ARTICLE

Why the European Union Must Dump So-called 'Non-market Economy' Methodologies and Adjustments in Its Anti-dumping Investigations

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There is a growing controversy on the expiry of the provisions on the special treatment of China for anti-dumping purposes in its Protocol of Accession to the World Trade Organization (WTO). Actually, there is no legal basis in the Protocol for the continuing application of such special treatment after 11 December 2016; the so-called 'non-market economy status' put forward by its advocates is a myth. The European Union (EU) should remove China from its non-market economy status list and refrain from taking 'mitigating measures' aiming at offsetting the effects of any kind of State interference, which is inconsistent with the letter and spirit of the WTO anti-dumping rules.

1 Introduction

The debate is heating up in Europe over China's 'market economy status' (MES) for the purpose of anti-dumping procedures as Article 15 (a) (ii) of China's Protocol of Accession[1] to the World Trade Organization (WTO) is set to expire on 11 December 2016.

As a reminder, dumping is determined by comparison between the export price of the product concerned and the price of the like product on the domestic market of the exporting country pursuant to Article VI of the General Agreement on Tariffs and Trade (GATT). Dumping is deemed to occur when the former is lower than the latter. Article 15 (a) (ii) of China's Accession Protocol provides that in determining price comparability, the importing WTO Member 'may use a methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product'. In other words, this provision allows WTO Members to derogate from the general methodology set out by WTO rules on dumping determination when Chinese exporters of the product concerned have failed to rebut a presumption that 'market economy conditions' prevail in the industry concerned.

The European Union (EU) uses this derogation. Its anti-dumping regulation[2] (the 'Basic Regulation') classifies China as a 'non-market economy' (NME) – without however providing a definition thereof. This triggers the application of special rules for dumping determination: unless Chinese exporters are able to show that they operate under market economy conditions (against a set of criteria), and to get thereby 'market economy treatment', the investigating authority shall resort to alternative methodologies.[3] The Commission's practice is to use the 'analogue country' methodology, by which normal value is determined on the basis of the price or constructed value in a market economy third country, and not, as the ordinary methodology prescribes, by using the prices on the domestic market of the exporting country. Such a practice, by allowing the Commission to overstate dumping margins, has led to the imposition of higher anti-dumping duty rates than under the ordinary methodology.

As the expiry date of Article 15 (a) (ii) is looming, some European industries – first and foremost the steel industry which is facing a massive crisis – are urging the European Commission to maintain the same level of protection

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1 Protocol of Accession of the People's Republic of China, WT/L/432, Nov. 2001.

2 Council Regulation (EC) No. 1225/2009 of 30 Nov. 2009 on protection against dumped imports from countries not members of the European Community.

3 Pursuant to Art. 7(a) of the Basic Regulation, normal value 'shall be determined on the basis of the price or constructed value in the market economy third country […] or where those are not possible, on any other reasonable basis, including the price actually paid or payable in the Community for the like product, duly adjusted if necessary to include a reasonable profit margin'.

against Chinese imports after 11 December 2016. Many commentators, among which lawyers, recently expressed disagreement on the common understanding that, as from 12 December 2016, WTO Members would no longer be allowed to use an alternative NME methodology in investigations against Chinese imports. The controversy over the interpretation of Article 15 of China's Accession Protocol has been growing.

Against this backdrop, the European Commission has launched impact assessments in order to make an informed decision on whether or not to continue applying the so-called 'NME methodology' against China. This is in line with its repeated assertions that the 'China market economy status' issue is not only a legal issue, but also an economic one. In other words, the EU intends to base its decision on economic considerations. Yet, it has asserted that it had not reached any conclusion at this stage regarding the WTO-consistency of the continuing use of an NME methodology (admitting thereby that such option could be WTO-inconsistent). Such a stance is hard to reconcile with the EU's commitments to respect its WTO obligations.[4] Unless the EU decides to remove China from the list of NME countries, and address its economic concerns rather through WTO-consistent alternative measures, which, according to the Commission, are currently under examination.

The EU has not specified what kind of 'mitigating measures' (as it has chosen to label them) it is considering to adopt as part of its anti-dumping practice, but the terms of the debate gives an idea. China is blamed for not having fulfilled all its commitments under its Accession Protocol, and for failing to have transformed into a fully-fledged market economy (while no definition is provided in any WTO-covered agreement). The discussion revolves around how to counteract Chinese 'unfair practices' that this situation allows. In other words, the EU is concerned with maintaining a 'fair' playing field that State interference and regulation in China prevents.[5]

This debate provides a good opportunity to question the EU's recourse to anti-dumping measures to neutralize the effects of State interference.

This article supports that the EU should remove China from the list of NME countries for dumping purposes, and should refrain from adopting anti-dumping rules and practices aiming at counteracting any form of State intervention affecting competition.

