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Introduction

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1. Amidst it all, dispute settlement shows no sign of slowing down

The WTO dispute settlement system has come under severe criticism in recent times, which does not seem, for now at least, to affect its relevance. In terms of output, 2017 was yet another bumper year. We review eight cases that constitute the 'last word' of the dispute settlement system: we review exhaustively all Appellate Body reports, as well as all un-appealed panel reports.

Unsurprisingly, the majority of disputes concerned contingent protection. A couple of them though, dealt with novel issues that panels had not entertained in prior jurisprudence. *China–Cellulose Pulp* deals with parallel pricing in antidumping investigation, an issue reminiscent of conscious parallelism in antitrust enforcement. In *US–Tax Incentives*, the question was whether the US was providing local content subsidies. Unlike export contingent subsidies though, the law does not mention de facto subsidies in the body of the provision, so the WTO court had to address this issue before going any further.

We also note the continuing unwillingness of WTO courts to interpret the Import Licensing Agreement (ILA), as evidenced in *Indonesia–Import Licensing Regimes*. It is the only case where WTO courts continue to avoid ordering the specialized agreement ahead of the GATT, and start their analysis from ILA. Instead, they prefer to examine claims under Article XI of GATT.

With this in mind, we turn now to a brief presentation of the papers that our invited authors presented at the two-day conference held at the premises of the European University Institute (EUI) in Florence in June 2018. Our sincere thanks to the Robert Schuman Centre of EUI for hosting and generously financing our event, as well as useful discussions provided by Maria Alcover, Bernard Hoekman, Robert Howse, Soumaya Keynes, Juergen Kurz, Niall Meagher, Roberta Piermartini, Laura Puccio, and Arie Reich.

2. The papers presented

Emily Blanchard and Mark Wu analyze the fascinating *Russia–Pigs* dispute, which involved trade in products impacted by outbreaks of the African Swine Fever

disease. The critical question that arose is when can an importing country (Russia) justifiably ban products from exporting countries unaffected by the disease, on the basis of the fact that the country is part of the same customs union (the European Union) as another country inflicted with the disease. Their legal–economic analysis establishes four distinct classes of cross-border and cross-product externalities ought to play in an important role in future instances when this policy question arises. They identify the complexities introduced by bilateral, sequential, pass-through, and supply chain externalities in propagating the transmission of agricultural disease across borders through trade.

Dukgeun Ahn and **Arevik Gnutzmann-Mkrtchyan** assess the two disputes titled *Indonesia–Import Licensing Regimes* brought by the United States and New Zealand in response to a series of import licensing measures for agricultural products imposed by the Indonesian government in order to promote food self-sufficiency. The complainants challenged 18 separate measures under Article XI:1 of the GATT 1994, and all but two measures were found to be WTO-inconsistent. As of April 2018, half of all disputes WTO members have brought forward against Indonesia involved these measures. The authors find that what differentiates this dispute is the relatively small share of complainants' export value and high share of third party exports and argue that a contributing explanation is the nature of the import licensing regimes. Unlike tariff barriers that increase the marginal cost, the import licensing regimes operated as the fixed cost of trade and the frequent changes reduced trade policy certainty. As a result, some exporters sustained significant market losses while other large exporters, in particular Australia, experience relative gains.

Similarly, *Indonesia–Chicken* is a dispute involving poultry imports from Brazil, effectively banned from the Indonesian market due to these same measures. **Boris Rigod and Patricia Tovar** describe how the dispute addresses import restrictions that were not in conformity with WTO law while also touching upon the broader relationship between WTO law and domestic food policy preferences, including self-sufficiency. While the Panel found that Indonesia infringed its WTO obligations, it also stated that food self-sufficiency is a legitimate policy objective. On this basis, the authors discuss the economic case for and against self-sufficiency and assess whether Indonesia could have attained its policy goal in a WTO-compliant manner. They find that under its current commitments, Indonesia is unlikely to be able to simultaneously implement self-sufficiency in food policies and comply with WTO law.

