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# Introduction

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WTO dispute adjudication had a memorable year in 2012: the WTO adjudicating bodies were flooded with disputes coming under the aegis of the WTO Agreement on Technical Barriers to Trade (TBT) for the first time and thus had the opportunity to develop the legal test for consistency with this Agreement; the docket prominently featured high profile cases such as the notorious EU/US disputes on subsidies paid to Airbus and Boeing; and several disputes considered aspects of China's non-market economy (NME) status. Finally, issues such as whether governments can impose export restrictions on allegedly public policy grounds appeared for the first time in many years before Panels and the Appellate Body (AB).

This issue of the *World Trade Review* contains a critical evaluation of the legal reports and WTO case law issued during 2012. The analysis stems from a group of legal and economic scholars convened at an annual conference in Florence at the European University Institute on 3 and 4 June 2013. At the risk of generalizing, the scholars' verdicts are mixed; that is, there are cases where our analysts agreed with the final result, and there are important cases where they did not. Most of the criticism focused on the methodology used by WTO adjudicating bodies; this is a critical issue since the methodology provides the key to predicting the outcome in any similar future disputes.

We now turn to a review of the main findings of the analysis.

Dunoff and Moore examine the un-appealed Panel Report in *European Union – Anti-Dumping Measures on Certain Footwear from China*, a dispute surrounding the EU's imposition of anti-dumping duties on imports of Chinese leather footwear. The authors assess the Panel's ruling that the EU's presumption that Chinese exporters are subject to economy-wide non-market-economy antidumping duties was inconsistent with WTO obligations, a ruling that the EU declined to appeal and which subsequently resulted in the EU changing its anti-dumping regulation. From the economics perspective, the authors also identify this dispute as an important case study underpinning the rapidly changing structure of global manufacturing and how these changes are having complex effects on the 'traditional' political economy of import protection. This includes highlighting how particular EU member positions on trade remedy actions can depend importantly



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on national production patterns and firms' responses to economic pressures from globalization, in light of the continuing evolution of global supply chains.

Bown and Wu argue that the *Dominican Republic – Safeguard Measures* disputes have given rise to a number of issues that numerous WTO members are likely to confront when seeking to implement a new safeguard import restriction, given the increasingly complex web of trade concessions through preferential trade agreements (PTAs) in addition to their WTO commitments. They find that there are difficulties in assessing the extent to which safeguards imposed following a PTA are the result of PTA concessions relative to developments that pre-date or are otherwise unrelated to the PTA. The paper also assesses a number of previously unaddressed questions that arose in the un-appealed Panel Report, including jurisprudence on use of WTO safeguards, PTAs, and developing countries. The authors conclude that the drafting of safeguard-related provisions within a PTA can affect how its members subsequently apply safeguards made available under the WTO Agreements, and they describe some broader implications that arise from the interplay of PTAs, safeguards, and dispute settlement with respect to policy choice – both for the implementation of new protection and for the subsequent forums under which to resolve disputes that may arise related to trade between PTA partners.

Prusa and Vermulst analyse *China – Countervailing and Anti-dumping Duties on Grain Oriented Flat-rolled Electrical Steel from the United States*. The dispute involved a US challenge to Chinese imposition of antidumping and countervailing duties on imports of grain oriented electrical steel – a high value-added steel product – from the United States. The challenge centered on deficiencies in the producers' application to China's Ministry of Commerce (MOFCOM) – its antidumping investigating authority – and certain aspects of MOFCOM's injury analysis. On one hand, given the deficiencies in the application and China's handling of the case, the authors argue that the Panel and AB were justified to rule in favor of the US on almost every issue. On the other hand, the ruling establishes important standards for allegations and evidence in trade remedy applications – an issue of systemic importance to China given that its firms are the exporters most heavily targeted by trading partners' use of trade remedies in the entire system. Thus the authors note that China could paradoxically emerge as the 'winner' of this dispute, because other countries, including the United States, may also be failing to meet such standards in their own imposition of antidumping and countervailing duties.

Ahn and Messerlin present *United States – Anti-Dumping Measures on Certain Shrimp and Diamond Sawblades from China* as merely one more example of how the US government exhausts the entire DSU process in order to implement WTO rulings. The authors highlight that the United States has declined to categorically rectify the WTO-inconsistent antidumping duties based on zeroing calculation methods, despite many legal rulings to clarify the WTO inconsistency of zeroing practices. They also describe how the current situation in which WTO Members

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must individually resort to dispute settlement to rectify the US zeroing practices raises a serious concern regarding the legitimacy and integrity of the WTO dispute settlement system. Finally, the authors suggest it may be appropriate for WTO Members to focus on mechanisms for better implementation rather than mechanisms for developing additional regulatory processes for compliance, which themselves are likely to raise additional problems.

