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# Replacing the Non-Market Economy Methodology: Is the European Union's Alternative Approach Justified Under the World Trade Organization Anti-Dumping Agreement?

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*The European Commission has announced that it would issue a proposal to amend the European Union (EU) anti-dumping regulation to tackle the forthcoming expiry of the provision in China's Protocol of Accession to the World Trade Organization (WTO) which allows WTO Members to derogate from the WTO rules on dumping determinations against imports from China. The proposal will include the removal of the 'non-market economies' (NME) list, which justifies the use of the 'analogue country' methodology, and the adoption of a new, country-neutral methodology to 'capture distortions linked to State intervention'. This article analyses the consistency of this alternative approach to NME conditions with the WTO anti-dumping rules. It argues that the EU's approach may amount to a continuous treatment of China as a NME for anti-dumping purposes. Such an approach, however, finds no legal basis under the WTO Antidumping Agreement which does not concern any government intervention per se but concerns a proper comparison between export price and normal value. Moreover, should normal value be constructed, the investigating authority shall take into account costs actually incurred by exporters. It follows that an investigating authority cannot use the WTO anti-dumping rules to sanction all forms of State intervention that results in lower export prices.*

## 1 Introduction

At a press conference on 20 July 2016,[1] the European Commission announced its plan to tackle the expiry of provisions of China's Protocol of Accession[2] to the World Trade Organization (WTO) ('Accession Protocol'). As a reminder, Article 15 (a) (ii) of the Accession Protocol, set to expire on 11 December 2016, allows WTO Members to derogate from the provisions on dumping determinations set forth in Article VI of the GATT[3] and the Anti-Dumping Agreement (ADA)[4] against imports from China. When Chinese exporters of the product concerned have failed to rebut a presumption that 'market economy conditions' prevail in the industry concerned, the investigating authority is allowed to use '*a methodology that is not based on a strict comparison with domestic prices or costs in China*'.

The European Union (EU) chose to label China as a 'non-market economy' (NME) in its anti-dumping regulation (the 'Basic Regulation'),[5] which entails that unless exporters establish that they operate under market conditions against a set of criteria listed therein, the European Commission shall resort to an alternative methodology in the determination of normal value with which the export price is compared. In practice, it uses the 'analogue country' methodology on the basis of the price or constructed normal value (CNV) in a market economy third country.[6] This has allowed the EU to apply inflated dumping margins and hence higher anti-dumping duties.

Faced with the prospect of reducing significantly the level of protection afforded to its industry or violating its WTO obligations, the EU has now created a new approach whereby the anti-dumping instrument may be

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1 Extracts of the press conference are available at: http://ec.europa.eu/avservices/video/player.cfm?ref=I124960

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

3 General Agreement on Tariffs and Trade 1994.

4 Agreement on Implementation of Art. VI of the GATT 1994.

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

6 Art. 7 (a) of the Basic Regulation.



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employed to '*capture distortions linked to State intervention*'. This solution will materialize in a Commission's proposal to amend the Basic Regulation, involving the removal of the NME list from the Basic Regulation and the inclusion of the new country-neutral methodology to address price distortions caused by State intervention. The Commissioner for Trade Cecilia Malström assured that the new methodology '*would lead to approximately the same level of anti-dumping duties as we have today*' and would be fully compatible with the EU's WTO obligations.

At the time of writing, we do not have further details on this new methodology. Nevertheless, as discussed below, it may amount to continuous treatment of China as a NME for anti-dumping purposes – although on a different, non-discriminatory basis – with virtually the same level of protection as the use of the 'analogue country' methodology would achieve. This is surprising, as it suggests that the derogation from the regular anti-dumping rules as permitted under China's Accession Protocol was actually dispensable.

