exposé

Dissertation Title:

"Non-market Economy Treatment and Associated Practices in International Anti-dumping Law - *Novel Perspective on the Changing International Legal and Economic Environment*"

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Research Field:

International Law

1. Introduction of the topic

"Market economy" is a terminology which is frequently utilized in divergent occasions, both official and unofficial. Its literal antonym — "non-market economy", which may not strictly oppose it in economic terms, though is also mentioned regularly, has only limited implication in international law. It plays a role only in the framework of AD investigations of certain countries. That is according to relevant WTO rules, in AD investigations regarding NME exports, investigating authorities can disregard the domestic prices of the products concerned, not using them as a benchmark to compare with export prices, for the determination of dumping and dumping margin. This approach is adopted because NMEs' domestic prices are considered as not reflecting the real value of the products concerned since they are not determined by market force due to the prevailing government interference in their markets. Instead, normally investigating authorities rely on relevant data from a surrogate market economy third country to calculate dumping for NMEs. This methodology for calculation of dumping is termed as the analogue/surrogate country methodology or the NME methodology; The treatment suffered in an AD investigation of being applied with the NME methodology is accordingly called the NME treatment. With respect to NMEs, it is held that if particular methodology for dumping calculation were not adopted, market distortion within them cannot be rectified. The AD measures adopted thereby will thus not be able to defend the unfair trade practice of NMEs and a level global playing field cannot be preserved for importing country's domestic producers either.

NME treatment in AD law, however, *per se* is a problematic regime right from its formation in the cold war era, which is characterized by polarization. The economic rationale underlying it is untenable; relevant rules contained are extremely crude and ambiguous as well. Under the present dramatically changed international legal and economic environment, this regime is getting even more out-dated and questionable. Moreover, revolving the NME treatment, a series of other closely associated practices have arisen in practice, such as country-wide AD duty for NMEs and concurrent AD and anti-subsiding investigations regarding NME exports. These practices do not have a solid legal basis in international law and have therefore been challenged in front of the DSB with their trade protectionist nature in reality being questioned. Hence, some people have criticized that "in effect the term NME has become a non-tariff barrier, facilitating selective restrictions on imports from low-cost economies into developed country markets".[1]

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[1] McCarty, Adam and Kalapesi, Carl, "The Economics of the 'Non-market Economy' Issue:Vietnam Catfish Case Study Mekong Economics" 2003, available at: http://www.eldis.org/fulltext/vietnam.pdf

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3. Overview of the state of research

3.1 Economic rationales underlying dumping and anti-dumping measures

In broad sense, AD is one of the most well-developed legal instruments in the GATT/WTO arena, however, it is one of the most controversial trade instruments as well.[2] In economic terms, there are huge disputes concerning a wide range of subjects contained in this regime, including even the most basic ones as the definition and determination of dumping, the practical significance of AD measures, the prerequisites for imposing them, and so on. With respect to anti-dumping measures, some people regard them as a justified trade defence instrument indispensable for the protection of importing countries' domestic industries and the preservation of a level playing field in a liberal trading system, while others consider them as being disadvantageous for the benefits of the whole society, undermining international competition and even betraying its proclaimed aim of fairness.[3] Some scholars have advocated an overhaul of the current AD legal system to rectify the wrongful development direction of it in - evolving practically into an effective protectionist tool in lieu of tariff barriers. Some have proposed for the substitution of international AD law by international competition rules. More radical researchers have even claimed the abandonment of whole AD legal system.

3.2 International anti-dumping rules

During the pre-GATT era, AD rules already existed in several countries' national law as a unilateral trade policy; their specific provisions, however, are widely divergent.[4] The integration of AD rules into the GATT is viewed as an important part of the process of legalization of trade rules at the international level.[5] After the conclusion of the GATT, the international AD rules were further enriched and improved progressively in several rounds of trade negotiation. Nonetheless, these rules are still considered as "awfully technical" and did not provide a sound solution rendering the AD regime any less controversial.[6] In general, the legalization of AD rules at the international level serves basically two major aims: for one thing establishing the legal basis in international trade law for applying AD measures in the context of trade liberalization; for the other setting specific rule constraints for the imposing of AD measures, preventing them from degenerating to a trade protectionist instrument. If the latter aim is achieved, however, is questioned by many legal practitioners who claim that AD measures have in practice, or in many occasions, played actually a disguised protectionist role.[7]

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[2] Luo Yan, *Anti-dumping in the WTO, the EU and China — The Rise of Legalization in the Trade Regime and its Consequences*, p53-9.