2 The Anti-Dumping Agreement and the concept of 'non-market economies'

At the outset, it is useful to put the 'NME' provisions and debate back in the wider context of WTO rules on anti-dumping.

2.1 *The WTO Rules on Anti-dumping Are Not Concerned with 'Unfair' Practices*

Article VI of the GATT provides that the contracting parties 'recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry'.

Let us highlight two essential points. Firstly, dumping is to be condemned only insofar as it causes or threatens material injury to the industry of the importing members: dumping per se is not considered as a condemnable practice. Secondly, despite this 'condemnation' of harmful dumping, GATT Article VI does not direct importing countries to take action against it. It merely permits them to levy anti-dumping duties to 'offset or prevent dumping'.[6] The GATT does not prohibit dumping; it is limiting to allowing the importing country to take measures that would otherwise infringe its obligations under the GATT – the obligation to respect the most favoured nation principle, and the obligation to not raise tariffs above bound tariffs levels.

So what is the rationale for such exception? The WTO provisions on anti-dumping remain silent about it. Even the Agreement on Implementation of Article VI of the GATT 1994 (Anti-Dumping Agreement) lacks a preamble expressing its object and purpose. And the relevant negotiating record is not readily available.

In any event, there is no reference to 'unfair' pricing practices in the GATT anti-dumping provisions. And GATT anti-dumping disciplines cover all types of dumping, whether anti-competitive or not. Actionable dumping is not limited to recognized anti-competitive practices such as pricing below cost of production (predatory pricing) or strategic dumping. It covers each and every case of price differentiation, including normal competitive behaviours.[7] Moreover, if the purpose of

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[4] For information, *see* the speech of Cecilia Malström, Commissioner for Trade at a meeting of stakeholders in Brussels on 17 Mar. 2016: http://trade.ec.europa.eu/doclib/docs/2016/march/tradoc_154363.pdf.

[5] Generally speaking, the EU considers that anti-dumping measures as a tool against unfair imports. This is evidenced by the fact that on its website, it describes defence measures, including anti-dumping measures, under a heading 'EU actions when imports are not fair'; *see* http://ec.europa.eu/trade/import-and-export-rules/import-into-eu/.

[6] *See* Art. VI.2 of the GATT.

[7] *See* for example P.J. Lloyd, *Anti-dumping and Competition Law*, in *World Trade Organization: Legal, Economic and Political Analysis*, Chapter 40 (International Trade Law Center, Arthur E. Appleton & Michael G. Plummer eds., Springer, May 2005); Alan V. Deardorff, *Economic Perspectives on Antidumping Law,* in *Antidumping Regime: A View from the Competition Policy Perspective*, Research Seminar in International Economics (The University of Michigan Ann Arbor 1989), Post-print Paper No. 7; Wentong Zheng, *Reforming Trade Remedies*, 34 (1) Mich. J. Intl. L. 151–206 (2012); Session 36, *WTO Public Forum*, 17 Sept. 2010, summary available at: https://www.wto.org/english/forums_e/public_forum10_e/programme_e.htm.

anti-dumping measures were to counter-act unfair practices, most likely would dumping be actionable per se, while anti-dumping is allowed only if the injury is established. So definitely, the ADA is not concerned with so-called 'unfair' practices.

The most probable explanation for such an exception to major GATT principles is that it results from a compromise between users of anti-dumping measures and exporting countries subject to those measures. In this regard, it should be reminded that anti-dumping did exist beforehand; the concept was not born with the GATT. Faced with the obligation to further open up their markets, traditional users may have pushed for keeping this trade tool, while countries subject to anti-dumping complained about the excessive discretion of users in implementing anti-dumping measures. As a result, WTO anti-dumping rules allow the recourse to anti-dumping measures, but subject them to conditions and disciplines.

Therefore, it is reasonable to think that the WTO anti-dumping corpus should be understood as mere disciplines/limits on the use of anti-dumping measures, rather than provisions whose ultimate goal is to sanction anti-competitive behaviours at the international level. Anyone supporting the contrary would be forced to admit that it is a big failure: pursuant to a study conducted jointly by the Trade and Competition Committees of the Organisation for Economic Co-operation and Development (OECD), in over 95% of the cases that had been successful in OECD countries, anti-dumping cases would not have been successful if competition law criteria had been used.[8] The fact that those measures create distortions that are not meant to offset anti-competitive practices suggests that they are themselves anti-competitive.

The United States summed up the purpose of WTO anti-dumping rules very well:

> contrary to the assumptions of some economists, the anti-dumping rules are not intended as a remedy for the predatory pricing of firms or as any other private anti-competitive practices typically condemned by competition laws. Rather, the antidumping rules are a trade remedy which WTO Members have agreed is necessary to the maintenance of the multilateral trading system. Without this and other trade remedies, there could have been no agreement on broader GATT and later WTO packages of market-opening agreements, especially given imperfections which remain in the multilateral trading system.[9]

Such clarification being made, we can now turn to examining the reference to 'non-market economies' in the WTO anti-dumping corpus.

