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Introduction

1.1 Background to the Problem

This book attempts to clarify the controversial issue of anti-dumping and its relationship with hidden trade protectionism.[1] My interest in this and other anti-dumping issues was initially sparked by my involvement in international trade regulation as a civil servant. I have participated in or directly conducted several trade remedy investigations, including anti-dumping and anti-circumvention, while wondering whether the common use of trade remedies is proportionate, especially regarding complex investigation procedures. Further reading on the issues involved in the international trade law literature encouraged me to offer research and analysis on anti-dumping procedures and procedural justice as a remedy against hidden trade protectionism.

Exporting products with a lower price compared to their normal value in the home market is dumping.[2] Dumping constitutes price discrimination between national markets.[3] Most of these measures are challenged through the Dispute Settlement Mechanism (DSM) under the framework of the World Trade Organization (WTO).[4] For instance, zeroing[5] is the

[1] Some parts of this book was previously published as an article. Yilmazcan, Abdulkadir, 'The Role of Anti-Dumping in the US–China Trade War', China & WTO Rev. 2021, no. 1 (2021), 7–36.

[2] Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (Cambridge University Press, 2017), 677.

[3] Raj Krishna, *Anti-Dumping in Law and Practice* (The World Bank, The World Bank E-Library, 1999), 6.

[4] WTO is an international organisation mainly aiming at open and non-discriminatory markets that would increase welfare in all countries. Bernard M. Hoekman and Petros C. Mavroidis, *World Trade Organization (WTO): Law, Economics, and Politics* (Routledge, 2007), 1.

[5] Zeroing is a calculation method that generally leads to a larger dumping margin. This is because, typically, an anti-dumping investigation deals with one or more years as the investigation period, and during this period, some of the transactions may not be subject to dumping. Generally, the average of these transactions should be calculated to find the dumping margin for a specific exporter. However, in the zeroing method, the investigating

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single most litigated issue under WTO law.[6] Tariffs and other trade policies are traditionally used by governments to boost domestic industries.[7] One may call this policy *import substitution* and criticise it for protecting inefficient sectors. Therefore, several countries switched to *export promotion* policies with the expectation of international competition in favour of these sectors.[8] Yet, during the negotiations of the General Agreement on Tariffs and Trade (GATT) and the establishment of the WTO, developed countries were especially unwilling to liberalise trade and reduce the tariffs imposed. Temporary trade barriers (anti-dumping, safeguards and countervailing duties) are labelled as the international trade system's safety valves.[9] Without these measures, WTO members would be unwilling to reduce their customs barriers. During the negotiations of the GATT, trade remedies were seen as a small trade-off compared to the larger gains from the liberalisation process. However, the last few decades showed the opposite. Trade remedies can constitute a threat to open and non-discriminatory markets. Trade barriers have proliferated over the years, and among these three trade barriers, anti-dumping is the most popular.[10] Nevertheless, anti-dumping rules divide scholars and policymakers.

The reason for such a persistent debate on dumping and anti-dumping is the controversial causes of dumping. Dumping can occur under particular circumstances: (1) companies endure financial difficulties, go out of business or dissolve their stocks because of overcapacity; (2) companies are subsidised by their government or a third party and (3)

authority omits the transactions without dumping and calculates the dumped transactions, thus reaching a higher dumping margin. The Appellate Body constantly rules that zeroing is not allowed under the ADA.

[6] Thomas J. Prusa and Edwin Vermulst, 'United States – Continued Existence and Application of Zeroing Methodology: The End of Zeroing?', *World Trade Rev.* 10, no. 1 (2011), 45–61. Some examples focusing on the zeroing issue would be DS402, United States – Use of Zeroing in Anti-Dumping Measures Involving Products from Korea, DS350, United States – Continued Existence and Application of Zeroing Methodology or DS322, United States – Measures Relating to Zeroing and Sunset Reviews.

[7] James Brander and Barbara Spencer, 'Tariff Protection and Imperfect Competition', in Gene M. Grossman (ed.), *Imperfect Competition and International Trade* (MIT Press, 1992), 107.

[8] Robert C. Feenstra, *Advanced International Trade: Theory and Evidence* (Princeton University Press, 2015), 209.

[9] Chad P. Bown, *Trade Remedies and World Trade Organization Dispute Settlement: Why Are So Few Challenged?* (The World Bank, 2005), 7.

[10] Chad P. Bown, 'Temporary Trade Barriers Database: Update through 2013', World Bank, accessed June 2023, http://econ.world bank. org/ttbd/.

companies use dumping as a strategy to expand market share.[11] If a firm is capable of discriminating its prices, then it is likely to benefit from a closed home market.[12] A closed market secures the exporters' high-profit margin, enabling the company to discriminate or predate its losses arising from dumping in other markets and cross-subsidise. Closed markets send false price signals and adversely affect firms, possibly resulting in their extinction. Therefore, anti-dumping has become increasingly popular among WTO members and as well as a highly controversial topic under the WTO law.