Neven and Sykes describe portions of the AB judgment of *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*. In their view, the core issue is whether the mix of monetary compensation, access to government personnel and facilities, and intellectual property (IP) rights over-compensated Boeing for the services it rendered. The authors argue that the panel's analysis of this core issue, which focused on whether Boeing was the principal beneficiary of the contracts, and the AB's alternative approach are equally flawed. They suggest the analogy between a research and development (R&D) joint venture and an equity infusion is dubious and that the existence of a benefit does not turn on how one dimension of the contract, such as the allocation of the resulting IP rights, is specified. They also examine issues such as the adverse effects related to product developments in addition to the conditions under which a contract that confers a benefit (or economic rent) to Boeing could still be efficient. Finally, the authors consider the issues of lost sales and price suppression in the context of specific features of competition in the aircraft industry.

Mavroidis and Saggi assess the AB Report in *US–COOL* that found that the US measure imposing country of origin labelling (COOL) requirements on livestock of domestic, foreign, and mixed origin was in violation of the obligation to avoid discrimination embedded in Article 2.1 of the TBT Agreement. They present a number of arguments against the AB's decision as well as the methodological approach the AB adopted in this particular dispute. They find that the AB also failed to address the dispute's central question of whether there exists an alternative to COOL that is less trade restrictive. Finally, the authors suggest that the most important determination of this dispute was what, if anything, the TBT Agreement did to affect the non-discrimination obligation that was already inherent in WTO rules.

Crowley and Howse investigate *US – Tuna II (Mexico)*, where Mexico had challenged a US measure that monitored and enforced a private voluntary, 'dolphin-safe' label on tuna. Mexico's legal claims focused on two aspects of the US measure. First, US Courts interpretations have led to a US legal framework that required prohibition of the use of the label on tuna marketed in the United States in any instance where the tuna was caught by a method involving encircling dolphins. Mexico argued the United States violated Article 2.1 of the TBT Agreement by not allowing tuna fished in this way to be certified as dolphin-safe, even if no actual dolphin was killed despite the encircling or setting upon of dolphins. Second, Mexico argued that the United States violated national treatment by having a strict monitoring and enforcement scheme for tuna originating in the

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Eastern Tropical Pacific (ETP), whereas the United States allowed the label 'dolphin safe' to be used based upon the self-declaration of the captain of the fishing vessel that no dolphins had been set upon and no dolphins killed for tuna fished *outside* the ETP. In the authors' view, the Panel tended to conflate these rather different claims into a single claim of *de facto* discrimination with respect to the requirement of not setting on dolphins. The authors further take issue with the Panel and AB's understanding of 'technical regulation' which blurs the distinction with 'standards'.

Broude and Levy examine the AB Report in *US – Clove Cigarettes*, which used different logic to ultimately confirm the Panel Report that found that imported clove cigarettes were 'like' US menthol cigarettes, and accorded 'less favourable treatment' for the purpose of national treatment under Article 2.1 TBT. The authors argue that the AB in this case applied competition-oriented analysis to the question of product definition, while reserving consideration of regulatory purpose to the comparison of treatment. They find the AB thus extended earlier GATT jurisprudence into the TBT and that the AB's decisions were sensible from both legal and economic perspectives. They provide a novel economic model for analysing regulatory 'utility', where they find it impossible to ignore regulatory purpose in discrimination cases. While there is not much economic difference in analysing regulatory purpose separately from more observable market considerations, they find that the sequencing does add political logic, analytical focus, and formal transparency. They conclude that this may enhance the legitimacy of WTO dispute settlement rulings, although they would prefer further specification from the WTO Membership regarding the methodological content of the national treatment discipline.

Bronckers and Maskus assess *China – Raw Materials* and shed light on whether WTO members, when exploiting their natural resources, can give priority to the needs of their domestic market as opposed to the needs of other WTO Members. The authors' conclusion from the AB Report and the un-appealed part of the Panel Report is that a WTO Member must normally ensure an even-handed distribution of the natural resources amongst the WTO membership that it decides to mine or harvest. The only difference arises in cases that a Member's citizens or industries face a crisis because of a temporary shortage of an essential product. For those who share an international outlook on the world, this may be an acceptable, and even a desirable outcome. The authors note how such a ruling has potentially far-reaching implications for international trade, not only in minerals and metals, but also for agricultural and energy goods. Nevertheless, the AB also made a highly regrettable finding in reaching an otherwise laudable result that circumscribed the use of export restrictions when they ruled that China was not allowed to invoke a public policy justification for certain of its export restrictions (notably: its export duties, on which it had assumed additional commitments), because of the wording of its Accession Protocol. The authors conclude that it is deplorable to assume that sovereign states can sign away their rights to pursue public policies, such as

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environmental protection, which are generally admitted amongst the broader WTO membership.

Hoekman and Meagher analyse the unappealed WTO Panel Report in *China – Certain Measures Affecting Electronic Payment Services*. In their view, the core issue was whether China's measures that resulted in China having only one dominant supplier of electronic payment services (EPS) violated the specific commitments that China made under the General Agreement on Trade in Services (GATS). The panel ruled that the measures did not violate China's market access commitments because there were no explicit limitations on the entry of foreign suppliers, but that the measures were inconsistent with China's national treatment commitments in that they modified the conditions of competition in favour of domestic suppliers. The authors' discussion illustrates a number of complexities in interpreting WTO Members' commitments under the GATS.

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