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WTO Case Law of 2014: A Busy Year

CHAD P. BOWN*
The World Bank and CEPR
PETROS C. MAVROIDIS**
EUI and Columbia University

1. Introduction

The WTO adjudicating bodies were busy in 2014, as they issued 22 reports, a net increase of 15 reports when compared to 2013. In fact, the WTO was forced to hire additional staff to work on disputes, since the caseload overwhelmed the existing limited administrative capacity dedicated to dispute settlement.

It was not just busy, it was also a year where a number of submitted disputes dealt with novel issues, and/or with issues where there was need for case law to take a stance on prima facie unclear prior case law. *EC–Seal Products* is an example of the former, where the Appellate Body (AB) was called to decide on a measure, which arguably contained more than one distinct measure. *China–Rare Earths* is an example of the latter: the AB was called to decide whether, and if so under what conditions, recourse to the general exceptions clause of the GATT (Article XX) is possible when facing a violation of an obligation included in a Protocol of Accession of a WTO member.

And then, of course, there were the usual suspects. Zeroing does not seem to be a thing of the past. Reminding us of the legendary Mel Brooks movie, it is dead and loving it. Various disputes concerned the legality of imposition of countervailing duties, and more precisely, the notion of 'public body', the allocation of benefit to productive capacity, etc.

Our invited authors produced highly readable analyses of the 2014 case law. We had the pleasure to welcome a few new authors who brought a breath of fresh air and blended remarkably well with old hands. As usual, we assigned case studies to dyads consisting of an economist and a legal scholar. There are two exceptions to this: James C. Hartigan authored the paper by himself due to the unavailability of his coauthor. To counterbalance, the threesome of Rachel Brewster, Claire Brunel, and Anna-Maria Mayda teamed up to write a joint paper.

* Email: chad.p.bown@gmail.com
** Email: Petros.Mavroidis@EUI.eu

2. Summary of the dispute reports that were examined

Eric W. Bond and Joel Trachtman examined the *China–Rare Earths* AB decision, and argued that it addressed two main issues. The first is whether China's obligations not to impose export duties under its accession protocol are subject to exceptions under Article XX of GATT. The second relates to the scope of the exception for China's export quota measures regarding conservation under Article XX(g) of GATT. The authors argued that, in accord with the AB's prior ruling on *China–Raw Materials*, it found no textual basis for application of the Article XX exception to China's export duty obligations. The AB also approved the Panel's overall approach to determining the availability of the Article XX(g) exception that focused on the design and structure of China's quota measure but left unresolved important issues, including the extent to which non-conservation purposes may prevent use of the exception and the role of empirical evidence of effects in these determinations. Finally, the authors argue the chapeau's requirement of non-discrimination is an appropriate additional criterion for determining whether a policy with a target of reducing extraction of a natural resource satisfies the requirements of Article XX, despite the AB finding no 'even-handedness' requirement in Article XX(g) itself.

Paola Conconi and Tania Voon addressed the relationship between public morals and international trade at the heart of the *EC–Seal Products* dispute that Canada and Norway brought to the WTO. The fundamental questions include whether WTO members can impose trade restrictions based on moral or ethical concerns and the conditions under which such concerns may trump trade liberalization commitments. The EU alleged that its seal product ban had been introduced in response to European moral outrage at the inhumane killing of seals. Nevertheless, the EU seal regime included a series of exceptions including that it allowed imports of seal products hunted by Inuit or other indigenous communities, as well as imports of seal products processed and re-exported by EU producers. The authors describe some of the key legal and economic issues raised by the AB's ruling and, most importantly, provide insight on the negotiating record of the EU measure, which helps illuminate aspects of the EU legislation that even the AB did not touch upon.

Next, the *India–Agricultural Products* dispute is one of an increasing number of cases arising at the intersection of the WTO and domestic regulatory policy over human, animal or plant health. Chad P. Bown and Jennifer Hillman assessed the key issues in the dispute, which featured allegations that India's import measures applied against avian influenza- (AI-)infected countries over poultry and related products were too restrictive, in light of the World Organisation for Animal Health's (OIE's) scientifically motivated standards and guidelines. The authors use a set of economic models of commercial poultry markets in the presence of negative externalities such as AI to identify critical tradeoffs for public policy at the intersection of government regulatory regimes designed to deal with AI,

standard-setting bodies such as the OIE, and trade agreements such as the WTO. While the authors find the institutional design of the OIE to be well-motivated and are in broad agreement with the main results of the Panel Report, they shed light on a number of subtle issues that suggest lingering challenges for the multilateral trading system's ability to balance trade rules with public health concerns, including the political independence of standards-setting bodies like the OIE.

Kamal Saggi and Mark Wu analyze *Peru–Agricultural Products*, which is the second WTO dispute concerning the consistency of an agricultural price range system (PRS) with the WTO Agreement on Agriculture. One motivation for a PRS is to stabilize prices for economies in the process of liberalizing agricultural trade. While standard economic models indicate such a policy to be inherently distortionary and welfare-reducing, the authors offer an explanation for why a government concerned with national welfare may nevertheless implement such a policy when faced with risk aversion and imperfect insurance markets. They also identify unresolved questions arising out of the dispute for the AB to address in order to clarify how to design a WTO-consistent PRS. Finally, they examine the possibility of a WTO member resorting to a free trade agreement (FTA) to preserve its flexibility to implement a PRS and how such FTA provisions could be treated in WTO litigation.

