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WTO Case Law 2016

CHAD P. BOWN*
Peterson Institute for International Economics and CEPR
PETROS C. MAVROIDIS**
Columbia Law School, New York

1. Introductory remarks

The WTO adjudicating bodies faced some very tough questions in 2016: the status of non-market economies, the consistency of policies aiming to address tax evasion with the WTO, and the clash between environment and trade policies were all on the menu. Old issues, like the consistency of zeroing, resurfaced as well, albeit with a twist this time, since the Appellate Body (AB) had to address the question whether zeroing is consistent with the WTO when practiced in the realm of a methodology that was so far untested.

By and large, the contributions of our authors confirmed conclusions we had reached in previous years, namely that, irrespective of the final outcome, the methodology that WTO Panels and the AB employ leaves much to be desired. Concerns include the haphazard treatment of the underlying economic issues involved, as well as the often cursory treatment of arguments made.

2. The papers presented

Jennifer Hillman and Meredith Crowley present a legal-economic analysis of the AB's decision in *EU–Biodiesel (Argentina)* that the WTO's Anti-Dumping Agreement (ADA) does not permit countries to take into account government-created price distortions of major inputs when calculating anti-dumping duties. In this case, the EU made adjustments to the price of biodiesel's principal input – soybeans – in determining the cost of production of biodiesel in Argentina. The adjustment was made based on the uncontested finding that the price of soybeans in Argentina was distorted by the existence of an export tax scheme that resulted in artificially low soybean prices. The AB found that the EU was not permitted to take tax policy-induced price distortions into account in calculating dumping margins. Hillman and Crowley analyze the economic rationale

* Email: cbown@piie.com.
** Email: pm2030@columbia.edu.

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for Argentina's export tax system, distortions in biodiesel markets in Argentina and the EU, and the remaining trade policy options for addressing distorted international prices, in light of their finding that the AB report severely limits the ability to take government distortions into account in the anti-dumping context. Their article also assesses whether existing subsidies disciplines would be more effective in addressing this problem and concludes that they would not.

India–Solar Cells brings India's solar energy policies under WTO scrutiny, giving the opportunity for the AB to take a stance on a growing tension between climate change policies and multilateral trading rules. Marianna Karttunen and Michael Moore examine the Indian policies aiming to establish India as a global leader in solar energy. The policies relied on domestic content requirements, which were considered discriminatory by the Panel. In appeal, India justified its measures with GATT provisions that were not specifically related to the environment: the derogation of government procurement (art. III.8), the exception on short supply (XX(j)), and the exception on compliance with laws and regulations (art. XX(d)). The AB rejected all of India's claims, confirming that these provisions did not justify the discrimination in the current case. Nevertheless, the authors argue that the AB's interpretation of the provisions leaves space for climate policies to be justified on these grounds in the future.

Petros C. Mavroidis and Thomas Prusa examine the issue of zeroing in *US–Washing Machines*. While numerous previous Panel and AB decisions found the practice of zeroing to be inconsistent with the Anti-Dumping Agreement (ADA), the *US–Washing Machines* dispute is noteworthy because it is the first to challenge zeroing under the exceptional method of Article 2.4.2. The text of ADA supports the view that weighted average to weighted average (W-W) and transaction to transaction (T-T) methods are the 'normal' methods for establishing the dumping margin and weighted average to transaction (W-T) is the 'exceptional' method. With respect to the narrow issue of zeroing, the AB sided with Korea, ruling yet again zeroing inconsistent. Importantly, it did so by allowing investigating authorities to exclude dumping amounts from non-pattern transactions when computing the dumping margin. Mavroidis and Prusa argue that this decision along with the AB's failure to define what constitutes a pattern and what the 'explanation' requirement entails, means that a clever investigative authority might have enough leeway to produce margins using the 'exceptional' method sans zeroing that are similar to margins produced using the preferred methods with zeroing. The authors conclude that the zeroing issue is far from dead and this AB ruling will likely spur future litigation in order to address the shortcomings of *US–Washing Machines*.

The WTO AB report in *Argentina–Financial Services* allowed for the WTO to address a number of questions involving tax evasion. The first is whether a WTO Member discriminates against foreign suppliers of services located in non-cooperative foreign jurisdictions that refuse to share information on whether a nation's citizens are engaging in tax evasion. The second is whether standards

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developed by an international body are used as the criterion for deciding whether to impose measures in the first place. Panagiotis Delimatsis and Bernard Hoekman examine the AB's decision that services from jurisdictions that share financial tax information may be different from services provided by non-cooperative jurisdictions and that measures to increase taxes on financial transactions with non-cooperative jurisdictions were non-discriminatory. They argue that the AB erred in their arguments – despite reaching the right conclusion – thus increasing the likelihood of future litigation by introducing confusion on the issue.

In *Russia–Tariff Treatment*, Kara M. Reynolds and Boris Rigod assess the Panel Report finding that some of Russia's combined tariffs violated Article II of GATT 1994, by exceeding Russia's bound ad valorem rates if unit prices fell below certain thresholds. The authors also examine EU arguments around whether these tariff violations resulted in systematic duty variation (SDV) and thus might be lumped together so as to be considered a 'more general measure'. While the Panel ruled that the EU failed to establish the tariffs' systematic nature, they explore the issue by discussing how claims of systematic non-compliance are treated in other legal settings, and the implications of considering statistical evidence of systematic treatment to promote compliance.

Ilaria Espa and Philip Levy investigate how the AB compliance decision in the *EC–Fasteners* dispute marks the latest twist in the long-running dispute. This dispute caused the AB to raise interesting questions about non-market economy (NME) status in the WTO; in the case of China's exports this has traditionally led to large dumping margins. The authors find that the AB seems to constrain the analogue country methodology of dumping calculations by allowing for adjustments of certain costs. Furthermore, they also highlight the tension of how to balance the right to see evidence – the targeted country in the antidumping investigation – against the need for confidentiality – of the third country's firm chosen by the investigating authority to serve as the 'surrogate' in the NME calculation.

Joe Francois and Janet Whittaker examine the recent *Colombia–Textiles* dispute, which focused on how governments use trade measures to target trade-related money laundering. While targeting trade-related money laundering can successfully follow from cooperation of customs authorities and financial regulators, the authors conclude trade measures are likely to be second best, misdirected, and not easily justified at the WTO.

3. Concluding remarks

The WTO adjudicating bodies provided some necessary clarifications regarding, for example, the issue of whether distortions created by export taxes can be taken into account when calculating the dumping margin, or the manner in which likeness of services suppliers will be decided. Some issues, like the extent of the obligation of investigating authorities to justify why recourse to the

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'exceptional' methodology (weighted average to transaction) is warranted, were left for another day.

Overall, this was far from a dull year from the perspective of jurisprudential evolution. We hope that the papers presented in this volume will provide practitioners, academics, and institutional players alike with some food for thought as to how similar cases should be treated in the future.

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