This article reviews the relevant provisions of the ADA in light of the EU's objective and analyses whether and to what extent they allow sanctioning State intervention in the market of the exporting country in anti-dumping investigations. Specifically, the article focuses on discussing two circumstances in which an investigating authority may disregard domestic prices and use a CNV in determining normal value and how a CNV should be calculated in accordance with Article 2.2 of the ADA.

## 2 Legal grounds for disregarding domestic prices

The ADA provides two main circumstances in which domestic prices can be disregarded.[7]

### 2.1 *Particular Market Situation*

The first circumstance concerns the existence of a Particular Market Situation (PMS) in the relevant market of the exporting country subject to an antidumping investigation.[8] Article 2.2 of the ADA provides:

> When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or 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 a proper comparison*, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits. (emphasis added)

Accordingly, where a PMS is found to exist, normal value may be decided by reference to the selling price of 'like' goods in a third country or by adding up the cost of production, other costs associated with the sale of the goods in the domestic market, and the profit on the domestic sale (known as the constructed method or CNV). However, neither Article 2.2 nor the rest of the ADA provides guidance on what may constitute a PMS. At the time of writing, the issue of PMS has not been adjudicated by the WTO tribunals.[9]

The lack of multilateral standards on the interpretation and application of PMS has left WTO Members the discretion to determine whether a PMS exists in anti-dumping investigations. Australia's practice offers a perfect illustration on how PMS may be used to effectively treat China as a NME for anti-dumping purposes. Australia recognized China as a full market economy in 2005 (as a precondition for the negotiation of the China – Australia Free Trade Agreement) and committed not to apply the NME methodology against China.[10] However, Australia's investigating authorities – the Anti-Dumping Commission ('AD Commission') and formerly Australian Customs and Border Protection Service ('Australian Customs') – have frequently treated China as having a PMS in anti-dumping investigations.[11] The AD Commission summarized its approach to PMS as follows:

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[7] The only other circumstance in which a strict comparison with domestic prices is not mandatory is when the home country of exporters '*has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State*' (*see* the addendum to GATT Art. VI para. 2, incorporated by reference in ADA Art. 2.7). As such an extreme situation is virtually impossible to find nowadays, we will limit our examination to the circumstances set forth in Art. 2.2 of the ADA.

[8] *See* Weihuan Zhou, *Australia's Anti-Dumping and Countervailing Law and Practice: An Analysis of Current Issues Incompatible with Free Trade with China*, 49(6) J. World Trade 975–1010, 980–991 (2015).

[9] There is an ongoing dispute between the EU and Russia where the issue of PMS was raised. *See European Union – Cost Adjustment Methodologies and Certain Anti-Dumping Measures on Imports from Russia*, Request for Consultations by the Russian Federation, WT/DS474/1 (9 Jan. 2014); and *European Union – Cost Adjustment Methodologies and Certain Anti-Dumping Measures on Imports from Russia (second complaint)*, Request for Consultations by the Russian Federation, WT/DS494/1 (19 May 2015).

[10] *See Memorandum of Understanding Between the Department of Foreign Affairs and Trade of Australia and the Ministry of Commerce of the People's Republic of China on the Recognition of China's Full Market Economy Status and the Commencement of Negotiation of A Free Trade Agreement Between Australia and the People's Republic of China* (18 Apr. 2005) http://dfat.gov.au/trade/agreements/chafta/Documents/mou_aust-china_fta.pdf.

