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REVIEW PAPER

Circumvention of Trade Defence Measures and Business Ethics

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Abstract With the rise of globalization, the debate around free trade versus fair trade and liberalism versus protectionism has become increasingly complicated. At times, the regulations of the World Trade Organization seem to pit developed markets against emerging markets as governments attempt to expand international trade while at the same time protecting local industry. To this end, antidumping measures have been extensively developed as a way to block foreign low-cost goods (often produced in emerging countries) from entering domestic markets. In response, some exporters have begun to circumvent these antidumping measures using strategies such as transhipment, assembly operations, and slightly modified products. While previous studies have addressed the ethical aspects of antidumping measures, this study will focus on the ethics of circumvention strategies with a special focus on the theories on legal compliance and, specifically, civil disobedience and conscientious evasion.

Keywords Antidumping · World Trade Organization · Business ethics · Circumvention · Civil disobedience · Conscientious evasion · Legal compliance · Trade defence instruments

Abbreviations

ACWL	Advisory Centre on WTO Law
ASEAN	Association of Southeast Asian Nations
CSR	Corporate Social Responsibility
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EU	European Union
GATT	General Agreement on Tariffs and Trade
WTO	World Trade Organisation

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Introduction

Antidumping laws have been in place since the beginning of the twentieth century (Viner 1923) with the aim to protect domestic industry from assumed "unfair" trade, i.e. low-price imports. Some companies persist, however, in their efforts to gain access to foreign markets using a low-cost strategy. Often a target of EU trade defence measures, companies in China in particular have developed a variety of methods for circumventing antidumping measures resulting in a game of cat and mouse between the two. Within the context of globalization, circumvention tactics can be viewed as "smart business strategies" by exporters on the one hand and on the other hand unfair and illegal practices by administering authorities (Yu 2008, p. 56). Given these differing viewpoints, the ethics of antidumping laws have been extensively debated since the proliferation of antidumping actions in the 1980s (McGee 2008; McGee and Block 1997; Robin and Sawyer 1998). Despite calls from such scholars, these laws continue to place constraints on free trade and arguably on developing country economies (Delener 1998). Over time, exporters, especially in China, have developed a number of strategies for avoiding the imposition of antidumping measures on their products. These practices have been declared illegal, but given the protectionist nature of antidumping laws, to what extent are these actions unethical?

Given the more recent development of circumvention laws, this article attempts to update the previous research dealing with the ethics of antidumping laws (Delener 1998; McGee 2008; McGee and Block 1997; Robin and Sawyer 1998). From a broader antidumping perspective, McGee (2008) summarizes that there are those who believe antidumping laws are fine the way they are, those who believe they should in fact be strengthened, and those who believe "that the antidumping laws are evil, a club that can be used by domestic producers and unions to batter the competition and protect themselves at the expense of the general public" (p. 760). Taking a largely liberal perspective, some academics have proposed that antidumping laws are not only unfair but that even bringing an antidumping complaint is in fact unethical (Delener 1998; McGee 2008; McGee and Block 1997; Robin and Sawyer 1998). While the ethics of antidumping laws themselves have been disputed, this article will go further in exploring the ethics of actually circumventing antidumping laws.

Wasserstrom (1999) points out the mistake in assuming that "justified disobedience of the law is a rare, if not impossible, occurrence" (p. 19). He further critiques scholars as being overly focused on legal disobedience within the context of revolution noting that the nature and extent of a person's obligation to obey the law has been an issue "relatively neglected by legal or political philosophers and critics" (Wasserstrom 1999, p. 18). While most scholars in this field tend to rest in extreme hypotheticals, this article attempts to test the boundaries of the ethics of legal disobedience with the real and more debatable example of circumventing antidumping measures.

Starting with a short historical overview, the first part of this study will discuss trade defence measures focusing on the European Union (EU) circumvention laws and explaining the methods businesses use in circumvention. The EU is one of the major users of trade defence measures coming in third behind India and the USA, respectively. From 1994 to 2014, the EU has imposed 298 antidumping measures (WTO 2016b). Given its well-developed set of rules governing anti-circumvention investigations, it represents a good reference to analyse this topic. Furthermore, given that all of the recent circumvention investigations brought by the EU have been against China, we can see that there is a developed country versus developing country narrative to this legislation. The circumvention of trade defence measures is a sensitive issue between these two important trading partners and sets a precedent. The second part of the article will then discuss the literature and debate around when legal disobedience may be justified given the debate around antidumping measures and the perception by some of a lack of fairness towards developing countries (Narlikar 2006; Busch and Reinhardt 2003).

Circumvention of Antidumping Duties: The EU's Law and Practice

Historical and Legal Background of Trade Defence Measures

Before exploring the ethics of circumvention, we must start with a general explanation of international trade within the World Trade Organization (WTO). With the General Agreement on Tariffs and Trade (GATT) in 1947 and subsequently the WTO, the involved states have agreed to pursue two main objectives: (1) to provide a legal framework for the international exchange of goods and services and for selected trade-related policies in order to reduce "policy-related uncertainty" and (2) to establish an international trade dispute settlement mechanism to resolve conflicts between Member States (Blackhurst 2002).

