellate Body made 'no recommendation, in this case, to the Dispute Settlement Body pursuant to Article 19.1 of the DSU' (para. 232). Subsequently, the Appellate Body report and the panel report, the latter as modified by the former, were duly adopted by the Dispute Settlement Body (DSB).

## Commentary

The Appellate Body's overall findings and conclusions are accurate. It rightly corrected some of the panel's interpretations of Articles II:1 (b) and II:2 (a) of the GATT 1994. In addition, two specific aspects of the Appellate Body report are particularly noteworthy. First, the deliberations of the panel and the Appellate Body on the allocation of the burden of proof deserve a closer look. The panel determined that the burden was on the complaining party to show that the contested measure did not fall within Article II:2 (a) of the GATT 1994. The Appellate Body slightly modified this clear-cut allocation of the burden of proof, but it essentially agreed with the notion that the burden is, in principle, on the complaining party in this situation. According to the Appellate Body, there is no general requirement that a complaining party must, for all claims under Article II:1 of the GATT 1994, prove that the measure is not covered by Article II:2 (a). It went on, however, to state that if 'due to the characteristics of the measures at issue or the arguments presented by the responding party, there

is a reasonable basis to understand that the challenged measure may not result in a violation of Article II:1 (b) because it satisfies the requirements of Article II:2 (a), then the complaining party bears some burden in establishing that the conditions of Article II:2 (a) are not met' (para. 192). Such an allocation of the burden to prove the illegality of a controversial charge imposed upon importation of foreign products is not unproblematic. It might well undermine the strong protection of tariff concessions negotiated among the interested Members potentially on a reciprocal basis and inscribed into the Members' schedules of concession.<sup>8</sup> Such concern would not arise if the burden of proving that an additional duty applied to imported goods amounts to 'a charge equivalent to an internal tax imposed consistently with the provisions of paragraph 2 of Article III' entirely rests with the responding party.

Second, the final outcome of the case is somewhat unsatisfactory. Due to incorrect interpretative findings and insufficient factual findings by the panel, the Appellate Body report did not produce concrete results for either party. On the major claims, they were left without a substantive ruling. This case brings to light, once again, an obvious deficiency in the current system under the DSU and reinforces the argument for the inclusion of remand competence for the Appellate Body. In the *Doha Round*, various proposals to this effect have been tabled, and the majority of the membership – including Switzerland – seems to support the introduction of remand authority.<sup>9</sup> At present, the Appellate Body's finding permits the United States at least to request the establishment of a new panel to examine the matter again.<sup>10</sup> Up to the end of 2008, no such action has been initiated. One of the reasons might be that India has, in the meantime, agreed to reduce the federal additional duty substantially.<sup>11</sup> At the same time, however, some Indian states still maintain controversially high charges and fees for imported wines and spirits at the state level, so that imported wines and

<sup>8</sup> See also WorldTradeLaw.net Dispute Settlement Commentary (DSC) on *India – Additional and Extra-Additional Duties*, at 12–3 (accessible online at [www.worldtradelaw.net](http://www.worldtradelaw.net), visited December 2008).

<sup>9</sup> See, on the issue of remand authority, FERNANDO PIEROLA, *The Question of Remand Authority for the Appellate Body*, in: Andrew D. Mitchell (ed.), *Challenges and Prospects for the WTO*, London 2005, at 193–213; for a similar outcome Appellate Body report in *European Communities – Selected Customs Matters*, adopted on 11 December 2006 (WT/DS315/AB/R), and the comments by MATTHIAS OESCH, *The Jurisprudence of WTO Dispute Resolution (2006)*, in: SZIER 2006, 501–23, at 507–10.

<sup>10</sup> See, for a precedent in which a complaining party initiated the dispute resolution process anew by requesting a second panel, Panel report in *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Recourse to Article 21:5 of the DSU* (WT/DS103/RW2, WT/DS113/RW2).