[11] *See*, for example, Australian Customs and Border Protection Service, *Certain Hollow Structural Sections Exported from the People's Republic of China, the Public of Korea, Malaysia, Taiwan and the Kingdom of Thailand*, Report to the Minister No. 177 (7 June 2012) (REP 177); Australian Customs and Border Protection Service, *Aluminium Road Wheels Exported from the People's Republic of China*, Report to the Minister No. 181 (12 June 2012) (REP 181); Australian Customs and Border Protection Service, *Dumping of Zinc Coated (Galvanised) Steel and Aluminium Zinc Coated Steel Exported from the People's Republic of China, the Republic of Korea, and Taiwan*, Report to the Minister No. 190 (30 Apr. 2013) (REP 190); Anti-Dumping Commission, *Dumping of Hot Rolled Plate Steel, Exported from the People's Republic of China, Republic of Indonesia, Japan, the Republic of Korea and Taiwan, and Subsidisation of Hot Rolled Plate Steel Exported from the People's Republic of China*, Report Number 198 (16 Sept. 2013) (REP 198); Anti-Dumping Commission, *Alleged Dumping and Subsidisation of Silicon Metal Exported from the People's Republic of China*, Report No. 237 (3 June 2015) (REP 237); Anti-Dumping Commission, *Alleged Dumping of Certain Crystalline Silicon Photovoltaic Modules or Panels Exported from the People's Republic of China*, Report No. 239 (6 Oct. 2015) (REP 239).

> In investigating whether a market situation exists due to government influence, the Commission will seek to determine whether the impact of the government's involvement in the domestic market has materially distorted competitive conditions. A finding that competitive conditions have been materially distorted may give rise to a finding that domestic prices are artificially low or not substantially the same as they would be if they were determined in a competitive market.[12]

In practice, the investigating authorities have predominantly relied on evidence relating to: (1) China's macroeconomic policies which promote industrial development; (2) the provision of financial assistance or subsidies to domestic industries; and (3) import and export measures such as tariffs and quotas. The combined effect of the evidence has been consistently found to be creating a PMS in the relevant Chinese markets on the ground that the government interventions in the markets have caused distortions in the domestic selling price of the subject goods. Based on the finding of the existence of a PMS, Australian authorities disregarded the domestic selling price of the subject goods and determined normal value using the constructed method. In the calculation of a CNV, it has become a common practice of the authorities to find that the prices of raw materials used for the production of the subject goods have been distorted by government influence and therefore to replace the actual production costs incurred by the Chinese producers under investigation with benchmark prices such as raw material costs in a third country or reference prices provided by trading centres such as London Metal Exchange. The use of the surrogate prices has consistently resulted in increased production costs in the form of uplifted costs of inputs to manufacture and consequently inflated normal value and dumping margins. Accordingly, Australia's use of PMS against China constituted a disguised application of the NME methodology. Indeed, in a determination of PMS it is the responsibility of investigating authorities to establish that a PMS exists, which contrasts with the situation where the NME methodology may be used unless China proves that market economy prevails in the relevant industries. However, due to the lack of WTO standards of proof on the issue, China has been unsuccessful in rebutting Australia's findings of PMS in the past decade, although there were good arguments that the findings were not supported by sufficient evidence and objective assessment.[13] As China has recently decided not to continue to fight for a losing case,[14] a finding of PMS and the resultant use of surrogate prices/costs may well become a standard practice based on the evidence available to Australian authorities in previous investigations.

In 2002, Article 2(3) of the EU anti-dumping regulation was amended to state that a PMS may '*be deemed to exist, inter alia, when prices are artificially low, when there is significant barter trade, or when there are non-commercial processing arrangements*'. This provision has been very rarely applied due to the availability of the NME methodology and the 'no sales in the ordinary course of trade' option which will be discussed in section 1.2. However, with the expiration of the NME methodology, the EU may follow Australia's approach to PMS and hence continue, in effect, the application of the NME methodology against China. It should be noted that the Australia's approach to PMS may fall nicely within the EU's proposed new methodology which targets 'distortions linked to State intervention'.

