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ORIGINAL ARTICLE

It Ain't Over 'Til It's Over: The WTO Case Law of 2018

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1. 2018 Was Busy, Busy, Busy As Well

Our annual gathering in Florence (8 and 9 July 2019), generously sponsored by the European University Institute, amidst the crisis at the WTO, was business as usual. Trading nations continue to entrust the WTO dispute settlement system with the adjudication of their disputes. The conference covered a very healthy number of disputes across different subject matter, ranging from antidumping duties to protection of public health.

As with previous years, the majority of reports discussed concerned the consistency of measures aiming to afford contingent protection to the WTO member invoking the relevant provision.

None of the reports contained ground-breaking jurisprudence. Some of the reports presented in this volume though, include important clarifications of existing case law. On the other hand, some very high profile cases, such as the Australian measure to protect public health from consumption of cigarettes, were discussed during the meeting.

2. The Papers Presented

Thomas Prusa and Edwin Vermulst assess *Indonesia–Safeguard on Certain Iron or Steel Products* (DS496). Following complaints by Vietnam and Chinese Taipei challenging a safeguard measure imposed on galvalume by Indonesia, the Appellate Body clarified the distinction it had already drawn in prior case law between the constituent elements of a safeguard measure and the conditions for its application. It decided to first examine whether the conditions for imposing a safeguard had been complied with, before delving into a review of the legality of the application of the litigious safeguard in the instant case.

Nevertheless, this ruling may make it (even more) difficult for WTO members to impose safeguard measures on products for which tariffs are not bound, unless their safeguard measures take the form of quotas. Ironically, therefore, the authors conclude the strict interpretation by the Appellate Body of the safeguard disciplines may force WTO members to resort to more trade-restrictive safeguard measures in the form of quotas (rather than higher tariffs) in the future.

Dukgeun Ahn and Philip Levy discuss the US–OCTG (Korea) dispute, and describe how oil country tubular goods (OCTG) are one of the most frequently targeted products by antidumping (AD) actions, due to the combination of the high values involved and unbalanced trade structure in this market. This case illustrates the political interplay among interested parties in domestic AD procedures, as well as between members in the WTO dispute settlement system.It also highlights the political economy of contingent protection, and makes a strong call for the urgent need to fundamentally restructure the trade remedies system.

Rod Ludema and Mark Wu consider the question of how investigating authorities are to undertake a price suppression analysis, which includes the construction of a counterfactual for domestic prices. As they highlight, this is made even more difficult in abnormal economic times.

They discuss the Appellate Body's consideration of these questions in the *Russia–Commercial Vehicles* case, focusing on questions related to assumptions made by the Russian investigating authority on rate-of-return and the market's ability to absorb additional price increases. They argue for a more economics-friendly approach towards price suppression, a concept, which in and of itself, invites economic analysis.

Elisa Baroncini and Claire Brunel examine the US–Mexico dispute over the US requirement for Dolphin-Safe labelling of tuna, which has finally come to an end after almost three decades of litigation. The WTO adjudicators found the most recent US amendment to be calibrated to the different level of risks posed to dolphins by the different fishing methods in different fishing areas, and, thus, respected WTO law. Nonetheless, the authors are nuanced in their judgment regarding the reasonableness of the approach adopted. Although they do recognize that the US legislative initiative does provide additional protection to the dolphins, they add that, regrettably, the WTO adjudicators did not go further and decide that the Dolphin-Safe labelling scheme was consistent with the principle of sustainable development, which is included in the Preamble of the WTO Agreement.

Eugene Beaulieu and Denise Prévost discuss *US–Coated Paper (Indonesia)*, a dispute regarding the imposition of anti-dumping and countervailing duties by the US on certain coated paper from Indonesia. This dispute raises interesting issues regarding how a 'benefit' to the recipient is determined for purposes of establishing a subsidy under the WTO Agreement on Subsidies and Countervailing Measures (SCM).

The authors examine the Panel's findings in this regard from a legal and economic perspective, focusing on the use of out-of-country benchmarks against which to establish a benefit in cases of predominant government ownership of natural resources, as well as the reliance on adverse inferences, because of the failure of a respondent to provide requested information on whether a benefit had been bestowed, which left gaps in the factual record. The authors argue that the Panel's deferential assessment of the benefit determinations of the US Department of Commerce may create possibilities for abuse by investigating authorities, thereby undermining the disciplines on the use of countervailing duties.

