THE USE OF ECONOMICS IN INTERNATIONAL TRADE AND INVESTMENT DISPUTES

Dispute settlement mechanisms of international trade or investment agreements are under increased public scrutiny. With chapters contributed by leading practitioners and academics, this volume draws upon investor–state arbitration and competition/antitrust disputes to focus on the application of economics to international trade law and specifically WTO law. Written in an accessible language suitable for a broad readership while providing concrete insights designed for the specialist, this book will be of use to those active or interested in the related fields of trade disputes, competition law, and investor–state arbitration.

Marion Jansen is the Chief Economist of the International Trade Centre (ITC). She previously held senior positions in the World Trade Organization (WTO) and the International Labor Office (ILO). Her publications in the field of international trade and global governance cover domestic regulation and the social impacts of globalization. She holds a PhD in Economics from the Universitat Pompeu Fabra (Barcelona, Spain).

Joost Pauwelyn is Professor of International Law at the Graduate Institute of International and Development Studies in Geneva, and the Murase Visiting Professor of Law at Georgetown Law Center. He served as legal officer at the WTO and advises governments and non-state actors in dispute settlement under the WTO and FTAs and investor–state arbitration. He is on the roster of WTO panelists and is a Member of the ICSID Panel of Conciliators.

Theresa Carpenter is Executive Director of the Centre for Trade and Economic Integration at the Graduate Institute of International and Development Studies, Geneva. Her previous publications have focused on regional trade agreements and their relationship to the WTO. Theresa holds a PhD in Economics, focusing on the links between trade and investment, from the Graduate Institute of International and Development Studies, Geneva.
The Use of Economics in International Trade
and Investment Disputes

Edited by

MARION JANSEN, JOOST PAUWELYN and
THERESA CARPENTER
Contents

List of Figures and Tables viii
List of Contributors x
Acknowledgements xvii

1 Introduction: The Use of Economics in International Trade and Investment Disputes: Complex, Contentious but Oh-So-Important for the Sustainability of Trade and Investment Treaties 1
Marion Jansen, Joost Pauwelyn and Theresa Carpenter

PART I THE USE OF ECONOMICS IN INTERNATIONAL TRADE AND INVESTMENT DISPUTES: A PRACTITIONER’S VIEW 13

2 Integrating Economic Analysis into WTO Dispute Settlement Practice: A View from the Trenches 15
Robert Teh and Alan Yanovich

3 Present at the Creation: Economists and Accountants in International Trade Law Practice 47
Tom Graham

4 The Role of Economics in WTO Dispute Settlement and Choosing the Right Litigation Strategy – A Practitioner’s View 55
Christian Lau and Simon Schropp

5 On Interpretation and Economic Analysis of Law 76
David Unterhalter

6 The Client’s Perspective 83
James Flett
## Contents

7 The Use of Economics in Competition Law: What Works and What Doesn’t Across National Jurisdictions?  
*Bruce Malashevich and Kathryn Kobe*

### PART II THE USE OF ECONOMICS IN INTERNATIONAL TRADE DISPUTES: ECONOMIC VERSUS LEGAL THINKING

8 What to do if Economic Insights are Disputed: On the Challenge to Deal with Competing and Evolving Theories or Empirics in International Trade Disputes  
*Anne van Aaken*

9 Lost in Translation: Communication and Interpretation Challenges Related to Economic Evidence in Trade Disputes  
*Marios C. Iacovides and Marion Jansen*

10 Land Rich and Cash Poor? The Reluctance of the WTO Dispute Settlement System to Entertain Economics Expertise: An Institutional Analysis  
*Petros C. Mavroidis and Damien Neven*

11 The Economics of Actionable Subsidy Disputes  
*Jorge Miranda*

12 In Search of a “Genuine and Substantial” Cause: The Analysis of Causation in Serious Prejudice Claims  
*Pablo M. Bentes*

13 The Games We Play – Simulation Models in Merger Analysis and Their Potential Use in Trade Litigation  
*Amar Breckenridge*

### PART III THE USE OF ECONOMICS IN INTERNATIONAL INVESTMENT DISPUTES: LIABILITY AND DAMAGES

14 Aligning Loss and Liability – Toward an Integrated Assessment of Damages in Investment Arbitration  
*Wolfgang Alschner*

15 An Economic Assessment of Contracts, Requests for Contract Reform, and Damages in International Arbitration  
*Bastian Gottschling and Willis Geffert*
# Contents

