Chapter 5 considers the overlap between defences under international criminal law and circumstances precluding wrongfulness under the law of State responsibility. It discusses whether the two are to be interpreted and applied in a consistent manner in so far as they overlap. In addition, the chapter explores the interesting question of whether a circumstance precluding wrongfulness may prevent an individual being held criminal liable in a situation where the State has not acted unlawfully. Chapter 6 analyses the specific modes of liability by which individual criminal liability is ascribed to the participants in collective criminality.

Finally, Chapter 7 examines the international bodies charged with establishing State and individual responsibility for international crimes and seeks to challenge the strict separation between them. Bonafè thus notes that the application of the rules on attribution found in the law of State responsibility by the international criminal tribunals provide a clear point of contact between the two systems of international responsibility (p 194). However, the precise closeness of this relationship must be called into questioned given that the ICJ and ICTY have both applied the rule on State attribution differently. One further connection between the international bodies in establishing responsibility discussed by Bonafè is the role of the Security Council in dealing with both State and international responsibility.

The concluding two chapters in part III provide a theoretical framework which attempts to explain the various points of contacts between the two regimes found in the international practice. Part III completes the study and makes the book work as a whole by drawing together all of the threads identified in the earlier analysis. By elaborating a general framework explaining the relationship between the two systems of responsibility which is based upon a meticulous examination of the international practice, Bonafè's work will no doubt be both heavily and widely referred to in the future. In particular, the study will be referred to for many years to come as the theoretical framework proposed by Bonafè is a flexible one that may take into account any future developments in this field.

PAUL DAVID MORA*

Evidence, Proof, and Fact-Finding in WTO Dispute Settlement by MICHELLE T GRANDO [Oxford University Press, Oxford, 2009, 350 pp, ISBN 978-0-19-957264-9; £70 (h/bk)]

The establishment of the World Trade Organization (WTO) in January 1995 accompanied an increase in the regulation of international trade. Inevitably, the number of disputes between the 153 members also increased. In his Foreword, William J Davey, a past Director of the Legal Affairs Division of the WTO, observed that civil and common law lawyers often experienced difficulties in communication, and, as Michelle T Grando illustrates, these difficulties are not necessarily solely because of language, but also as a result of the legal concepts, cultural norms and rules of evidence that divide jurisdictions across the world. Arguably, the central and most valuable aspect of this interesting text is the useful discussion of the theoretical issues of how fact-finding should be conducted and the burden of proof allocated. For this reason, the fact that the text is restricted to the WTO dispute settlement process should not inhibit the lawyer and legal scholar from including this book in their reading list.

The Dispute Resolution Body of the WTO does not contain many rules to guide panels in the process of fact-finding. Those rules that are set out are general in nature. This means that the panels and Appellate Body must deal with any questions that arise, case-by-case. In the light of this, the author sets out to determine the following:

i The extent to which panels and the Appellate Body have developed optimal rules to govern the process of fact-finding through existing jurisprudence and, to the extent that this has not been the case,
ii how that goal could be achieved.

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After setting the scene with a brief opening, the introductory chapter, entitled 'Optimizing the Process of Fact-Finding', considers legal adjudication and the process of fact-finding in a broad context, before providing a detailed explanation of the WTO dispute settlement system. The author then considers the concepts of the burden of proof, the standard of proof, and presumptions in Chapter 2. The standard Anglo-Saxon and American authorities are referred to in a wide-ranging discussion of each of these terms, which are considered in the light of the common law and civil law jurisdictions. This discussion is valuable, because the author has usefully referenced the major academic texts on these topics in broad outline, bringing together pertinent materials that are of value to a comparative study of the issues across jurisdictional boundaries, affecting, as they do, the adjudication process within the WTO.

In Chapter 3 on the 'Functioning of the Burden of Proof', the prima facie case or presumption approach; holistic or weighing of all the evidence approach, and standard of proof are each explained and analyzed extensively within the context of the WTO dispute procedure. To consider one of these for the purpose of illustration, the analysis illustrates how various panels of the WTO panels furnish different meanings to what is meant by the prima facie case: (i) functioning as a standard of proof, (ii) functioning as a final standard of proof, and (iii) referring to a threshold requirement that must be met before the proceedings can continue with an examination of all the evidence. The author examines each of these uses of the meaning of prima facie case in detail, teasing out the inconsistent way in which the phrase has been employed by successive panels, concluding that 'scholars have struggled to decipher what panels and the Appellate Body mean when they refer to prima facie case' (p 132). The Appellate Body stands accused of failing to explain the meaning of prima facie case, and, because of the lack of clarity as to its meaning, this has led to errors. The author suggests that the Appellate Body should focus on weighing all the evidence on the record, and in so doing, to determine whether the weight of the evidence is sufficient to reach the standard of proof required. In adopting this approach, the author recommends that the panels and Appellate Body refrain from referring to the term 'prima facie case'. With respect, this approach must be right. As the admission of digital evidence rapidly becomes the norm in legal proceedings across the planet in all forms of tribunal, consideration will increasingly need to be given to the weight of the evidence, as in Norway, for instance, which has no rules of evidence.

