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Introduction

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The year 2011 has been a remarkable one for WTO dispute settlement: there were substantially more decisions than the previous year, covering a wide range of issues from anti-dumping and customs matters to consumer and environmental protection. The WTO adjudicating bodies had to confront some issues for the very first time, and this led to noteworthy jurisprudential developments. As customary, we gathered a stellar group of scholars to evaluate from a joint law-and-economics analysis all Reports by the Appellate Body (AB) issued during the calendar year 2011, as well as all Panel Reports that were not appealed and could no longer be appealed (at our cutoff date, 31 December 2011). We made only one exception to our rule, we invited Rob Howse and Phil Levy to write a report on the three TBT (Technical Barriers to Trade) Panel Reports issued during 2011, although all three of them were appealed and AB Reports have been issued in 2012; the reason for disregarding custom has to do with the immense interest that these Reports provoked, the first Reports in the TBT area since *EC–Sardines* (2002). Here we proceed with a short presentation of the Reports in the hope that the reader will find the analyses provided insightful and stimulating.

Hahn and **Mehta** discuss the AB Report on *EC and Certain Member States – Large Civil Aircraft* (DS316), a case involving the subsidization of the Airbus industry by the EU (European Union) and its member states. The authors note that the emergence of Airbus transformed the market structure of the LCA (Large Civil Aircraft) industry into a duopoly of similar-sized full-range manufacturers. The financing of Airbus's upfront investment expenditures came in a significant proportion from public funds. The United States alleged that this violated the SCM Agreement. The United States prevailed before the Panel, and the EU appealed the Report. While the AB followed the US view to a great extent, it did so in a measured way: the category of *per se* illegal export subsidies was interpreted with a view to the manipulation of normal market conditions. In the AB's view, what matters is the distortion on competitive conditions and not the increase of exports. Other aspects of the SCM Agreement were also clarified. For example, the relationship between the effect of the subsidy and the granting of the subsidy itself are closely related but not identical concepts. The Report operates from the premise that the SCM Agreement's regime focuses on the effect, and not on the subsidy as such, which is a manifestation of a political choice by a sovereign Member State. The AB affirmed that a subsidy has a 'life', shorthand for a beginning and an end; in this view, the effect of a subsidy is not bound to be permanent but is

bound to terminate. The authors note, with regret, some omissions in the AB Report and most notably the fact that the AB did not clarify to what extent partial privatization, that is sale of assets at market prices to private investors, 'extinguishes' subsidies.

Davey and **Maskus** analyze the AB report on *Thailand – Cigarettes (Philippines)* (DS371). This case evolved around the question whether Thailand was affording to foreign cigarettes less favourable treatment than that reserved for its domestic cigarettes through a host of internal measures (policies). Their paper suggests two improvements that could be made to Panel procedures. It supports the AB's interpretation of Article XX(d) GATT in the present case, which seems to discard an earlier mistaken approach to this provision. It further examines, in some detail, whether the AB's application of the 'less favourable treatment' component of Article III:4 GATT in this and other cases is consistent with the jurisprudence under Article III:2 GATT, and Article 2.1 TBT. From an economics perspective, the case is straightforward on its face. However, the AB's rigorous application of the 'less favourable treatment' principle might not survive a fuller market analysis in terms of policy impacts on conditions of competition. Further, while the authors agree with the rejection of Thailand's claim under Art. XX GATT, they raise the question of whether a strict national-treatment rule may be an unwarranted constraint on policy where there is a clear trade-related external cost to address.