With regard to the first aspect, the basis of the WTO is the belief that a substantial reduction of tariffs and barriers to trade and an elimination of discriminatory treatment in international commerce is necessary to expand the production and exchange of goods. The WTO has thus become a major driver of globalization: in order to have access to foreign markets, each country has to give access to its own market. In practice, this has not been so straightforward of course. Developed countries have cried foul at the inundation of cheaper products from the developing world, while developing countries have likewise claimed that their involvement in the WTO has not brought the level of expected benefit and development. Within the WTO framework, the relations between developed countries and developing countries have been shaped by the GATT initial phase. Under GATT, developing countries demanded (and were granted with) large exceptions to the reciprocity in commitments due to the internal difficulties encountered by their governments. This hampered the process of liberalization within certain developing countries; thus, the relations between developed and developing countries were more formal than substantial. In other words, while an effective liberalization took place among developed countries, with developing countries it was mainly just on paper (Hudec 1987). With regard to more recent agreements established under the WTO, Finger (2008) points out that developing countries undertook reforms in favour of liberalization before and during the Uruguay Round and accepted the GATT/WTO rules which resulted in an unbalanced deal for them. To correct that imbalance, developed countries were supposed to have provided technical assistance to facilitate the rules' implementation. However, this assistance was either insufficient or in any case did not change the result, and the imbalance described by Hudec remains.

With regard to the second aspect, i.e. the legal enforcement of WTO law through the dispute settlement mechanism, the diffusion of the benefits provided by the new system has been delayed for developing countries due to the lack of technical knowledge required to defend their own interests when disputes arise. It has been demonstrated that low capacity is a determinant factor (more than power relations) in preventing member states from bringing a case in front of the dispute settlement body: indeed, the related start-up costs may constitute an initial deterrent (Davis 2009). Since 2001, the Advisory Centre on WTO Law (ACWL), established with resources provided by developed countries, has offered technical assistance for capacity building to developing countries. In addition, developing countries have gradually acquired technical knowledge through experience, for example by participating in the WTO adjudication system initially only as defendant and third party, and later as plaintiffs, becoming in this way active members. Busch and Reinhardt (2003) have found, however, that acting effectively early in the settlement of the dispute and during the consultation phase "offers the greatest likelihood of securing full concessions from a defendant at the GATT/WTO", but this is a "pattern that has been less evident in cases involving developing countries" (p. 720). In addition, it is true that the legalization process of the dispute settlement mechanism represents an opportunity for the developing countries (Davis 2012) but, at the same time, "Because its systemic interests as a quasi-judicial actor do not always coincide with the objectives of developing countries, the Appellate Body has enacted procedural reforms that threaten to exacerbate existing inequalities" (Smith 2004, 573).

Notwithstanding the liberalization process, Member States have decided to maintain the possibility to impose duties on trade goods under particular circumstances as a relief valve. Such trade defence instruments are established to provide a precise set of rules that Member States shall respect when imposing safeguard, countervailing, or antidumping measures. Safeguard measures allow a temporary restriction of imports to protect domestic industry from an increase in imports of the product concerned. Countervailing measures are imposed on subsidized imports. Finally, antidumping measures are imposed on imports sold at a price lower than the so-called normal value, usually the domestic price on the exporter's own market (WTO 2016a). In all these cases, the imports under examination cause, or threaten to cause, injury to the domestic industry. Antidumping measures are the most frequently used of the three instruments in addition to also being the most controversial. For this reason, they will be the focus of this article.

The practice of dumping is not in itself prohibited. The WTO rules govern the reaction of the importing countries to dumping to try to prevent protectionist policies (Marceau 1994). There are two different approaches to antidumping regulations. For some scholars, the fundamental aim of the antidumping duties is to avoid that lower-priced imports eliminate domestic producers from the internal market with the consequence being the establishment of monopolies or oligopolies and a final increase of prices (Laussel and Montet 1995; Rai 2006). Thus, selling imports at a lower price than what is domestically offered is often labelled as an "unfair practice". However, more liberal scholars have condemned the use of this expression to refer to dumping (Hindley and Messerlin 1996). Finger (1993) declares that "antidumping is a trouble-making diplomacy, stupid economics, and unprincipled law" (Finger 1993, p. 56). A wide literature has pointed to the rise of antidumping duties proposing that they are a weapon for protectionist purposes (Prusa 1999; Lindsey and Ikenson 2001; Messerlin 2001; Vandenbussche and Zanardi 2010). The objective of this article is not to conclude in favour of one of these two main streams and disqualify the other one, but rather to highlight that there is no consensus among the scholars on the antidumping measures and we need to take that into consideration in the analysis on their circumvention.

The circumvention of antidumping duties is a practice which consists of avoiding the imposition of antidumping duties. In such a way, the exporters are able to maintain their advantage in terms of low prices. Using the traditional dichotomy of tax avoidance versus tax evasion (Anquetil 2016), scholars distinguish between "avoidance" of antidumping duties which is considered "acceptable" and evasion of such measures which on the contrary is qualified as "unacceptable". In the same way that companies create sophisticated methods to reduce their tax liability short of engaging in illegal practices, exporters also may be viewed as avoiding rather than evading antidumping duties (Yu 2008).