There follows chapters on the 'Allocation of the Burden of Proof' (Chapter 4) and those responsible for the process of fact-finding and the development of the factual record (Chapter 5). In dealing with the burden of proof, for instance, the problems faced by the WTO are set out in a careful analysis of the WTO jurisprudence, in which 10 cases are illustrated and discussed, before the criteria used by the WTO is then subject to scrutiny (the criteria comprise the language criterion, relating to the ordinary meaning of words; positive rules establishing legal obligations, and the hierarchical criterion, which considers whether a provision is an exception). Although the WTO has been inconsistent in dealing with the burden of proof, the author points out that this is partly because the panels and Appellate Body do not have a set of fundamental principles that tend to be available in a national constitution. The reason for the lack of legislative expressions in the text of the WTO agreements is, the author proposes, because Members were able to agree on the text, but there were often considerable differences on policy that lay behind the Agreements.

In reaching conclusions to the main objectives of the book, the author suggests that the adjudication process could be improved by: (i) clarifying the conceptual vagueness concerning the meaning of burden of proof, standard of proof and presumptions; (ii) emphasizing the features of the WTO dispute settlement systems that enable it to aim for accuracy of decision making (for instance the panels have the power to seek information and technical advice from any individual or body they deem to be appropriate, and the parties have a duty to cooperate in the development of the factual record of the Panel) and (iii) panels should take a more active role in proceedings in order to facilitate the shortcomings highlighted in this text.

In the General Editor's Preface, John H Jackson observes that some of the procedural problems faced by the World Trade Organization are of great significance, and deserve the comprehensive treatment of this text by Michelle T Grando. This is indeed so. The problems that are illustrated in this text apply across the globe, and will continue to exercise politicians internationally. This is

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because the networked world in which we now live is affecting law and the legal process as never before, whatever the tribunal. In this respect, there are moves towards discussing the possibility of international conventions on the admission of digital evidence into legal proceedings. It is for this reason that the tensions between different legal approaches, as highlighted by the author in the context of the WTO settlement procedure, cause so many conceptual problems that have practical consequences. To this extent, the findings of the Cambridge AHRC Research Project on European Legal Development conducted by the Centre for European Legal Studies will be of great interest. In the meantime, this very useful text serves to illustrate some of the problems not only faced by the WTO, but in legal systems across the earth generally.

STEPHEN MASON*

The WTO Agreement on Safeguards by ANDREW SYKES [Oxford University Press, Oxford, 2006, 392 pp, ISBN 978-0-19-927740-7 £94.95 (h/bk)]

Since its inception, the GATT has allowed safeguard measures in case of unexpected import surges. In the context of reciprocal trade concessions, safeguards buffer the effects of sharp fluctuations in trade inflows and adjust the 'GATT bargain'. As the Appellate Body of the World Trade Organization (*Argentina—Footwear*) noted, however, safeguards are 'extraordinary' (*Argentina v Footwear*). Their requirements and conditions for their use raise difficult questions which have so far received confusing answers. They are difficult to resort to and to successfully defend. As Sykes notes, this 'state of affairs' may 'discourage the use of safeguard measures' (page 209) and, importantly, the under-utilization of safeguards may undermine the 'plausibly useful role' they 'play in the system' diverting 'protectionist pressures' elsewhere.

These few remarks confirm the importance of a serious analysis of safeguards regulation and one which tests its suitability against its rationale. This is the objective of Sykes' commentary: '[m]y goal in this book is not simply to illuminate the legal issues associated with safeguard measures, but to explore the rationale for safeguard measures in the WTO/GATT system, and the related policy debate over the proper role of safeguard measures' (p 34).

Chapter 1 offers an overview of safeguards in the GATT/WTO. Chapter 2 is particularly important. After a brief overview of the basic economics of international trade and protection, Sykes develops his analysis systematically, considering the economic and political economic rationales of safeguards. He shows how economic theory militates against the use of safeguards. The claims that they would facilitate the restoration of competitiveness or the execution of orderly contraction or structural adjustments, or that they would achieve redistributive equity objectives, are rejected. So is the case in favour of political economic theories that view safeguards as safety valve or as deterrents of cheating in international trade relations. Instead Sykes puts forward a justification based on public choice and optimal contracting literature which is the cornerstone of this chapter and has various implications for the operation of safeguards, most notably the 'serious prejudice' test and the analysis of causation. Safeguards would be acceptable Sykes argues, when the 'import-competing industry is suffering severe dislocation, and when the exporting industry that would be harmed by revocation is prosperous' (p 68) and is able to weather any compensation/retaliation. Safeguards would be justified when they are 'politically efficient', that is when 'the gains to officials in the importing country can "outweigh" the losses to officials in the exporting country' (ibid). Confirming a finding of Kenneth Dam,[1] the entitlement of political officials to 'take back' concessions that become politically burdensome would also enhance their willingness to make concessions in the first instance.

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[1] K Dam, *The GATT: Law and International Economic Organization* (University of Chicago Press, Chicago, 1970).

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