Almost a hundred years ago, Viner, one of the leading scholars in this field, analysed the motives of the act of dumping in international trade.[13] Viner's two well-known articles focus on the link between industrial reform and dumping practices.[14] The articles highlight how different countries react to dumping practices and also the shift of dumping accusations from England to other countries, such as the United States (US) or Germany. During that period, countries introduced new tariffs or took other measures to prevent dumping just as they do today. The analyses used at that time were based on key modern economic principles, namely economies of scale and comparative advantage. Further studies have signalled the need for other factors to be considered, and economists have structured new models to better understand the dumping phenomenon. Caves and Jones suggest that the theory of monopolistic price discrimination can explain dumping.[15] This means that the monopolist is already enjoying his position in the home market and, therefore, can bear losses resulting from sales below cost and secure a monopolist position in the foreign market. Caves and Jones's model also claims that firms facing dumping do not have a choice to export.[16] However, Brander and Krugman developed and elaborated the earlier model and showed that the opening of trade has positive effects on

[11] Terence P. Stewart, 'US–Japan Economic Disputes: The Role of Anti-Dumping and Countervailing Duty Laws', *Ariz. J. Int'l & Comp. L.* 16 (1999), 698.
[12] Ibid.
[13] Jacob Viner, 'The Prevalence of Dumping in International Trade: I', *J. Pol. Econ.* 30, no. 5 (1922), 655–680; Jacob Viner, 'The Prevalence of Dumping in International Trade: II', *J. Pol. Econ.* 30, no. 6 (1922), 796–826.
[14] Ibid.
[15] Rafael S. Espinosa Ramírez, 'Reciprocal Dumping and Environmental Polices', *Panor. Econ.* 3, no. 6 (2017), 10.
[16] Paul R. Krugman, 'Industrial Organization and International Trade', *Handb. Ind. Organ.* 2 (1989), 1179–1223.

consumer welfare because firms practise 'reciprocal dumping' when they face dumping.[17] The literature is still divided on whether dumping is unfair or whether it should be allowed for consumer welfare purposes.[18]

This book assumes that anti-dumping investigations are directed in such a way that exporters are discouraged from cooperating with the investigating authorities. Once exporters are unable to submit sufficient information, investigating authorities can inflate anti-dumping duties and use this balancing tool for protectionist purposes. Anti-dumping measures have been criticised for being protective. However, this book holds the view that anti-dumping is not protective, provided that it is used to balance market distortions and that procedural justice is secured. But, if the investigating authorities use legal gaps or take advantage of certain provisions and exercise excessively strict procedural rules to set higher duties on imported goods, this creates protectionism.[19]

Strict procedural rules can secure rights if used in the defendants' favour, as in criminal cases.[20] The same applies to anti-dumping rules. Messerlin, for instance, noted that China is negotiating stricter anti-dumping rules under the Anti-dumping Agreement (ADA), which means a restricted field of application for the investigating authorities.[21] China defends the ADA's regulatory reform, including the prohibition of zeroing, limitations on measures to a maximum of five years, and disclosure of more information.[22] In this case, the ADA's stricter rules would limit the discretion of investigating authorities and work in favour of exporting members. In its current form, the ADA leaves room for discretion so that members can enforce complex and burdensome rules during anti-dumping investigations. For the purposes of this book, strict

[17] James Brander and Paul Krugman, 'A "Reciprocal Dumping" Model of International Trade', *J. Int'l Econ.* 15, nos. 3–4 (1983), 320.

[18] Brink Lindsey and Dan Ikenson, *Antidumping 101: The Devilish Details of 'Unfair Trade' Law* (Center for Trade Policy Studies, Cato Institute, 2002), 3; Diane P. Wood, '"Unfair" Trade Injury: A Competition-Based Approach', *Stan. L. Rev.* 41, no. 5 (1989), 1155. In practice, the US labels dumping as unfair. The Antidumping Act of 1921 begins with the following line 'This memorandum deals with the unfair practice of "dumping"'. Similarly, the USITC official website defines dumping and certain subsidies as unfair trade practices.

[19] Yilmazcan, Abdulkadir, 'The Role of Anti-Dumping in the US–China Trade War', China & WTO Rev. 2021, no. 1 (2021), 7–36.

[20] Gemma Daly, 'Should Truth Commissions Be Viewed as Second-Best Alternatives to Prosecutions', *SOAS L.J.* 2 (2015), 188.

[21] Patrick A. Messerlin, 'China in the World Trade Organization: Antidumping and Safeguards', *World Bank Econ. Rev.* 18, no. 1 (2004), 105–130.

[22] Ibid.

procedural rules in anti-dumping are used to create procedural obstacles for exporters. The concept of 'red tape' is relevant within this context.[23] In terms of long questionnaires and detailed verification visits, investigating authorities can be criticised for red tape. Within the scope of this book, strict procedural rules have a broader meaning than red tape or procedural obstacles since the burdens are not limited to requiring excessive information from exporters. Strict procedural rules also cover the procedures followed by the investigating authorities, such as the calculation methods or limited disclosure of the information used for final determinations.

In this context, strict procedural rules constitute a limitation on the right to defend and meaningful participation. Imagine a company exporting its products to overseas markets while selling them to its domestic market at the same time. This company is accused of unfair trade practices by the overseas investigating authorities and has been asked to submit a questionnaire consisting of a hundred pages to supply confidential information such as the costs of raw materials and labour. The company needs to hire lawyers in a foreign jurisdiction to defend itself, which is costly. Most exporters, therefore, choose not to cooperate. So, the long questionnaire or the legal costs would be procedural obstacles, whereas the rules, including the calculation methods governing the anti-dumping investigation, would be strict procedural rules.