Tax is indeed an amount of money collected by the government or other public authorities and used to provide certain services, while tariff is a schedule of duties imposed by a government on imported goods (or sometimes exported goods), and duty is the actual amount of money levied on imported/exported goods. Thus, antidumping duties can be qualified as a special category of levies on imports. They are collected by the customs authorities of the country of destination and are payed by the importer. Since they are a special category of taxes, the concepts of avoidance/evasion can be applied.

The topic of tax avoidance frequently comes up in business ethics studies and in the discussion on corporate social responsibility (CSR) and serves as an interesting analogy to circumvention. Its main consequence is that the company deprives the government of the place where its

activity is located of financial resources that would be used for providing services while the company benefits from such services. In other words, the main objective of CSR, i.e. taking into consideration in the decision-making process the impact of the companies' activity on the society, is clearly not achieved. Therefore, tax avoidance has been qualified by some as a non-ethical practice in light of different ethics theories (Preuss 2012). In contrast, some scholars have reached the conclusion that tax evasion can be ethical in some circumstances (see Bagus et al. 2011; McGee 2006).

However, unlike with paying taxes, in the case of circumvention the exporting company does not receive a benefit from the antidumping duties because they are collected by the importing country. In other words, the difference lies on the fact that in the previous example the company is located in the same country of the public authority collecting the taxes so the company benefits from the services provided in the territory under its jurisdiction. In the case under examination, the company is located in the exporting country which is different from that of the authority collecting the duties (importing country). In addition, the purpose of the collection is different: taxes are imposed to provide resources to the government to afford public expenditure (e.g. to provide services), while the antidumping duties are imposed on imports to remove the effect of dumping. Thus, although the distinction existing between tax evasion and tax avoidance may apply to the antidumping circumvention practices, it seems to be an imperfect analogy, and the circumvention of antidumping duties necessitates its own deeper analysis. The next section will provide a more in-depth explanation of circumvention practices and laws.

Overview of Circumvention

In the context of antidumping law, circumvention is qualified as a conduct undertaken by exporters in order to evade antidumping duties imposed by importing countries. On the basis of the WTO Glossary, the term "circumvention" is defined as

> Getting around commitments in the WTO such as commitments to limit agricultural export subsidies. Includes: avoiding quotas and other restrictions by altering the country of origin of a product; measures taken by exporters to evade anti-dumping or countervailing duties (WTO 2016c).

Circumvention is considered a "serious threat" (WTO 2016d) in international trade because it nullifies the trade defence measures imposed at the conclusion of investigations (WTO 2016e). It should be acknowledged that circumvention practices mislead the national custom authorities as well as the economic operators and the consumers (Ostoni 2005).

Because WTO Members were not able to agree on a common text, the matter of circumvention was referred to the Committee on Antidumping Practices which created the special Informal Group on Anti-Circumvention to continue the discussion on the topic (WTO 2016f). The EU has taken the position that as there is no common text, WTO Member States can unilaterally address circumvention issues (Bellis 2011). In other words, each country is able to determine its own circumvention laws. While specific rules focusing on circumvention are not yet provided in the WTO Agreements, the current domestic legislation of certain WTO's Member States establishes the possibility to carry out reviews of the imposed measures. This implies that each Member State is currently free to decide which practices can be included and excluded in the notion of circumvention largely depending on the extent to which its policies tend to be more protectionist or more liberal (Yu 2008).

Not surprisingly, the country approaches can substantially diverge. According to an independent study, only a minority of countries have designed special anti-circumvention instruments. In addition to the EU, the USA and South Africa should be mentioned as they provide a comprehensive legal framework in this domain. On the contrary, in spite of its numerous antidumping investigations, India has not established anti-circumvention rules and has not carried out such kinds of investigations (European Commission 2012; Bierwagen and Hailbronner 1988).

The US regulation does not include a general definition for circumvention but does identify specific categories of practices which would count as circumvention. In contrast, the EU regulation provides a catch-all definition and mentions limited kinds of practices. The US approach has the advantage of clearly establishing the criteria to determine if a practice constitutes circumvention. This reduces the discretion of the competent authorities to determine what is or is not circumvention and increases legislative predictability. The problem is that new types of circumvention would unlikely be pursued. The EU approach avoids this shortcoming through a catch-all provision that increases the law's flexibility, while the limited number of circumvention practices clearly identified implies a higher degree of discretion for the authorities (Yu 2008). In essence, the EU authorities are less constrained than their American counterparts and have more power to declare certain practices as constituting circumvention. In addition to a well-established legal framework, the EU has a rich practice in this domain. Scholars identify two main periods in which major steps were taken to develop circumvention laws. Under the initial legislation in the 1980s, the EU was

reacting to the frequent assembly operations carried out by Japanese companies that established assembly plants in the EU to circumvent antidumping measures. In a second post-reform phase starting in the 1990s, the EU has focused on Chinese strategies to circumvent the antidumping measures which normally involve practices of transhipment (Vermulst 2015). Transhipment is qualified as "dropping like products being subject to anti-dumping duties or under the investigation into a third country" (Yu 2008, p. 35). Essentially, products are shipped to a third country where similar products are not subject to antidumping duties before being shipped again to the destination country.