2.2 *The WTO Rules on Anti-dumping Are Not Intended to Sanction Governments' Policy*

There is actually a single reference to NMEs. It is in the addendum to Article VI paragraph 2, which states:

> It is recognized that, in case of imports from a country which *has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State*, special difficulties may exist in determining price comparability for the purposes of paragraph 1, and in such cases importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate. (emphasis added)

It should be underlined that this provision does not explicitly refer to 'non-market economies', but to countries that have a 'complete or substantially complete monopoly of [their] trade' and where 'all domestic prices are fixed by the State'. This is an extreme situation, which, even though it may have existed at the time of the GATT negotiations, is nowadays hard to find, not to say impossible.

It is noteworthy that this provision was adopted in 1955 by the parties to the GATT pursuant to a request by Czechoslovakia.[10] This shows that countries with centrally planned economies had an interest in being applied an alternative methodology for the purpose of determining dumping, most probably because they were concerned about situations where domestic prices would be set at an artificially high level. This 'NME' provision was not taken 'against' non-market economies, to inflate dumping margins, this is quite the contrary.

So why have domestic prices been recognized unfit for comparison for dumping determination when they are set, not by companies, but by the State? It is certainly because anti-dumping measures allowed by the GATT should sanction commercial companies' decisions,[11] not the State's policy.

Furthermore, the WTO Appellate Body stated that the addendum to Article VI paragraph 2 'appears to describe a certain type of NME, where the State monopolizes trade and sets all domestic prices' and it 'would thus not on its face be applicable to lesser forms of NMEs that do not

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[8] *See* the intervention of Alen Fels during session 36 of the WTO Public Forum.

[9] Communication of the United States to the Working Group on the Interaction between Trade & Competition Policy, *Observations on the Distinctions between Competition Laws and Antidumping Rules*, WT/WGTCP/W/881998, p. 2.

[10] *See* the report of review working party III on barriers to trade other than restrictions or tariffs, L/334, 1 Mar. 1955, para. 6.

[11] In this respect, it is interesting to note that the report L/334 states, in its para. 4, that the parties 'agreed that it follows from paragraph 1 of Article. VI that contracting parties should, within the framework of their legislation, refrain from encouraging dumping, as defined in that paragraph, *by private commercial enterprises*'. (emphasis added)

fulfill both conditions, that is, the complete or substantially complete monopoly of trade and the fixing of all prices by the State'.[12] Therefore, the reference to a 'strict comparison with domestic prices' not always being 'appropriate' does not provide flexibility in respect of the determination of normal value if the exporting country does not fulfil those two conditions, even if prices are influenced to some extent by State intervention.

3 The EU should remove China from the NME countries list

In light of the above, there is no doubt that the China's special treatment constitutes a significant derogation to regular anti-dumping rules, which substantially diminishes the rights of China under the GATT and the ADA.

With this background in mind, let us examine the parts of Article 15 of the said Protocol dealing with anti-dumping.

Article 15 (a) reads:

> (a) In determining price comparability under Article VI of the GATT 1994 and the Anti-Dumping Agreement, the importing WTO Member shall use either Chinese prices or costs for the industry under investigation or a methodology that is not based on a strict comparison with domestic prices or costs in China based on the following rules:
>
> (i) If the producers under investigation can clearly show that market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product, the importing WTO Member shall use Chinese prices or costs for the industry under investigation in determining price comparability;
>
> (ii) The importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product.
>
> (d) Once China has established, under the national law of the importing WTO Member, that it is a market economy, the provisions of subparagraph (a) shall be terminated provided that the importing Member's national law contains market economy criteria as of the date of accession. *In any event, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession.* In addition, should China establish, pursuant to the national law of the importing WTO Member, that market economy conditions prevail in a particular industry or sector, the non-market economy provisions of subparagraph (a) shall no longer apply to that industry or sector. (emphasis added)

The disagreement over the interpretation of these provisions relates to the effect of the expiry of subparagraph (a)(ii) after 11 December 2016: does it imply that China should automatically be granted MES? That is, should the EU remove China from its list of NMEs?

3.1 *There Is No Legal Basis for the Continuing Application of China's Special Treatment*

At the outset, it should be stressed that Article 15 does not confer a 'non-market economy status' upon China. Its subparagraph (a)(ii) merely allows WTO Members to use an alternative methodology in respect of Chinese producers if they 'cannot clearly show that market economy conditions prevail in the industry under investigation […]'. This subparagraph constitutes the only basis for the derogation to regular anti-dumping rules, so it is logical to conclude that its expiry will put an end to this derogatory regime.

