

Comment on Niall Meagher's

"Representing Developing Countries in WTO Dispute Settlement Proceedings"

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I. Introduction

Niall Meagher's paper presents a very interesting, accessible, and poignant account of some of the practical problems facing poor countries (and the individuals that advise them) in WTO dispute settlement litigation. Furthermore, the paper does much to describe the role of the Advisory Centre on WTO Law (ACWL), as well as some of the limitations that it confronts when providing subsidized legal assistance services to developing countries.

This comment focuses on three areas related to provision of WTO litigation assistance to poor countries.¹ My intention is to use an economic perspective to expand on (and complement) some of the points that Meagher's analysis touches on only briefly. I first highlight the role that economics could play, before then advocating for an increased role for the complementary and necessary services that economists should contribute to the lengthy process of WTO litigation. If the purpose of subsidized intervention on behalf of poor country governments is to more fully *inform* (as opposed to simply guide) the client's consideration of the WTO litigation tool, I will argue that

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¹ A more complete discussion of a number of the points raised here is provided in Chad P. Bown and Bernard M. Hoekman (2005) "WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector," *Journal of International Economic Law* 8(4): 861-890.

providing poor country litigants with more economic information is extremely important. Finally, in the last section, I consider a somewhat broader perspective by discussing some of the benefits to expanding legal assistance centre services like the ACWL, relative to alternative sources that might provide basic legal services to developing countries.

II. The Role of Economics in Providing Assistance to Developing Countries in WTO Litigation

Among the many questions to consider when thinking about how to effectively provide assistance to poor countries in potential and/or actual WTO litigation, I highlight one particular quote from Meagher's paper, as it forms an excellent starting point for my discussion,

“The fact that a developing country is likely to prevail, in a legal sense, in WTO dispute settlement proceedings, is simply not enough to justify going ahead with the case. Careful thought must be given to whether and how the litigation strategy can be shaped to maximize the practical benefit of the eventual remedy.” (p. 10 of the 11/29/2005 version)

As Meagher notes, the lawyers and legal advice provided by an institution like the ACWL is one critical component to assisting poor countries in enforcing their market access rights in WTO litigation. Nevertheless, the provision of legal advice alone is a necessary but insufficient service to poor country government officials and domestic

stakeholders, given the “extended WTO litigation process”² that is required if a complainant is to achieve an economically successful outcome to an initiated dispute.³ I will argue that there is a necessary and (as yet) untapped role for economics and economists to complement the legal analysis provided by attorneys and institutions like the ACWL. In the next two sections I detail how it is important to more extensively use economics both *before* any WTO litigation is started (section A.) as well as *during* the actual litigation itself (section B.).

A. The use of economics in the pre-litigation phase

There have been over 330 formal disputes initiated during more than ten years of WTO dispute settlement activity thus far. In most of these disputes, there were nonparticipating members that also had a market access interest in the litigation and thus an incentive to engage as either a co-complainant or even as an interested third party. Furthermore, there are likely hundreds of other latent WTO transgressions that members could have brought forward to litigate but of which they were not aware or which they chose not to litigate. From the perspective of this comment, the primary implication is that any WTO member

² By “extended WTO litigation process,” I refer to the idea that bookending the period of *actual* litigation at the DSU are critical pre- and post-litigation phases. The pre-litigation phase is where domestic governments must decide what potential WTO violations to investigate and pursue at the DSU based on legal and economic viability, and the post-litigation phase is where it is necessary to mobilize political constituencies in the (guilty) respondent country in order to generate compliance and the realization of market access benefits, potentially via politically targeted retaliatory threats.

³ By economically successful, I refer to an outcome that results in the respondent complying with its WTO obligations, which would frequently mean the respondent increasing market access available to the complainant. For an empirical analysis, see Chad P. Bown (2004), ‘On the Economic Success of GATT/WTO Dispute Settlement’, *The Review of Economics and Statistics* 86(3): 811-823, and Chad P. Bown (2004), ‘Developing Countries as Plaintiffs and Defendants in GATT/WTO Trade Disputes’, *The World Economy* 27(1): 59-80.

country is likely to face a menu of potential and/or existing disputes that it could formally engage in at any point in time.

Nevertheless, all countries face financial and/or human capital constraints that limit the resources they can allocate to WTO litigation. Thus an important economic question is, where should a country focus its limited litigation resources? Despite the existence of a legal services centre such as the ACWL that can assist the poor country once it has made this decision, the issue will continue to exist simply because the ACWL cannot possibly provide the unlimited resources it would take to aid each country in every possible dispute that it *might* pursue. Furthermore, while one input needed to answer the resource allocation question is information on the legal merit of each potential case, other important factors to consider include the expected economic (market access) benefits to pursuing different cases as well as even the political likelihood of generating respondent compliance should the complainant obtain a legal victory.