The push for anti-circumvention regulation started during the 1980s when rapid globalization made it easier to bypass antidumping measures through involving third countries in product production. As a result of their increasing rate, business practices which would have previously been ignored prompted a reaction of the public authorities and were declared to circumvent antidumping measures. In 1987, the EU adopted what is considered to be the first anti-circumvention regulation through Regulation 1761/87. The regulation was a response to the Japanese practice of setting up assembly plants in the EU purportedly to circumvent antidumping duties (the so-called screwdriver circumvention). As they came from EU assembly plants, the products were assumed to be produced in the EU. The original EU anti-circumvention regulation was arguably strict and was eventually challenged by Japan before the WTO Dispute Settlement Body (DSB). Japan pointed out the inconsistency of such legislation before the WTO DSB (WTO 2016g). As a consequence of the recommendations of the WTO DSB, the EU had to modify such legislation (Yu 2008).

The Current EU's Circumvention Regulation

From 2012 to 2015 there were sixteen circumvention investigations initiated by the EU (European Commission 2016a). In addition, two investigations were initiated, respectively, in 2015 and 2016, and one of them is still ongoing (European Commission 2016b). The EU has very conspicuously focused on China which has been the subject of all EU circumvention investigations to date. Of these investigations, all except one have regarded antidumping measures. This is not surprising if we consider that trade defence is a sensitive field in EU–China relations. China is indeed the first target country of EU defence measures and, particularly, of antidumping duties (European Commission 2016c). Their often antagonistic trade relationship only partially explains the primacy of China as a country concerned by anti-circumvention EU investigations though. More than just being a favourite mark for political reasons, it seems some Chinese companies are repeatedly using circumvention as a business practice. In certain industrial sectors, it is evident that Chinese managers are planning and carrying out precise trade strategies with the clear purpose of misleading the custom authorities and avoiding the imposition of the measures.

We can, for example, observe sequences of anti-circumvention procedures concerning the same product such as molybdenum wire. In 2010, antidumping duties were initially imposed on molybdenum wire originating in China. Later in 2012 and 2013, it appeared that Chinese exporters of this product had tried to circumvent these duties through transhipment to Malaysia and by slightly modifying the product's weight so that it would be classified under a different customs code to which the duties did not apply [see Commission Implementing Regulation (EU) 395/2015, OJ L 66, 4–9 (2015)]. In 2015, in another investigation concerning Chinese molybdenum wire exporters were found of making slight modifications of the weight or dimension of the wire so that the wire would again fall out of the product description. A similar cat and mouse story can be seen with Chinese exporters for bicycles, open mesh fabrics of glass fibres and silicon metal. It seems that in certain sectors, circumvention has become a commonly used trade strategy.

All the above-mentioned investigations between 2012 and 2016 were successful and imposed the extension of the measures except one, and it seems that the exporters had some difficulties to defend their position. In deciding whether circumvention has occurred, the European Commission determines if there is insufficient due cause or economic justification for the change in pattern of trade other than the imposition of the duties. As pointed out by Yu (2008), usually the exporters try to demonstrate a comparative advantage at the basis of their business strategy such as lower labour cost. If the Commission does not find evidence concerning a different economic justification, it extends the antidumping duties to the imports concerned. It is true that the definition of circumvention provided by the EU antidumping basic regulation is quite vague in order to be flexible, and it thus assures a certain margin of discretion to the European Commission to assess whether the practice of circumvention occurred or not (Yu 2008). Notwithstanding, there seems to be adequate evidence that Chinese companies have intentionally and repeatedly used circumvention strategies as a way to continue accessing the EU market with lower-priced goods. This is clearly illegal, but to what extent is it unethical?

Legal Compliance

There has been a great deal of literature on the ethics of whether or not disobeying the law can be moral; however, few studies have dealt with this issue using less

"revolutionary" examples from the business world (Ostas 2010; Wasserstrom 1999). Generally speaking, legal compliance can be divided into three viewpoints with the first two being in opposition and the last providing a more nuanced perspective: (1) people are free and autonomous and therefore have no moral duty to obey the law, (2) there is an absolute duty to obey the law, and (3) people have a prima facie duty to obey the law. The first position is of course extreme in nature and supports the anarchist view that people can be self-legislating with no state having the moral authority to oblige them to obey its law (Wolff 1999). The anarchist approach clearly has limited application to a business context; therefore, this paper will focus on the latter two perspectives.

Absolute Duty to Obey the Law

For the second viewpoint, it is believed that the mere fact an action is illegal precludes any moral justification for that act. Under this line of thinking, there is a deontological argument that the actions of managers should be "driven by adherence to institutional rules, regulations, laws, and norms" (Chakrabarty and Bass 2015, p. 496). As such, laws may be used to determine the duties and responsibilities of business managers (Kujala and Pietilainen 2004), and for strict followers of stockholder theory, are the only normative rules that need to be followed (Hasnas 2007).