<sup>11</sup> See Thomson Reuters, 'U.S. wins WTO appeal in India wine, spirits case', 31 October 2008, accessible online at <http://in.reuters.com> (visited December 2008).

spirits cannot compete on a level playing field.<sup>12</sup> In September 2008, it was the European Communities which initiated another dispute against India, arguing that certain taxes and other measures on imported wines and spirits violate WTO law, in particular Articles II and III of the GATT 1994.<sup>13</sup>

### III. Role of Appellate Body Precedents

#### Introduction and Facts

Anti-dumping measures range among the most controversial issues in international trade regulation. They are prone to being used as instruments of protectionism. While economists largely agree that protection through anti-dumping measures is excessive, it is strongly embedded and forms a core part of international adjudication, both domestically and at the WTO. The legal framework of anti-dumping in the WTO regime consists of Article VI of the GATT 1994 and the Agreement on the Implementation of Article VI of the GATT 1994 (Anti-Dumping Agreement). The latter implements the general provision of Article VI of the GATT 1994.

Pursuant to these legal guidelines, three basic requirements need to be met, cumulatively, in order to establish the existence of dumping: i) the export price of a product must be lower than the price of that product in the domestic market of the exporting country; ii) exports of such products must cause or threaten to cause material injury to a domestic industry or materially retard the establishment of a domestic industry; and iii) there must be a causal relationship between dumping and the injury or retardation. Thus, in order to determine whether a product is being dumped, the anti-dumping authority of the importing country must determine, pursuant to Article 2 of the Anti-Dumping Agreement, whether there is a difference between the export price and the normal value (domestic price) of the product. In particular the United States, but also other countries, have developed a long-standing practice of a 'zeroing' methodology in determining the margin of dumping, i.e., the magnitude or amount of dumping. Under 'zeroing', anti-dumping authorities do not give any credit for so-called negative dumping margins, i.e., when the export price of the product is higher than the price in the exporting country. The consequence of 'zeroing' is that the anti-dumping authority does not average positive and negative dumping

<sup>12</sup> See EC Commission, 'Background Note: EU WTO cases against Indian Wines and Spirits duties', 22 September 2008, accessible online at [http://trade.ec.europa.eu/doclib/docs/2008/september/tradoc\\_140700.pdf](http://trade.ec.europa.eu/doclib/docs/2008/september/tradoc_140700.pdf) (visited December 2008).

<sup>13</sup> *India – Certain Taxes and Other Measures on Imported Wines and Spirits* (WT/DS380), request for consultations submitted to the DSB on 22 September 2008.

margins together. Instead, it considers the negative dumping margins to be zero with the effect of inflating the overall average dumping margin. The Appellate Body has, on numerous occasions and in different contexts, unequivocally established that the practice of ‘zeroing’ is not consistent with Article VI of the GATT 1994 and the relevant provisions of the Anti-Dumping Agreement.<sup>14</sup>

The *United States – Zeroing (Mexico)* dispute turned on an anti-dumping investigation conducted by the United States in which the ‘zeroing’ methodology was again used.<sup>15</sup> The United States had introduced, based on the original anti-dumping investigation and on five subsequent reviews, anti-dumping measures against stainless steel from Mexico. Mexico argued that the use of ‘zeroing’ is inconsistent with Article VI of the GATT 1994 and the Anti-Dumping Agreement, ‘as such’ as well as ‘as applied’ in the specific investigation against the Mexican products at issue. It made reference to the existing long-standing practice of the Appellate Body on this issue. The United States did not actively contest the illegality of the use of ‘zeroing’ in original anti-dumping investigations, but argued that the ‘zeroing’ methodology should be considered to be consistent with WTO law when anti-dumping measures are periodically reviewed by domestic authorities.

## Findings

The panel confirmed that the ‘zeroing’ methodology is not consistent with Article 2 of the Anti-Dumping Agreement when it is applied during original anti-dumping investigations, recalling the fact that ‘zeroing’ during original investigations had been found to be WTO-inconsistent ‘in all dispute settlement proceedings in which it was challenged’ (para. 7.55). However, as the United States had ceased to apply this method in original investigations since the initiation of this dispute and plausibly argued that it would not do so in future investigations either, the panel did not make any recommendations regarding ‘a measure that no longer exists’ (para. 7.50).