Another 'zeroing' dispute decision arose in 2014, and James C. Hartigan presented an evaluation of *US–Shrimp II (Viet Nam)*. For even though the US Department of Commerce announced on 14 February 2012 that it would cease the use of zeroing in the calculation of anti-dumping (AD) margins in all reviews as of 16 April 2012, this policy change did not pertain to targeted dumping. The author argued that the Panel in the dispute erred in not finding 'as such' inconsistency by the US with the AD Agreement, despite this not being a targeted dumping complaint. Hartigan illustrates how economic arguments regarding market structure could be used by Panels in 'as applied' inconsistency determinations, with a special application of the seasonality of agricultural production of particular relevance to this dispute as a case study.

While the *China–Autos* dispute dealt with claims on issues that had previously been dealt with a few times in recent case law that were ruled WTO-inconsistent, Andrew D. Mitchell and Thomas J. Prusa argue that virtually all of the deficiencies noted by the Panel could be easily addressed with minor changes to MOFCOM (the Chinese Ministry of Commerce) practices. Thus they conclude that the main interest in this dispute stems from the question of how the trade policy interaction between the US and China is continuing to evolve, especially with respect to the policy of AD. For while the US has now relied on this as part of a series of related WTO disputes to demonstrate that China has been utilizing its AD policy in a manner that does not comply with WTO rules, the larger concern is for the apparent tit-for-tat motivation for these recently implemented Chinese trade policies. They find that the prospective nature of WTO relief makes it almost impossible for the WTO to discourage the type of opportunistic protectionist actions exemplified by this case, and the authors suggest there is

nothing novel in this particular dispute that would radically change the nature of the interaction between these two major trading countries.

Rachel Brewster, Claire Brunel, and Anna Maria Mayda analyze the AB decision in *US–Countervailing Measures (China)* and find little in the decision that would challenge how countries implement countervailing duties (CVDs). They argue that although the US may have formally 'lost' the case, a change in the procedures and tests used to motivate the CVD could still allow the US to continue using this policy tool on the specified products. The authors provide a focused and thorough economic investigation of the trade in two (of a long list) of products subject to the countervailing measures that are at the heart of the dispute – wind towers and solar panels. They argue that, from an economic perspective, the implications of the AB decision are not necessarily heartening, given that CVDs have the standard distortionary effects of tariffs and could go against environmental goals of encouraging the expansion of products that combat the negative externalities associated with carbon-based fuels.

Dukgeun Ahn and Alan Spearot note that one of the key findings in *US–Carbon Steel (India)* deals with the appropriate method to determine material injury when imported products are subject to simultaneous AD and CVD investigations. Along with addressing a number of legal issues concerning CVD investigations, they argue that the AB clarified some of the restrictions that investigators can rely on regarding cross-cumulation of injury. In particular, the restrictions essentially prohibit the current US practice and this could result in an increased burden of proof needed to sustain parallel claims of dumping and subsidies. The authors argue that this decision can be justified on economic grounds, where cumulation imposes a counterfactual scenario against which marginal damages of dumping and subsidies by each country cannot be properly evaluated. However, what the legal rulings by the AB did not recognize is the economic reality that many like products produced by the firms alleged to have received subsidies were selectively absent from the investigation, and this creates additional complications for the assessment of injury in dumping and subsidy cases.

Mostafa Beshkar and Adam S. Chilton conclude the analysis with their assessment of the *US–Countervailing and Anti-Dumping Measures (China)* decision. They first recall that the United States opened a CVD investigation against China in 2006 after not applying CVD law against non-market economies (NMEs) for two decades. After extensive domestic litigation, which resulted in a US appeals court ruling that it was illegal to apply CVD law to NMEs, the US Congress passed new legislation in 2012 making the application of CVD law to NMEs starting in 2006 legal. China challenged this new US 'GTX' legislation at the WTO. The authors illustrate the implications of this dispute and its rulings for a number of current WTO debates regarding potential DSU reform including: whether AB rulings create binding precedent, whether the AB should have authority to remand cases, and what information should be required in panel requests.

3. Concluding remarks

The case law discussed in the committed papers certainly clarifies a few issues, but also adds to the long list of questions that have emerged and that continue to emerge. The various papers discussed underline the need for economic input when discussing disputes of an inherently economic contract like the WTO. The synergies created between lawyers and economists can lead to more sophisticated, coherent results. The papers contained in this volume are the best proof for this statement.

Finally, we would like to thank, besides our authors, our lead discussants for this year's event, Bill Davey, and Rob Howse; Bernard M. Hoekman of EUI, for helping us organize the event, and providing our authors with most valuable comments; the EUI and its President, Joseph H.H. Weiler for hosting the event and covering its financial cost. In particular, we would like to thank Mia Saugman, and Ingo Linsemann who helped us put this conference together.