It further can be said that Kant's categorical imperative "Act only on maxims which you can will to be universal laws of nature" (Bowie 1999, p. 4) bears consideration. Essentially, allowing someone to break the law could create a situation where everyone would feel free to break any law at any time leading to general chaos. Indeed, few would argue that breaking the law should become a universal norm. Wasserstrom (1999) points out, however, that this causal argument is perhaps "overdrawn" and that it is not "at all evident that a person who claims to be justified in performing an illegal action is thereby committed to or giving endorsement to the principle that the entire legal system ought to be overthrown or renounced" (p. 28). This paper therefore should not be taken as arguing that managers can choose at whim which laws to follow.

There is another argument that if we knowingly accept the benefit of a law, we in turn have an obligation to obey that law (Rawls 1999). For example, we have a moral duty to pay taxes because we benefit from the results of those taxes (infrastructure development, medical and emergency services, etc.). Wechsler (1959) indeed describes taking the benefit of a legal system "while denying it allegiance when a special burden is imposed [as] the antithesis of law" (Wasserstrom 1999, p. 37 citing Wechsler 1959, p. 35). Furthermore, by disobeying the law, you are in fact shifting your burden to others (such as with tax evasion). In the case of antidumping laws though, we need to adapt the reasoning. Using this logic, circumventing antidumping laws can be said to shift the burden to local manufacturers in the form of lower-priced goods against which the manufacturers may have trouble competing. Wasserstrom (1999) points out, however, that an overall greater benefit may arise though from "less than total obedience" (p. 38). To this point, Delener (1998) proposes that when dumping occurs, the benefit created for consumers in terms of lower prices outweighs the injury to domestic companies. Citing studies by the United States International Trade Commission (1995), Gallaway et al. (1999), and Hufbauer et al. (1986), McGee (2008) argues that there is in fact a net welfare loss created by antidumping investigations. Furthermore, the consequences of antidumping laws should not only be viewed from the perspective of the country initiating them but also from the perspective of the defending country.

In arguing against an absolute duty to obey the law, we should then ask who benefits from antidumping legislation, or conversely, who loses from antidumping legislation? It is believed that antidumping measures represent a relief valve for domestic industries in those developed countries where the environmental and labour standards impose higher costs on the producers compared to the cost afforded by the exporters in certain developing countries—commonly known as "social dumping" and "environmental dumping". However, antidumping duties are not conceived expressively to this objective. Although the link between environmental/labour issues and trade has been discussed, within the WTO system they have not been included (Charnovitz 2002). As Großmann's (1993) work points out, the antidumping measures do not serve the purpose of getting the developing countries to raise labour and environmental standards. Furthermore, scholars believe that common competition rules at the international level should replace the existing antidumping regulation, because they are the best choice against unfair competition (Messerlin 1994; Boscheck 2001). As a consequence, one may argue that the current lack of common competition rules at the international level could justify the need of antidumping measures and thus of anti-circumvention rules. In accepting this argumentation though, we must still acknowledge that leaving anti-circumvention rules to be crafted by individual states creates power inequalities. Furthermore, as the situation is advantageous for legislating states, there is a risk that these domestic laws will become permanent rather than a bandaid until more international and democratic regulation is created. In other words, as the status quo serves the traditional power elites, there may be no incentive to change. From this broader viewpoint, antidumping laws can be seen as a strategy used by

developed countries to maintain their positions through keeping developing countries at an economic disadvantage. Delener (1998) questions "how ethical it is to impose economic barriers on developing countries when they are trying to join the company of manufacturing countries and attempting to improve the living conditions of their populations" (p. 1751). Indeed, Cuyvers and Dumont (2005) point out that ASEAN countries have historically been the most targeted by the European Commission for antidumping. It seems, then, that the absolute duty to obey the law is a too simple way to explain a complex reality because it does not take into account the larger picture of the opposed interests at stake.

Prima Facie Duty to Obey the Law

This leads us to the third and most relevant viewpoint that there is a prima facie duty to obey the law. Essentially, if something is illegal, then you have a compelling but not absolute reason to obey (Wasserstrom 1999). Wassertrom makes the rule deontology argument that a person is not morally obliged to follow the law when there is a conflicting superior obligation or duty. In other words, "only an obligation can beat an obligation" (Williams 1985, p. 180). Such a higher obligation could be of an economic or moral nature although most scholars and philosophers would lean towards the later.

For the economic obligation, there is an argument that managers may have an economic duty allowing them to break the law. Under agency theory and legally speaking, managers do have a duty to "promote [the] success of the company" (Abbasi 2009, p. 416). In the extreme, Easterbrook and Fischel (1982) reason that "managers do not have an ethical duty to obey economic regulatory laws just because the laws exist… managers not only may but also should violate the rules when it is profitable to do so" (p. 1177). It is not necessarily uncommon for a company to do this. For example, Amazon paid $1500 in daily fines to the French government rather than discontinuing free shipping practices which were determined to be a form of predatory pricing (Shannon 2008). In another example, larger retailers in France including IKEA have chosen the profitable decision to pay fines in order to illegally stay open on Sunday (Matlack 2013). In these cases, breaking the law and paying the penalty fulfilled managers' duty to maximize profit.

