
International Trade “from Status to Contract” and Back: A Critique of the NME Normal Value Determination and Beyond

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This paper critically examines the normal value determination of NME and its implications for the purpose of contributing to Doha antidumping reform deliberation. From domestic to international arenas, antidumping development sees the significant growth of government paternalistic discretion turning antidumping into a distributive instrument challenging constitutionalism. Deeply rooted in the ideological divide of the 1950s, NME methodology's obsession with national divide turns free trade from traders' commutative exchange to nations' distributive predation. NME distributive discretion, though against the free market principle, is ironically used to accuse foreign economies of not being free-market enough. When products and producers are given certain status via nationality instead of treated individually, antidumping development has been a process “from Status to Contract” and back. Therefore, it is time to de-legitimize the NME methodology, and the success of antidumping reform lies in limiting rather than deferring to governments' paternalistic discretion, thus strengthening the international rule of law in the context of WTO.

Keywords

Antidumping, From Status to Contract, Normal Value, Nonmarket Economy, Dumping Determination, WTO

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I. Introduction

From the General Agreement on Tariff and Trade (“GATT”) to the World Trade Organization (“WTO”), antidumping has been one of the most contentious, yet most frequently used mechanisms in the multilateral trading framework. On several occasions since the GATT’s establishment in 1947, antidumping has received ‘*elaborate attention*’ in the international trading framework.¹ The Anti-Dumping Agreement is considered to be the most technical and controversial agreement within the WTO framework.² In WTO’s first decade (1995-2004), 37 out of 89 cases, for which original panel or Appellate Body reports have been circulated to Members, were trade remedy cases, and among them, 19 cases were antidumping related.³ As of November 2013, among those 464 cases that have reached the WTO dispute settlement process, 97 cases cite the Antidumping Agreement in their requests for consultations.⁴ Antidumping is thus considered to be “the most important contingent protection measure” that is provided in the GATT/WTO framework.⁵ Given the significance of the regime, there has been rich scholarship on the antidumping system.⁶

Antidumping reform has therefore long been one of the key issues in the GATT/WTO framework, and yet has faced strong resistance at the same time. In prior negotiations before the Doha Round, the US and the EU successfully “contain[ed] antidumping reform initiatives within narrow limits without any real sacrifice of their own major negotiation objectives.”⁷ However, recent proliferation of antidumping laws and the threat of abuse have changed the situation.⁸ Antidumping reform is now one of the points of concern in the WTO Membership’s agenda in

¹ E. VERMULST, *THE WTO ANTI-DUMPING AGREEMENT: A COMMENTARY* 3 (2005). [Emphasis added]

² *Id.* at Forward. Lindsey and Ikenson call antidumping policy “a hot-button issue” in the US trade policy debate. See B. LINDSEY & D. IKENSON, *ANTIDUMPING EXPOSED: THE DEVILISH DETAILS OF UNFAIR TRADE LAW* ix (2003).

³ See *Selected Statistics: the First Ten Years of the WTO*, in *KEY ISSUES IN WTO DISPUTE SETTLEMENT: THE FIRST TEN YEAR* 289 (R. Yerxa & B. Wilson eds., 2005).

⁴ For details, see WTO, *Disputes by Agreement*, available at http://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm?id=A6 (last visited on Nov. 20, 2013).

⁵ A. AGGARWAL, *THE ANTI-DUMPING AGREEMENT AND DEVELOPING COUNTRIES: AN INTRODUCTION* 3 (2007).

⁶ See, e.g., J. JACKSON & E. VERMULST, *ANTIDUMPING LAW AND PRACTICE: A COMPARATIVE STUDY* (1990); J. FINGER, *ANTIDUMPING: HOW IT WORKS AND WHO GETS HURT* (1993); B. HINDLEY & P. MESSERLIN, *ANTIDUMPING INDUSTRIAL POLICY: LEGALIZED PROTECTIONISM IN THE WTO AND WHAT TO DO ABOUT IT* (1996); G. MASTEL, *ANTIDUMPING LAWS AND THE US ECONOMY* (1998); B. LINDSEY & D. IKENSON, *ANTIDUMPING EXPOSED: THE DEVILISH DETAILS OF UNFAIR TRADE LAW* (2003); R. RASLAN, *ANTIDUMPING: A DEVELOPING COUNTRY PERSPECTIVE* (2009).

⁷ Lindsey & Ikenson, *id.* at 149.

⁸ *Id.*