

Introduction

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The WTO Dispute Settlement Body faced a lean year in the quantity of new jurisprudence arriving in 2013; however, the same cannot be said about the depth of the content that arose in these disputes. While our annual project's focus this year thus covered only four disputes, all disputes dealt with either a novel issue (*Canada–Renewable Energy*), were high profile and therefore caught the public eye (*EC–Seal Products*), or were otherwise prone to occupy the minds of analysts thanks also to the very insightful comments provided by our reporters (*China–X Ray Equipment*; *China–Broiler Products*) even without addressing novel issues. For the last two disputes, issues such as ‘like product definition’ appeared in both, and, by repeating prior case law, the reports identify how WTO adjudicating bodies left many questions unanswered.

Given the significance of the first dispute over renewable energy, we have also sought both an ambitious first legal-economic assessment and an equally ambitious commentary by a renowned legal scholar.

Charnovitz and Fischer begin by providing a legal-economic assessment of *Canada–Renewable Energy*, the first renewable energy case to arrive at the door of WTO dispute settlement. They first describe the 2009 Canadian (Government of Province of Ontario) program that incentivized renewable electricity production from wind and solar. The law was alleged to include a local content provision designed to encourage sourcing of the component and services inputs from firms within Ontario. The authors then provide context by describing the basic economics at work in markets for renewable energy production and consumption. They describe the Appellate Body's treatment of the local content requirement of Ontario's feed-in-tariff that had been challenged on the grounds that it was a discriminatory investment-related measure and a prohibited subsidy. While both the Panel and Appellate Body agreed that Canada was violating the GATT and the TRIMS Agreement, a second critical issue in the dispute was whether the

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Canadian price guarantee for electricity produced via renewable sources constituted a 'benefit' under the SCM Agreement. Neither the Panel nor the Appellate Body found such a benefit, and thus the program itself was not ruled a subsidy. The authors conclude that while the Appellate Body provides some useful guidance on how to calculate the existence of a benefit, their decision also created substantial uncertainty by reasoning that the policy choices made by a government also contributes to what defines an appropriate market for 'benefit' analysis. In an additional comment on this particular dispute, Rubini presents added frustration with the Panel and Appellate Body approach, especially with this last issue of how to define the appropriate market.

Moore and Wu examine the European Union dispute brought against *China–X-Ray Equipment*. The authors provide an extraordinarily insightful political-economy analysis by using the lens provided by the dispute to generate new insights *vis-à-vis* the well-established economics literature on strategic industrial policy. They use the setting of the dispute to investigate a two-firm rivalry between Smiths Heimann GmbH (a European firm) and Nuctech Company Ltd. (a Chinese firm) in order to describe how an incumbent oligopolistic firm can use government intervention – through antidumping – to its strategic advantage relative to a new foreign entrant. They assess the tit-for-tat use of trade policy by these firms in different markets, and the authors show how such firms' manipulation of antidumping can become a *de facto* part of a government's industrial policy toolkit, alongside policies such as subsidies and local content requirements that have faced greater scrutiny in the analysis of industrial policy. The authors make the convincing case that the dispute contains important lessons despite the fact that (they also argue) the Panel Report reveals relatively little 'new' jurisprudence. Antidumping has already been subjected to substantial previous WTO litigation, and, in this particular case, the legal issues involved mostly procedural inadequacies of the Chinese antidumping regime. Moore and Wu therefore provide a number of new legal-economic insights despite the standard legal findings in the dispute that China violated certain WTO rules in the process, and the fact that the dispute was resolved by the Chinese government ultimately reforming its policies in line with the Panel Report.

Prusa and Vermulst provide an analysis of the Panel Report for *China–Broiler Products*. The dispute concerns China's antidumping and countervailing duty measures on chicken feet imported from the United States resulting from an investigation initiated in September 2009, shortly after the US had announced its controversial application of a China-specific transitional safeguard on imports of tires. Like Moore and Wu, Prusa and Vermulst conclude that there is also not much new jurisprudence arising in yet another WTO legal decision regarding technical aspects of a country's administration of its antidumping regime. Nevertheless, their analysis identifies a number of interesting economic issues, including one related to the question of how to cost inputs in antidumping calculations in the presence of strong differences in consumer preferences across markets. In this particular application, the US producers' valuation reflected US preferences – in which

case chicken breasts are heavily valued and chicken feet hold little or no value – whereas chicken feet hold significant value in the Chinese market. While the Panel may have had to confront this issue for the first time in this dispute, the crux of the issue is latent in most all disputes of this nature, and thus it is certain to arise again in future cases. Finally, the authors' analysis also addresses how the Panel dealt with a number of procedural aspects of the anti-dumping and countervailing duty investigations such as the right to disclosure of 'essential facts', sufficiency of public notices, and how to conduct cost calculations and perform price effects analysis.

Levy and Regan take up the dispute over *EC – Seal Products* initiated by Canada and Norway against a European Union regulatory ban on imports of seal products. Canada and Norway challenged the EU seal products regime under the Technical Barriers to Trade (TBT) Agreement and the GATT. The central question concerned whether the EU's public policy goal was legitimate and applied evenhandedly, or whether the ban was excessively trade-restrictive. The dispute arose largely because complainants thought that the many exceptions to the ban on sales of seal products led to discriminatory treatment of 'like goods'. The Panel and the AB had to decide where to fit 'animal welfare' among the objectives included in Article XX GATT, but also how to understand the impact of exceptions to the rule (ban on sales) itself? The authors apply a number of different approaches from economic theory to help clarify key issues in the underlying dispute, including consideration of alternative methods for measuring consumer welfare and their potentially distinct implications for regulation, and the potential for use of screening equilibria to better identify which regulations are legitimate versus illegitimate. They acknowledge that distinguishing wheat from chaff could be highly problematic on occasion, since 'protection' is an amorphous concept not well defined in the WTO, and difficult to penetrate in the absence of symmetric information about objectives and means employed to this effect. Absence of symmetric information is, alas, the rule rather than the exception in a context where there is strong incentive to behave opportunistically. Consequently, while they critically evaluate the AB report, they acknowledge the difficulties associated with this exercise.

All reports presented this year will undoubtedly continue to be heavily discussed in trade circles. Our annual conference presented us with a first-hand opportunity to discuss them with some of the world's best experts in this field. We would like to thank the European University Institute for its financial support and for hosting the annual 2013 WTO Case Law Conference on 16 June 2014. Special thanks go to the participants at the EUI Conference. Ambassador Jonathan Fried honoured our meeting and delivered a keynote speech on the challenges the WTO dispute settlement has been facing. Roderick Abbott, Henrik Horn, Rob Howse, Luca Rubini, and Jasper Wauters commented on papers presented during the conference.