

Introduction

It is said a butterfly flapping its wings in South American may ultimately create a tornado in the other side of the Pacific Ocean. So did the United States' financial crisis. Just like the notably economic depression in 1930s, the crisis first started from America, and then spread to the rest of world. Although the impact of the crisis breaking out in 2008 has by and large dominated the financial sector, it has extended to other sectors as well. Nearly no industry and no country can run away from this economic turmoil, which shows the globalization of our era and the close interaction of global affairs.

Globalization, for our purpose, can be defined as "a set of processes leading to the integration of economic activity in factor, intermediate and final goods and services markets across geographical boundaries, and the increased salience of cross-border value chains in international economic flows."¹ Such definition is more of an economic color, while in a broader sense, globalization is often regarded as "a process combining of economic, technological, sociocultural and political forces."²

In the context of economic globalization, one of the most significant phenomena may be the shifting of power from sovereign states to "sovereignty-free" actors, or from public actors to private actors. This means that in the international arena nation-states are no longer the only protagonists. Instead, individuals, firms, NGOs, as well as international organizations all play their roles actively. Among those actors, multinational corporations (MNCs) are indubitably the most remarkable ones. According to the United Nations' definition, a MNC is generally defined as follows:

"A Multinational Corporation is generally regarded as an enterprise comprising entities in more than one country which operate under a system of decision-making that permits coherent policies and a common strategy. The entities are so linked, by ownership or otherwise, that one or more of them may be able to exercise a significant influence over the others and, in particular, to share knowledge, resources and responsibilities with the others."³

¹ See e.g. Aseem Prakash and Jeffrey A. Hart (Editors), *Globalization and Governance*, London /New York: Routledge, 1999, at 3.

² See e.g. Sheila L. Croucher, *Globalization and Belonging: The Politics of Identity in a Changing World*. Rowman & Littlefield, 2004, at 10.

³ Here, the concept of Multinational corporations can be seen the same as Transnational corporations.

On the one hand, MNCs have provided the major impetus to the process of globalization and at the same time, they are the main recipients of its benefits. Since the end of Cold War, the share of MNCs in global economic activities has increased dramatically. Compared to before they are more willing to manage businesses where the value chain⁴ for a given product or service is distributed across great geographic distances and keep their global competitive advantage⁵ by focusing on certain tache of the value chain.

If it is the raw materials and market that MNCs fight for in the early periods of time, then it is the “standards” that they deem as one of the most significant strategies in global business. As a general word used here, “standards” refers both to “the products of formal standard-setting activities and to the outcome of market exchanges in which certain technologies, protocols, to mention but a few come to be accepted as the *de facto* standards of an industry”.⁶ However, this thesis is confined to the discussion of the latter one, namely, standards set by MNCs. By setting standards alone or an alliance of standard-setting, MNCs are trying their best to convey a message of sheer excellence to consumers⁷ and win a place in the standards game.

It is no doubt that some private standards are designed to protect health, safety and the environment, but some private standards will be used to hurt competitors or potentially cause ultimate harm to consumers, which may have quite adverse effects on international trade. In this sense, it is necessary to examine MNCs and their private standards under the international legal framework.

The latter was defined by UNCTAD, available at <http://www.unctad.org/TEMPLATES/Page.asp?intItemID=3159&lang=1> (date accessed 01/11/2008). This definition is also used here in the whole thesis.

⁴ The concept of “value chain” was first introduced by Michael Porter. In his book, he mentioned: “Every firm is a collection of activities that are performed to design, produce, market, deliver, and support its product.” A value chain is a chain of such activities, when products (or services) pass through all activities of the chain, they gain some value. However, not every activity will create value, it is some special tache of the activities that create real value and maintain the competitive advantage of the firm. See Michael E. Porter, *Competitive Advantage: Creating and Sustaining Superior Performance*, New York: Free Press, 1985.

⁵ See *Ibid*.