Procedural rules can be classified as 'strict' when they unreasonably limit the exporters' right to defend. Within the scope of WTO law, only the Agreement on Rules of Origin states 'unduly strict requirements' as a benchmark.[24] Another formulation of a similar benchmark is 'not be

[23] The excessive use of administrative procedures or bureaucracy is called 'red tape'. Preece S. Lynn and Bart M. McMillan, 'Free Trade Does Not Equal Freedom from Red Tape: Practitioner Thoughts on FTAA Rules of Origin', *Int'l L. Rev.* 1 (2003), 159.

[24] Agreement on Rules of Origin Article 2:

> (c)rules of origin shall not themselves create restrictive, distorting, or disruptive effects on international trade. They shall not pose **unduly strict requirements** or require the fulfilment of a certain condition not related to manufacturing or processing, as a prerequisite for the determination of the country of origin. However, costs not directly related to manufacturing or processing may be included for the purposes of the application of an ad valorem per centage criterion consistent with subparagraph.
>
> (www.wto.org/english/docs_e/legal_e/22-roo_e.htm#2, accessed 30 June 2023)

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more trade-restrictive than necessary' as stated under the Technical Barriers to Trade (TBT) Agreement.[25] Equating strictness with trade restrictiveness or protection can be accommodating.[26] The DSM needs to define the scope of strictness case by case. Within the scope of this book, strict procedural rules include, but are not limited to the following examples. The procedures can be classified as strict if the investigating authority: (1) requires exporters to fill long and detailed questionnaires (as in the case of the US with nearly 150 pages), (2) prepares the questionnaires in the local language (not applicable to the US and European Union (EU) as English is one of the WTO's official languages), (3) rejects minor revision requests after submission of the questionnaire, (4) rejects requests to grant an extension, (5) limits the scope of non-confidential summary, (6) limits access to the non-confidential summary, or (7) demands confidential or private information during on-the-spot investigations, such as access to e-mails. All in all, the investigating authority limits the information submitted by exporters and relies on available facts so that the margins are inflated, and inflated margins eventually restrict trade.[27]

[25] TBT Agreement Article 2.2:

> Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall **not be more trade-restrictive than necessary** to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, inter alia: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, inter alia: available scientific and technical information, related processing technology or intended end-uses of products.
>
> (www.wto.org/english/docs_e/legal_e/17-tbt_e.htm, accessed 30 July 2023)

[26] In the DS400 and DS401, Norway held this view. DS401, European Communities – Measures Prohibiting the Importation and Marketing of Seal Products, accessed 30 June 2023, www.wto.org/english/tratop_e/dispu_e/cases_e/ds401_e.htm.

[27] On the relationship between discretion and strictness, Mitchell, Sornarajah and Voon argue that good faith can ease the strictness of 'overly formalistic application of legal rules'. Therefore, limiting excessive discretion is also associated with the good faith principle. While multilateral agreements require discretionary areas to get signed, the discretionary power of the signatories should not be enjoyed unreasonably and unfairly. Andrew D. Mitchell, Muthucumaraswamy Sornarajah and Tania Voon, eds., *Good Faith and International Economic Law* (Oxford University Press, 2015), 88.

Some examples of strict procedural rules can be tracked through varied procedural requirements for different sorts of economies. In terms of non-market economy status, Chinese exporters receive different questionnaires in almost every jurisdiction. In the EU, exporters who want to be treated as market economy exporters need to fill in an additional questionnaire.[28] The US questionnaires are also different for market economies and non-market economies.[29] Furthermore, some empirical findings in this book suggest that the procedural rules are applied especially strictly to Chinese exporters vis-à-vis other exporters.[30] One WTO lawyer, for instance, notes that there is prejudice against Chinese exporters during anti-dumping investigations. The differentiation of forms between market economies and non-market economies is a natural result of Article 2.2 of the ADA. Furthermore, the strictness of procedures is not a negative practice per se; however, considering objective indicators, such as the length of questionnaires, legal costs, timing or language requirements, this strictness can indicate protectionism by impeding the opportunity to defend interests.

Procedural obstacles may seem like minor problems in global trade. However, given their effects, they should not be disregarded. Anti-dumping as a whole has been long debated. Apart from a few WTO members and academics, the general belief is that anti-dumping is harmful to global trade.[31] The ADA under the WTO is still being

[28] More information on EU investigations can be found at European Commission website 'trade Defence', European Commission, accessed 15 January 2023, https://ec.europa.eu/trade/policy/accessing-markets/trade-defence/actions-against-imports-into-the-eu/anti-dumping/#_templates.

[29] US Anti-dumping questionnaires available at 'Antidumping Questionnaires', US Department of Commerce, accessed 30 June 2023, https://enforcement.trade.gov/questionnaires/questionnaires-ad.html.

[30] Regarding other non-market economies, the questionnaires are the same but, for most non-market economies (Tajikistan, Turkmenistan, Kyrgyzstan, Moldova, Georgia) there have been no or few anti-dumping investigations. Only Vietnam faced a considerable number of investigations (69 between 1995 and 2020). Both the EU and US still do not consider Vietnam as a market economy but as Vietnam has signed FTAs with these economies, it is likely to be considered as a market economy soon. Regardless, more empirical study would be useful to clarify the different treatment faced by Chinese and Vietnamese exporters.

