

“Issues of Economic Analysis in International Trade Litigation”

For: St. Petersburg State University
Department of World Economy

Jan Bohanes

The course examines the interplay of legal and economic issues in particular types of WTO litigation. Economic analysis is increasingly relied upon in the adjudication of disputes between WTO members and is being used at an increasingly sophisticated level. The resulting enhanced economic credibility of WTO adjudication is interesting not only from a systemic and academic perspective. It also changes the rules of the game for the litigating parties, who must rely to a greater extent on the input of economists, which in turn also boosts the standing and importance of economic experts. At the same time, the economic analysis is firmly embedded in a legal rules-bound context and must therefore also observe the idiosyncrasies of the underlying legal framework. In short, lawyers and economists must be aware of each other's tools, rules, language, and methodological approaches.

The course examines three areas of such interplay of legal and economic analysis in WTO dispute settlement. The first area is the determination of nullification and impairment in so-called “arbitrations” surrounding the WTO process for authorizing trade sanctions. To recall, where a WTO Member fails to comply with previous adverse judgments of WTO panels and the Appellate Body and fails to rectify WTO-inconsistencies in its internal legal order, the complaining party may request authorization from the Dispute Settlement Body to impose trade sanctions on the non-complying member. The extent of the permissible trade sanctions may be subject to an independent determination by an arbitral panel, acting pursuant to legal standards either under the Dispute Settlement Understanding (DSU) or the Agreement on Subsidies and Countervailing Measures (SCM Agreement). The degree of sophistication of the economic analysis

performed by these arbitral panels has dramatically increased over the past 15 years. The course would examine these arbitral awards and cast a spot-light on not only the economic methodologies applied, but also the way these methodologies have interacted with legal considerations (e.g. choice of counterfactuals).

The other two areas include in-depth discussion and analysis concern the “serious prejudice analysis” under Articles 5 and 6 of the SCM Agreement. Pursuant to these provisions, in particular Article 6.3 of the SCM Agreement, WTO panels are called upon to determine whether subsidies granted by a WTO Member have caused “serious prejudice” to the interests of another WTO Member. For instance, the subsidies may have displaced or impeded exports/imports or may have led to lost sales or price effects, such as price suppression, price depression or price undercutting. WTO case law holds interesting lessons on how these provisions have been applied, in particular the rulings in the *US – Upland Cotton*, *US – Upland Cotton (21.5)* and in the *Airbus/Boeing* disputes.

Finally, the course examines issues of trade-restrictiveness under the *Agreement on Technical Barriers to Trade (TBT Agreement)*. Specifically, technical regulations – at the very least in challenges under Article 2.2 – must be shown to have trade restrictive effects. While in some circumstances, such a trade-restrictive effect may be obvious, in other circumstances more thorough analysis may be required. The course would examine one relevant determination by a WTO panel and would provide for a discussion of related potential scenarios.

Beyond presentations and class discussion, the course features a simulation exercise. For instance, students prepare economic analysis on the basis of a hypothetical case and could then present this case in the format of a “moot court” exercise, designed to simulate a WTO process.

Didactic Goal: The course would enable students to increase their awareness of how economic issues are treated in international inter-governmental trade litigation, and how the economic and legal disciplines interact in this regard. Far beyond the confines of WTO dispute settlement, these insights could also be useful for students who may in the future advise lawyers in other types of

litigation or legal analysis, for instance, quantifying damages or other economic aspects in the context of commercial or investment arbitration.

Duration: 14 hours.