[3] Gabrielle Marceau, *Anti-dumping and Anti-trust Issues in Free Trade Ares*, p16-8; Jeffrey S. Thomas, Michael A. Meyer, *The New Rules of Global Trade —A Guide to the World Trade Organization*, p131-5; Wolfgang Müller, Micholas Khan, Tibor Scharf, *EC and WTO Anti-dumping Law: a Handbook*, second ed, p6.

[4] Gabrielle Marceau, *Anti-dumping and Anti-trust Issues in Free Trade Ares*, p7-9.

[5] Luo Yan, *Anti-dumping in the WTO, the EU and China — The Rise of Legalization in the Trade Regime and its Consequences*, p53.

[6] Ibid.

[7] William A. Kerr and Laura J. Loppacher, "Anti-dumping in the Doha Negotiations: Fairy Tales at the World Trade Organization", *Journal of World Trade* 38(2), 2004, p211-44.

3.3 Evolution of non-market economy rules in international anti-dumping law

Actually, the WTO rules never defined the term NME, which forces us to trace the genesis of it for the clarification of its true meaning. When countries convened to establish an international trade organization after the WWII, originally they intended to include all types of country, both market and non-market economy countries, into the ITO.[8] In the negotiation of multilateral trade rules, they had included provisions particularly designed for NMEs as well.[9] These provisions, however, were gradually weakened with the withdrawal of the USSR from the negotiation.[10] The first provision dealing with special methodology for dumping calculation regarding NMEs was introduced into the GATT in 1955 as an interpretative note on Article VI:1 of the GATT. This provision is provided based on the background that Czechoslovakia, a founder member of the GATT, began to adopt a centrally-planed economy system.[11] From the wording of the second Ad Note to Article VI:1, it is clear that what it targets is state trading members of the GATT within which trade is monopolized or substantially monopolized and all prices are fixed by the state. Furthermore, what the second Ad Note to Article VI:1 provides is only that "a strict comparison with domestic prices may not always appropriate"; no specific methodology however is provided by it for the calculation of dumping from NMEs.

In the 1970th, articles regarding NME treatment were introduced into the working party reports concerning accession of several countries, Poland, Romania and Hungary; but their provisions are crude and ambiguous as well.[12] Afterwards, during the WTO era, special arrangements regarding NME treatment were included in the accession legal documents of China and Vietnam. Though according to these special arrangements, China and Vietnam committed to be viewed directly as NMEs in AD investigations, being applied automatically with special methodology for dumping calculation, specific stipulations were still not provided concerning the definition of NME and the applicable dumping calculation methodology for NMEs.

3.4 National practices of non-market economy treatment

Since relevant international rules are not sufficiently explicit, members of the multilateral trade system have thus been rested with great discretion regarding NME treatment. The specific application of this treatment actually largely depends on WTO members' national law; the analogue country methodology is formed and developed in national investigating practices as well. Individual members' national practices however are divergent with respect to NME treatment, among which the practices of the US and the EU stand out as the most prominent ones. The US as the only superpower then in the GATT system, its practices had greatly influenced the formation of both relevant international AD rules and other members' national

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[8] Vera Thorstensen, Daniel Ramos, Carolina Muller, Fernanda Bertolaccini, "WTO—Market and Non-market Economies: the hybrid case of China", *Latin American Journal of International Trade Law* 2(1), 2013, p778.
[9] Ibid, p786.
[10] Swedish National Board of Trade, *The EU Treatment of Non-market Economy Countries in Anti-dumping Proceedings*, p9.
[11] Vera Thorstensen, Daniel Ramos, Carolina Muller, Fernanda Bertolaccini, "WTO—Market and Non-market Economies: the hybrid case of China", *Latin American Journal of International Trade Law* 2(1), 2013, p779.
[12] Francis Snyder, "The Origins of the 'Nonmarket Economy' Ideas, Pluralism and Power in EC Anti-dumping Law about China", European Law Journal, 7(4) 2001, p392-4.

legislation in this regard. The EU's rules though are affected by the US counterparts, have demonstrated their own features and characteristics.