The pre-litigation phase is thus one area where it is arguably necessary for economists to complement the legal advice provided by institutions like the ACWL in order to inform poor country governments about which are the most economically beneficial cases to pursue. As poor countries face a menu of choices of potential disputes to litigate, there is scope for the expertise of economists knowledgeable about international trade, industrial organization, and the distortions generated by trade policy interventions to be used to provide client governments with estimates of the market access gains under various forms potential respondent compliance with DSU rulings. Poor country client governments could then combine this economic information with the complementary information on the likelihood of a legal victory (provided by attorneys) as

well as the likelihood of respondent compliance (provided by political scientists), to make a more fully informed calculation as to whether it should pursue any particular piece of WTO litigation.⁴

It is increasingly important for advisors to work cooperatively with others outside of their area of expertise so that poor country governments receive accurate and complete information on which to base their choices in the WTO system. Furthermore, for advisors that are interested in promoting the sustainability of the WTO system, it is critical that they neither undersell nor oversell what WTO *litigation* is likely to accomplish in terms of market access benefits. Providing a poor country government client with unrealistic economic expectations in one particular dispute could have adverse consequences if it breeds domestic dissatisfaction with the overall WTO system once it is clear that such benefits have failed to materialize. The failure to fulfill unrealistic expectations regarding export market access could trigger additional mercantilist political pressure that may force a poor country government into erecting new WTO-inconsistent *import* barriers of its own. The effect would be to compound the initial problem, as such an action is likely to only the country's own interests by eliminating the *import*-side benefits to WTO membership that economists argue are equally beneficial (to exporting) via consumer access to new varieties of goods and services at lower prices.

Nevertheless, despite the importance of accurate and complete economic information needed in the pre-litigation phase, an open question is how to institutionalize

⁴ There is also a useful role for economics in the post-litigation phase (which may help influence client government expectations in the pre-litigation phase through backward induction), as economists can work with political scientists to identify viable retaliation threats (e.g., products exported from politically sensitive districts) so as to increase the likelihood of respondent compliance with DSU rulings.

its provision so as to make it accessible to the poor country governments and domestic stakeholders that need it.

B. The use of economics during the WTO litigation phase

As Meagher notes, the disputes of greatest interest to potential developing country complainants are those focused entirely on immediate market access (economic) benefits.⁵ Poor countries may also feel pressure to pursue cases with direct (and transparent) economic benefits, as winning these cases and gaining compliance could legitimize the country's overall participation in the WTO system.⁶ To some extent this trend is apparent in the overall data even among the WTO membership at large, as DSU challenges to *trade remedies* (i.e., antidumping, countervailing duty and safeguard statutes, investigations and impositions) are increasingly what members are litigating over – e.g., in the last 5-7 years, trade remedy challenges alone have made up roughly 50% of the entire DSU caseload.⁷

Given that poor country litigation is likely to focus disproportionately on market access disputes such as those involving trade remedies, one implication is that there is a heightened role for technical economic analysis and economic support during the process of actual litigation. The technical economic evidence frequently at issue in trade remedy

⁵ With a tighter resource constraint, poor countries may be less interested in pursuing cases involving “systemic” issues, i.e., cases where the removal of WTO-inconsistent policies would generate substantial positive externalities to other member countries.

⁶ From this perspective such disputes may also generate positive externalities that go beyond the particular exporting firms; nevertheless, such spillover benefits in this case would remain *within* the complainant country.

⁷ One notable exception is the United States which only rarely chooses to challenge other WTO members' use of trade remedies. For a discussion and empirical investigation of what factors influence challenges to U.S.-imposed trade remedies, see Chad P. Bown (2005) "Trade Remedies and World Trade Organization Dispute Settlement: Why Are So Few Challenged?" *Journal of Legal Studies* 34(2): 515-555.

cases may include econometric and statistical estimates for the level of “injury” associated with a WTO-inconsistent policy, for the attribution of injury to imports (i.e., “causation” as in antidumping or safeguard investigations), for the “adverse effects” that stem from domestic subsidies, for the use of “zeroing” in dumping margin calculations, or even for estimating the size of damages (withdrawal of equivalent concessions) in arbitration awards.⁸ With the proliferation in national antidumping laws and impositions of administered protection around the world,⁹ the near-term future of the WTO caseload might increasingly focus on these types of disputes.