There are a number of issues that the EU's investigating authorities should consider in determining whether and how to apply PMS. First of all, while there has been no WTO jurisprudence on PMS, Article 2.2 of the ADA was considered in *EEC – Cotton Yarn* – the last GATT dispute – where the Panel found:

> the wording of Article 2:4 [now Article 2.2 of the WTO AD Agreement] made it clear that the test for having any … recourse [to use of CNV] was not whether or not a 'particular market situation' existed *per se.* A 'particular market situation' was only relevant insofar as it had the effect of rendering the sales themselves unfit to permit a proper comparison. In the Panel's view, therefore, Article 2:4 specified that there must be something intrinsic to the nature of the sales themselves that dictates they cannot permit a proper comparison.[15] (original emphasis)

This finding suggests two ways of interpreting PMS, neither of which would support Australia's approach to the issue. The first interpretation concerns whether an alleged situation in the market has resulted in price distortions of the subject goods so that a PMS cannot be established unless such distortions are found. As Australia's approach to PMS in recent investigations has relied heavily on government influence on the price of raw materials used in the production of the subject goods, this way of interpretation requires an assessment of whether the price distortions of inputs have actually affected or flowed through to the price of the final goods.[16] Such a 'flowing through' must be determined based on positive

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[12] *See* Anti-Dumping Commission, *Dumping and Subsidy Manual* 35 (Nov. 2015), http://www.adcommission.gov.au/accessadsystem/Documents/Dumping and Subsidy Manual - November 2015_20 Nov 2015 - final on website.pdf

[13] *See* above n. 1, Zhou, *supra* n. 8, at 983–985.

[14] *See* Alleged dumping and subsidisation of silicon metal from China – Submission of the Government of China concerning Government Questionnaire 5 (18 Apr. 2014).

[15] GATT Panel Report, *EC – Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil*, 42S/17 (adopted 30 Oct. 1995), para. 478.

[16] For relevant rulings of the Appellate Body on the issue of 'passing through', *see* Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R (adopted 17 Feb. 2004).

evidence rather than mere assumption (which has been the practice of Australian authorities). The second interpretation relates to whether an alleged market situation has affected a proper comparison between export price and normal value so that a PMS cannot be established unless such a comparison is precluded. Given Australia's recent practice, this way of interpretation requires an assessment of whether price distortions of raw materials have affected the comparability of domestic selling prices of the subject goods with their export price. Australian authorities have not undertaken such an assessment but simply assumed that the comparability of domestic prices has been affected so that a CNV should be calculated. The assumption is unjustified because, if input costs are artificially lowered by government intervention, the distorted costs are likely to affect both the domestic price and the export price of the final goods even-handedly such that the comparability of the two prices would not be affected and the overall dumping margin would not be affected.

Secondly, even though a PMS is found to exist and a CNV is calculated based on benchmark/surrogate production costs, there remains an issue whether the comparison between the export price of the subject goods and the CNV complies with the requirement of 'fair comparison' under Article 2.4 of the ADA. Apparently, there is a difference between the export price (which is determined based on artificially-lowered production costs) and the CNV (which is determined based on 'undistorted' and typically higher benchmark prices of raw materials), which should be adjusted to ensure fair comparison.[17] One may argue that, in its recent report on *EC – Fasteners (Article 21.5)*, the Appellate Body has ruled:

> *Article 2.4 of the Anti-Dumping Agreement has to be read in the context of the second Ad Note to Article VI:1 of the GATT 1994 and Section 15(a) of China's Accession Protocol.* We recall that the rationale for determining normal value on the basis of [the surrogate prices] was that the Chinese producers had not clearly shown that market economy conditions prevail in the fasteners industry in China. [footnote omitted] Costs and prices in the Chinese fasteners industry thus cannot, in this case, serve as reliable benchmarks to determine normal value. In our view, the investigating authority is not required to adjust for differences in costs between the NME producers under investigation and the analogue country producer where this would lead the investigating authority to adjust back to the costs in the Chinese industry that were found to be distorted.[18] (emphasis added)