Prusa and **Vermulst** analyze the AB Report on *US–Anti-Dumping and Countervailing Duties (China)* (DS379). In 2007, the United States reversed its longstanding policy prohibiting the simultaneous imposition of anti-dumping duties (ADDs) and countervailing duties (CVDs) against nonmarket economies (NMEs). Subsequently, the United States has imposed concurrent ADDs and CVDs in numerous cases against China. China challenged a number of aspects of the US practice, most notably the double-remedies issue, which occurs when a domestic subsidy is offset by both an ADD and a CVD. The AB correctly ruled, the authors note, that double remedies are inconsistent with the SCM Agreement and that the burden was on the investigating authorities to ensure that double remedies were not being imposed; however, the AB largely limited its discussion to measurement concerns, an approach that may have inadvertently opened the door to future double-remedies disputes involving other methods for computing normal value. Two other issues that are likely to have significant long-term ramifications, in the authors' view, are: (a) the scope of the term 'public body'; and (b) the appropriate use of out-of-country benchmarks. On both issues, the authors believe the AB's conclusions and analysis were correct.

Bown and **Mavroidis** discuss the AB Report on *EC–Fasteners* (DS397). The AB dealt with a number of issues for the first time in this Report. Importantly, it discussed the consistency of the EU regulation on the conditions for deviating from the obligation to calculate individual dumping margins with the multilateral rules. Although China formally won the argument, the AB may have opened the door to treat China as an NME even beyond 2016 when China's NME status was thought

to expire under the terms of China's 2001 WTO Accession Protocol. The AB further dealt with numerous other issues ranging from statistical sampling to the treatment of confidential information. In handling its investigation, the EU authorities made a number of questionable decisions regarding the collection of information, and this aspect of the process was central to China's legal challenges.

Hoekman and **Charnovitz** analyze the AB Report on *US–Tyres (China)* (DS399). In 2009, the United States imposed additional tariffs for a three-year period on imports of automotive tires from China under a special safeguard provision included in China's 2001 WTO Accession Protocol. China challenged the measure in the WTO. The case marked the first WTO dispute in which a challenged safeguard was upheld by the AB, the first in which an accession protocol was used successfully as a defense, and the first that China lost as a complaining party. It also was noteworthy, the authors note, in that the safeguard was sought by a labour union and not the domestic industry.

Neven and **Trachtman** assess the AB Report on *Philippines–Distilled Spirits* (DS396). In this case, the AB reconsidered its case law on 'like products' and 'DCS' (directly competitive or substitutable) products (Art. III:2 GATT). The authors note that the AB focused on the effect of differential taxation on domestic products ignoring the degree of substitution across products, a finding that they find hard to reconcile with the overarching purpose of Art. III GATT. They are unhappy with the treatment of evidence by the Panel and the AB since, in their view, foreign and domestic products are distant substitutes for the bulk of the market examined. Putting aside the jurisprudence, a methodologically sound finding regarding substitution (and competition) seems necessary, but not sufficient, for a finding of inefficient discrimination. In order to find inefficient discrimination, there must also be a finding that the nonprotectionist benefits that may arise from the national regulation are not sufficient to justify the discriminatory action. Otherwise, rational regulation that is globally efficient might be invalidated and inappropriately restrict the national right to regulate. In the present case, the Philippines articulated no nonprotectionist rationale for its distinctions. Existing WTO jurisprudence in this area, prior to the AB decision in *US–Clove Cigarettes*, has only hinted at the additional focus on the justificatory role of nonprotectionist regulatory benefits, yet an explicit and appropriately contextualized reference to the nonprotectionist rationale, if any, of regulation seems to be a necessary part of decisionmaking.

Howse and **Levy** authored a paper that examines the basic issues in the three TBT Panel Reports issued in 2011: *US–Clove Cigarettes* (DS406), *US–COOL* (DS386), and *US–Tuna II (Mexico)* (DS381). In a series of controversial decisions, the WTO Panels sought to reconcile legitimate regulatory interests of the state with various obligations to treat imported products in an even-handed and not unnecessarily trade-restrictive manner. Among the key points of contention were which obligation pertained in each case, e.g. national treatment, limits on technical regulations, or rules governing standards. In each case, the Panel imposed

significant restrictions on national regulatory practices, and in each case Panel reasoning was challenged by the AB. The authors address some of the key legal and economic issues raised in the original Panel decisions, leaving the late-breaking AB decisions for future analysis. Given the unsettled nature of the terrain, the economic analysis focuses primarily on the question of national treatment, while the legal analysis deals with other interesting points that emerge from these rulings, such as the appropriate level of deference to international standards and the legitimacy of labeling requirements.