However, some commentators have supported the contrary on the ground that other parts – notably the chapeau of article 15 (a) and subparagraph (a)(i) – will survive after 11 December 2016.[13] Such conclusion is grounded on the language of subparagraph (d) that makes a distinction between paragraph (a) as a whole and subparagraph (a)(ii).[14]

Even admitting that only subparagraph (a)(ii) will expire and that other parts of paragraph 15 (a) will survive, these remaining parts, as highlighted above, do not contain any basis for derogating to the ADA. Indeed, if the chapeau refers to the possibility of using an alternative methodology, it specifies that it should be in accordance with the rules that follow. Subparagraph (a)(i) only mandates importing countries to use domestic

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[12] Appellate Body Report in *EC – Definitive Anti-dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, adopted on 15 July 2011, para. 285, fn. 460.

[13] *See* notably Jorge Miranda, *Interpreting Paragraph 15 of China's Protocol of Accession*, 9 (3) Global Trade Cust. J. 94–103 (2014); Laurent Ruessmann & Jochen Beck, *2016 and the Application of an NME Methodology to Chinese Producers in Anti-dumping Investigations*, 9 (3) Global Trade Cust. J. (2014); Bernard O'Connor, *The Myth of China and Market Economy Status in 2016* (worldtradelaw.net, January 2012), available at: http://worldtradelaw.typepad.com/files/oconnorresponse.pdf; Terence P. Stewart, William A. Fennel, Stephanie M. Bell & Nicholas J. Birch, *The Special Case of China: Why the Use of a Special Methodology Remains Applicable to China after 2016*, 9 (6) Global Trade Cust. J. 272–279 (2014).

[14] *See* Miranda, *supra* n. 13 and Theodore E. Posner, *A Comment on 'Interpreting Paragraph 15 of China's Protocol of Accession' by Jorge Miranda*, 9 (4) Global Trade Cust. J. 146–153 (2014).

prices if the producers can clearly show that market conditions prevail. It does not allow them to do otherwise if the producers can't. This provision becomes inutile with the expiry of subparagraph (a) (ii): absent any basis for applying a special methodology, importing countries will necessarily be required to use domestic prices pursuant to the ADA.

The stance of the supporters of the continuing application of China NME status is precisely based on the principle that these provisions shall not be deprived of their *effet utile.*[15] And the only way to give them meaning and effect is to find by any means circumstances allowing the use of special methodologies even after subparagraph (a) (ii) has expired.

But no such circumstance can reasonably be found in the text of Article 15, even if interpreted extensively. The other difficulty is to reconcile it with the second sentence of paragraph (d) which mandates the termination of subparagraph (a) (ii), and which shall also be given effect (by the own admission of these commentators). The resulting argumentation is circumvoluted, and based on extrapolations.

For those commentators, the circumstance justifying a continuing special treatment would be the so-called 'NME status' of China, stemming either from the logic, or a reading of paragraph (d).

In the first case, the argument goes as follows: it is illogical to move at once from a rebuttable presumption that Chinese producers do not operate under market conditions, to a situation where China benefits from MES status. It is so because China cannot have changed into a market economy overnight. In sum, China cannot be treated as a market economy for anti-dumping purposes, simply because it is not one. This reasoning completely ignores the basic rules of treaty interpretation.

The WTO-covered Agreements are treaty texts that must be interpreted in accordance with the customary rules of interpretation of public international law, codified in Article 31 and to the extent appropriate, Article 32 of the Vienna Convention on the Law of Treaties (VCLT).[16]

Article 31(1) of the VCLT provides:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

Article 31(1) of the VCLT makes clear that the interpretation of treaty provisions shall be based on the terms of the treaty. Even if the ordinary meaning shall be ascertained taking into account the context and object and purpose, the starting point (and the only starting point) shall be the terms of the treaty text. The Appellate Body jurisprudence confirms that the purpose of treaty interpretation is to elucidate the relevant meaning of the word or term at issue.[17] Obviously, the terms of Article 15 (a) (i) – which allegedly justifies the continuous application of NME methodologies – are neither obscure nor ambiguous. It is limited to mandating the importing country to use Chinese prices or costs if the producers can clearly show that market economy conditions prevail in the industry concerned. Context, object and purpose just serve to elucidate the meaning of existing treaty words and terms[18] (which are clear in this case), not to complete them.[19]

In any event, subparagraph (a) (ii) – the sole provision allowing NME methodologies – cannot be considered as relevant context after 11 December 2016, for the simple reason that it will have expired. Arguing otherwise would simply amount to negating the 'sunset clause' in paragraph d.