⁶ See Richard P. Suttmeier & Yao Xiangkui, “China’s Post-WTO Technology Policy: Standards, Software, and the Changing Nature of Techno-Nationalism”, *The National Bureau of Asian Research Special Report*, No. 7, May 2004.

⁷ See Harm Schepel, *The Constitution of Private Governance: Products Standards in the Regulation of Integrating Markets*, Oxford and Portland: Hart Publishing, 2005, at 3.

While private actors, especially MNCs' business practices are crossing the boundaries of nation states, the international economy is still regulated by the state, or supra-national institutions designed for member states. Here, the gap between private actors' practices and the international legal framework is a big challenge for law and lawyers.

As can be seen, it is private initiative and foreign direct investment (FDI) that has accelerated the pace of economic globalization and the flow of international economic factors. Meanwhile, some international organizations, especially the World Trade Organization (WTO) and the United Nations (UN) have endeavored to remove obstacles among international economic activities. One of their dramatic efforts is the increasing lower of tariff barrier. As a result, discussions have shifted to the rise of non-tariff trade barriers.⁸ However, most of those discussions pay attention to the state-state level, and only few of them realized the possibility of private actors' practices as a new form of non-tariff barrier. For instance, Professor Baldwin defines a "non-tariff barrier" (or 'distortion') as "any measure (public or private) that causes internationally-traded goods and services, or resources devoted to the production of these goods and services, to be allocated in such a way as to reduce potential real work income".⁹ Therefore, the key issue discussed here is still the traditional topic about "trade barriers", but in a more specific area, that is, to examine the possibility of private actors, especially MNCs' self-regulating standards resulting in the creation of trade barriers.

Generally speaking, the topic of trade barriers naturally falls into the area of international trade law, which was traditionally focused on "border issues", that is, tariff and non-tariff measures that imposed on goods or services when they cross the border of one territory to enter the one of another. Thus, it is necessary to analyze the existing international trade law to see whether there are some approaches for the issues raised by MNCs' self-regulating standards. However, since such kind of trade barriers raised by private parties are not only "at the border", but are also capable of

⁸ See Simon P. Anderson & Nicolas Schmit, "Non-Tariff Barriers and Trade Liberalization", 2000, *CESifo Working Paper Series* No. 254, available at SSRN: <http://ssrn.com/abstract=263955> (date accessed 08/02/2009)

⁹ See Robert E. Baldwin, *Nontariff distortions of international trade*, Washington: The Brookings Institution, 1970.

transcending the border to potentially cause some adverse effects inside the market. In this regards, competition law is of great relevance to private barriers or private-private conflicts. This thesis thus chooses competition law as a main angle to analyze the problem, but from a global perspective. The global perspective of competition law includes a discussion of both the domestic and the international level, as well as an exploration of opportunities for the formulation of a universal competition law.

For the purpose of the research, this thesis thus proceeds as follows: Chapter I is designed to be a demonstration of the phenomenon in question. It will try to make a simple but clear description on the removal of tariff barriers and rise of non-tariff barriers, then special attention is given to the possibility of MNCs' standards as a trade barrier. Chapter II will further examine the MNCs' self-regulating under the current international trade legal system, especially the GATT/ WTO system. Chapter III will provide some general exploration on the relationship between trade and competition policy to explain why competition law is chosen as another angle of analyzing the phenomenon in question. Chapter IV will try to examine how private standards are regulated under competition law regimes of the US, the EU and China. Then in Chapter V, focus will shift from private standards to a wider spectrum, namely, private anti-competitive practices and try to make legal analysis beyond the confine of domestic competition law. Chapter VI is dedicated to find some solutions for global competition issues. By looking through several important international organizations like the WTO, UNCTAD and OECD, this chapter is going to examine what have been done and what should be done and then provides some alternative approaches for global competition problems. Finally, the conclusion part will summarize the main points of the study, and also makes an attempt to give out some suggestions regarding to the questions in the process of research.