[31] Thomas J. Prusa, 'Anti-dumping: A Growing Problem in International Trade', *World Econ.* 28, no. 5 (2005), 683–700; Inge Nora Neufeld, *Anti-dumping and Countervailing Procedures: Use or Abuse?: Implications for Developing Countries* (United Nations, 2001), 20; Mitsuo Matsushita, Thomas J. Schoenbaum, Petros C. Mavroidis and Michael Hahn, *The World Trade Organization: Law, Practice, and Policy* (Oxford University Press, 2015), 406.

debated, and attempts to revise it have failed. Although the literature suggests abolishing or replacing anti-dumping laws, this is unrealistic at this stage for political reasons.[32] Therefore, this book focuses on the procedural effects of these investigations and argues that before a substantial revision of the ADA, procedural justice must be secured in a way that benefits all WTO Members.

The ADA has little to say on procedural aspects of anti-dumping investigations, and WTO members enforce their own procedural rules in investigations. It has been asserted that anti-dumping investigations constitute a barrier for exporters.[33] As a result, exporters prefer not to cooperate. This, in turn, results in high anti-dumping duties, which defeats the ADA's primary purpose.[34]

This research examines whether or not this phenomenon is real. In order to visualise the common practice, the book focuses on the US's and EU's procedural rules, specifically against China, as it is the top target for several WTO members. Supplementing research to date, this book not only discusses the underestimated effect of procedural obstacles but also offers a new perspective in terms of international trade policy to hidden trade protectionism. To date, procedural justice has not been explicitly proposed in relation to anti-dumping procedures. In this context, this book examines the WTO's DSM and the rules negotiations to establish whether there have been sufficient attempts to limit the misuse of anti-dumping measures. This book also proposes a revision of the ADA under the procedural justice framework. Procedural justice would improve exporters' levels of cooperation and avoid inflated anti-dumping measures. Concrete suggestions, such as a standard anti-

[32] ADA is subject to a single undertaking like other WTO agreements, which means that members must agree the agreements as a whole. Any amendment to an agreement requires a consensus. It is hard to achieve a consensus for a controversial issue like anti-dumping.

[33] David N. Palmeter, 'The Antidumping Law: A Legal and Administrative Nontariff Barrier', in Richard Boltuck and Robert E. Litan (eds.), *Down in the Dumps: Administration of the Unfair Trade Laws* (Brooking Institution, 1991), 65–89; Xiuping Hua, Ying Jiang, Qian Sun and Xinyi Xing, 'Do Antidumping Measures Affect Chinese Export-Related Firms?', *Rev. Quant. Finance Account.* 52 (2019), 1–30, 1; Sarah J. Marsh, 'Creating Barriers for Foreign Competitors: A Study of the Impact of Anti-dumping Actions on the Performance of US Firms', *Strateg. Manag. J.* 19, no. 1 (1998), 25–37, 34; Nam-Ake Lekfuangfu, 'Rethinking the WTO Anti-Dumping Agreement from a Fairness Perspective', *Cambridge Student L. Rev.* 4 (2008), 307.

[34] Abdulkadir Yilmazcan, 'The Role of Anti-Dumping in the US–China Trade War', *China & WTO Rev.* 7, no. 1 (2021), 7–36.

dumping questionnaire for all members, are addressed in order to conceptualise procedural justice during anti-dumping investigations.

1.2 Research Question and Outline

This book's concerns are evaluated through an examination of three specific issues. First, the main interest is to determine to what extent the procedural rules used in anti-dumping investigations can be used to achieve hidden trade protectionism in favour of domestic industries. In answering this question, particular attention is given to the relationships between the US, EU and China as a case study. Second, this research sets out to verify whether the anti-dumping investigation procedures used by the US and EU support the assumption of hidden trade protectionism, particularly against China. Lastly, the book explores to what extent procedural justice would avoid the hidden trade protectionism in anti-dumping investigations.

In seeking answers to these questions, the book is organised as follows. Chapter 1 introduces the research questions and the scope of research; a summary of the relevant literature is also included. Chapter 2 sets out the theories and relevant concepts used in the book. The arguments for and against anti-dumping laws are explained considering efficiency, fairness and political issues. The theories used are interdisciplinary in nature and require a political economy perspective. Also, macro and micro views need to be taken into account because anti-dumping investigations involve both states and firms. Later, the justifiable level of anti-dumping laws is discussed. Anti-dumping laws are ill-defined cures for market distortions; this book suggests that the improvement of procedural justice can reduce the negative reaction to anti-dumping laws by limiting their misuse.