This is probably the reason why some supporters of the continuing application of NME methodologies, rather than relying on Article 15 (a) (i), have argued that the textual basis for such continuing treatment could be found in Article 15 (d). The chapeau read in combination with Article 15(d) would allow importing Members to use an alternative methodology as long as China has not established that it is a market economy according to the legislations of the importing Member.[20] This reasoning is flawed. The relevant sentence only provides that the provisions of paragraph (a) – which allows departure from the regular methodology – shall be terminated provided that China has established that is a market economy in compliance with the importing Members' standards. Right after, it is stated: 'In any event, the provisions of

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[15] As put forward by Miranda, *supra* n. 13, the Appellate Body, concerning the rules of interpretation of WTO law, ruled that '*interpretation must give meaning and effect to all the terms of a treaty*' and that '[a]*n interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility*' (Appellate Body report, *United States – Standards in Reformulated and Conventional Gasolines*, WT/DS2/AB/R, adopted 20 May 1966, p. 21.).

[16] The WTO Dispute Settlement Body is directed to clarify the provisions WTO-covered agreements in accordance with the customary rules of interpretation of public international law by Art. 3.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).

[17] *See* for example Appellate Body Report, *United States – Continued Existence of Application of Zeroing Methodology* (hereinafter 'US – Zeroing'), WT/DS350/AB/R, adopted 4 Feb. 2009, para.268; *see also* Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* (China – Publications and Audiovisual Products), WT/DS363/AB/R, para. 399.

[18] *See* Appellate Body Report, US – Zeroing, para. 268.

[19] The principles of treaty interpretation set out in Art. 31 of the VCLT '*neither require nor condone the imputation into a treaty of words that are not there, or the importation into a treaty of concepts that were not intended*' said the Appellate Body in *India – Patent Protection for Pharmaceutical and Agricultural Chemical products* (WT/DS50/AB/R, adopted 16 Jan. 1998), para. 45).

[20] *See* for example O'Connor, *supra* n. 13 and Ruessmann & Beck, *supra* n. 13.

subparagraph (a) (ii) shall expire 15 years after the date of accession'. It clearly stems from this reading that:

(i) until 11 December 2016, unless China has established that it is a market economy as defined by the laws of the importing Member, the provisions of paragraph (a) apply. The importing Member may use an alternative methodology, except if the producers show that market economy conditions prevail in their industry;

(ii) after 11 December 2016, 'in any event', that is, even if China has not established that it is a market economy under the law of the importing Member, the provisions of subparagraph (a) (ii) shall no longer apply.

The provisions of paragraph (d) on market economy only impose the early termination (before 11 December 2016) of paragraph (a) if China establishes that is a market economy. It does not change anything to what has been said above with respect to the post–11 December 2016 period.

Last but not least, this provision on 'market economy' is applicable only insofar as 'the importing Member's national law contains market economy criteria as of the date of accession'. In sum, the so-called 'MES' may only exist in the laws of the importing Member, and should date back to before the accession. And this does not apply to the EU.

Therefore, it is absolutely true that the expiry of subparagraph (a) (ii) does not mandate the termination of the NME status for the simple reason that such status do not exist in the Protocol, nor is it defined in the EU's legislation.

3.2 *A Threat to the Legal Security*

Rather than trying to find an effect to the allegedly remaining provisions of Article 15 (a), in contradiction with the basic rules of treaty interpretation, one shall keep in mind that:

– The so-called NME provisions in China's Protocol of Accession constitute a significant derogation to the WTO rules on anti-dumping, which substantially diminishes the obligations of Members under the GATT and the ADA towards China;

– The WTO-covered agreements do not confer a NME status upon China, nor do they provide a definition of what a market economy or a non-market economy is. Therefore, saying that the derogation shall subsist for importing Members until they unilaterally decide that China is a 'market economy' seriously impairs the security and predictability of the multilateral trading system, which the WTO dispute settlement system shall protect[21];

– The principle of good faith, which directs a treaty interpreter to give all terms of a treaty a meaning, also extends to the proposition that 'interpretation should not lead to a result which is manifestly absurd or unreasonable'[22];

– It stems from the above that the interpretation of Article 15 supplied by the supporters of the China's permanent 'NME' status leads to both depriving the 'sunset clause' of any effect, and to a result that is manifestly absurd and unreasonable, as it blatantly collides with the basic principles on which the multilateral legal system is based.

In view of all the above, the safest and most reasonable option would be to accept the Appellate Body's statement that 'the provisions of paragraph *15(a)* expire 15 years after the date of China's accession (that is, 11 December 2016)'[23] (emphasis added).

4 The WTO consistency of 'mitigating' measures as alternatives to NME methodologies is doubtful

The EU, should it finally decide to remove China from the NME list, may adopt 'mitigating measures' to offset the distortive effects of State intervention on Chinese prices. Therefore, such measures would lead to disregarding the domestic price for the purpose of normal value determination.