3.5 Practices associated with non-market economy treatment

Apart from the analogue country methodology for dumping calculation, some other associated practices are developed in AD investigations regarding NMEs as well, which include country-wide AD duty for NMEs and the disputed concurrent AD and anti-subsidy investigations concerning NME exports. The so-called country-wide AD duty refers to the imposition of the same AD duty on all imports of a certain product originated from a NME, regardless of the diversity of their producers. The rationale underlying this practice is claimed to be the prevention of circumvention of AD duties, which is based on the assumption that if different AD duties are imposed on NME exports, producers will circumvent their higher AD duties by exporting their products through producers imposed with lower ones since NMEs can liberally interfere the exports of manufactures located in its territory. However, the county-wide AD duty is not stipulated in WTO rules. Though international anti-dumping law has left individual states with the margin to deal with the issue of circumvention, it has also provided that "the authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation". And the only exception provided is sample when the number of the investigated parties or products are too large.[13]

With respect to the concurrent imposition of AD duty and Countervailing duty, relevant WTO rules only explicitly stipulate that AD duty cannot be applied simultaneously with CVD against export subsidy for the same situation since the concurrent application of them will result in double remedy.[14] The concurrent application of AD duty and CVD against domestic subsidy is considered as permitted by WTO law since no double remedy will be induced. For NMEs, however, since the calculation of their AD duty is based on normal value determined by analogue market economy country data, it is held that the price distortion caused by domestic subsidy within NMEs is already rectified simultaneously in this process. As a result, it is theoretically believed that anti-subsidy investigation cannot be initiated concurrently with AD investigation concerning the same NME export, or double remedy will be unavoidable.[15] This discipline however used to be broken by the US. It held that the WTO rules did not prohibit the concurrent application of AD duty and CVD against domestic subsidy, and the analogue country methodology for dumping calculation regarding NMEs was also permitted by WTO rules. Its practice of concurrent AD and anti-subsidy investigations thus did not violate any international trade rule. To the country, the prohibition of this practice constitutes a derogation of its WTO rights, which lacks international legal basis.[16]

3.6 Changing international legal and economic environment regarding non-market economy

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[13] Article 6.10 of the WTO Anti-dumping Agreement.

[14] Article VI:5 of the GATT 1994 stipulates that: "No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to both anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidization."

[15] Luo Yan, *Anti-dumping in the WTO, the EU and China — The Rise of Legalization in the Trade Regime and its Consequences*, p182-93.

[16] Ibid.

treatment

International legal and economic environment has changed dramatically since the emergence of the NME treatment in AD law, which may exert certain influence on the development of it. With respect to legal change, the most recent influential one should be the expiry of certain provisions in China's Accession Protocol after December 2016 which allow other WTO members to identify China directly as a NME and apply automatically special dumping calculation methodology to it.[17] Afterwards, similar provisions contained in Vietnam's Working Party Report will be terminated as well.[18] The termination of these commitments may induce the demise of the NME treatment in AD law in reality. The development of the state of this affair, however, is far beyond this simple prediction. Pending the expiry of China's relevant rules, the US had declared conclusively that it would not abandon automatic NME treatment regarding China. Instead, it tried to interpret relevant rules through a different way, denying the expiry of those rules and claiming the continuation of automatic NME treatment regarding China. The EU conversely has taken a different strategy. It sought to find other legal basis in WTO AD rules, rather than that contained in China's Accession Protocol, for the application of special methodology for dumping calculation regarding China.[19] Another thing worth mentioning is that 88 countries had already recognized China as a market economy in AD investigations even before the stipulated expiry deadline, including Australia, New Zealand, Norway, and so on.[20]

In economic terms, the most significant change during the development of the multilateral trade system is the reform of the former centrally-planned economies with respect to both their domestic economic scheme and their foreign trade policy. For one thing, after the end of the Cold War and the disintegration of the Soviet bloc, a number of former state-controlled economy countries began to undertake the so-called market-oriented reform. For another thing, different from the right establishment of the GATT, when former centrally-planed economies were seldom involved in international trade, with the progression of their economic reform, these economies nowadays actively participate in international trade and have applied for accession into the multilateral trade system in succession. Moreover, they have gradually gained extraordinary heavy weight in international trade, which even threatens the status of other main market economy trading countries.