However, while the Appellate Body was concerned about the reintroduction of distorted production costs into a CNV if adjustments are made to such costs, it referred to the specific and limited circumstances where the use of surrogate costs is explicitly authorized under the WTO, that is, the second *Ad Note* to Article VI:1 of the GATT and section 15(a) of China's *Accession Protocol.* This suggests that the obligation of making adjustments under Article 2.4 may be qualified by specific provisions of the AD Agreement or other WTO instruments such as Accession Protocols which explicitly allow the replacement of distorted costs with surrogate costs in the determination of a CNV. However, while a finding of PMS may trigger the use of CNV, the calculation of the CNV must still be based on the actual costs of the producers/exporters under investigation. This has been confirmed recently in *EU – Biodiesel* where the panel found that Article 2.2.1.1 of the ADA does not allow for consideration of the reasonableness of the actual producers' costs but merely authorizes an assessment of whether the costs are accurately and faithfully recorded.[19] Accordingly, the panel ruled that the EU authorities' finding of the price distortion of soybeans and soybean oil (the main raw materials used in the production of biodiesel) caused by Argentinean government interventions 'does not constitute a legally sufficient basis under Article 2.2.1.1 for concluding that the producers' records do not reasonably reflect the costs associated with the production and sale of biodiesel'.[20] Thus, if a CNV is employed based on a finding of PMS, the actual producers' costs must be used to determine the CNV; and if the CNV is otherwise calculated based on surrogate production costs, adjustments must be made to any cost difference between export price and the CNV to ensure fair comparison.

Thirdly, any abuse of PMS to treat China as a NME may provoke retaliatory actions. Unlike the NME methodology which is exclusively available to WTO members against China, PMS may be invoked by all WTO members. Given the current standards of proof as shown in Australia's practice, the existence of government regulations and other forms of government interventions may be

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[17] *See* Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* (*US – Hot Rolled Steel*), WT/DS184/AB/R (adopted 23 Aug. 2001), para. 177.

[18] Appellate Body Report, *European Communities — Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China (Recourse to Article 21.5 of the DSU by China)*, WT/DS397/AB/RW (adopted on 12 Feb. 2016).

[19] Panel Report, *European Union – Anti-Dumping Measures on Biodiesel from Argentina*, WT/DS473/R (dated 29 Mar. 2016), para. 7.242 & FN 400. For a detailed analysis of the panel report, *see* Weihuan Zhou & Andrew Percival, 'Panel Report on *EU – Biodiesel*: A Glass Half Full? – Implications for the Rising Issue of 'Particular Market Situation'', (2016) 3(1) *Chinese Journal of Global Governance* (forthcoming), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2820857

[20] *Ibid.*, at para. 7.248.

treated as being sufficient to create a PMS. However, as China submitted in an Australian antidumping investigation, '[g]overnment policies and industry regulations are common and necessary in every country and are certainly legitimate and not incompatible with the operation of an undistorted market economy'.[21] Watson has relevantly pointed out that '[m]any of the nonmarket aspects of China's economic policies that [the US Department of] Commerce points to are, in fact, common in other countries comfortably recognized as market economies'.[22] Thus, if Australia's standard of proof is adopted, it is equally arguable that a PMS may exist in developed countries that have similar forms of financial assistance and government regulation of key industries.

## 2.2 *Insufficient or No Sales in the Ordinary Course of Trade*

Article 2.2 of the ADA provides for another circumstance in which domestic prices may be disregarded in determining normal value, that is, when '*there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country*'. It is so because, pursuant to Article 2.1 of the ADA, dumping can be established only by comparing the export price of the product under consideration and '*the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country*'.

The ADA and the WTO case law supply no definition of 'ordinary course of trade'. This has encouraged investigating authorities to rely on this ground for disregarding domestic prices that they find distorted as a result of State intervention, and ultimately to construct a normal value. The EU's practice in this respect is notable. The European Commission makes a positive finding that 'there are no sales in the ordinary course of trade' when it is established that the input costs incurred by the producer of the product under consideration do not reasonably reflect its cost of production. The input costs are then disregarded and replaced with international market prices in the calculation of a CNV.[23] The EU may be tempted to extend the recourse to the 'no sale in the ordinary course of trade' option to all cases where State intervention may have affected the price of 'like products' in the market of the exporting country.