The ADA, in its Article 2.2 provides for only two circumstances in which the domestic price may be disregarded and constructed or replaced by the export price to a third country:

(i) 'When there are no or insufficient sales of the like product in the ordinary course of trade in the domestic market of the exporting country'; or

(ii) 'When, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit proper comparison'.

Article 2.2 provides that constructed normal value must be 'the cost of production in the country of origin plus a

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[21] *See* Art. 3 of the Understanding on Rules and Procedures Governing the DSU.

[22] *See* Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, 7 Apr. 2005, para. 17.

[23] Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron and Steel Fasteners from China*, WT/DA397/AB/R, para. 289.

reasonable amount for administrative, selling and general costs and for profits'. Article 2.2.1.1 further specifies that 'costs shall normally calculated on the basis of the records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration'.

Any practice consisting in disregarding domestic prices, and constructing normal value shall be consistent with these rules.

The EU resorts extensively to the 'ordinary course of trade' circumstance to justify the construction of normal value when the price of the major input of the product under consideration is regulated. For the purpose of constructing normal value, the actual cost of the major input is disregarded and replaced by the international market price. This 'cost-adjustment practice' is notably used towards Russia (who was removed from the list of NME countries in 2002) in order to sanction dual pricing system for gas. It is a system whereby different prices for the same input are set depending on whether it is destined to export, or to the domestic market (in which case it is set below world market prices). State influence results in lower costs for the domestic industries, increasing thereby their competitiveness.

The forms that the 'mitigating measures' could take are not known yet, but the cost-adjustment practice illustrates the manner the EU can invoke the exceptions set out in Article 2.2 to offset the effects of State intervention on domestic prices.

4.1 *The Precedent of the Cost-Adjustment Practice*

As a first step, it seeks to determine whether sales on the domestic market are sufficient, that is, if such sales volume constitutes at least 5% of the sales volume of the product under consideration to the EU, pursuant to Article 2.2 of the Basic Regulation. As regards sales that have been found representative, the Commission examines whether they have been made 'in the ordinary course of trade'. It does so by comparing the prices on the domestic market with the production costs. In performing this test, the Commission first seeks to examine whether the costs associated with the production and sale of the product under consideration are 'reasonably reflected in the records of the parties concerned'.[24] Even further, the Commission seeks to establish whether the gas costs incurred by the producer 'reasonably reflected the costs associated with the production and distribution of gas'.[25] In other words, the Commission tries to establish whether an input has been sold below its production cost.

It follows that the Commission, in applying the 'ordinary course of trade' test in respect of gas-intensive products from Russia, does not seek to determine whether domestic sales of the product concerned to independent customers are profitable. It aims at evidencing any price and market distortions stemming from State intervention that may occur at any stage of the entire value chain and this circumstance would justify constructing the normal value.

Moreover, when constructing normal value, the EU authorities disregard the cost of raw material actually incurred by the producers under investigation, on the ground that it does not reasonably reflect the costs associated with the production of the product under consideration.

4.2 *Why the ADA Provisions Do Not Allow Disregarding Domestic Prices on the Ground of State Interference*

This article supports that none of the circumstances allowing disregarding domestic prices for normal value determination pursuant to Article 2.2 of the ADA covers all kinds of State interference that may affect, even indirectly, domestic prices.

4.2.1 *'No Sales in the Ordinary Course of Trade'*

The term 'ordinary course of trade' is not defined by the ADA. It has been deduced that absent any clear definition of such concept, WTO Members may have latitude in interpreting it and hence in deciding that domestic sales are outside the ordinary course of trade.[26] However, this does not mean that each and every 'interpretation' is *ipso facto* consistent with the ADA.

As a reminder, treaty text (such as the ADA) shall be interpreted in accordance with the customary rules on treaty interpretation, codified in Articles 31 and 32 of the VCLT. Moreover, the ADA itself in its Article 17.6 (ii) specifies that a panel shall interpret the relevant provisions of the said agreement in accordance with those rules. The process of interpretation usually involves resorting to

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[24] *See* Council Regulation (EC) No. 661/2008 of 8 July 2008 imposing a definitive duty on imports of ammonium nitrate originating in Russia following an expiry review pursuant to Art. 11(2) and a partial interim review pursuant to Art. 11(3) of Regulation (EC) No. 384/96, rec. 32.

[25] Commission Implementing Regulation (EU) 2015/110 of 26 January 2015 imposing a definitive anti-dumping duty on imports of certain welded tubes and pipes of iron or non-alloy steel originating in Belarus, the People's Republic of China and Russia and terminating the proceeding for imports of certain welded tubes and pipes of iron or non-alloy steel originating in Ukraine following an expiry review pursuant to Art. 11(2) of Council Regulation (EC) No. 1225/2009, rec. 68.