Chapter 3 focuses on WTO disputes about anti-dumping issues. Anti-dumping or, to be more specific, zeroing is the single-most litigated issue under WTO law.[35] Although the Appellate Body has found zeroing method inconsistent with ADA several times, it is still being used with

[35] Prusa and Vermulst, 'United States – Continued Existence and Application of Zeroing Methodology', 45–61. Some examples focusing on the zeroing issue would be DS402, United States – Use of Zeroing in Anti-Dumping Measures Involving Products from Korea; DS350, United States – Continued Existence and Application of Zeroing Methodology or DS322, United States – Measures Relating to Zeroing and Sunset Reviews.

small alterations.[36] Chapter 3 shows that the so-called jewel in the crown[37] is sometimes ineffective. To do so, the role of the DSM in the anti-dumping issue is presented, and anti-dumping cases dealing with procedural issues are analysed. The procedural issues mentioned in this chapter are as follows: calculation methods, transparency, public notice/notification, selection of investigated parties (sampling), submission of evidence and rebuttals, access to non-confidential files, hearings, newcomers and enforcement. Chapter 3 analyses the reasons for revising the ADA. First, not all problems in practice can be challenged before the DSM, and second, the DSM cannot resolve all disputes that come before it due to a lack of explicit rules under the ADA.

Chapter 4 explains the anti-dumping investigation procedures of the US and EU and their differences. China represents a special case for other members with its socialist market economy and a growing impact in the global political arena. Within the scope of this research, China needs to be evaluated in detail as (1) nearly one-quarter of all anti-dumping measures were taken against China,[38] (2) Chinese exporters complain about the anti-dumping investigations both at the domestic level and the WTO DSM, (3) the protectionist policies towards Chinese exporters eventually turn into general policies towards other WTO members since the ADA is silent on some procedural issues. Thus, Chapter 4 describes the trade policies of these top three economies and reveals facts about the ongoing trade war from an anti-dumping perspective. These different procedural rules form a connection with the notion of hidden trade protectionism and anti-dumping.

Chapter 5 is dedicated to the results of the fieldwork on procedural problems in the course of anti-dumping investigations. The chapter notes that some problems with anti-dumping are not mentioned in the literature. The fieldwork attempts to uncover the problems that arise in practice. As China is the top anti-dumping target and the top hunters are the US and EU, the fieldwork focuses first on Chinese exporters who shared their experience of US and EU investigation procedures. In addition, law firms were asked to take part in an online survey about their experience with these two jurisdictions. The questions did not involve confidential information about their clients but focused on

[36] Chad P. Bown and Thomas J. Prusa, US Antidumping: Much Ado about Zeroing, The World Bank Research Working Paper (2010), 3. Also see DS402, DS350, DS322, etc.
[37] Van den Bossche and Zdouc, *The Law and Policy of the World Trade Organization*, 94.
[38] Placing China as the top anti-dumping target amongst all WTO members.

procedural obstacles that inflate anti-dumping margins. Lastly, officials at the relevant public authority in China, the Ministry of Commerce of the People's Republic of China (MOFCOM), were interviewed as they take part in anti-dumping investigations to support their exporters. The officials from MOFCOM believe the US and EU do not treat China equally and fairly. After the procedural problems from the field were identified, additional questions were sent to the investigating authorities in the US and EU. In this part of the book, these complaints and responses are gathered according to empirical data collection methods. Chapter 5 then evaluates the data in these three jurisdictions. The current situation and the inefficiency of the ADA are also highlighted.[39]

Chapter 6 is the final substantial part of the book, explaining the need for a revision of the ADA. There are ongoing negotiations on the ADA but they are without positive outcomes. There are several reasons for this lack of progress, such as deadlock in the Doha Development Round, the mega trade agreements or unwillingness on the part of top users of anti-dumping measures. Still, alternative solutions are proposed to settle the hidden trade protectionism in anti-dumping problems. Normative solutions include a comprehensive reform of the ADA. Such a revision has already been suggested in the literature, but this book departs from most others by prioritising procedural revisions rather than substantive reform. The study proposes changes to procedural justice in anti-dumping procedures. Due to the constraints of a short timescale on substantive ADA reform, other possibilities are also discussed to improve procedural justice, including (1) publishing best practice guidelines; (2) creating a standard questionnaire to be used by all WTO members; (3) reforming and fixing the DSM; (4) raising awareness among exporters that cooperation with investigating authorities may have a significant effect on the anti-dumping measures imposed; (5) improving the accounting systems for Chinese exporters; (6) a support tool for exporters or exporting countries, such as the Advisory Center on WTO Law (ACWL) in Geneva; and (7) software to assist exporters to fill in questionnaires. The boldest suggestion is the standard anti-dumping investigation questionnaire, which may solve most of the procedural problems arising from divergent enforcement. Only with such a standard could an exporter defend itself in different anti-dumping investigations and cooperate effectively with investigating authorities. This chapter aims to

[39] Edwin Vermulst, 'Ten Major Problems with the Anti-Dumping Instrument in the European Community', *J. World Trade* 39 (2005), 105.

highlight the current state of the negotiations on the ADA as well as the importance of procedural justice during a possible revision of the ADA and other practical means.

Chapter 7 is the conclusion and consolidates ideas and findings. This chapter calls for and reflects on the possibility of a more transparent and fair anti-dumping system for all WTO members achieved by promoting procedural justice. It also considers the significance of the book's findings for international trade law discourse more generally by relating them to contemporary trade issues such as the US–China trade war, Brexit, the WTO crisis, and mega free trade agreements.

1.3 Scope of the Research

This book focuses on three economies, namely the US, EU and China. From a macroeconomic perspective; these three economies are the world's 'dominating powerhouses'.[40] In 2022, the US produced around 15.5 per cent of global GDP, while the EU accounted for 14.9 per cent.[41] China, on the other hand, had 18.6 per cent of global GDP alone, placing itself at the top.[42] This also means that these three economies are generating almost half of the global GDP, so trade policies between these three economies significantly impact the global economy.

