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Let's Stick Together (and Break with the Past): The Use of Economic Analysis in WTO Dispute Litigation

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Abstract

The treatment of a number of issues that are being routinely discussed in WTO dispute settlement practice could benefit substantially, were economists to be institutionally implicated in the process. As things stand, the participation of economists in dispute settlement proceedings is infrequent and erratic: for all practical purposes, it depends on the discretion of WTO adjudicating bodies. There is *indirect* evidence that recourse to such expertise has been made, albeit on very few occasions. Institutional reforms are necessary; otherwise, it seems unlikely that the existing picture will change in the near future. A look into ongoing negotiations on the DSU review however, leaves no scope for optimism in this respect: involving economists in WTO litigation is not a priority-issue.

1 A caveat

In this short paper, I do not address the wider issue how economics can help re-draft the existing dispute settlement procedures. The issue addressed here is much narrower: how economics expertise is and has been used so far in WTO litigation. At the end of the paper, I advance some thoughts aiming to explain the scattered use in light of the existing need for such expertise.

2 Is economics relevant in WTO litigation?

The short answer is yes. Actually, there are instances where, absent economics analysis, it is simply impossible to complete through interpretation the largely incomplete WTO contract: how does one calculate dumping or subsidy margin, otherwise? Or how does one calculate damage, a necessary step to ensure equivalence between inflicted damage and authorized countermeasures, as requested by Art. 22.4 DSU? These are but examples, and the list of instances where recourse to economics is *passage obligé* is wider. Such instances are what I will term the *inner* circle of instances where recourse to economics is warranted.

There is however, a *wider* circle of instances where, although past judiciary practice evidences reasonable outcomes (sometimes, at least), the use of economics can greatly benefit the quality of legal analysis. Examples here are abundant.[1] To cite a few: economics can help construct the anti-subsidy counterfactual and thus enable an operational definition of subsidy in Art. 1 SCM; it can help discuss the causality-element (which is a legal requirement for a lawful imposition of duties under all contingent protection instruments) in a meaningful manner; it can provide a

[1] To paraphrase one of TN Srinivasan's favourite quotes, economics can be of help in thinking about anything.

coherent framework to discuss *like products/services*, the *key* concept in the *key* obligation in the WTO edifice, not to discriminate.[2]

At the same time, one should be under no illusions as to how much can be achieved through recourse to economics. For a start, economics cannot undo economically irrational legal instruments, like the *WTO agreement on antidumping*, for instance: judges are agents in a contractual relationship where the principals (the WTO Membership) have the sole responsibility to amend the existing contract; on the other hand, economics will usually not *decide* cases. It will however, provide useful input and contribute towards an *informed* decision.

With this discussion in mind we turn to a brief discussion on the institutional dimension of recourse to economics expertise in the WTO system.

3 Intellectually desirable, institutionally possible

A look into the various provisions of the DSU suggests a rather limited role for the WTO Secretariat in dispute settlement (see Arts. 8 and 12 DSU). In practice, however, the WTO Secretariat plays a much more active role than meets the eye that is confined to a reading of the DSU: essentially, almost all panel reports are being drafted by the WTO Secretariat, panellists reacting to a draft received. This practice is explained, and probably justified too, on many reasons. The dominant explanation however is the lack of incentives (part-timers, little pay, with a high opportunity cost most of the time) for panellists to do what a normal judge does.

[2] This is in great part what the work undertaken by the American Law Institute on WTO has demonstrated, see for a particular reference Horn and Mavroidis (2005).

Now, who is the Secretariat? The servicing of panels has been *de facto* hi-jacked by the legal services. Economists have little input, if at all. Yet, the Secretariat includes trade economists as well. They have been used however, sparingly so. Keck (2004) and the WTO *World Trade Report* (2005) provide evidence of such use: they do not put into question at all the observation that economists will be used on *ad hoc* basis, depending, for all practical purposes, on the will of the *enlarged* panel (i.e., panellists plus Secretariat members).

There is no official record stating the involvement of the Secretariat either. It seems however, that the economic divisions have been used primarily in Art. 22.6 DSU arbitrations, that is, in the segment of the process where a quantification of countermeasures is being requested.[3]

What has been described above is unofficial use of economics expertise. Officially, panels can invite whoever they want, whoever they believe could help them understand better a particular case (and, eventually, help them draft a better report): Art. 13 DSU provides panels with wide powers to this effect. It reads:

> "Each panel shall have the right to seek information and technical advice from *any individual or body which it deems appropriate*. However, before a panel seeks such information or advice from any individual or body within the jurisdiction of a Member it shall inform the authorities of that Member. A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate. Confidential information which is provided shall not be revealed without formal authorization from the individual, body, or authorities of the Member providing the information.