[26] *See* for example Vitaliy Pogoretskyy, *The System of Energy Dual Pricing in Russia and Ukraine: The Consistency of the Energy Dual Pricing System with the WTO Agreement on Anti-dumping*, 4 (10) Global Trade Cust. J. (2009).

dictionary definitions and narrowing the range of possible meanings of the treaty terms to be interpreted taking into account the context, object and purpose.[27]

We shall start with dictionary definitions. 'Trade' is defined as 'the action of buying and selling goods and services'.[28] The phrase 'in the course of' refers to 'undergoing the specified process'.[29] It follows that the 'course of trade' refers to the process of buying and selling goods. The definition of 'ordinary' is 'with no special or distinctive feature; normal'.[30] It can be deduced that the phrase 'there are no sales of the like product in the ordinary course of trade' means that there are no sales made through the normal process of buying and selling.

Interestingly, the French version is more precise, and allows drawing more inferences as to the meaning of 'ordinary course of trade'. In French, the relevant part of Article 2.2 of the ADA reads: 'Lorsqu'aucune vente du produit similaire n'a lieu *au cours d'opérations commerciales normales* […]' (emphasis added).

According to the economic definition of the Larousse online dictionary, 'opération' means 'affaire dont on évalue le profit financier'.[31] The literal English translation could be: 'deal whose financial profit is evaluated'. The Petit Robert provides that 'opération', in its commercial sense means 'affaire, speculation' [32] (which can be translated into 'transaction, deal, speculation'). The term 'commercial' means 'qui se rapporte au commerce', literally 'that relates to trade' in English. In turn, the term 'commerce' means 'activité consistant dans l'achat, la vente, l'échange de marchandises, de denrées, de valeurs, dans la vente de services'.[33] The definition of the French word 'commerce' is equivalent to that of the English word 'trade'. It follows that an 'opération commerciale' can be defined as a transaction relating to the sell and purchase of goods, and whose goal is essentially to make profit. 'Au cours' is defined as 'durant' ('during' in English).[34] Accordingly, 'sales in the ordinary course of trade' refer to sales made during 'ordinary' commercial transactions. Therefore, the relevant element whose 'ordinary' character should be assessed is the commercial transaction during which the sale of the product concerned has been made.

We now turn to the term 'normal'. According to the Larousse, 'normal' means 'Qui est conforme à une moyenne considérée comme une norme, qui n'a rien d'exceptionnel' (which is consistent with an average considered a standard, which has no exceptional feature) or 'Qui est conforme au plus habituel […]'[35] (consistent with the most usual). The Petit Robert provides the following definitions: 'Qui est dépourvu de tout caractère exceptionnel; qui est conforme au type le plus frequent (> norme)', which means 'which has no exceptional feature, which is in line with the most frequent type (>standard)'; 'qui se produit selon l'habitude'[36] (which occurs as usual).

At this stage, it appears that the phrase 'lorsqu'aucune vente du produit similaire n'a lieu au cours d'opérations commerciales normales' – in English 'when there are no sales of the like product in the ordinary course of trade […]' refers to a situation where there are no sales of the like product made in the framework of a commercial transaction which is considered standard, i.e. a transaction that is in line with the most frequent type of transactions, whose characteristics are normal as compared to transactions generally made. As highlighted above, commercial transactions are characterized by profitability, such that it should logically be a yardstick against which 'normality' should be assessed.

The immediate context confirms this understanding. Indeed, Article 2.2.1 provides that sales below cost may be treated as not being in the ordinary course of trade if such sales are made within an extended period of time in substantial quantities and at prices which do not provide for the recovery of all costs within a reasonable period of time.

In view of all the above, it appears that an assessment of whether sales of the like product in the domestic market of the exporting country are 'in the ordinary course of trade' shall be based on an evaluation of the characteristics of the commercial transaction in question. Transactions having characteristics that are extraordinary for the market in question, notably in terms of profitability, shall be considered as being outside the ordinary course of trade.

On this basis, it is difficult to see how the phrase 'there are no sales in the ordinary course of trade' could possibly extend to situations where the domestic price is distorted by subsidization or State intervention impacting the costs of production. Firstly, as explained,

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[27] *See* for example Appellate Body Report, *China – Publications and Audiovisual Products*, WT/DS363/AB/R, paras 348 and 399.

[28] *Oxford Dictionary of English*, 3d ed., at 1884.

[29] *Ibid.*, at 400.

[30] *Ibid.*, at 1251.

[31] http://www.larousse.fr/dictionnaires/francais/opération/56142?q=opération#55792

[32] Le Petit Robert de la Langue Française, ed. 2016, p. 1745.

[33] http://www.larousse.fr/dictionnaires/francais/commerce/17486?q=commerce#17355

[34] *Ibid.*, at 569.