Under Easterbrook and Fischel's thinking, a manager has a duty to shareholders to weigh the risk of being caught and/or the penalty for engaging in circumvention. If the risk of being caught and the penalty are both sufficiently low, then the manager should circumvent the law in order to maximize profit. This has some clearly questionable consequences, however. Drawing on Kant's categorical imperative as applied to business ethics by Bowie (1999), a manager should ask herself if a world in which everybody acts in such a way would be possible. It is difficult to argue with integrity that it would be acceptable for managers to constantly break the law in order to maximize profits as long as they did not think they would be caught. Indeed, there has been extensive scholarship disparaging the limited view of stockholder theory and expanding the moral duties of managers to extend beyond shareholders (Quinn and Jones 1995; Williams 1998; Hasnas 1998). For these scholars, stockholder theory "does not assert that managers have a moral blank check that allows them to ignore all ethical constraints in the pursuit of profits" (Hasnas 1998, p. 22).

It is generally believed that when faced with conflicting duties and obligations, the "rival action should represent another and more stringent obligation" (Williams 1985, p. 180). Although managers have a duty to promote the success of a company, circumventing antidumping duties is certainly not the only way to do this. Even for Friedman (1962), maximizing profits is limited to legal behaviour. Furthermore, unlike in the case of Amazon or IKEA in France, with circumvention the managers are trying to evade detection rather than accepting the consequences of violation. Is there another obligation non-economic in nature which could further explain non-compliance? Civil disobedience seems to provide an alternative in which we can make a moral rather than economic argument. In this way, the exporters' sense of fairness of the law would be taken into account.

Civil Disobedience

Many scholars and philosophers posit that a person need not comply with a law which the person feels is unjust. Indeed, academia has acknowledged the viewpoint that antidumping laws are unethical, and managers of exporting companies may easily share this same opinion. In this case, managers who circumvent antidumping laws could be acting not only from an economic viewpoint but also from a moral viewpoint. The idea of breaking a law that one is morally opposed to is strongly embodied in the principle of civil disobedience which has long been developed in the literature (Rawls 1971). Ostas (2010) defines civil disobedience "as an intentional breach of law for reasons of conscience and moral principle" (p. 294). Under the traditional view though, civil disobedience is "a public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government" (Rawls 1971, p. 364). Rawls further limits civil disobedience to civil and political

rights leaving economic injustice out of its scope. Some scholars have proposed that this view is too narrow though (Franceschet 2015; Scheuerman 2016), and it would certainly preclude circumventing antidumping laws which is done covertly. To this end, Ostas (2010) has adapted the concept of civil disobedience to business and uses the term "conscientious evasion" in its place to limit the requirement of publicity. Other scholars, however, continue to use the term civil disobedience but have weakened this requirement of publicity as well as political motivation. For such scholars, civil disobedience is not merely a political act but a strategy of the weak against stronger institutional powers (Franceschet 2015; Scheuerman 2016).

To begin, for Rawls (1971), civil disobedience would only include acts which are: (1) public, (2) non-violent, (3) and political with the aim to change the law. Circumvention would fail the first point, and it is not sure to what extent managers are using these tactics as a political statement with the hopes of changing the law. Scheuerman (2016) points out though that the civil disobedience literature (developed within a context of domestic legislation and domestic injustice) has become outdated given the shift of post-nationalization in which even powerful states share authority through institutions such as the WTO. In pointing out the complexity of demanding that the dissenter's objection should be public and political, he asks:

> To whom—that is, local, national, or post-national addressees—should the disobedient's appeal be directed? Which political majorities need to be swayed, and at which level of decision making are they located? From which political authorities should one seek redress? What are the relevant (national or global) laws or policies that require change, or the shared principles of justice on which one's appeal should rest? Which laws are crucial when expressing fundamental fidelity to the law? (p. 245)

Most certainly, smaller exporting firms and even the larger firms would have trouble maintaining their business function while also engaging in a complex political crusade against the WTO and "power elites". Indeed, in doing so they quite possibly could damage their relationship with trading partners and governments. Scheuerman (2016) is not alone in critiquing the traditional view of civil disobedience noting that Celikates (2010) has even gone so far as to reject not just the component of publicity but also non-violence.

In the same vein, Franceschet (2015) argues that the Rawlsian view of civil disobedience is an "elitist conception" covering only "cases where the powerful seek to transform the international system for the sake of justice" (p. 241). Rather than seeking to overthrow or change the legal system, Franceschet (2015) argues that weaker actors (such as developing countries) may use destituent power (Agamben 2014; Laudani 2011) in a broader vision of civil disobedience. In the case of destituent power, non-compliance can be seen as a withdrawal "from the obligations of a particular set of international institutions" and "may be a legitimate form of self-protection" (p. 251). Although Franceschet's work deals with civil disobedience in the context of "weaker" states, its application to businesses in the developing world is possible. Given their weaker comparative position to more sophisticated legal actors, business managers need not show that their goal is to overthrow the current legal system but more simply to avoid its application through evasion. In this way, we can see the requirements of civil disobedience are being broadened (and perhaps softened) to include cases occurring at the post-national level.