From the perspective of anti-dumping investigations, limiting the scope of the book to the US, EU and China seems helpful. These members represented more than 25 per cent of the anti-dumping measures enforced between 1995 and 2022(6) and more than 50 per cent of the global exports in 2021.[43] China is the top country for both the EU and the US in terms of anti-dumping measures. The US and EU are the first- and fourth-ranked targets in terms of measures enforced by China.[44]

As mentioned above, China is a special case in this comparison. For some three decades, China implemented gradual reforms to transform

[40] Ralph Wrobel, '"The China Effect": Changes in International Trade Patterns as Reasons for Rising Anti-Globalism'. No. 2020-1. Ordnungspolitische Diskurse (2020).
[41] Ibid. GDP based on PPP, share of world, IMF Datamapper, accessed 17 June 2023, www.imf.org/external/datamapper/PPPSH@WEO/OEMDC/ADVEC/WEOWORLD.
[42] Ibid.
[43] Ibid.
[44] Anti-dumping Measures: Reporting Member vs Exporter, WTO, accessed 17 June 2023, www.wto.org/english/tratop_e/adp_e/adp_e.htm.

into a market-driven economy. Agricultural production was the first stage supported by manufacturing and exports.[45] The growth model is unique as the socialist market economy carries Chinese characteristics. Three main features of China's socialist market economy were highlighted by Jiang Zemin:

> First, concerning the ownership structure, it keeps the public sector in the dominant position, supplements it with a private sector that includes individually owned enterprises and other sectors... Second, concerning distribution, it retains distribution according to work in the dominant position, supplements it with other modes, permits and encourages some localities and individuals to prosper first, gradually achieves prosperity for all and prevents polarization. Third, concerning economic operating mechanisms, it achieves the long-term, organic integration of the planned economy and market economy; makes full use of the advantages of both.[46]

Together with accelerated export growth, these features also make China the first target of anti-dumping measures. Especially after 2001, China's accession to the WTO affected its trading partners' attitude towards Chinese competition. Other members of the WTO were obliged to convert WTO-inconsistent import restrictions against China into WTO-consistent measures such as anti-dumping.[47] However, while using the so-called WTO-consistent anti-dumping measures, WTO members are likely to overprotect their domestic industries. Regarding the scope of this book, China is the main concern along with the US and EU because, as mentioned, China's WTO membership prevents other members from enforcing China-specific import restrictions. Therefore, WTO members, specifically the US and EU, seek alternative ways to restrict imports from China as much as they can. The investigation procedures allow WTO members to inflate anti-dumping measures.

The first aspect of the possible misuse of anti-dumping measures is the excessive application of non-market economy status. US law defines a

[45] Shenggen Fan, Ravi Kanbur, Shang-Jin Wei and Xiaobo Zhang, eds., *The Oxford Companion to the Economics of China* (Oxford University Press, 2014), 7.

[46] Xun Gong and Corinne Cortese, 'A Socialist Market Economy with Chinese Characteristics: The Accounting Annual Report of China Mobile', *Account. Forum* 41, no. 3 (2017), 206–220.

[47] Chad P. Bown, 'China's Market Economy Status and Antidumping: A $100 Billion, $10 Billion, or $1 Billion Dispute? Part 2', Peterson Institute for International Economics (8 June 2016), accessed 1 June 2022, https://piie.com/blogs/trade-investment-policy-watch/chinas-market-economy-status-and-antidumping-100-billion-10-0.

non-market economy as one without the market principles of cost or pricing structures resulting in an unfair value of goods.[48] China argues that if China were not treated as a non-market economy, dumping margins would be lower.[49]

> On a trade-weighted basis, less than 1.5 per cent of China's total goods exports to the US were subject to a US-imposed antidumping import restriction in 2000. By 2015 US imposed antidumping import restrictions affected roughly 7 per cent (about $35 billion) of China's annual exports to the United States. The significant uptick after 2007 is consistent with research indicating that import restrictions tend to increase during macroeconomic slowdowns – e.g., the Great Recession – and periods of the sharp appreciation of the real exchange rate. To the extent that China believes that its exports to the United States have been limited because of its treatment under NME status, it is clear why China is concerned about its NME status.[50]

This 7 per cent may seem negligible, but it is high compared to other countries.[51] Furthermore, in terms of value, 7 per cent corresponds to nearly $100 billion USD.

Second, the procedural rules are designed to discourage exporters from cooperating with investigating authorities. The outcome is the excessive use of the 'facts available' provision. Thus, investigating authorities are able to calculate higher anti-dumping duties than needed. The parties need to cooperate to be exempted or subjected to a lower duty in the context of the anti-dumping investigations. However, procedural obstacles might be burdensome, such that the cost of non-cooperation might outweigh the benefits of cooperation. This book analyses whether these procedures are protective policy tools against exporting firms and other members. Then, revealing these different and burdensome procedures in different members, it is easier to discuss whether there is a need for a renegotiation of the ADA and see whether the Negotiating Group on Rules (NGR) is taking sufficient initiative.