16 Economics in Investor–State Arbitration beyond Quantum  
Carla Chavich and Pablo López Zadicoff  
335

17 Assessing Investor Damages Involving Publicly Traded  
Companies – with Examples from the Yukos Cases  
Manuel A. Abdala and Alan Rozenberg  
349

18 From the Law of Valuation to Valuation of Law? On the  
Interplay of International Law and Economics in Fair Market  
Valuation  
Fuad Zarbiyev  
370

Conclusion: The Use of Economics in International Trade  
and Investment Disputes: Summing Up and Looking Forward  
Marion Jansen, Joost Pauwelyn and Theresa Carpenter  
383

Appendix to the Conclusion: Guidelines for submitting quantitative  
evidence in WTO or investor-state dispute settlement proceedings  
Marion Jansen, Joost Pauwelyn and Theresa Carpenter  
394

Index  
397
Figures and Tables

Figures

4.1 The “extended” WTO litigation process 57
7.1 Distinguishing “practical” (i.e., simple and straightforward to the noneconomist) versus a more “theoretical” and sophisticated quantitative analysis. 114
11.1 Market Price Higher than Target Price and Loan Rate 228
11.2 Market Price Lower than Target Price but Higher than Loan Rate 230
11.3 Market Price Lower than Target Price and Loan Rate 231
11.4 Market Price Higher than Target Price and Loan Rate with Inelastic Supply 233
11.5 Market Price Lower than Target Price but Higher than Loan Rate with Inelastic Supply 234
11.6 Market Price Lower than Target Price and Loan Rate with Inelastic Supply 235
11.7 Market Price Lower than Target Price, Loan Rate and Total Cost 236
14.1 Steps in investment arbitration to align loss and liability to calculate damages 294
14.2 Time-focus of the Different Elements of Legal Causation 313
16.1 The Coin Toss “Investment”: Possible Outcomes 337
16.2 Post-Award Interest and Market Value of the Award 346
17.1 Actual Yukos Stock Price Evolution 358
17.2 Evolution of Yukos Stock Price, Quasar Benchmark, and RTS Oil & Gas Index (Jan 2003 to Apr 2004) 363
17.3 Evolution of Yukos Stock Price, Quasar Benchmark, and RTS Oil & Gas Index (Jul 2003 to Dec 2007) 364
List of Figures and Tables

Tables

2.1 Illustrative cases where economic analysis has been submitted by the parties 22
10.1 A list of all AB members so far 201
13.1 Principal Applications of Cournot and Bertrand Simulation Models 264
14.1 Summary of the specific tasks involved at the different investment arbitration stages 315
Contributors

Prof. Dr. iur. et lic. rer. pol. Anne van Aaken is a Professor for Law and Economics, Legal Theory, Public International Law and European Law at the University of St. Gallen, Switzerland. Her main research areas are international law with a special focus on international economic law and its interaction with other areas of international law and economics. She has published widely on these topics. She holds a Master’s in Law from the University of Munich, a PhD in Law from the University of Frankfurt/Oder, a Master’s degree in Economics from the University of Fribourg, Switzerland, and is admitted to the bar in Germany.

Dr. Manuel A. Abdala is Executive Vice President with Compass Lexecon. He has provided written and oral expert testimony as an economist in more than 150 international arbitration matters involving investment treaty cases between private investors and governments, as well as commercial disputes. He has published extensively on topics covering infrastructure economic regulation, utility privatization and valuation, and competition policy. He has been advisor to the World Bank, and to several governments, regulators, and industries on privatization and regulation of infrastructure sectors. He holds a PhD in economics from Boston University.

Wolfgang Alschner is an Assistant Professor at the University of Ottawa’s Faculty of Law and a former post-doctoral researcher at the Graduate Institute of International and Development Studies in Geneva and the World Trade Institute in Bern. He worked for UNCTAD’s International Investment Agreements Section as a consultant for several years and has published in peer-reviewed journals on WTO law, regionalism, and investment law and arbitration. His current research focuses on the empirical and computational analysis of international economic law. He holds a PhD in International Law and a Master’s degree in Law from Stanford Law School.
List of Contributors

Pablo M. Bentes is Managing Director, International Trade & Investment, at Steptoe & Johnson LLP in Washington, DC, USA. He advises foreign clients on WTO dispute settlement procedures and frequently appears as lead counsel before WTO panels and the Appellate Body. Prior to joining Steptoe, he was a Legal Officer with the Appellate Body Secretariat of the WTO (2006–2012). He holds a JD and an MBA (Finance and Risk Management) from the University of Sao Paulo, and an LLM (International Law) from the University of Miami. He is a PhD candidate with the Graduate Institute of International and Development Studies in Geneva, Switzerland, and a Visiting Professor at the University of Miami School of Law.

