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NME Status in Anti-dumping Proceedings: A Revision under WTO Law and Practice

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Anti-dumping (AD) is a legal institution that allows an importing country to impose a reciprocal duty to neutralize the effect of unfair pricing by an exporting firm in an importer's market. The regime of AD has been well stipulated in WTO documents and analyzed by many scholars worldwide. However, among AD rules, non-market economy (NME) status has not received adequate attention. Meanwhile, the absence of WTO rules explicitly regulating NME status and the wide discretion of importing countries in AD investigations place exporting alleged NME countries at a disadvantage, particularly when normal value calculation methodologies are used. This practice undermines the fundamental principles of non-discrimination and transparency of the WTO. This article examines the present WTO rules and jurisprudences concerning NME status and then makes some proposals for reforming NME regulations and discusses their feasibility in practice.

Keywords: anti-dumping, non-market economy, WTO

Introduction

At the end of 2016, the automatic consideration of China as a NME will expire under China's protocol of accession to the WTO. Similarly, under its commitments to the WTO, Viet Nam agreed to have its economy considered as a NME for the purpose of AD and countervailing investigations to the end of 2018. Once expiry of NME status occurs it will trigger many legal issues under AD law, in which NME status has both theoretical and practical significance. Moreover, considering that the WTO Dispute Settlement Body (DSB) might come to different or even opposing conclusions regarding the WTO consistency of different practices of NME treatment, the core WTO principles, specifically the principle of non-discrimination and the principle of transparency, will be eroded. For these reasons, a revision of NME status in AD procedures under WTO law and practice is virtually essential.

NME treatment with regard to the domestic AD rules adopted and applied by importing countries – usually developed countries such as the EU and the United States – to allegedly dumped products originating in exporting countries of which the economy is not classified as functioning in market conditions due to government intervention, is based on the assumption that domestic prices in these countries are unreliable as a basis for determining the normal value of goods. Therefore, goods from NME countries will be subject to a different method of normal value calculation, in which data from a third country, which is often regarded as an analogue country, will be collected instead when determining the dumping margin in the AD and countervailing investigations on the products concerned. The widespread use of this practice increases the risk of distortion of world trade.

However, WTO rules neither specifically regulate the determination of what is to be considered a NME nor provide any criteria to identify such an economy in either GATT or the Anti-Dumping Agreement of the WTO (ADA). WTO members, therefore, have discretion in establishing criteria that identify a NME in their domestic laws. As a consequence, there is no consistency among members' domestic laws regarding these criteria.

In this article, the authors will first discuss the legal basis and the consistency of NME treatment in the light of WTO rules and recent practices. Subsequently, proposals will be highlighted for the improvement of AD rules in this regard.

1. Legal Basis for NME Treatment in WTO Legal Texts

It should be noted that the terms “NME” and “NME treatment” are not literally mentioned in any WTO agreements. No definition is thereby provided. One can invoke the second Supplementary Provision Article VI:1 in Annex I to GATT 1994 (“the second *Ad Note*”) referred by Article 2.7 of the ADA to justify NME treatment.¹ However, as the Appellate Body remarked in *EC–Fasteners (China)*, this provision does not apply to all NMEs, since it refers to a “country which has a complete or substantially complete monopoly of its trade” and “where all domestic prices are fixed by the State”.² This appears to describe a certain type of NME, where the state monopolizes trade and sets all domestic prices. Thus, the second *Ad Note* would not, on its face, be applicable to lesser forms of NMEs that do not fulfill both conditions.³ Therefore, NME treatment, as such, is not allowed in the ADA.

In order to legalize this practice in the WTO system, some developed members succeeded in including provisions allowing special treatment for non-market producers in the specific commitments of newly acceded WTO members, such as China and Viet Nam. Thus, paragraph 15(a)(ii) of China’s accession protocol provides that an importing WTO member “may use a methodology that is not based on a strict comparison with domestic prices or costs in China if the producer under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product.” In the same way, the possible use of a methodology that is not based on a strict comparison with domestic prices or costs in Viet Nam is provided in paragraph 255 of the Working Party Report.

However, a careful consideration of both accession documents reveals that the alternative methodology is only allowed with regard to individual producers that fail to satisfy market economy conditions. These commitments do not explicitly allow the treatment of Viet Nam and China as NME countries. Consequently, products originating in these countries shall not be discriminated against in AD procedures just because they are treated as NMEs.

In conclusion, the available texts of the WTO neither include the definition of a NME nor provide for the different treatment of products originating in NME countries in AD and countervailing investigations. This statement was endorsed by the panel in the *EU–Footwear* case,⁴ in which, for the first time, the relationship between the MFN principle under Article I:1 of GATT and provisions on AD (i.e., Article VI of GATT and the ADA) was substantially and definitely addressed.