However, the panel arrived at a completely different solution with respect to the WTO-consistency of the ‘zeroing’ methodology when applied in periodic reviews of existing anti-dumping measures. At the outset, the panel summarised the long-standing and unequivocal Appellate Body practice according to which ‘zeroing’ is not allowed in reviews of anti-dumping measures. Then, the panel stated that ‘even though the DSU does not require WTO panels to follow

<sup>14</sup> See for the references to earlier case law on ‘zeroing’ Appellate Body report (fn. 15), para. 66.

<sup>15</sup> Panel and Appellate Body Reports in *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, adopted on 20 May 2008 (WT/DS344/AB/R). Chile, China, the European Communities, Japan and Thailand participated as third parties.

adopted panel or Appellate Body reports, the Appellate Body *de facto* expects them to do so to the extent that the legal issues addressed are similar' (para. 7.105). Nonetheless, the panel went on to note that 'concern over the preservation of a consistent line of jurisprudence should not override a panel's task to carry out an objective examination of the matter before it through an interpretation of the relevant treaty provisions in accordance with the customary rules of interpretation of public international law' (para. 7.105). Based on these considerations, the panel concluded that 'we have no option but to respectfully disagree with the line of reasoning developed by the Appellate Body regarding the WTO-inconsistency of simple zeroing in periodic reviews' (para. 7.106). Essentially, the panel deviated from prior case law by noting that it was 'troubled by the fact that the principal basis of the Appellate Body's reasoning in the zeroing cases seems to be premised on an interpretation that does not have a solid textual basis in the relevant treaty provisions' (para. 7.119). Therefore, the panel reasoned that the 'zeroing' methodology in periodic reviews is consistent with WTO law both 'as such' and 'as applied'.

Upon appeal, the Appellate Body reversed the panel's finding with respect to the WTO-consistency of 'zeroing' during periodic reviews of anti-dumping measures. It considered the arguments set forth by the panel, as well as the negotiating history of the Anti-Dumping-Agreement, and concluded that '[s]imple zeroing ... results in the levy of an amount of anti-dumping duty that exceeds an exporter's margin of dumping, which, as we have explained above, operates as the ceiling for the amount of anti-dumping duty that can be levied in respect of the sales made by an exporter. Therefore, simple zeroing is, as such, inconsistent with Article VI:2 of the GATT 1994 and Article 9.3 of the Anti-Dumping Agreement' (para. 133). Similarly, the Appellate Body concluded that 'zeroing' was WTO-inconsistent as applied in the periodic reviews at issue in this case. In doing so, the Appellate Body reaffirmed its earlier case law on 'zeroing'. It stressed that it was 'deeply concerned about the Panel's decision to depart from well-established Appellate Body jurisprudence clarifying the interpretation of the same legal issues. The Panel's approach has serious implications for the proper functioning of the WTO dispute settlement system' (para. 162). Overall, the Appellate Body corrected the panel's erroneous legal interpretation and reversed all of the panel's findings and conclusions which were appealed.

The Appellate Body report and the panel report, the latter as modified by the former, were duly adopted by the Dispute Settlement Body (DSB).

## Commentary

This dispute represents a rare case in which a panel has explicitly departed from a consistent and long-standing practice which the Appellate Body has developed over the years. The panel declared that it had ‘no option but to respectfully disagree’ with prior case law (para. 7.106). Irrespective of the merits of the panel’s departure in substance,<sup>16</sup> such a move has serious implications for the system and for specific cases.