Combining these two side effects, rather than being a minor trade-off to liberalise markets, anti-dumping creates tension between the US, EU and China. There are internal and external factors placing China as the

[48] 19 USC § 1677(18)A, accessed 17 June 2023, www.law.cornell.edu/uscode/text/19/1677.
[49] Chad P. Bown, 'Should the United States Recognize China as a Market Economy?' The Peterson Institute for International Economics, Policy Brief No. PB16–24 (2016), 3.
[50] Ibid., 4.
[51] United States 1.3 per cent, South Korea 3.9 per cent or India 2.7 per cent. Bown, ibid.

top anti-dumping target, which are further elaborated in Chapter 4. It is worth noting that the practices against China inevitably turn into general policies because members cannot explicitly apply different rules to China. Strict procedures to increase the level of protection from China become a general restrictive trade policy against each and every WTO member.

Therefore, these economies represent a substantive part of the problem. The solution applicable to these three economies is also applicable to other WTO members. This solution is based on the application of procedural justice into the anti-dumping investigation procedures.

Rawls's classification of procedural justice is based on three categories: perfect, imperfect, and pure.[52] Perfect procedural justice always leads to just outcomes whereas imperfect procedural justice cannot guarantee just outcomes.[53] Pure procedural justice seeks agreeable outcomes. Coin flipping or traffic lights are some examples of pure procedural justice.[54] The collective consent in pure procedural justice creates a notion of justice.[55] In general, legal proceedings are a form of imperfect procedural justice as there is no guarantee that the outcome will be just. However, without imperfect procedural justice, the outcome cannot be just.

At this juncture, procedural justice is a requirement for substantive equality.[56] There are four widely recognised components of procedural justice, namely trustworthiness, respectful treatment, neutrality and voice.[57] According to another categorisation, procedural justice improves accuracy, cost-balancing and meaningful participation.[58] Like neutrality, accuracy means that substantive laws are applied in the same way at any time. Accuracy also secures predictability while avoiding discretion. Cost-balancing requires a comparison of the benefits of accuracy against its costs. Meaningful participation is required to provide procedural justice independent of accuracy and cost-balancing. Relevant parties to

[52] Filippo Fontanelli and Paolo Busco, 'The Function of Procedural Justice in International Adjudication', *Law Pract. Int'l Court. Trib.* 15, no. 1 (2016), 1–23.
[53] Ibid.
[54] Ibid.
[55] Ibid.
[56] Paul Stancil, 'Substantive Equality and Procedural Justice', *Iowa L. Rev.* 102 (2016), 1649.
[57] Trustworthiness means acting honestly and considering the public interest. Respectful treatment means behaving politely and professionally. Neutrality means following the same procedures for everyone, every time. Voice means allowing individuals to express their interests and opinions during the decision-making process. Julie M. Barkworth and Kristina Murphy, 'Procedural Justice Policing and Citizen Compliance Behaviour: The Importance of Emotion', *Psychol. Crime & L.* 21, no. 3 (2015), 254–273.
[58] Stancil, 'Substantive Equality and Procedural Justice'.

a dispute may defend their interests only by meaningful participation.[59] In this context, two categorisations overlap in being objective and transparent while allowing meaningful participation for the parties. Therefore, procedural justice can reduce the misuse and overly protectionist effects of anti-dumping measures by ensuring enhanced transparency, less discretion on the part of investigating authorities and more predictable investigation procedures for all members.[60] In such circumstances, exporters would have more opportunity to express their position.

At this point, it is also notable that due process is a relevant and similar concept to procedural justice.[61] In other words, due process covers two essential elements: impartiality of the court and the juridical equality of parties to the trial.[62] So the main application of due process is within court proceedings. Due process generally points to 'procedural due process', which means that the predetermined procedures should be followed when life, liberty or property of citizens are restricted by the state.[63] Therefore, procedural due process deals with the notice and hearing process during government actions as well as court proceedings. 'Substantive due process' requires just reasons for the government to deprive one's life, liberty or property.[64] Substantive procedural justice is a controversial concept as some argue the origin of due process only covers procedural due process.[65] When the term is used in its single format as 'due process', it mostly points to procedural due process. In adjudicative procedures, due process is often referred to as 'minimum procedural standards' or 'fundamental procedural norms'.[66]

[59] Ibid.

[60] Procedural justice also consists of other elements such as the authorities' motivation, honesty, ethicality, and the opportunities for representation; the quality of the decisions; the opportunities for error correction, the authorities' bias. Another approach is grouping these elements under three main groups; effort to be fair, ethicality and consistency. Tom R. Tyler, 'What Is Procedural Justice-Criteria Used by Citizens to Assess the Fairness of Legal Procedures', *Law & Soc'y Rev.* 22 (1988), 131.

[61] *Due process*: the conduct of legal proceedings according to established rules and principles for the protection and enforcement of private rights, including right to a fair hearing before a tribunal with the power to decide the case. Bryan A. Garner, *Black's Law Dictionary* (West Group, 1999), 516.

[62] John P. Gaffney, 'Due Process in the World Trade Organization: The Need for Procedural Justice in the Dispute Settlement System', *Am. U. Int'l L. Rev.* 14 (1998), 1179.

[63] Erwin Chemerinsky, *Constitutional Law* (Aspen, 2019), 813.

[64] Ibid.

