

## CONTENTS

	List of Table	wledgments page xiii Tabbreviations xv of cases xvii of legal texts xxvii
	Intro	luction 1
	I	The research question and scope of the study 1
	II	Practical relevance of the research question 9
	III	Methodology and structure 11
1	Comp	parison of antitrust and international trade law 13
	I	Emphasizing differences or commonalities? 13
	II	Antitrust law 15
		1 Introduction 15
		2 Promotion of economic efficiency 17
		3 Promotion of consumer welfare 19
	III	WTO/GATT law 21
		1 Introduction 22
		2 Promotion of economic efficiency 23
		3 Promotion of total welfare 25
	IV	Congruence in efficiency and welfare standards 26
2	The ro	ole of market definition 29
	I	Antitrust law 29
		1 Introduction 29
		2 Market definition as a statutory requirement 30
		3 Market definition as an analytical tool in antitrust
		analysis 34
		A Overview 34
		B Legal definition of market power 35
		C Economic definition of market power 36
		vii



viii		CONTENTS			
			<ul><li>(i) Direct measurement of market power</li><li>(ii) Indirect measurement of market power</li><li>38</li></ul>		
		II	Article III of the GATT 40		
			1 Introduction 40		
			2 The non-discrimination obligation of national treatment 43		
			3 The legal framework of GATT national treatment 44 A The structure of Article III of the GATT 44  (i) Fiscal measures: Article III:2(1) and (2) of the GATT 45		
			(ii) Regulatory measures: Article III:4 of the GATT 49		
			B The scope of the national treatment principle 52 (i) Beneficiaries 52		
		***	(ii) Types of discriminatory treatment 53		
		III	Conclusion 54		
	3	Analy appro	rtical evolution from the traditional to the economic ach 57		
		I	The traditional formalistic approach 57		
			1 Antitrust law 58 A US antitrust law 58 B EU antitrust law 63 2 Article III of the GATT 67 A The traditional approach: the Border Tax Report 68 (i) The Border Tax criteria 68 (ii) Legal and de facto status 70 (iii) The evolution of the traditional approach 72 (a) Prominence of physical characteristics and tariff classifications 73 (1) Physical characteristics 73 (2) Tariff classifications 74 (3) GATT 1947 jurisprudence 75 (4) GATT 1994/WTO jurisprudence 77 (b) End-uses 82 (c) Consumers' tastes and habits 84		
			B Other non-economic approaches 88  (i) The aims-and-effects test 88  (ii) Process- and production-based methods 92		
		II	The economic approach 94		
			1 Antitrust law 95 A US antitrust law 95 B EU antitrust law 97		
			2 Article III of the GATT 100 A A market-based approach 100		



4

	CONTENTS	
	B Marketing strategies and distribution channels 107	
III	Assessment of the analytical evolution 109	
	1 Reasons for the initial reluctance toward economics 109	
	2 Reasons for the rise of economics 111 A Paradigm shifts 111 B "Country of the rise of economics 117	
	B "Supply-side" factors 117 C Problems with the traditional approach 119	
	<ul><li>(i) Arbitrariness 119</li><li>(ii) Failure to respond to the pertinent</li></ul>	
	question 123	
	<ul><li>(iii) Predetermined results 124</li><li>(iv) Failure to reflect degrees of substitutability 126</li></ul>	
	3 Reasons for the transitory impact of economics in	
	GATT 128	
IV	Conclusion 130	
	eptualizing an economic approach to market	
defini	tion 132	
I	Introduction 132	
II	Market definition framework: a matter of treaty	
	interpretation 133	
	1 Ordinary meaning of the words 134	
	2 Contextual modality 135 A Immediate context: the WTO legal regime 136	
	B Broader context: the EU legal regime 137	
	3 Historical modality 140	
	4 Object and purpose 141	
	A Introductory remarks 141 B The standard of discrimination and the interpretation of	
	protectionism 142	
	C The marketplace comparator 145	
III	The content of a marketplace test 148	
	1 The relevant economic force: demand-side substitutability 149	
	2 A price increase test for Article III of the GATT 158	
IV	Potential competition 162	
V	The relevant "market" concept 168	
VI	The role of the traditional criteria 178	
VII	Making sense of the different Article III prohibitions 181	