With respect to the systemic implications, it is obvious that frequent departures by panels from Appellate Body precedents would seriously endanger and undermine the credibility of the Appellate Body and its role in developing a coherent and predictable body of jurisprudence clarifying Members’ rights and obligations under the covered agreements. The Appellate Body report confirms what has been the majority view ever since: the WTO legal regime has effectively adopted a *system of de facto precedential effect* of prior decisions similar to that required by Article 38(1)(d) of the Statute of the International Court of Justice (ICJ).<sup>17</sup> The ICJ does not observe a doctrine of precedent, and is not bound by a doctrine of *stare decisis*. Nevertheless, it essentially refers to and takes into account prior decisions, and departs from them only if change is imperative, by carefully balancing legal certainty vs. the rule of law. The same holds true for adopted panel and Appellate Body reports within the WTO system. They are short of legally binding force except for the particular dispute, but have nonetheless strong persuasive power. In fact, direct reference to Articles 38(1)(d) and 59 of the Statute of the ICJ can be found in the case law of panels and the Appellate Body; the latter explicitly held, in one of its first ever reports, that decisions ‘create legitimate expectations among WTO Members’ in the sense that these rulings will be followed in the future.<sup>18</sup> JOHN H. JACKSON concluded that ‘a common-law lawyer would find himself very much at home in GATT legal discussions!’<sup>19</sup> It might be added that, today, the same, by and large, is equally true for continental lawyers. In practice, officials who have participated in dispute settlement deliberations in WTO panel and Appellate

<sup>16</sup> Unsurprisingly, the issue of ‘zeroing’ is also subject to controversial discussions in the ongoing *Doha Round* negotiations. Whereas the United States is attempting to include the ‘zeroing’ methodology explicitly in a revised Anti-Dumping Agreement, most other members oppose such a proposal, see, e.g., the Draft Consolidated Chair Texts of the AD and SCM Agreements of 30 November 2007, WTO Doc. TN/RL/W/213.

<sup>17</sup> See THOMAS COTTIER/MATTHIAS OESCH, *WTO Law, Precedents and Legal Change*, in: *Turku Law Journal* 2001, 27–41, at 28–30; DAVID PALMETER/PETROS C. MAVROIDIS, *Dispute Settlement in the World Trade Organization: Practice and Procedure*, Cambridge 2<sup>nd</sup> ed. 2004, at 51–64.

<sup>18</sup> Appellate Body report in *Japan – Taxes on Alcoholic Beverages*, adopted on 1 November 1996 (WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R), para. 5.6 and fn. 30.

<sup>19</sup> JOHN H. JACKSON, *The World Trading System*, Massachusetts 2<sup>nd</sup> ed. 1997, at 122.

Body proceedings have always been strongly influenced by precedents and have often explicitly mentioned them in some detail. Nevertheless, panel and Appellate Body reports do not ‘constitute a definitive interpretation’<sup>20</sup> of an agreement. This power is only vested in the Ministerial Conference pursuant to Article IX:2 of the WTO Agreement. Symptomatically, the Appellate Body stressed in its report in the present dispute that panels shall follow prior case law and resolve the same legal questions in the same way in subsequent cases ‘absent cogent reasons’ (para. 160). Based on this language, panels are thus still entitled to depart from Appellate Body precedents if they ably demonstrate that their departure rests on forceful and well-argued reasons. Only future cases – i.e., when panels will test the boundaries of this standard – will indicate what such reasons may be.

With respect to the consequences on specific cases, a panel’s departure from earlier case law might well result, from the perspective of the complaining party, in an unsatisfactory outcome of an Appellate Body proceeding. The Appellate Body might have corrected the interpretation of the relevant legal provisions, criticising the panel for its imprudent departure from existing practice, but the complaining party may be left without a concrete finding and enforceable ruling when the Appellate Body finds itself in a situation of not being able to complete the analysis due to insufficient factual evidence and, furthermore, not being able to authoritatively command the panel to resolve the case in light of the corrected interpretation due to the lack of remand power.<sup>21</sup>

<sup>20</sup> *Japan – Taxes on Alcoholic Beverages*, adopted on 1 November 1996 (WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R), para 5.4.

<sup>21</sup> See for the lack of remand power in the WTO dispute resolution mechanism the reference in fn. 9.