3.7 Divergent opinions regarding the future of non-market economy treatment and its associated practices

Confronting the changing international legal and economic environment, some radical scholars claim that the whole regime of NME treatment in AD law should be completely

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[17] Article 15 of China's Accession Protocol, Paragraph 150, 151 of Report of the Working Party on the Accession of China.

[18] Paragraph 254 and 255 of Report of the Working Party on the Accession of the Vietnam.

[19] Speeches in the Joint press conference by Jyrki Katainen, Vice-President of the EC and Cecilia Malmström, member of the EC, on the treatment of China in anti-dumping investigations, vedio available at: http://ec.europa.eu/avservices/video/player.cfm?sitelang=en&ref=I124948

[20] Laura Puccio, *Granting Market Economy Status to China: an analysis of WTO law and of selected WTO member's policy*, European Parliament Research Service, November 2015, p9.

abolished.[21] Some other scholars, however, hold a different view that NME treatment should be enhanced and even transplanted to other areas of international trade law instead of being crippled.[22] They think the current multilateral trade system is congenitally deficient with the NME respect. A modern multilateral trade system should not just focus on trade liberalization and tariff concession. Rather, more attention should be paid to members' national policy so as to level the global playing field which embrace both market and transitional economies.[23]

4. Methodology

Firstly, a doctrinal methodology will be applied. Relevant economic literature will be studied for the investigation of economic rationale underlying the regime and measures explored in this research. Specifically, which needs to be investigated include the economic basis for dumping and AD measures, the economic justification for NME treatment and analogue country methodology, and the economic disputes revolving country-wide AD duty for NMEs and concurrent AD and anti-subsidy investigations concerning them. In addition, the doctrinal methodology will also be utilized for the analysis of the meaning of relevant AD rules and the prospect of the NME treatment. This means that existing academic works and theories in this regard will also be studied for reference of the current research.

Secondly, a historical methodology will be applied for the analysis of the origin and evolution of international AD rules and the NME treatment therein. The development of relevant legal norms will be put in specific time frames. Research effort will then be given especially to those points of time at which significant development was made. By linking these points together, full description of the development of relevant legal norms can thus be made in chronological order. Moreover, after the establishment of the multilateral trade regime, lots of countries have fundamentally reformed their respective economic system, and the global trade situation has changed tremendously as well. A historical analysis thus also needs to be conducted regarding the changing background against which the NME treatment regime is based.

Thirdly, a comparative analysis methodology will be utilized and what will be comparatively analyzed in this research are mainly domestic AD rules and practices of the US and the EU regarding NMEs. As elaborated above, international norms in this regard are extremely implicit and ambiguous; great discretion concerning the application of NME treatment has actually been rested upon national administrating authorities. In-depth analysis of pertinent national rules and practices is therefore an indispensable part of the study of NME treatment. Within all WTO members, the practices of the US and the EU undeniably are the most predominant ones, no only simply because of their weight in international trade but also for the representative and influential role of their rules. Moreover, regarding the expiry of the rules relating to China's NME status, the US and the EU have conveyed different attitudes and proposed divergent reacting

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[21] For example Francis Snyder in "The Origins of the 'Nonmarket Economy' Ideas, Pluralism and Power in EC Anti-dumping Law about China", European Law Journal, 7(4) 2001, p369-434.

[22] Vera Thorstensen, Daniel Ramos, Carolina Muller, Fernanda Bertolaccini, "WTO —Market and Non-market Economies: the hybrid case of China", *Latin American Journal of International Trade Law* 2(1), 2013, p765-98.

[23] Ibid, p784.

approaches. A comparative analysis of the EU's and the US' practices thus is crucial..

Fourthly, the methodology of case analysis will be utilized in this research. What will be investigated firstly are typical cases regarding the application of domestic NME treatment rules, such as the criteria for determining NMEs and the rules about the application of the analogue country methodology. Study of these cases can demonstrate specifically how NME treatment is applied in practice and what its practical effects are. Moreover, research effort will also be given to those famous cases regarding country-wide anti-dumping duty for NMEs. In these cases, the DSB has made analysis and judgment regarding the compatibility of national rules and practice with WTO law, giving detailed interpretation of pertinent provisions and clarifying the discriminatory practices targeting NMEs. The analysis of them is therefore of great significance.

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