Arevik Gnutzman and Isabelle Van Damme examine the report in *EU–PET (Pakistan)*. This report attempted to but did not definitively resolve the question of whether the design and function of the WTO dispute settlement system require or preclude findings on expired measures. Conversely, the authors claim that the report usefully clarifies other issues, such as those in respect of duty drawback schemes, that the investigating authority may consider as a subsidy only the remission paid in excess of the amounts due.

The authors further agree with the Appellate Body, and find that it has rightly concluded that any methodology for the causation analysis should be permissible as long as it results in a complete and objective analysis. While the general principle is correct, its application in this case failed. It appears, in the authors' view, that the methodology used by the investigating authority in this case revealed a number of deficiencies that were raised by Pakistan, but were not recognized by the Appellate Body.

Emanuel Ornelas and Laura Puccio examine the Brazil–Taxation dispute, which concerned a joint complaint by the European Union and Japan against seven different Brazilian industrial subsidy programmes. There are as many similarities as there are differences across the programs. One, for example, concerned the automotive sector and represented a clear case of policies dictated by strong domestic political-economy forces, with little attention to impacts on consumers or imports.

The Appellate Body reversed the Panel findings with respect to two issues: the extent to which subsidy measures can be exempted from complying with the principle of national treatment under the GATT, and the identification of local content requirements. The authors claim that, the test devised by the Appellate Body, distinguishing eligibility criteria to qualify for a subsidy

from prohibited local content requirements, could facilitate the circumvention of the prohibition under the SCM to favour local content.

Whether a measure restricts trade is a central question to many WTO provisions, yet it is occasionally insufficiently addressed in WTO case law. Kristy Buzard and Tania Voon examine how the WTO Panel Reports in *Australia–Tobacco Plain Packaging* address this question, as well as various other questions falling under the scope of the Agreement on Technical Barriers to Trade (TBT), and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs).

They investigate the meaning of trade-restrictiveness under the TBT, and its application to Australia's tobacco plain packaging measures. According to the Panel, a Member's measure restricts trade if it has a limiting effect on trade with one or more Members. Based on this finding, the Panel went on to conclude that the challenged Australian measures were designed to reduce consumption of tobacco products. Nevertheless, no less favourable treatment had been afforded to foreign tobacco goods, since the measure was pursuing a social objective, and was applied in a non-discriminatory manner. The Panel's reasoning, the authors argue, may hold for any non-discriminatory measure designed to limit a socially undesirable product such as tobacco.

Maria Alcover and Meredith Crowley examine the *China–Broiler Products (Article 21.5 – United States)* dispute. The US challenged China's 2009 imposition of duties on US chicken feet, and China continued to impose duties on the basis of a re-determination, even though the Panel report had found that China had acted inconsistently with its WTO obligations.

China proceeded to its re-determination, as an attempt to comply with the original Panel's adverse findings. The authors provide a cogent analysis of the report, exploring the legal and economic implications of the 2018 compliance Panel Report which had concluded that China, when allocating costs to construct US domestic prices for broiler products, had failed to live up to its WTO obligations.

Carolyn Fischer and Timothy Meyer examine two broad themes at play in the *EU–Biodiesel (Indonesia)* decision. They argue that the case offers yet another example of the WTO Dispute Settlement Body (DSB) striking down creative interpretations of antidumping rules by developed countries. Applying the Appellate Body's decision in *EU–Biodiesel (Argentina),* the Panel found that the EU could not use antidumping duties to counteract the effects of Indonesia's export tax on palm oil. The decision will, in all likelihood, play a role in ongoing battles over renewable energy markets, as both the EU as well as Indonesia have intervened in their markets to promote the development of domestic biodiesel industries. The authors argue that the Panel decision prevents the EU from using antidumping duties to preserve market opportunities created by its Renewable Energy Directive for its domestic biodiesel producers.

Pramila Crivelli and Luca Rubini review the Appellate Body decision regarding the implementation by the EU of the rulings in the long-running *EC–Aircraft* dispute. The authors criticize various other aspects of the report, such as, the hesitation to confirm that quantitative methods are the key tool to define the relevant market.

When it comes to the quintessential elements of the report, the authors are equally critical. In this dispute, the EU had been requested to remove all adverse effects caused by its subsidization programme. The authors conclude that while intellectually probably legitimate, the requirement for the EU to remove all adverse effects caused by actionable subsidies is the weakest part of the report, as the defendant is called to go into great lengths to first establish which effects matter in the first place.

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