Amar Breckenridge is a Senior Associate at Frontier Economics, an economic consulting firm. He advises clients on matters related to international trade, environmental economics, public policy, and competition. Prior to joining Frontier Economist, he was a staff economist at the World Trade Organization. His research includes the economics of trade disputes, trade and development, resource and energy economics, and climate change.

Theresa Carpenter is Executive Director of the Centre for Trade and Economic Integration at the Graduate Institute of International and Development Studies, Geneva. Her previous publications have focused on regional trade agreements and their relationship to the WTO. Theresa holds a PhD in Economics, focusing on the links between trade and investment, from the Graduate Institute of International and Development Studies, Geneva.

Carla Chavich is a Vice President in the New York office of Compass Lexecon. She has participated in more than 35 international arbitration cases and in several regulatory consultancy projects. She has provided regulatory opinion and designed complex valuation models related to assets in diverse industries and locations. She is a CFA® charterholder and holds an MBA from Harvard Business School. She obtained her degree in Economics from Universidad de San Andrés with summa cum laude honors and a specialization in Finance at the same university.

James Flett is deputy to the Director of the European Commission Legal Service WTO Team. He has been practicing international trade law for 25 years. He spent several years working for two international law firms, before joining the Commission Legal Service in 1995, when the WTO was founded. He has represented the EU in 170 WTO proceedings. He teaches WTO law at Leuven University, and has been a frequent guest lecturer at more than...
List of Contributors

Willis Geffert is a Senior Consultant in NERA Economic Consulting's Energy, Environment, and Network Industries Practice in Washington. His litigation support practice specializes in international arbitrations; he has provided in-depth analysis and advice as a consulting expert in ten completed or ongoing international arbitrations, addressing issues such as contract reform, BOOT/BOT concessions, regulatory economics, expropriation, breach of contract, damages, asset valuation, and market definitions. His advisory practice focuses on aiding governments and regulators in electricity market reforms and providing market analysis and forecasts for energy market investors. Mr. Geffert received an MS in Physics from the University of Pennsylvania and a BA in Physics, magna cum laude, from Amherst College. He also studied at Oxford University’s Worcester College.

Bastian Gottschling works as a Principal at NERA Economic Consulting in Frankfurt. He specializes in providing clients with expert economic advice in dispute resolution, performing testifying expert roles or consulting expert roles depending on the case. In his recent case work, Mr. Gottschling has provided economic analysis in relation to disputes involving price adjustment, hardship, competition law, and damages claims. Mr. Gottschling is an Associate Member of the Chartered Institute of Arbitrators (ACIArb). He holds an MPhil in Economics from the University of Cambridge, Queens’ College, and a BSc in Economics from the London School of Economics.

Tom Graham is a member of the WTO’s Appellate Body. Previously, he was Senior Counsel in the International Trade Group of the King & Spalding law firm. Prior to joining King & Spalding, Mr. Graham served for several years as the deputy head of the International Group of Skadden, Arps, Slate, Meagher & Flom. Earlier in his career, Mr. Graham served as Deputy General Counsel in the Office of the US Trade Representative. Mr. Graham taught for many years at the Georgetown Law Center as an adjunct professor. He holds a BA in International Relations and Economics from Indiana University and a JD from Harvard Law School.

Marios C. Iacovides is Legal Counsel and Senior Adviser at the Swedish Competition Authority. He obtained his LL.D with the monograph “A More Economic Approach’ to WTO Law’s Relevant Market Definition, Trade Harm and Quantification of Trade Effects and Countermeasures,” a normative law and economics comparison of WTO law with EU competition law. Previously, he worked as an intern at the WTO’s Legal Affairs
List of Contributors

Division, was a guest researcher at the European University Institute, and a Marie Curie Early Stage Research Fellow at Bocconi University within the DISSETTLE programme. He holds an LL.B from King’s College London, an LL.M from Stockholm, and an LL.D from Uppsala University.