Moreover, the focus of civil disobedience is not only on the dissenter themselves but also on the organization establishing the law. For a case of civil disobedience, we must also consider whether the WTO and furthermore the local governments creating circumvention laws are just and effective institutions. Rawls (1999) argues:

> the principles to which social arrangements must conform, and in particular the principles of justice, are those which free and rational men would agree to in an original position of equal liberty; and similarly, the principles which govern men's relations to institutions and define their natural duties and obligations are the principles to which they would consent when so situated. (p. 50).

For Rawls, social arrangements are just to the extent that they (1) provide an equal right to the greatest level of liberty possible and (2) render social and economic inequalities to everyone's advantage (Rawls 1999). If truly in an original position then the contracting parties "are unable to tailor principles and legislation to take advantage of their social or natural position" (Rawls 1999, pp. 52–53). Indeed, scholars have questioned the fairness of the WTO pointing out that its "democratic credentials remain dubious" (Scheuerman 2016, p. 46). Even if we consider the WTO to be fair and just in its legislation though, it is in fact at the country level that circumvention legislation occurs. Circumvention laws are left to the purview of importing countries meaning that exporting countries have no representation or voice in the legislation. This creates a clear bias in favour of the importing country and by no means leaves the two parties in an "original position".

As a demonstration of how this domestic component can unbalance the system, we can see that in practice antidumping duties which are designed to be temporary are in practice often extended. Under the WTO rules an antidumping duty "shall be terminated on a date not later

than five years from its imposition" (Article 11.3 of the WTO Anti-dumping Agreement). It is possible, however, to initiate a review before the duty's expiration to ask for a time extension if "the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury" (Article 11.3 of the WTO Anti-dumping Agreement). In the EU practice, the expiry reviews are frequently used, and in fact were initiated in all the circumvention cases from 2012 to 2015. This could represent a factor that provides motivation to exporters to circumvent the duties. Here again, we have a game of cat and mouse in which the exporter can be tempted to react to an extensive practice of measures imposed for long periods through circumvention. Again, the issue is perceived fairness.

The authors of this study do not make an extreme claim that the WTO is a radically unjust institution nor do they suggest the EU's circumvention legislation is tyrannical. It is, however, certainly problematic that there is a legal vacuum at the international level leaving circumvention laws in the hands of potentially biased domestic institutions. Inasmuch, Rawls (1999) points out that even just and effective institutions cannot guarantee that only just and effective legislation will be passed. Wasserstrom (1999) agrees that even in cases where there is a "representative government, majority rule, frequent [and] open elections", that does not guarantee that all laws will be moral (p. 33).

In conclusion, for Rawls (1999) "…in a reasonably just (though of course not perfectly just) democratic regime, civil disobedience, when it is justified, is normally to be understood as a political action which addresses the sense of justice of the majority in order to urge reconsideration of the measures protested and to warn that in the firm opinion of the dissenters the conditions of social cooperation are not being honoured" (p. 49). In the case of antidumping, it is possible to argue that developed market countries constitute the "majority" in that they have historically dominated WTO membership often through their greater economic power (Bown and McCulloch 2010). The current circumvention practices in this light could be explained as a way to maintain exporters' interests which may not be adequately represented in current WTO legislation (Narlikar 2006), and/or be established in a way that developing countries may have the power and capacity to use them (Davis 2009).

Arguing that companies have a moral right to break the law is indeed dangerous ground though. Ostas (2010) states that "Some laws demand obedience; others provide choice, while still others require breach. The question becomes where one draws the line" (p. 308). Similar to Easterbrook and Fischel (1982), Ostas states that laws which are based around morality should be followed, whereas those based around regulation are more flexible. To guide managers, Ostas (2004) makes the distinction between laws which are *malum in se*, clearly evil regardless of the law, and acts which are *malum prohibitum*, only wrong because the law says they are. Managers should certainly not break laws which are *malum in se*. A manager should not, for example, illegally compromise the safety of a product in order to minimize costs resulting in the deaths of consumers. This would clearly be evil regardless of laws around product and consumer safety. On the other hand, circumventing antidumping duties is not "clearly evil". For example, evading EU antidumping duties by assembling the product in the EU rather than the country of origin may cause harm to EU manufacturers, but it also benefits the EU in terms of lower prices for consumers as well as providing employment for assembly workers. These benefits to EU stakeholders arguably move antidumping legislation from the realm of *malum in se* to *malum prohibitum*. Ostas (2004) indeed posits that the majority of business regulations are likely to fall under *malum prohibitum* noting that the "substance of most business regulations has much less to do with the public interest than with the private will of the politically well-organized" (Ostas 2004, p. 572). For Ostas, managers could disobey laws which are *malum prohibitum* in circumstances where there is a moral argument to do so or in which complying with the law would result in economic waste.