However, a proper interpretation of this provision – that is, '*in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose*'[24] – suggests that this 'catch-all' approach is not justified.[25]

### 2.2.1 *Ordinary Meaning of the Term 'Ordinary Course of Trade' in the Context of Article 2.2 of the ADA*

While dictionary definitions suggest that the phrase '*there are no sales of the like in the ordinary course of trade*' simply means that there are no sales made through the normal process of buying and selling goods, the French version '*lorsqu'aucune vente du produit similaire n'a lieu au cours d'opérations commerciales normales*' is more instructive. The ordinary meaning of '*au cours d'opérations commerciales normales*' indicates (1) that the term 'course of trade' concerns the characteristics of the transaction between the seller and the buyer of 'like products' and (2) which characteristics are important in assessing 'ordinary'.

The term '*opération*' (in a commercial context) means '*affaire dont on évalue le profit financier*' (whose literal English translation could be 'deal whose financial profit is evaluated'), or '*affaire, speculation*' ('transaction, deal, speculation'). Accordingly, the French equivalent to '*ordinary course of trade*' refers to commercial deals or transactions whose main object is to make profit, such that the word 'ordinary' should be assessed primarily in relation to profitability. The adjective '*normales*' qualifies commercial transactions that have no exceptional characteristics and reflects the usual practice in line with the most frequent type of transactions.[26] It follows that an assessment of whether sales are made in the ordinary course of trade involves an examination of the terms and conditions of commercial transactions so as to determine

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[21] *See* Dumping & Subsidy Investigation – Stainless Steel Sinks – Comments of the Government of China concerning 'particular market situation' in PAD 238 (19 December 2014), at 4.

[22] *See* William Watson, *Will Nonmarket Economy Methodology Go Quietly into the Night?: US Antidumping Policy Toward China After 2016*, Cato Institute Policy Analysis Number 763 (28 Oct. 2014) at 8, http://object.cato.org/sites/cato.org/files/pubs/pdf/pa763.pdf

[23] *See*, for example, 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) N0 384/96, rec. 32; Commission Implementing Regulation (EU) 2015/110 of 26 Jan. 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.

[24] Vienna Convention on the Law of Treaties, Art. 31(1) 'General Rule of Interpretation'.

[25] This section is based and expands on Stéphanie Noël, *Why the European Union Must Dump So-called 'Non-market Economy Methodologies and Adjustments in Its Anti-dumping Investigations'* 11 (7/8) Global Trade & Customs J. 296–305 (2016).

[26] *Ibid*, referring to dictionary definitions of 'normal': '*Qui est conforme à une moyenne considérée comme une norme*' and '*Qui est conforme au plus habituel*' (Larousse online dictionary: http://www.larousse.fr/dictionnaires/francais/normal_normale_normaux/54992), '*Qui est dépourvu de tout caractère habituel; qui est conforme au type le plus fréquent (> norme)*', '*qui se produit selon l'habitude*' (Petit Robert de la Langue Française, ed. 2016, 1745).

whether they are in line with the usual practice, notably in terms of profitability.[27]

Moreover, the French version of Article 2 of the ADA is more specific about which commercial operations must be considered in order to determine whether the sales are in the ordinary course of trade. As stated above, domestic prices can be disregarded when sales are outside the ordinary course of trade because, pursuant to Article 2.1 of the ADA, dumping is determined by comparison between the export price of the product under consideration and '*the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country*'. The French version reads: '*prix comparable pratiqué au cours d'opérations commerciales normales pour le produit similaire destiné à la consommation dans le pays exportateur*' (emphasis added).

