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To sue or not to sue

Role of economics in pre-litigation assessment

Joint WTO/ICTSD/ACWL Workshop on TBT

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The WTO “extended litigation process” (red boxes indicate role for economics in WTO litigation)

**Monitoring:** Identify trade barriers (“TB”)

- Assess scale and scope of TB
- Legal analysis: Assess WTO-inconsistency
- Economic analysis: Assess economic effects of TB
- Policy assessment
- Convince domestic government

**Prelitigation**

- Develop and litigate WTO dispute
- Calculate trade effects
- Design retaliation schedule

**Litigation**

- Monitor withdrawal of WTO-inconsistent measure

**Postlitigation**

- Negotiated settlement
- Foreign policy-making process

**Nonlitigation**
**Economic input in the Prelitigation Phase**

- **Monitoring: Identify trade barriers ("TB")**
  - Identify causes for lost market access, esp. indirect trade barriers ("TB") (e.g. IPRs, subsidies, copyright, TBT, SPS)
  - Use publicly available information sources (GTA, GSI, iTIP, WB, etc.)

- **Assess scale and scope of TB**

- **Legal analysis: Assess WTO-inconsistency**
  - "Sniff test":
    1) How important is problem for exporting economy? Upstream issues?
    2) Can we work around the problem? Can we make problem “work for us?”
    3) How big is problem “politically”? (Who is glad? How glad? Who is mad? How mad?)

- **Economic analysis: Assess economic effects of TB**
  - Quantify **effects** of TB:
    1) Assess economic **effects** of TB on Complainant (jobs, revenue foregone, opportunity costs, knock-on effects, etc.)
    2) Quantify effect of **removing** TB (what is the most likely compliance scenario?)
    3) Quantify welfare effects on other affected WTO Members (rally support)
    4) Quantify costs of **maintaining** TB for Respondent

- **Policy assessment**

- **Convince domestic government**

- **Quantify, what’s at stake before litigating**
- **Bargaining chips for non-litigation phase**
Economic analysis: Assess economic effects of TB

Foreign policy-making process

Policy assessment

Convince Respondent to withdraw offending measure
1. Wave “club” of WTO-inconsistency
2. Help Respondent understand domestic (direct and indirect) costs of maintaining the offending measures and of sustaining retaliation
3. Rallye domestic interests (importers, users, consumers)
4. Rallye international backers (other affected WTO Members)

Convince domestic government

Negotiated settlement

Convince Respondent to settle out of court

Provide real-time negotiation support:
1. Assess economic effects of proposal on Complainant
2. Quantify welfare effects of proposal other affected WTO Members
3. Quantify costs of current proposal for Respondent
Economic input in the Litigation Phase

Develop and litigate WTO dispute

Examples:
- “competitive opportunities”
- substitutability/likeness (Art. III.4 GATT)
- “serious injury”, “unforeseen developments” (Art. XIX GATT)
- Existence of “benefits” (Art. 5 SCM)
- Existence of price suppression and depression, displacement, and impedance (Art. 6.3 SCM);
- “Necessity test” (contribution, less restrictive alternatives) (Art. 2.2 TBT, Art. XX GATT)
- Causation / non-attribution analysis (Art. 6.3 SCM)

Calculate trade effects/adverse effects/amount of the subsidy

Article 22.6 Arbitration
- What is the most reasonable counterfactual?
- Correct metric: trade effects, economic effects, lost revenues
- Quantify direct or indirect effects?
- Effects suffered by whom? Level of inclusion
- Point in time for measuring harm

General modeling issues:
- Model or economic principles?
- Simulation or regression?
- GE or PE?
- Perfect or imperfect competition?
- Linear supply /demand relationships?
- Homogeneous/heterogeneous products?
Economic input in Postlitigation Phase

- Develop and litigate WTO dispute
- Calculate trade effects
- Monitor withdrawal of WTO-inconsistent measure
- Design retaliation schedule
- Develop economic early warning system

- Design retaliation schedule
- Implement retaliation
- Issues:
  - How to maximize impact without “shooting oneself in the foot”?
  - Create political momentum in Respondent country
  - Modeling issues for retaliation schedule:
    - Quantification of non-tariff suspension (i.e., suspension of “other obligations“)
    - Appropriate metric of retaliation:
      - “trade affected”?
      - “trade subject to”?
      - tariffs collected?
    - Cumulating of damages
    - “Carry forward” v. “use or lose”
More information on Sidley Austin’s Pro Bono Program for Developing Countries