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Book reviews

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The Relevant Market in International Economic Law: A Comparative Antitrust and GATT Analysis

by Christian A. Melischek
Cambridge, UK: Cambridge University Press, 2013

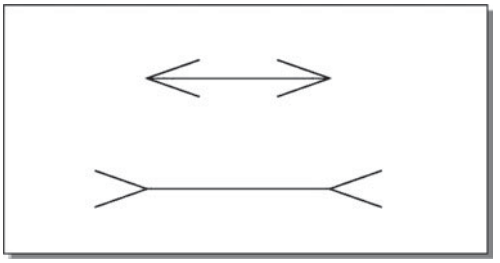
The Relevant Market in International Economic Law treats the problem of drawing up legal comparisons between products to determine whether they are 'like' or 'directly competitive' in the context of national treatment obligations – a test that the author treats as the WTO law equivalent to the determination of the relevant market in antitrust systems. The book focuses on the evolution and utilization of the main WTO national treatment provisions applicable to goods – Articles III:2 and III:4 of GATT – and the role of economics in case law by comparing the WTO legal system with the antitrust systems in the US and the EU. The author has selected a complex and constantly evolving topic – a choice to be commended. For while national treatment may appear to be a very simple WTO obligation, its practical application – a challenge to adjudicators, litigators, and scholars – determines the level of freedom to regulate under WTO law. Among its many contributions, this book provides valuable hints for WTO litigants on what to expect when facing economics in WTO claims.

In his description of WTO law, this research illustrates the blurring of the line that divides the legal test in like products for tax purposes (Article III:2 first sentence), directly competitive products for tax purposes (Article III:2 second sentence), and like products for non-tariff measures (Article III:4). When introducing economics, the border separating the three legal tests tends to disappear. All tests involve a competitive relationship, and the author points out the difficulty in distilling the apparently different levels of competition required by each legal test.

Using economics

The use of economics is not granted amongst WTO litigants. The message the author is sending with respect to the qualitative and quantitative approaches can be explained

Figure 1. Optical Illusion



using a metaphor. Figure 1 above presents an optical illusion comprising a double arrow and a double inverted arrow. Let us assume that the legal test is whether the two lines have the same length. Looking at the two, one might conclude that the line with two arrows is shorter than the one with the two inverted arrows. But when one uses a ruler and actually measures the two lines, the conclusion is that they have the same length. The author implies that that the ruler represents the use of economics, which seems logical and positive. He explores how it can be used and points out its limitations.

Using economics as the legal test and the potential use of the SSNIP test

Among others, the author examines whether each *Border Tax* (plus one) criterion – i.e., the current WTO legal test – makes sense from the economic perspective, and whether each criterion is qualitative or quantitative in nature. He argues that consumers' tastes and habits (the door usually used to insert some economics into case law under Article III of GATT) should not be a stand-alone criterion. Rather, it should be the guiding principle against which to assess physical characteristics, end-uses, and any other relevant qualitative element.

Furthermore, in a section entitled 'A price increase test for Article III of the GATT' the author delves into the issue of whether WTO courts should use the economic test of 'small but significant non-transitory increase price (SSNIP)', relied on in antitrust cases, in applying GATT Article III. The author recognizes that other scholars have rejected this approach. Yet, he explains that the rejection might be shortsighted because the SSNIP test goes 'to the heart of the matter of most protectionist cases'. In particular, he adds, once the test is translated into the context of national treatment, 'the extent to which the domestic firm can raise the price could serve as proxy for the protection conferred to the domestic firm'. Thus, if a discriminatory measure allows an increase in the price of the domestic product, this would point to the existence of competition between the domestic and the imported product.

One may object that it is not clear that the opposite holds. If the price of the domestic product does not increase (or its marginal cost is not affected) as a result of a governmental measure affecting imported products, it is not at all clear that the domestic and imported products are not like or in competition from the perspective of Article III – i.e., that the national treatment obligations should not apply to the measure in question. For instance, in an extreme simplification, Mexico could be exporting pens to the US, but

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not in sufficient quantities so as to modify the pricing behaviour of pen producers in the US. Furthermore, the US price might be maintained by competition with pens imported from the EU, even when the US regulation discriminates only against pens coming from Mexico. The author's emphasis on the fact that the test would relate to the *hypothetical* ability to increase the price partly pre-empts such objections. But the difficulties remain if the SSNIP test is based on real trade data, such as that of our hypothetical example. Thus, in the context of adjudicating on governmental measures that are alleged to afford protection, an SSNIP analysis might not be enough to put to rest the question of whether the products are like/directly competitive and therefore whether the national treatment provisions must apply. As the author himself accepts, 'there is no single completely satisfactory answer to the trade market definition question'. From this point of view as well, the author's exploration of different possible economic approaches is of value.