[65] Ibid.

[66] Gaffney, 'Due Process in the World Trade Organization'.

Due process under the WTO adjudication is more concerned with the DSM. Article 12 of the Dispute Settlement Understanding (DSU) has determined the general framework of due process in dispute settlement proceedings.[67] Panel and Appellate Body reports also interpret the concept of due process within the DSM. In DS371, the Appellate Body highlights the role of due process within the DSM as:

> Due process is intrinsically connected to notions of fairness, impartiality, and the rights of parties to be heard and to be afforded an adequate opportunity to pursue their claims, make out their defences, and establish the facts in the context of proceedings conducted in a balanced and orderly manner, according to established rules. The protection of due process is thus a crucial means of guaranteeing the legitimacy and efficacy of a rules-based system of adjudication.[68]

In this context, due process and procedural justice can both be applied to the DSM in terms of impartiality of the tribunal and juridical equality of the parties to the dispute.[69] However, it should be kept in mind that despite the similarities, due process and procedural justice are different concepts. Due process does not guarantee that the outcome is just.[70] At the same time, the lack of due process results in unjust treatment.[71] Subsequently, procedural justice is a broader concept than due process. In terms of the scope of this book, due process remains closely related, but the main focus is the procedural justice in anti-dumping investigations rather than the due process in WTO's DSM.

Another issue out of the scope of this book is the justification of unfair trade practices conducted by Chinese exporters. Apart from being the top anti-dumping target, there is sound evidence that the majority of Chinese exporters are subsidised and controlled by the central government and are thus able to dump in overseas markets.[72] However, the main argument of the book is that even if Chinese exporters conduct unfair trade

[67] Dispute Settlement: Legal Text, Understanding on Rules and Procedures Governing the Settlement of Disputes, accessed 16 July 2023, www.wto.org/english/tratop_e/dispu_e/dsu_e.htm#12.

[68] DS371, Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines, Appellate Body Report, WT/DS371/AB/R (2011).

[69] Gaffney, 'Due Process in the World Trade Organization', 1195.

[70] David Resnick, 'Due Process and Procedural Justice', *NOMOS: Am. Soc'y Pol. Legal Phil.* 18 (1977), 206.

[71] Ibid.

[72] For more details see Trade Policy Review Report by the Secretariat China, WTO, 2018, WT/TPR/S/375, accessed 16 July 2023, https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/TPR/S375.pdf&Open=True; Edwin Vermulst and Brian Gatta,

practices, procedural justice is needed for the sake of international trade overall because, if the importing members adopt overprotective measures against unfair trade practices utilising overly complicated anti-dumping investigations, the circumvention risk arises and protectionism spreads among WTO members, slashing the welfare gains from trade. Therefore, the book does not discuss whether Chinese exporters actually export with dumped prices or not.

1.4 Conclusion

This book examines how anti-dumping procedures can be used to overprotect domestic industries and considers whether procedural justice would avoid this misuse, and the case studies and empirical findings highlight the need for a revision of the ADA. The different procedures or burdensome exercises by the US and EU against Chinese exporters comprise a significant proportion of these disputes and/or lead to a low level of cooperation. Therefore, the ADA needs revision.

Other studies have proposed the revision of the ADA in terms of addressing procedural issues as well as substantive ones.[73] Yet, there is no explicit proclamation that investigating authorities are using strict procedural rules in a protective manner. This book attempts to discover whether or not the authorities are using strict procedural rules, and the anti-dumping investigations by the US and EU against China represent a coherent case study. Also, if the answer is positive, then the relationship between strict procedural rules and protective outcomes of anti-dumping investigations can be conceptualised as the 'procedural effect', and procedural justice is promoted as providing an improved legal framework. Unlike this book, the literature on procedural justice focuses on the DSM in the WTO context.[74] This book applies procedural justice to anti-dumping investigation procedures to avoid its misuse.

In addition, the NGR is discussing a consolidated text of the ADA and SCM, but these proposals do not explicitly suggest applying the concept of procedural justice into anti-dumping investigations. Improved

'Concurrent Trade Defense Investigations in the EU, the EU's New Anti-subsidy Practice against China, and the Future of Both', *World Trade Rev.* 11 (2012), 527.

[73] Vermulst, '10 Major Problems with the Anti-Dumping Instrument in the European Community', 105.

[74] Adam S. Chilton and Ryan W. Davis, 'Equality, Procedural Justice, and the World Trade Organization', *Intercultural Hum. Rts. L. Rev.* 7 (2012), 277.

procedural justice brings greater participation of exporters during investigations, which would reduce the discretion of investigating authorities in calculating anti-dumping duties. Eventually, procedural justice would reduce the anti-dumping measures in force as well as the duty rates. Thus, disputes arising from anti-dumping measures would decrease. This book, therefore, suggests revising the ADA by means of procedural justice but also proposes alternative solutions, such as a standard questionnaire for use by all WTO members or low-cost legal assistance to exporters. By drawing more attention to procedural justice in anti-dumping investigations rather than the DSM prioritising procedural justice, this book attempts to contribute to existing literature and steer trade negotiations. Mega FTAs offer the potential for partial revision of global anti-dumping practices. If positive results are achieved through these FTAs, similar provisions could be extended to the ADA to provide a uniform practice.