 $\mathbf{x}$ 

5

	CONTENTS
VIII	Conclusion 184
The in	nplementation of an economic approach: quantitative ods 185
I	Introduction 185
II	The law and economics of expert economic testimony 190  1 Institutional and procedural frameworks for expert testimony 191
	2 Problems with party-proffered expert testimony 195 A Introductory remarks 195 B Asymmetric information and principal–agent conflict of interests 196 C Adversarial bias (partisanship) 198 D Conflicting expert testimony 199 E Validity of these concerns 200 3 Remedial options 201 A Introductory remarks 201 B Expert panelists 202 C Institutional support of panelists 204 (i) Economic expertise in the WTO Secretariat 204
	(ii) Education and guidance of panelists 205  D Panel-appointed independent economic experts 206  E Evidentiary and procedural solutions 209  (i) Admissibility rules 210  (ii) Cross-examination 212  4 Analysis of the remedial options 213  A Evidentiary and procedural solutions 214  B Expert panelists, institutional support, and
	Panel-appointed experts 217 5 Conclusion 221
III	Analysis of price elasticities of demand 223
	1 The foundations of the analysis of price elasticities of demand 224
	2 The theoretical role of elasticity estimates in antitrust law and Article III of the GATT 225
	A conceptual framework for the use of cross-price elasticities under Article III of the GATT 230  A General observations 231  (i) The threshold issue 231  (ii) The relevant cross-price elasticity 233



			CONTENTS X	i
		(iii)	Wholesale or retail level cross-price	
			elasticity? 235	
		(iv)	Cross-price elasticity in tension with sovereignty? 237	
	В	Pote	ntial estimation problems under GATT 239	
		(i)	Misleading price elasticities of demand 239	
			(a) Elasticities and distorted competitive conditions 239	
			(b) Elasticities and distorted customer	
			perceptions 243	
		(ii)	New products problem 247	
	С		at can be learned from cross-price elasticities of	
			and for Article III purposes? 249	
4	The	found	dations of the econometric estimation of price	
			es of demand 253	
	A		oduction 253	
	В		pasics of regression analysis 255	
		(i)	Simple regression 255	
		(ii) (iii)	Multiple regression 260 The estimation of demand elasticities using multiple	
		(111)	regression 263	
	С	Appı	raising multiple regression analysis 266	
		(i)	Standard errors, confidence intervals, statistical	
			significance, and <i>t</i> -statistics 266	
		(ii)	"Goodness of fit" 270	
	D		stical and economic significance 271	
5			trics in market definition case law 273	
	A		non-econometric and econometric estimation of price icities of demand 273	
		(i)	Descriptive approximations of elasticities 273	
	ъ	(ii)	Econometric estimations of elasticities 280	
	В		cal assessment of the econometric estimation of	
		(i)	icities in Article III case law 289 Variables included in the regressions 290	
		(ii)	Data issues 293	
		(iii)		
		(iv)	Reliability of regression results 295	
		(v)	Transparency and accountability 299	
			ges and disadvantages of quantitative evidence 303	
6	Adv			
6	A	Adva	antages of quantitative evidence 303	
6		Adva Disa	antages of quantitative evidence 303 dvantages of quantitative evidence 307	
6	A	Adva	antages of quantitative evidence 303	



xii

## CONTENTS

- (iii) Weight and cost of the proceedings 314
- (iv) Eroding the ability to prove while increasing the ability to disprove 315
  - (a) The high technical burden for establishing econometric evidence 315
    - (1) General principles of the standard of proof 316
    - (2) Standard of proof in antitrust and WTO law 318
    - (3) Relationship between statistical significance and standard of proof 321
    - (4) A law and economics perspective on the level of statistical significance and standard of proof 322
  - (b) The imperfection of econometric evidence and its implications for the standard of proof 325
  - (c) Establishing a level playing field in the case of econometric evidence 327
- 7 Conclusion 330

Conclusion 332

Bibliography 339 Index 364