Marion Jansen is the Chief Economist of the International Trade Centre (ITC). She previously held senior positions in the World Trade Organization (WTO) and the International Labor Office (ILO). Her publications in the field of international trade and global governance cover domestic regulation and the social impacts of globalization. She holds a PhD in Economics from the Universitat Pompeu Fabra (Barcelona, Spain).

Kathryn Kobe joined Economic Consulting Services as Director of Price, Cost, and Productivity Analysis in 2003. Her research responsibilities include studying compensation, price, cost, and productivity issues as well as analyzing industry and company financial data and documents in support of litigation and valuations. She has testified on competitive conditions before the US International Trade Commission and the Postal Regulatory Commission. Ms. Kobe received her BA in Economics, summa cum laude, at the University of Maryland, College Park, and her MA in Economics from The George Washington University.

Christian Lau is a senior associate in the Geneva office of Sidley Austin LLP. He counsels clients on all aspects of international trade law, with a particular focus on WTO law. His practice focuses on WTO dispute settlement, from developing a case, to litigating it through the panel and appeal phases, to securing effective implementation. He has counseled and represented WTO members in disputes before WTO panels and the Appellate Body, both in original and in compliance proceedings, as well as before WTO arbitrators determining the amount and form of retaliation rights. His experience includes some of the largest and most complex disputes that the WTO has decided thus far, often in close cooperation with external experts.

Pablo López Zadicoff is a Senior Vice President at Compass Lexecon in Washington DC. Previously with LECG, Mr. López Zadicoff has more than 12 years of experience providing economic, regulatory, and financial analysis used in amicable and non-amicable dispute resolution processes. He has provided expert testimony in commercial and treaty arbitrations. He has designed and led teams in charge of implementing customized valuation models for worldwide assets in diverse industries, with emphasis in emerging markets. Mr. López Zadicoff holds an MA in Economics from UNLP.
List of Contributors

Bruce Malashevich is President and Chief Executive Officer of Economic Consulting Services, LLC, Washington, DC. He joined Economic Consulting Services in 1976 after a period of US Government service at the State Department and subsequently at the Treasury Department. Mr. Malashevich became Vice President of ECS in 1978, and President and Chief Executive Officer in 1988. Mr. Malashevich received his BA *cum laude* from the Woodrow Wilson School of Public and International Affairs at Princeton University and his MA from the Johns Hopkins University School of Advanced International Studies. At both institutions he specialized in international economics, politics, and Soviet area studies.

Petros C. Mavroidis is an Edwin B. Parker Professor of Law at Columbia Law School (New York), a Professeur extraordinaire at the University of Neuchâtel, and a Research Fellow at the Centre for Economic Policy Research (CEPR) in Washington, DC. He is the chief co-reporter for the American Law Institute (ALI) project, "Principles of International Trade: The WTO." Prof. Mavroidis worked in the WTO’s legal division in the 1990s and has written extensively on the WTO and the GATT. Prof. Mavroidis earned his law degree at the University of Thessaloniki and has an LL.M. from Berkeley and a PhD from Neuchâtel.

Jorge Miranda is Principal International Trade Advisor with the International Trade Group of King & Spalding LLP. An economist with over 25 years of experience in the area of GATT/WTO trade remedy rules and subsidy disciplines, he has advised the private sector and/or the government interests involved in 13 WTO disputes. Mr. Miranda was a Counsellor in the Rules Division of the WTO Secretariat from 1995 to 2002, and in this capacity he assisted six dispute settlement panels. He is co-author of *A Handbook on Antidumping Investigations* (2003) and has several publications in his field of expertise. Mr. Miranda holds undergraduate and graduate degrees in economics from Georgetown University.

Damien Neven is Professor of Economics at the Graduate Institute of International and Development Studies, Geneva. He has taught at INSEAD, the University of Brussels, the College of Europe and the University of Lausanne. His main research areas are competition economics and international economic integration. He has recently been focusing on the law and economics of enforcement and the international coordination of competition policy. He was Chief Competition Economist at the
List of Contributors

Directorate General for Competition of the EU Commission in Brussels from September 2006 until May 2011. He obtained a PhD in Economics from Nuffield College, Oxford, and a Master’s degree in Economics and a BA in Geography from the University of Louvain.

Joost Pauwelyn is Professor of International Law at the Graduate Institute of International and Development Studies in Geneva, and the Murase Visiting Professor of Law at Georgetown Law Center. He served as legal officer at the WTO and advises governments and non-state actors in dispute settlement under the WTO and FTAs and investor–state arbitration. He is on the roster of WTO panellists and is a Member of the ICSID Panel of Conciliators.