[3] Moreover, when used they have held a rather inconsistent approach in this context: in the *US – FSC* case, the report holds for the proposition that it is impossible to come up with one number when the calculation of the counterfactual (i.e., the world minus the observed illegality) is at stake. Measuring elasticities, the report concludes that the best estimation is a range of numbers. Yet, in the notorious *Byrd* litigation, the Arbitrators do come up with a number. It seems (although as stated, there is no official evidence that this has been the case) that both Arbitrations benefited from economics expertise provided by the Economics Division of the WTO. Of course, it could very well be the case that the representative of the Economics Division was not heard on both occasions.

> Panels may seek information from *any relevant source and may consult experts to obtain their opinion on certain aspects of the matter*. With respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute, a panel may request an advisory report in writing from an expert review group. Rules for the establishment of such a group and its procedures are set forth in Appendix 4." (emphasis added).

A look into practice evidences the willingness of panels to use experts only in SPS (sanitary-phytosanitary) cases, especially when confronted with contradictory expertise.[4] A couple of words seem appropriate to shed some light on this issue: SPS measures have to be supported by scientific evidence (if not based on precaution). A WTO Member challenging a measure (arguing it is WTO-inconsistent), will have to provide the basis for its challenge (scientific expertise). Almost unavoidably, it will ask scientists to represent the scientific opinion on the field. By the same token, a WTO Member whose measures have been challenged as WTO-inconsistent, will have to provide the basis for its measures (scientific expertise).

There is not one reported case where panels have invited experts (other than physicists, chemists and biologists) to provide scientific expertise. And yet, there have been so many opportunities: almost every antidumping-litigation involves a discussion on dumping margins, causality etc. To cite a very recent and quite notorious example: in the recent *US – Upland Cotton* dispute, the panel was presented with elaborate econometric evidence submitted by one of the parties to the dispute. It handled it by itself.[5]

[4] That is, the panels on *EC – Hormones, Australia – Salmon, Japan – Agricultural Products II* and *Japan – Apples* have all had recourse to expertise.

[5] I am not putting into question the final outcome. In fact, I agree with much of the outcome and disagree with certain aspects (treatment of decoupled income payments; disciplines on export credits). But this is besides the point. Getting it right once is no guarantee that an adjudicating body will get it right most of the times.

Hence, even when having to react to expertise, panels prefer to duck the issue. It seems that in the eyes of most panels, the dismal science is not science enough and lay people can develop similar thought patterns (to dismal scientists) even in absence of formal education.

It would indeed be quite encouraging for many people, myself included, if the labour-intensive part of acquiring such education could be set aside completely. Unfortunately, as writings by economists show, the WTO adjudicating bodies by not consulting economists have ended up with some very messy outcomes quite often.[6]

4 Why not defer to expertise?

Why are panels unwilling to have recourse to expertise? The response is not easy. In what follows, I simply aim to highlight *some* of the factors that might have influenced a passive attitude by panels so far. For a start, except for one case, there are, in principle, no formal institutional constraints as to the legal relevance of expertise (under Art. 13 DSU). The one exceptional case is that of *prohibited* subsidies: panels *can* ask a group, the so called PGE (permanent group of experts), established to this effect, to decide whether a scheme is (or is not) a *prohibited* subsidy. Assuming a request to a PGE has been tabled, the requesting panel must accept without any modification the decision of the PGE (Art. 4.5 SCM). A panel can of course, always blame another entity assuming a type I or type II error has been committed. Practice suggests however, that there has been not one single case since 1995 where recourse to the PGE has been made (in more than ten cases so far). Panels (probably at the advice of the Secretariat) might feel that they will be losing too much power by delegating such an important aspect of their work to another entity.

[6] See the contributions by Kyle Bagwell, Gene Grossman, Henrik Horn and Bob Staiger in the ALI reporters' studies cited in the References list.