Using economics as evidence in WTO courts

Throughout the book the author takes care to describe some of the difficulties in using evidence based on economics from the perspective of the parties, the court, and experts. In one particularly useful section, for example, he explains the rationale behind cross price elasticity, guiding the reader on the main steps and lessons that can be learned from multivariate regressions. His descriptive style is very useful for the non-economist and he identifies a number of issues a litigant may face when confronted with cross price elasticity as evidence in a dispute. The author also describes the evidence presented in actual WTO disputes, most of them consumer surveys of qualitative nature. He describes the few cases where an economic analysis has been presented as evidence, explaining how in one case the evidence backfired on the disputing party submitting it (*Philippines–Distilled Spirits*).[1]

Melischek also discusses the burden of proof associated with economic evidence and observes that both tribunals and litigants tend to have exacting standards when it comes to quantitative evidence in particular. He observes that these actors tend to be more flexible in their acceptance of qualitative evidence. Yet as the author points out, the burden of proof should be the same regardless of the kind of evidence used.

Final remarks

Consistent reliance on economics in WTO disputes under GATT Article III does not appear to be in sight. First, complainants prepare claims based on the level of evidence presented in previously successful complaints, and many successful WTO claims on national treatment were not sustained using economics. Accordingly, potential complainants would not necessarily rely on economic evidence when bringing a national treatment challenge. Second, contrary to antitrust authorities, the Appellate Body does not, outside the context of individual cases, issue guidelines on how to read the legal tests embodied in WTO provisions. Therefore, a relevant appeal of a Panel Report would be necessary in order for the Appellate Body to take a definite stance on whether

1 See WTO documents WT/DS396/AB/R and WT/DS403/AB/R.

the legal tests in Article III require 'more economics'. Third, the legislative process of the WTO (e.g., through the Doha Round) is certainly not close to accepting the use of economics. Hence, it is very much up to academia to provide the laboratory to test the possible evolution of economics in WTO dispute settlement, and Dr Melischek's work is a step in that direction. Perhaps a useful further exercise could be to measure, in practice, the competitive relationship between real world products (e.g., local and imported spirits) in various WTO Members (e.g., the US, India and Ecuador) with a view to shedding further light on sound approaches to the question of likeness in WTO adjudication.

If reading a book is like conversing with the author, I have enjoyed and learned a lot from the conversation with Dr Melischek.

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Legal and Economic Principles of World Trade Law

edited by Henrik Horn and Petros C. Mavroidis
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Legal and Economic Principles of World Trade Law brings together some of the most prominent scholars in the fields of international trade theory and international trade law to provide an interdisciplinary analysis of WTO law. This volume is part of a project to improve the interpretation of WTO law that is sponsored by the American Law Institute (ALI). The volume begins with two preparatory chapters, one summarizing a previous ALI volume on the history of the GATT and the other providing a non-technical analysis of the economic approach to trade agreements. The remainder of the book is split into two sections that analyze how the economic approach can be applied to understand the WTO rules and to critique the case law. The topics covered in these studies are border instruments (trade taxes and quantitative restrictions) and domestic instruments (through national treatment), respectively.

In the preparatory chapter 'Why the WTO', Gene Grossman and Henrik Horn provide a clear exposition of the international externalities approach to trade agreements. This approach argues that countries will ignore the negative effect of their trade policies on their trading partners when setting trade policy, so that all countries can gain from a trade agreement that results in mutual reduction of protectionist policies. In a broad class of trade models, including many where political considerations play a role, the negative externality from tariffs operates through the terms of trade and will be larger the greater the market power of the tariff-setting country. Grossman and Horn also discuss the commitment approach to trade agreements, which emphasizes the potential for trade agreements to be used by governments to alleviate domestic protectionist pressure. They argue that the commitment approach is primarily a complement to the market power model, since it requires partner countries to use their market power to enforce commitments.

A main theme addressed in this chapter and the study on border instruments by Kyle Bagwell, Robert Staiger, and Alan Sykes is the ability of the terms-of-trade theory to explain the features of the WTO agreement. The terms-of-trade model has produced