Saggi and **Wu** review the Panel Report on *US–Orange Juice (Brazil)* (DS382). Their paper analyzes Brazil's WTO challenge to the methods undertaken by the United States in calculating anti-dumping duties in administrative reviews and other investigations of Brazilian orange juice. The dispute resulted in a Panel ruling that conforms with earlier AB decisions outlawing the use of 'weighted average to transaction' zeroing in such reviews. However, the Panel's stance was driven largely from a desire to preserve 'stability and predictability' within the system, suggesting a practical recognition of the shadow of past AB decisions on the same legal question. In addition, the authors argue that to understand fully the effects of zeroing, it is important to account for the underlying reasons behind observed price changes in the market. They show that zeroing is more likely to convert a negative dumping determination into a positive one when price changes are driven by variations in demand relative to when they are driven by variations in the cost of exporting. In the present case, Brazilian exporters of orange juice experienced an increase in (residual) demand for their product, since, by reducing the local supply of round oranges, adverse weather conditions in the United States made it difficult for US orange-juice producers to meet local demand.

Prusa and **Rubini** scrutinize the Panel Report on *US–Zeroing (Korea)* (DS402) regarding the method of calculating anti-dumping duties. The case mirrors other recent WTO disputes involving zeroing. Even though the United States ceased zeroing in original investigations in December 2006, it implemented the policy change only prospectively. As a result, the margins applied to the products in this dispute remained unchanged because they had been calculated prior to the policy change. The United States did not contest Korea's claims. The Panel confirmed that zeroing was used and, following the long line of Panel and AB rulings, found the practice inconsistent with the Anti-Dumping Agreement. After the Panel Report was adopted, the United States recalculated the margins without zeroing. Nevertheless, it refused to refund unliquidated cash deposits that were based on zeroing, highlighting the United States's continued lukewarm compliance with WTO rulings on zeroing. This dispute offers an opportunity to ponder the weaknesses of the WTO Dispute Settlement and the ability of one Member to take advantage of it. The authors go on to ask two questions: since the facts and their legal assessment were undisputed, why was litigation necessary? Can compliance with WTO law be improved with broader findings and more incisive remedies? In their contribution, the authors offer tentative responses.

Finally, **Broude** and **Moore** analyze the Panel Report on *US–Shrimp (Viet Nam)* (DS404). This unappealed Panel Report not only deals with now-standard controversies involving US zeroing practices, but it also involves a number of novel problems in administrative reviews of US anti-dumping orders that transcend zeroing issues. Most importantly, this dispute highlights the economic, legal, and statistical importance of sample-selection bias when calculating 'all others' rates for exporters that were not queried during dumping investigations. Sampling is particularly problematic in this dispute, since US investigators found only zero and *de minimis* margins in the administrative reviews, a situation in which the relevant provision of the Anti-Dumping Agreement appears to provide no guidance (an apparent '*lacuna*'). The Panel did not directly deal with the key sample-selection issues in the case, and so the authors provide an alternative legal and statistical analysis. Because these issues are likely to become more important as the United States phases out the practice of zeroing, the authors query whether sampling may indeed become the new zeroing.

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Our discussants, both those who published their comments as well as those who did not, helped our authors improve the quality of their drafts: Geoff Carlson, Jorge Huerta-Goldman, Fernando González-Rojas, Mark Koulen, Joost Pauwelyn, Michele Ruta, Mark Sanctuary, Simon Schropp, Jasper-Martijn Wauters, and Erik Wijkström did a remarkable job in this respect.

Finally, this is the year that Henrik Horn decided to step down as co-organizer of this enterprise, and Chad P. Bown graciously accepted the invitation to take over his role. This project will always have the footprint of Henrik's idea to organize a permanent law-and-economics forum to seriously scrutinize the output of the WTO adjudicating bodies. We can only endeavor to hope that future editions live up to his dream.