2. Consistency of NME-Related Practices with WTO Provisions

2.1 Different Treatment between Like Products from Market and Non-market Economies: A Violation of GATT MFN Principle

The Most-Favored-Nation (MFN) principle, as stated in the Article I:1 of the GATT 1994, provides that WTO members must extend “immediately and unconditionally” any benefit which they accord to products from one country to like products from all other WTO members. In the *EU–Footwear* case, China claimed that Article 9(5) of the Basic AD Regulation violates Article I:1 of the GATT 1994, as this provision subjects certain NME WTO members, including China, to additional conditions in order for exporting producers to receive individual treatment, while WTO members with market economies automatically receive it.⁵ The dispute settlement panel agreed with China, saying that the EU’s rules challenged by China fall within the scope of the “rules and formalities in connection with importation” referred to in Article I:1 and that the automatic grant of individual treatment to imports from market economy countries is an “advantage” that is not immediately and unconditionally extended to like products from the so-called NME.⁶ According to the panel, as there is no conflict between the GATT 1994 and the ADA, WTO members are obligated to strictly adhere to the fundamental principle of MFN of the GATT in applying remedy measures such as AD measures.

The panel came to the conclusion that the distinction between products from market economies and products from NMEs constitutes a violation of WTO fundamental principles.⁷ It is unclear whether the panel’s findings will be upheld in future cases, as the report was not appealed,⁸ but once panel reports are adopted by the DSB they “create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute constituting, to some extents, a precedent”, as concluded by the Appellate Body (AB) in *Japan–Alcoholic Beverages II*.⁹

2.2 NME-wide Entity Rate Practice: A Violation of ADA

The application by the EU and the United States of a single AD duty to all suppliers and imports from NME countries¹⁰ has been recently challenged in some cases involving alleged NME countries – namely Viet Nam and China – such as *US–Shrimp II*¹¹ and *EC–Fasteners*.¹²

The panel in *US–Shrimp II* agreed with Viet Nam that the U.S. Department of Commerce’s practice permitting inquiry authorities to begin with the presumption that all companies belong to a single NME-wide entity, and assign a single rate to that entity, was, as such, inconsistent with the obligations under articles 6.10 and 9.2 of the ADA, whereby an investigating authority “shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned.”¹³ The AB in *EC–Fasteners* came to the same conclusion about the “NME single entity” provision in the EU’s Basic AD Regulation.¹⁴

In *US–Shrimp II*, the panel also analyzed U.S. arguments about paragraph 255 of Viet Nam’s Working Party Report recognizing the possible use of alternative methodology in AD proceedings involving exports from Viet Nam. According to the panel, paragraph 255 is only relevant to the determination of normal value,¹⁵ and the importing member is allowed to treat Vietnamese producers differently only if those producers fail to show that market economy conditions prevail in the industry producing the product under investigation.¹⁶ The panel thus disagreed with the United States that paragraph 255 provides for an alternative interpretation of Article 9.4 in the context of imports from NME countries. Thus, an investigating authority is not entitled to render application of an “all others” rate subject to some additional requirement not provided for in Article 9.4.¹⁷

All in all, there is a lack of legal basis for the NME-wide entity rate as well as its application in practice. The NME-wide entity rate practice infringes Articles 2, 6, and 9 of the ADA by failing to accord individual treatment to exporters from NME countries and by adversely presuming that all companies belong to a single, NME-wide entity in AD investigations. This practice cannot be justified under members’ accession protocols because the single export price determination is not allowed.

2.3 The Analogue Country Method: A Pending Question

According to the AD laws of members that distinguish market and non-market economies, the calculation of dumping for NME companies operating in an alleged NME such as China or Viet Nam should be based on values from an analogue country. Article 2 of the ADA provides that the calculation of the dumping margin must be based on a fair comparison between export prices and the normal value of like products when destined for consumption in the exporting country, in the ordinary course of trade. In certain circumstances, for example when there are no sales in the domestic market, it is not possible to determine normal value on this basis. The agreement allows two alternative methods for the determination of normal value, which are (a) the price at which the product is sold to a third country, and (b) the

“constructed value” of the product, which is calculated on the basis of the cost of production in the country of origin, plus selling, general, and administrative expenses, and profits. Apparently, nothing in the agreement legitimates the use of values from another country except for Article 2.7, which is applied to countries following purely state monopoly practice.