Alan Rozenberg is a Senior Economist in Compass Lexecon’s London office. He works on international arbitration matters, performing economic and financial analysis in the context of international treaty and contractual disputes. Alan has contributed to expert reports and presentations and to the preparation of expert witnesses for hearings and has participated in more than 15 international arbitration cases. Prior to joining Compass Lexecon, he worked at LECG and at Ernst & Young. Mr. Rozenberg holds a Master’s in Finance from Universidad del CEMA and a BA in Economics from Universidad Nacional de Cuyo.

Simon Schropp is Managing Economist at Sidley Austin LLP, a leading law firm in international trade law. Mr. Schropp has gathered extensive experience in an array of disciplines, as well as in a variety of business sectors. He has supported Sidley’s clients in a variety of fora, including before WTO panels and the Appellate Body, domestic courts, arbitral tribunals, and domestic regulatory agencies. Mr. Schropp was recognized in the 2015 edition of Who’s Who Legal in the Trade & Customs category as one of the “most highly regarded individuals” worldwide. Mr. Schropp holds two PhDs in Economics, a Master’s degree in International Relations, and a Master’s degree in Business Administration.

Robert Teh is Senior Research Economist at the World Trade Organization (WTO). He has provided analytical support on economic matters to a number of WTO panels, particularly those dealing with Article 22.6 arbitration cases. He has published research on, among other topics, regional trade agreements, WTO dispute settlement, trade remedies, and trade facilitation. He obtained his PhD in Economics from Stanford University.
List of Contributors

David Unterhalter is Senior Counsel with Monckton Chambers, a leading set of barristers’ chambers based in London, and former Chairman of the Appellate Body of the World Trade Organization. He also serves on the International Court of Arbitration of the ICC and has served as an ICSID Tribunal member. He is a Professor of Law at the University of Cape Town’s Faculty of Law. He is a member of the Johannesburg Bar and is one of South Africa’s foremost barristers. He holds degrees from Trinity College, Cambridge, the University of the Witwatersrand, and University College, Oxford.

Alan Yanovich is Senior Counsel at Akin Gump, advising foreign governments and multinational corporations on litigation of disputes before the World Trade Organization (WTO) and other international dispute-resolution bodies. Mr. Yanovich has extensive experience on international trade and investment matters at the multilateral, regional, and bilateral levels, having spent 12 years at the WTO Appellate Body, the WTO’s highest tribunal. He was co-lead lawyer in the two largest and most complex appeals – Airbus and Boeing – and in the appeal of the first dispute brought to the WTO involving government support policies in the renewable energy sector.

Fuad Zarbiev is Assistant Professor of International Law at the Graduate Institute of International and Development Studies, Geneva, and Counsel to the international law firm of Curtis, Mallet-Prevost, Colt & Mosle LLP. In his latter capacity, he acted as counsel to a number of governments and state-owned companies in international commercial and investment arbitration. He holds a PhD in International Law from the Graduate Institute of Geneva, an LL.M from Harvard Law School, and the Diploma of the Hague Academy of International Law.
Acknowledgements

This volume has its origins in the project ‘Dispute Settlement in Trade: Training in Law and Economics’ (DISSETTLE), a Marie Curie Initial Training Networks (ITN) Funded under the EU’s Seventh Framework Programme, Grant Agreement No FP7-PEOPLE-2010-ITN_264633.

DISSETTLE brought together five European institutions namely, the Graduate Institute of International and Development Studies, Geneva; Bocconi University; the Université Libre de Bruxelles; and the Universities of St Gallen and Warsaw.

One of the goals of DISSETTLE was to train a cohort of lawyers and economists to work together on dispute settlement. The project funded some 32 Marie Curie Fellows, doctoral candidates or post-docs, each for a period of three to 24 months. Whilst pursuing their own research, the Fellows benefitted from belonging to the DISSETTLE network by participating in interdisciplinary workshops and training activities. The network was supported by a dozen Associate Partners, including law firms and economic consulting firms, who contributed to various workshops and training activities such as the DISSETTLE Summer School. We are particularly grateful to all of the Associate Partners for having shared in these joint activities.

The editors are grateful to the authors that contributed to this volume and to those that taught on or attended the DISSETTLE Summer School. Finally, the editors would like to thank the publishers for their help and guidance in bringing this book to fruition.