The dictionary definition for the verb '*pratiqué*' is '*couramment employé, appliqué*',[28] literally 'usually used, applied'. '*Au cours de*' is defined as '*durant*',[29] which can be translated as 'during'. It follows that dumping determinations should involve a comparison between the export price of the product concerned and the price of 'like products' that is usually applied during standard commercial transactions. It is abundantly clear that the price of 'like products' is suitable for comparison whenever it is applied/charged during 'normal' commercial transactions. There is no requirement that the price of 'like products' in upstream transactions is 'in the ordinary course of trade'.

Likewise, Article 2.2 of the ADA refers to sales made during 'normal' commercial transactions ('*vente du produit similaire { … } au cours d'opérations commerciales normales*', emphasis added). The 'ordinary course of trade' refers to the terms and conditions for the sale of 'like products'.

### 2.2.2 *Object and Purpose of Article 2.2*

Although the Appellate Body has not defined the term 'ordinary course of trade', its report on *US – Hot Rolled Steel* offers useful guidance by expounding the object and purpose of Article 2.2 of the ADA.

Article 2.2 of the ADA concerns the methodology that shall be used to determine the 'normal value' of 'like products', with which the export price is to be compared. As explained above, this value must normally be the price of 'like products' that applies in 'normal' commercial transactions. It is therefore logical to exclude sales of 'like products' not made 'in the ordinary course of trade', that is, transactions whose terms and conditions are not consistent with 'normal' practice for sale of 'like products'.

The Appellate Body in *US – Hot Rolled Steel* has endorsed this stance:

> Article 2.1 requires investigating authorities to exclude sales not made 'in the ordinary course of trade', from the calculation of normal value, precisely to ensure normal value is, indeed, the 'normal' price of the like product, in the home market of the exporter. Where a sales transaction is concluded on terms and conditions that are incompatible with 'normal' commercial practice for sales of the like product, in the market in question, at the relevant time, the transaction is not an appropriate basis for calculating 'normal' value'.[30] (emphasis added)

The Appellate Body went on to explain:

> We can envisage many reasons for which transactions might not be 'in the ordinary course of trade'. For instance, where the parties to a transaction have common ownership, although they are distinct legal persons, usual commercial principles might not be respected between them. Instead of a sale between these parties being a transfer of goods between two enterprises which are economically independent, transacted at market prices, the sale effectively involves a transfer of goods within a single economic enterprise. In that situation, there is reason to suppose that the sales price might be fixed according to criteria which are not those of the marketplace.[31] (emphasis added)

Although there are '*many reasons for which transactions might not be "in the ordinary course of trade"*',[32] it appears that all of the reasons relate to whether the parties to the sales transaction of 'like products' have respected between them '*usual commercial principles*'. Therefore, a determination of whether sales of 'like products' are made 'in the ordinary course of trade' requires examining the terms and conditions of sales transactions of the goods to establish whether the parties have respected between them the usual commercial practice. It is the case when the parties to the transaction have fixed the price according to criteria which are '*those of the marketplace*'.

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[27] *See* Noël, above n. 25.

[28] Larousse, online dictionary, at: http://www.larousse.fr/dictionnaires/francais/se_pratiquer/63261?q=pratiquer#62556

[29] *See* above n. 26, Petit Robert, at 569.

[30] Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* (*US – Hot-Rolled Steel*), WT/DS184/AB/R (24 July 2001), para.140.

[31] *Ibid.*, at para.141.

[32] *Ibid.*, at para.141.

The Appellate Body has provided examples of sales transactions that are not in the ordinary course of trade, such as:

- Transactions that are aimed at shifting resources from seller to the buyer, and conversely.[33] Such transactions are not in the ordinary course of trade because, as the Appellate Body has explained, they result in an allocation of resources between the seller and the buyer different from what it would normally be in the marketplace. From the seller's perspective, this means unusual revenue[34];
- A liquidation sale by an enterprise to an independent buyer.[35]

In those cases, the process of price setting is not driven by the willingness of the buyer and seller to maximize their welfare (or revenue from the seller's perspective) but by other considerations. This suggests that whether price setting has been guided by the seller's objective to maximize revenue is key to a 'no sales in the ordinary course of trade' determination.