As noted by the panel in *EU–Footwear*, the term “analogue country” does not appear in any texts of the WTO and there is no reference concerning the procedure or criteria for the selection of an analogue country.¹⁸ However, the “analogue country” methodology is generally understood as an “alternative methodology” within the meaning of China’s Accession Protocol Paragraph 15(a)(ii).¹⁹ The same reasoning can be applied with regard to Viet Nam’s Working Party Report Paragraph 255.

Questions have been raised regarding the selection of the analogue country. In *EU–Footwear*, China argued that the choice of Brazil as analogue country violates the ADA, i.e., Article 2.1 requiring “comparable price” in determining normal value and Article 2.4 relating to the “fair comparison”.²⁰ However, the panel rejected this argument, reasoning that Article 2.1 is a definitional provision and therefore cannot impose independent obligations, and the fair comparison requirement of Article 2.4 does not apply to the determination of the normal value, as well as the selection of an analogue country.²¹

It should be noted that the allegations of China have been rejected for the reason that the invoked provisions were considered irrelevant in this case. Also, it is regrettable that the panel did not comment on the allegation of Viet Nam, as the third party, about the possible violation of Article X:3 of the GATT 1994 requiring that measures of general application shall be administered in an impartial, objective, and uniform manner.²² This raises the question of whether relevant provisions exist to assess the analogue country selection. According to the panel in *EU–Footwear*, if Article 2.1 is a simple definitional provision and therefore cannot be the basis of a stand-alone claim, it is different in the case of Article 2.2, which establishes specific rules for alternative methods that may be used in establishing normal value.²³ Unfortunately, China did not invoke this article, which appears more relevant. Would the panel’s findings possibly be different if China had invoked Article X of the GATT 1994 and Article 2.2 of the ADA instead of Articles 2.1 and 2.4?

Since the consistency of analogue country selection with the WTO provisions on AD remains unclear, the widespread use of this practice constitutes a risk to the effectiveness of the WTO system, where transparency and non-discrimination are fundamental. As WTO texts neither define, nor set criteria for the selection of, the analogue country, WTO members have wide discretion in adopting their own rules

and procedures regulating this issue. For example, in the *EU–Footwear* case, the EU Commission has rejected suggestions to choose Thailand, India, or Indonesia as a more suitable analogue country than Brazil, which is of a higher development level compared to that of China.

In practice, the selection of the analogue country is likely based on the willingness to cooperate in an AD investigation of producers in the country concerned, as not all enterprises will be ready to provide their business information, especially when answering the questionnaires requires considerably costly research. Therefore, it is more likely that enterprises with higher costs than the NME exporters are more willing to provide data for comparison, given that the calculation will result in higher dumping margins. This situation is more likely in cases where producers of the analogue country compete with NME producers in the importing market. Consequently, the practice constitutes a distortion to the market concurrence.

In addition, if a country with a significantly higher cost than the alleged dumping country is chosen for AD margin calculation, this will result in inflated normal values and consequently inflated dumping margins for NME companies. The practice may thus encourage protectionism within the WTO.

3. Some Proposals

3.1 Alternative Approaches to Consider for the Analogue Country Method

It is clear that use of an analogue country may result in less favourable treatment of NME exporting companies and affect the transparency and coherence of the WTO legal system. Before the WTO manages to reach agreement among its hundred members to set concrete criteria for the selection of analogue countries, the following approaches may be considered.

Likeness test

Analogue country selection can be assessed in the light of a likeness requirement. According to Article 2.1 of the ADA, the comparison between export price and normal value in order to determine the dumping margin must be done with regard to “like products”. The question is whether a related product from the analogue country can be assumed as “like” to a product that is alleged to be dumped in the investigating country, especially when the production method and cost in the analogue country are far different from those in the NME country.

“Like product” is defined in Article 2.6, but the definition is too vague and there is no more concrete definition available in any WTO documents. In its large number of

cases, the GATT/WTO DSB has set out certain criteria for a likeness test, including the product's end-uses in a given market; consumers' tastes and habits; and the product's properties, nature, and quality.²⁴ These criteria emphasize physical characteristics rather than production method and cost. In the famous Tuna/Dolphin cases, the GATT panels have rejected the process and production method as a criterion to assess likeness.²⁵ These panel rulings have been much criticized by scholars.²⁶ It should be also noted that these panels' reports were never adopted by the GATT Council.