Shushanik Hakobyan and **Joel Trachtman** explain how the *EU–Fatty Alcohols* decision of the Appellate Body addresses an inconsistent approach to transfer pricing that can arise across different regulatory areas. This dispute involved the scope of permissible adjustments in antidumping calculations, focusing on the 'mark-up' paid by an Indonesian exporter to a related company as a difference affecting price comparability between the normal value and the export price. The issue arose as the primary focus was on whether the relationship between related

companies can be demonstrated to be a factor that impacts the prices of the relevant transactions.

The 2017 *China–Cellulose Pulp* ruling marked the third time in five years that a WTO panel criticized China's use of the 'parallel price trends' methodology to assess the effects of subject imports on domestic prices. In each of these cases, **Kara Reynolds** and **Tatiana Yanguas** explain how the panel ruled that MOFCOM's use of this methodology fails to explain how dumped imports have caused the decline in domestic prices. In this paper, the authors explore whether it is the parallel price trends methodology itself that is problematic or China's implementation of that methodology and find that China's inability to provide detailed explanation of its findings has resulted in the large number of disputes over its recent anti-dumping actions. They also explore confounding factors driving the large number of disputes over these anti-dumping actions, including political economy and insufficient domestic judicial review of China's anti-dumping investigations. It remains to be seen whether China will be able to implement WTO panel and Appellate Body recommendations into their future anti-dumping investigations, thus reducing the need for future challenges.

Thomas Prusa and **Edwin Vermulst** assess the Appellate Body report in *US–Anti-Dumping Methodologies (China)*, another dispute involving US Department of Commerce's dumping margin calculation methodologies. The AB ruled against the United States on three important aspects: (1) how it rationalized the exceptional method to justify using the weighted average-to-transaction methodology in dumping margin calculations; (2) treating multiple companies in a non-market economy (NME) as a single NME-wide entity; and (3) the policy of using 'adverse facts available' for such an NME-wide entity. Nevertheless, the authors find some aspects of the decision to potentially encourage greater use of the exceptional method.

The *EU–Poultry Meat (China)* dispute allowed a Panel to clarify obligations for who to include in renegotiations modifying tariffs to tariff-rate quotas–obligations that could be important in an era of Brexit and similar global market unraveling. **David R. DeRemer** and **Federico Ortino** argue that the Panel ruling against most of China's claims as a principal supplier and renegotiation participant is another example of overly narrow and legalistic interpretation that undervalues the broader object and purpose of the GATT. The Panel recognized China's claims for tariff-rate quota allocations in two tariff lines in which it eventually achieved a 50% share of the EU market, but rejected all of China's other claims. Though the GATT offers guidance in determining principal supplying interest, the authors argue that an interpretation more in line with the GATT's object and purpose would permit a wider range of evidence in evaluating China's claim as a principal supplier in renegotiating tariff schedules. The authors also provide legal and economic arguments for obligations to update tariff-rate quotas. A permissive view towards nations using tariff-rate quota modifications to forestall emerging

markets from achieving a principal supplying interest runs against the purpose of a rules-based trading system.

The crux of the *US–Tax Incentives* dispute involves whether a WTO Member can circumvent its obligations under the Agreement on Subsidies and Countervailing Measures by implementing policies that focus on the 'siting', or location, of manufacturing activities rather than the use of domestic over imported goods. The state of Washington was alleged to provide tax incentives to Boeing if it adhered to two siting provisions regarding the location of assembly activities relating to the Boeing 777X aircraft. **Kristy Buzard** and **Panagiotis Delimatsis** argue that the Appellate Body's test to determine that a measure makes a subsidy contingent on the use of domestic over imported goods is too formalistic and narrow, and it was unnecessary to blur the distinction between contingency in law (de jure) and contingency in fact by ruling that identifying a condition requiring the use of domestic inputs is necessary for the determination of a de facto contingency.