So, where would antidumping laws fit on this spectrum of *malum prohibitum* and *malum in se*? To what extent are antidumping and circumvention laws merely regulatory rather than based around morality? Furthermore, does complying with antidumping laws result in waste? For previous scholars, it does indeed (Delener 1998; McGee 2008). Still, the answers to these questions perhaps depend on who you ask. The purpose of antidumping laws and hence circumvention laws are "to promote fair (as opposed to free) trade" (McGee 2008, p. 759). Fairness is, however, a charged term. In examining how fairness is defined within the context of the WTO, Narlikar (2006) asks:

> How far could it be argued that the discourse about fairness is little more than a discourse about interests? It is certainly true that the two extreme positions that developed and developing countries have traditionally taken – the former emphasizing equity of opportunity and process, the latter attaching primacy to equity in outcomes – reflect obvious differences between the status-quo powers and the revisionist ones, between the strong and the weak (p. 1026).

Finally, there is an argument that civil disobedience should not apply in cases where there is a procedure to amend, repeal, or somehow change the oppressive law (Rawls 1999). It is true that developing countries also have the right to bring complaints to the WTO related to unfair trade. Research shows, however, that there remain

obstacles in ensuring that developing market countries have the same level of access to justice under WTO Dispute Settlement Understanding (DSU) to enforce foreign market access rights (Bown and McCulloch 2010; Davis 2009; Smith 2004).

When business managers choose to circumvent antidumping laws they stand to not only maximize their profits but to improve their country's economy. A manager could circumvent antidumping laws not only to benefit her personal performance and career but also because she believes the laws to be unfair either towards her company, her country, or both. To conclude, for many people antidumping laws do not achieve fair trade but instead serve as a form of protectionism making circumvention arguably a moral option. In this case, managers may feel that they are justified in circumventing perceived unjust barriers to their country's development. In the context of a developing economy, profitability may take primacy over other concerns. Indeed, Xu and Yang (2010) point out that in a Chinese context, being socially responsible as a company includes providing job opportunities and ensuring social stability and harmony while promoting national development and prosperity. We can see then that the fairness of antidumping and circumvention may vary substantially from stakeholder to stakeholder and especially from a developed to developing country perspective.

Conclusions

Tyler (1990) observes that whether a businessperson will evade a law depends not only on how profitable evading the law would be but also on the person's sense of social obligation. In examining the ethics of circumvention we should therefore also be asking to what extent do developing country business managers feel socially obliged to respect the laws of the WTO which is questionable in its fairness towards the developing world and more importantly from foreign countries who have an incentive to protect their own interests. Scheuerman (2016) states that in "an increasingly undemocratic (post-national) political order, where institutions like the WTO […] possess substantial decision-making authority, it is not self-evident that politically motivated lawbreakers targeting post-national decision makers should be expected to show their loyalty to the law" (p. 261).

Wasserstrom (1999) warns us that there is a tendency to focus on "what is wrong with disobeying the law rather than upon the wrong which the law seeks to prevent" (p. 41). While antidumping regulation has been determined at the level of the WTO, circumvention laws have been left to member states to develop introducing a potential bias in their crafting. As we can see from the data presented in the first part of this study, circumvention of these laws has become an intentional business strategy used by exporters especially in China. Circumvention is illegal, at least in certain countries, but this study asks to what extent circumvention is unethical. To that purpose, the previous sections examined circumvention practices relying on the literature around legal disobedience. There is an argument that managers may use circumvention as a way to protest what they feel are unfair and overly protective trade practices. We found that the theories of civil disobedience provide a possible (although not conclusive) key for reading the current circumvention practices in the context of the EU–China trade relations. The extent to which exporters' non-compliance may be political in nature and a form of protest is unclear and would be an important area for future research.

Regardless of exporters' motivations though, circumvention is not the only option, and companies in the developing world have other avenues for accessing foreign markets than disobeying foreign laws. Delener (1998) suggests that in place of low-priced goods, exporters in the developing world should compete instead by improving their products, providing additional services, or establishing relationships with local competitors for distribution and communication. Low-price strategies have of course been the tool of choice for developing countries who often choose a "low-road approach" to develop their economies (Robinson 2010), and changing this can be easier said than done.

To conclude, many academics (and business managers) hold a liberal orientation viewing circumvention laws as an unjustified obstacle to free trade. In addition, while antidumping measures are regulated at the international level, circumvention is not, so it is up to each Member State to decide whether to pursue or not such practices. This leaves developing countries at the whim of more legally sophisticated actors (normally placed in developed countries). It would surely be too radical to affirm that managers from developing countries have a moral right to circumvent antidumping laws or any law in order to gain access to developed markets. Williams (1998) argues that discussions about corporate responsibility become meaningless at the point that "we cannot expect corporations to comply with the minimum standards of responsible behaviour set forth in positive law" (p. 1276). But what if the laws themselves as well as the processes used to create those laws are not socially responsible? In this way, we can see that civil disobedience is a way to explain exporters' evasive behaviour without superficially and paternalistically labelling them as "unethical managers". Given this more nuanced view, we can see that there needs to be a serious discussion about the imbalance of power between developed and developing market actors and perceptions of

fairness in international trade. As such, it would be useful to re-launch within the WTO the debate about antidumping in general and circumvention specifically in the attempt to find a global consensus about common international rules on circumvention and anti-circumvention measures. Such a debate should more carefully consider the viewpoints of all stakeholders including those in developing markets.

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Compliance with Ethical Standards

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