In fact, GATT/WTO agreements do not prohibit the use of other criteria in assessing likeness of products. On the contrary, GATT/WTO jurisprudence has repeatedly affirmed that these above-mentioned criteria are only non-exhaustive and indicative criteria, and the like-product analysis must be conducted on a case-by-case approach. Further in the *EC-Asbestos* report, the Appellate Body emphasized the necessity to examine all relevant factors in a given case and context, and to consider all the evidence pointing either in the direction of likeness or otherwise.²⁷ A similar view was shared by the GATT panel in *Japan-Alcohol*, which considered manufacturing processes of products to be relevant to the likeness enquiry.²⁸ Similarly, in *Indonesia-Autos*, the panel concluded that although passenger cars "share the same basic physical characteristics and share an identical end-use", they may differ greatly in terms of size, weight, engine power, technology, and features. In this case, the panel assessed differences in terms of production cost and consumer perceptions as proof of product characteristics differentiation.²⁹

Moreover, GATT's preparatory works have endorsed the opinion that the term "like products" must be interpreted in a careful manner in the context of AD and countervailing measures. While accepting that "downward or upward corrections of the price of the like product should be permitted so as to take into account the differences in the type of the products destined for the home market and for the various export markets", the Group of Experts on "AD and Countervailing Duties" in its 1959 report pointed out that "the meaning of 'like product' as agreed by them should not be interpreted either too broadly so as to cover products of a different kind with higher prices on the internal market, or too stringently so as to elude the application of paragraph 1(a) of Article VI."³⁰

In sum, in the context of AD investigation, it is recommended that a likeness test based on production costs and methods should be strictly applied as a criterion for the selection of the analogue country. This can diminish the negative effect on NME exporters and guarantee the transparency and coherence of the WTO legal system.

Use of data from market-economy companies

Another solution to prevent biased selection of the analogue country is the possible use of values from exporting companies which satisfy market economy conditions, instead of data from companies of a third country, for the calculation of AD margins. Indeed, the determination of normal value on the basis of figures from companies in the investigated country is undoubtedly more appropriate than from companies in a third and obviously unrelated country with different cost levels, production methods, and technologies. Given that, in the case of Viet Nam and China for example, accession documents also recognize the possibility of using domestic costs and prices with regard to market economy companies, why should data from these companies – much more relevant than data from a third country – not be used for NME companies under AD investigation?

This method also fulfills requirements of reasonableness and appropriateness under Article VI:1 of the GATT 1994 and Article 2.2 of the ADA in finding “comparable prices” for the determination of AD in special situations. Moreover, the legitimacy of using data from a third country seems only acceptable in the context of a country which has a complete or substantially complete state monopoly of its trade,³¹ where no data based on market conditions are available. However, this is not the case for many NME countries, where some companies can still prove that market economy conditions prevail in their industry.

3.2 NME Treatment in the Reform of the ADA

The reform of the ADA is one of the most discussed issues during the Doha Round. Although the Uruguay Round considerably improved the GATT rules on AD by adopting a specific agreement on AD, the lack of detailed provisions means the abuse of AD measures still cannot be prevented, eroding consequently the credibility and effectiveness of the WTO in practice.

The lack of rules governing trade practices of NMEs is one of these shortcomings. WTO members should consider including NME treatment on the agenda for negotiations on ADA reform. The significance of NME treatment codification in WTO rules can be challenged, as it concerns only a number of WTO members; however, the wide discretion of members in regulating and according NME treatment to other members can undermine the principles of transparency and non-discrimination, which are among the most important pillars of the WTO multilateral trading system. William Watson shared this view by noting that “without the legal discipline of the World

Trade Organization's ADA, nonmarket-economy AD practice has been able to develop in a state of lawlessness."³²

Detailed provisions should be included in the reformed ADA in order to make clear conditions in which NME treatment can be accorded and the way NME exporters may be treated in AD proceedings.

3.3 More Detailed NME Clause in Future Accession Protocols

While reforms to the ADA are pending, it is recommended that NME listed countries in the process of accession to the WTO³³ pay more attention and caution to the redaction of the "NME clause" in their future accession protocols. The clause should be more detailed and clear on the terms and conditions of NME treatment.

In the cases of China and Viet Nam, the NME clauses will theoretically expire by the end of 2016 and the end of 2018, respectively. However, the wording of the expiration provisions is unclear, thus not leading to a clear understanding, as they do not stipulate an automatic termination of the NME clauses, but rather set a condition, according to which related NME members must prove by their countries' national laws that market economy criteria are satisfied. Moreover, these provisions do not require investigating authorities to treat NME producers in the same manner as that accorded to market economy producers after the expiration date. Therefore, WTO members will still have discretion to use alternative methodologies in order to continue bypassing domestic data with regard to products of NME exporters.³⁴

More detailed provisions should be included in future NME clauses, especially on the conditions for bypassing domestic prices and costs and the use of alternative data and criteria for analogue country selection, as well as provisions for expiration of the clause.