Art. 13 DSU does not replicate Art. 4.5 SCM in this respect. Panels are free to decide on the legal relevance of the expertise sought. Still, as mentioned above, except for the SPS cases mentioned above, they have never had recourse to expertise. The absence of a PGE-type of legal compulsion notwithstanding, one would rationally expect that panels in practice would defer to expertise, assuming they decided to use such evidence. Indeed, how else (in the absence of qualified panellists) could panels disregard scientific expertise submitted to them? Assuming they do so light-heartedly, they risk violating their obligation to justify their findings (Art. 11 DSU). Hence, *de facto*, as opposed to *de jure*, their 'hands are tied' every time they request expertise. Do they have the incentive to do that then? On the one side, they can always (partly) blame someone else for a wrong outcome. Partly however, it will be their fault for having chosen the wrong experts. On the other side, they will be giving away much of their authority. Except for Nordstrom (2005), no one, to my knowledge, has seriously studies the role and the incentives of the Secretariat. Nordstrom's study supports the observation made above that he Secretariat has an important role in drafting panel reports, and points to its unwillingness to share this responsibility. Panellists who might wish to be repeat players (panellists) should be on the Secretariat's good books since it is the latter that will propose them to the parties any time a panel is being established (Art. 8.6 DSU).

Also, parties to a dispute do not often tilt the balance towards making it necessary for the panel to have recourse to expertise: the Upland Cotton dispute is an exception to the rule that wants parties not to include in their submissions economics expertise. Presented with pure legal constructs as to what causality

amounts to in say an antidumping dispute, a panel might feel less obliged to request multivariate analysis.[7]

On the other hand, there are some more legitimate reasons[8] why there is, in general, a tendency not to request expertise: panels might feel incapable to check the value of the expertise provided to them. At the same time, panels might legitimately expect that (some) experts might have a (strong) incentive to abuse their position (being the informed party in an asymmetry of information-context, where panels are the other party). True there are some mechanisms that might help reduce the size of the problem (by publishing, as Posner suggests, all expertise provided, assuming no confidentiality-related disciplines are not thus violated and inflicting reputation costs on experts who are prepared to testify anything against a certain compensation), but it is very hard to pretend that this issue does not exist. And there is a Division at the WTO, the *ERAD* (*Economics and Research Analysis Division*) staffed, in its vast majority, with Ph.D economists, which could provide the 'check' panels might be looking for. Recourse to its expertise however, as both Keck (2004) and the World Trade Report (2005) make it amply clear is scarce and unpredictable.

5 Can *Lamy* be *l'ami* of a much-needed change?

In this part I do not purport to come up with grand designs as to what to do. I suggest one very simple, easy to implement solution which, to my mind, might work wonders in future adjudication. Whenever the DSU mentions *Secretariat* it should mean *Secretariat* and not the *Legal Affairs Divisions*.[9] Let me explain this point: instead

[7] Although as I mentioned above, there are cases when even when presented with such expertise, panels decided to rule without having recourse to economics expertise.
[8] See among the many writings on this issue, Posner (1999) and Sykes (2002).
[9] A look into the WTO Organigram suggests that there is only one *Legal Affairs Division*. However, every division in the WTO is now staffed with lawyers. The *Rules Division* (dealing with contingent protection-ism) is now servicing almost always panels through its own layers. The *Services Division*

of having lawyers servicing panels, all panels should be serviced by teams of lawyers – economists.[10] There is no need to amend the existing text for that purpose. All that is required is that M. Lamy, upon arrival in Geneva (or a few days later) indicates to its personnel that from now on words will have their meaning, and, as a result, . His advisors can bombard him with a plethora of good arguments: antitrust practice has benefited enormously by opening up to economics expertise. To cite one, among numerous, examples: the European Court of Justice, not far (geographically or culturally) from M. Lamy's background, on three occasions in 2004 reversed the Commission's findings on three merger cases, having first heard economists' arguments to the effect that the merger analysis undertaken by the Commission left much to be desired.

I am not pretending that this change alone will solve all problems. Not at all. But I am indeed suggesting that this is one simple way to provide rationality in dispute adjudication. It is fast relief with all plus and minuses of such prescriptions. But, to my mind, it is necessary relief as well, while awaiting a more thoughtful analysis of the situation.

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has followed suit and so on and so forth. In general, dispute adjudication is probably the most exciting feature of a WTO-bureaucrat's (with the possible exception of the ERAD) career: in between rounds, the only activity in Geneva is dispute adjudication.

[10] Ideally, economists should sit in panels and the Appellate Body.

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