[35] http://www.larousse.fr/dictionnaires/francais/normal/54992?q=normal#54611

[36] Le Petit Robert de la Langue Française, ed. 2016, at 1703.

the characteristics to be assessed are those of the transaction relating to the product concerned. As highlighted by the Appellate in *US – Hot Rolled Steel*, 'price is merely one of the terms and conditions of the transaction'. The Appellate Body also stated in this respect that 'to determine whether the price is high or low, the price must be assessed in light of the other terms and conditions of the transaction'.[37] This shows that a determination of whether sales are not in the ordinary course of trade (including for price reasons) is all about the terms and conditions of the transaction at issue, not about other factors such as the costs of production. Secondly, it appears that the notion of profitability is central. A low price does not prevent a standard profit margin if such low price is due to subsidization. Thirdly, a determination of whether sales are not in the ordinary course of trade involves comparing the terms and conditions of the transaction in question with the other transactions. Therefore, if the price of the sale in question is in line with the usual pricing practice in the domestic market, this sale shall be regarded as in the ordinary course of trade.

4.2.2 *'Particular Market Situation'*

The EU could also attempt to rely on the other circumstance allowing disregarding domestic prices, i.e., 'when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit proper comparison' and holding that State interference in China leads to a 'particular market situation'. The WTO dispute settlement body has not yet interpreted the concept of 'particular market situation'. But it stems from the definition of 'market' together with the relevant context that it is not meant to cover all kinds of State interference.

The term 'market' refers to 'an area or arena in which commercial dealings are conducted'.[38] In the context of anti-dumping procedures, whose object is pricing behaviours for a specific product, the relevant market is that where commercial dealings relating to the product concerned are conducted. Thus, the 'particular market situation' refers to the market of the product concerned by the anti-dumping investigation. It follows that State intervention may have a bearing on the market situation only insofar as it concerns the conduct of commercial dealings for the product concerned.

Moreover, Article 2.2 makes clear that the existence of a 'particular market situation' cannot be used to justify disregarding domestic sales unless if affects price comparability. So even admitting that the granting of a subsidy to the domestic industry leads to a 'particular market situation', this would justify disregarding domestic prices only if does not affect the export price and the domestic price equally. In other words, the price effect of subsidization should be differential for justifying disregarding domestic sales. Therefore, in the case of a domestic subsidy, the investigating authority would be required to determine how much of it has passed through to the domestic price, and how much of it passed through to the export price to assess whether subsidization affect price comparability.

In any case, even if the EU authorities were able to establish that subsidization led to 'a particular market situation', the ADA does not allow an investigating authority to disregard the actual costs incurred by the producers concerned.

4.2.3 *Disregarding the Actual Costs Borne by the Producers Concerned*

As stated above, Article 2.2.1.1 of the ADA provides that 'costs shall normally be calculated *on the basis of records kept by the exporter* or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration' (emphasis added).

It follows that an investigating authority must in principle use the cost data as stated in the records of the exporter or producer under investigation. This is logical since the recourse to constructed normal value is justified only if the sales are not representative with respect to the usual commercial practices (in which case the purpose of construction is to determine what would have been the price if the product concerned had been sold under 'normal' terms and conditions) or if for some reasons related to the market situation, the export price and the price on the domestic market are not comparable (in which case construction should serve to render the domestic price fit for comparison with the export price).

If those cost data do not 'reasonably reflect the costs associated with the production and sale of the product under consideration', they can be disregarded. The EU has a very extensive interpretation of this exception. As explained above, the EU disregards those data, even if they reflect the costs actually incurred by the producers concerned, if it considers that they should have been different absent State interference. This interpretation is invalid. For all the reasons set out above, it is clear that

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[37] Appellate Body Report, *United States – Anti-dumping Measures on Certain Hot Rolled Steel Products from Japan* (hereinafter 'US – Hot Rolled Steel'), WT/DS184/AB/R, para. 142.

[38] *Oxford Dictionary of English*, 3d ed., at 1084.

this provision serves to excludes data that, on the contrary, do not reflect the costs actually incurred by the producers. The Panel, in *European Union – Anti-dumping Measures on Biodiesel from Argentina* confirmed this understanding.[39]

5 Conclusion

The arguments of the advocates of a perpetual special treatment of China in anti-dumping procedures are based on a misconception of anti-dumping laws. The ADA is not meant to sanction governments' policies; it is concerned only with commercial firm's pricing decisions. As a result, there is no angle in the WTO anti-dumping corpus to tackle the issue of State interference, unless the State set all the prices. If the EU is concerned about distortions caused by subsidization, it can take appropriate action under the WTO Agreement on Subsidies and Countervailing Measures. The EU should be aware that over-stretching the WTO rules on anti-dumping so as to counteract any form of State interference could backlash, as this could inspire its trading partners to follow its example against it.

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[39] Panel Report, *European Union – Anti-dumping Measures on Biodiesel from Argentina*, WT/DS473/R, para. 7.242.