Conclusion

NME treatment in AD and countervailing investigations is not a new phenomenon of international trade. However, the wide uncertainty concerning both the legal basis for, and the consistent practice of application of, this rule requires a reappraisal of WTO law and practices from time to time. While some aspects of NME-related practices have been found inconsistent with WTO principles and rules, some others remain unregulated. These shortcomings should and could be resolved in order to preserve the multilateral trading system against the return of protectionism. First, the biased use of data from an analogue country can be avoided by a likeness test based on production costs and the possibility of using data from market economy companies of the same country where the NME company is located. Second, the regulation of NME-related

practices should be included on the agenda for reform. Last but not least, a detailed NME clause should be included in future accession protocols of acceding WTO members so as to prevent the possible interpretation not in good faith of controversial expiration clauses.

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Endnotes

¹ “[...] in case of imports from a country, which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability for the purpose of paragraph 1.” This second *Ad Note* concerns the determination of price comparability between market and centrally planned economies. Thus, in certain aspects, it can be considered a WTO definition of a NME (Thorstensen et al., 769).

² *EC–Definitive Anti-dumping Measures on Certain Iron or Steel Fasteners from China (EC-Fasteners)*, AB Report, WT/DS397/AB/R, 15 July 2011, para. 285.

³ *EC –Fasteners*, fn. 460.

⁴ *EU–Anti-dumping Measures on Certain Footwear from China (EU–Footwear)*, Panel Report, WT/DS405/R, 28 October 2011.

⁵ *EU–Footwear*, para. 7.98. For certain classified MNE countries, Article 9(5) establishes criteria for the determination of whether the export prices of producers or exporters subject to anti-dumping investigations in the European Union will be taken into consideration, individual margins of

dumping calculated, and individual duties imposed upon importation of the relevant product to the European Union.

⁶ *EU–Footwear*, para. 7.99-7.100.

⁷ Mahncke (2014), 171.

⁸ *Ibid.*

⁹ *Japan–Taxes on Alcoholic Beverages*, AB Report, WT/DS8/AB/R, 1 November 1996, 107-108.

¹⁰ provided in the USDOC's AD Manual and the EU's Basic AD Regulation.

¹¹ Panel Report, *US–Anti-dumping Measures on Certain Shrimp from Viet Nam (US–Shrimp)*, WT/DS404/R, 17 November 2014.

¹² *Supra* note 2.

¹³ *US–Shrimp*, para. 7.158.

¹⁴ *EC–Fasteners (China)*, para. 364.

¹⁵ *US–Shrimp*, para. 7.179.

¹⁶ *US–Shrimp*, para. 7.180.

¹⁷ *US–Shrimp*, para. 7.192.

¹⁸ *EU–Footwear*, para. 7.258.

¹⁹ *EU–Footwear*, footnote 557.

²⁰ *EU–Footwear*, para. 7.229-7.230. In this case, Viet Nam, as the third party, argued that “Brazil has a higher level of socio-economic developments compared to China, and its footwear industry is one of the world's most protected ones” (para. 7.252).

²¹ *EU–Footwear*, para. 7.265.

²² *EU–Footwear*, para. 7.252.

²³ *EU–Footwear*, para. 7.260.

²⁴ Report of the Working Party on *Border Tax Adjustments*, BISD 18S/97, para. 18.

²⁵ *United States–Restrictions on Imports of Tuna (Mexico) (US–Tuna I)*, report not adopted, circulated on 3 September 1991, para. 5.15; *United States–Restrictions on Imports of Tuna (EU) (US–Tuna II)*, report not adopted, circulated on 16 June 1994.

²⁶ Howse and Regan (2000), 249; Read (2005), 239.

²⁷ *EC–Measures affecting Asbestos and Asbestos-containing Products*, AB Report, WT/DS135/AB/R, 12 March 2001, 46-56. The Appellate Body reversed the panel's approach not to take into account the health risks in products' likeness assessment.

²⁸ *Japan–Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, Panel Report, L/6216 - 34S/83, 10 November 1987, para. 5.7.

²⁹ *Indonesia–Certain Measures Affecting the Automobile Industry*, Panel Report, WT/DS54/R, 2 July 1998, para. 14.175.

³⁰ L/978, adopted on 13 May 1959, 8S/145, 149, paras. 12-14.

³¹ Note 2 Ad Paragraph 1 of Article VI of the GATT 1994.

³² Watson K.W. (2014).

³³ For example, Azerbaijan, Belarus and Uzbekistan, those countries on the NME list of the EU, are now in the process of accession to the WTO.

³⁴ Watson K.W., *Supra* note 32 at 11.