For those groups that provide advice to developing country governments in the actual litigation of such disputes at the WTO, there is therefore a need to combine a thorough understanding of the law with the implications of economic reasoning and technical economic evidence, both in the preparation of legal briefs as well as the rebuttal or assessment of evidence provided by an economist “expert” witness.

For an institution like the ACWL that is likely to face repeated requests to assist in the litigation of challenges to trade remedies imposed on their clients’ exports, an important issue is how to cost-effectively combine such a legal-economic service. To address the need for competent economic analysis during the litigation phase, there are at least three different models that those providing legal advice might therefore choose: 1)

⁸ For a review and discussion of some of the technical economic techniques used in DSU cases, see WTO (2005), ‘Economic Analysis in WTO Dispute Settlement’, in *World Trade Report 2005* (Geneva: WTO). For a discussion of how economic evidence is applied in U.S. trade remedy cases, see James P. Durling and Matthew P. McCullough (2004), ‘Teaching Old Laws New Tricks: The Legal Obligation of Non-Attribution and the Need for Economic Rigor in Injury Analyses under U.S. Trade Law’ in E.K. Choi and James Hartigan (eds.) *Handbook of International Trade*, Vol II (USA: Blackwell).

⁹ The biggest users of antidumping are increasingly developing countries such as India, South Africa, Brazil, Argentina, Turkey and Mexico. For a discussion and presentation of the data, see Chad P. Bown (2005) “Global Antidumping Database, Version 1.0” Washington, DC: *World Bank Policy Research Paper No. 3737*, October.

try to ignore the technical economics when developing briefs and arguments, 2) continually seek out and hire outside economists to work on cases via the “expert witness” model, or 3) have an economist on staff “in house” to work with the attorneys by advising on the economics of these cases not only for expert testimony, but also in argument-developing and brief-writing.

It should be noted that some private sector law firms with large trade remedy practice groups that litigate at the national level have gone to a business model where they now have an empirically-trained M.S. or Ph.D.-level economist permanently on staff and will only seek out external help when they need an expert (“star”) witness for testimony. Such an approach could make sense for institutions like the ACWL as well, especially if the economic expertise also can be used to provide clients with accurate economic information at other, related stages of the extended litigation process.

III. Alternatives to the ACWL Model and Implications

A final consideration is a brief thought experiment motivated by the following question: what would legal assistance services to poor countries look like without an institution like the ACWL? Below I consider a number of different alternatives, which I hope highlights the important role played by the ACWL.

One obvious alternative to an ACWL is simply that poor countries do not receive any external assistance for legal representation in WTO litigation. Suppose, for a moment, that we even abstract from concerns over equity or justice, about which economic analysis may be relatively ill-suited to inform. Nevertheless, to the extent that participation in WTO litigation either enhances the public good characteristics of the

system or generates positive externalities,¹⁰ the failure of an entire segment of the WTO membership (i.e., poor countries) to have their market access rights enforced raises economic efficiency concerns as well. For many reasons, this is therefore not an attractive alternative to contemplate.

A second alternative to poor countries receiving representation from the ACWL would be increased representation either on a pro-bono basis by private sector law firms or by issues-based organizations such as non-governmental organizations (NGOs). Unfortunately, this type of representation is likely to skew the distribution of cases that are litigated away from the immediate, market access cases that may be most important to the developing country client itself. Instead, this form of legal assistance may overemphasize a caseload of disputes relating to issues that may have precedent-value, involve systemic issues, or which might generate substantial media attention benefits for the private law firm (useful for client-building purposes) or for the NGO (useful for funding purposes as they seek donors going forward). Non-issues based, non-partisan entities like the ACWL are the best hope of providing legal assistance that is in the client government's own economic interest.

A third alternative is that poor countries finance the education of their own stock of trade litigators, who would then receive on-the-job training through use of the country's own national trade remedy (antidumping, countervailing duty, and safeguard) laws. This is also unattractive as it diverts scarce human capital away from being utilized

¹⁰ The positive externalities extending beyond a particular exporting industry but remaining within a country would be if such participation increases the legitimacy of the WTO in the eyes of domestic constituencies, perhaps allowing the country to further realize economic benefits on the import side by willingly binding their trade policies under WTO disciplines and engaging in deeper multilateral market access negotiations. Alternatively, the externalities might occur across countries if the result of the dispute is increased market access benefits accruing to exporters in different countries as well.

on more pressing domestic legal problems and resources away from more pressing development needs. As experience from other developed *and* developing countries would now indicate, this is a particularly socially costly way of providing lawyers such experience as it leads to additional import restrictions which tend to persist over time.