As the Appellate Body reminded, the purpose of disregarding sales not in the ordinary course of trade is to make sure that the export price is compared with '*the "normal" price of the like product, in the home market of the exporter*', that is, the price that is consistent with the producer's usual pricing policy in its home market. By definition,[36] the purpose of anti-dumping measures is to sanction price differentiation.[37] This implies that 'normal value' must reflect the normal pricing behaviours of producers under investigation in their home marketplace. It is therefore logical that Article 2.2 of the ADA allows the exclusion of sales that do not reflect exporters' commercial strategy.

### 2.2.3 *Conclusion*

In light of the above, an assessment of whether sales of 'like products' are 'in the ordinary course of trade' shall:

- be limited to the terms and conditions of the sales transaction applicable between the seller and the buyer of the like products;
- seek to determine if those terms and conditions are consistent with the 'usual' commercial principles of the marketplace for the like products.

Therefore, such an assessment is not concerned with subsidization. Nor is it meant to capture other forms of State interference (such as the regulation of the price of inputs) that is unrelated to the process of buying and selling of the final goods but may have an impact on the price of final goods. Reading this provision otherwise would not only be inconsistent with the WTO rules on anti-dumping, but would also amount to opening the Pandora box in the same way as an unjustified application of PMS.

## 3 Construction of normal value

If an investigation authority makes a positive finding that there are no sales of 'like products' in ordinary course of trade or that a PMS exists, it may determine normal value by reference to a third country price or a CNV. As explained above, in the calculation of a CNV, both Australia and the EU have chosen to disregard actual production costs of producers under investigation and use benchmark prices. However, as mentioned in section 1.1, the Panel has ruled in *EU – Biodiesel* that an investigating authority shall construct normal value on the basis of actual costs of production incurred by the producers concerned. The EU has appealed this decision, which is also strongly criticized by the advocates of the use of anti-dumping rules to tackle any forms of State intervention in the export country that may affect the price of imports. We believe the Panel's ruling is well grounded.

The contentious provision of the ADA is the following:

> 2.2.1.1 For the purpose of paragraph 2, 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)

The EU contended that the term '*costs associated with the production and sale*' in Article 2.2.1.1 aims at covering something else than the costs actually incurred by the producers under investigation, and extends to the costs 'to be paid' by the producer for the production of the product under consideration. It further argued that it '*captures the costs that would "normally" be associated with the production and sale of the goods*'.[38] According to the EU, a

**Notes**

[33] *Ibid.*

[34] *Ibid.*

[35] *Ibid.*, at para.143 & fn. 106.

[37] It should be specified that the ADA does not only sanction anti-competitive behaviours but also normal competitive behaviours (and provided that, as set out in GATT Art. VI dumping '*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*'). *See* Noël, above n. 25.

[38] *Ibid.*, at paras7.195–7.196.

determination that there are no sales of 'like products' in the ordinary course of trade supports its conclusion that the calculation of the production cost shall not be based on actual costs when those costs have been distorted by State intervention.[39] It argued that the object and purpose of the ADA is to sanction injury to the importing industry '*through the use of prices that are artificially low due to some abnormal conditions*'.[40] From Australia's perspective, disallowing an investigating authority to adjust or replace costs affected by State intervention would contradict the ordinary meaning of PMS.[41] Those interpretations are flawed for the following reasons.

Firstly, there is nothing in the text of Article 2.2.1.1 to suggest that '*costs associated with the production and sale of the product under consideration*' could cover something else than costs actually incurred by producers. The French version of Article 2.2.1.1 uses the word 'frais' for 'costs'. The dictionary definition of 'frais' is '*argent dépensé pour une raison precise*'[42] which means literally 'money spent for a specific reason'. The specialized definition supplied by the dictionary is '*dépenses et charges entraînées par le fonctionnement d'une entreprise*'[43] (whose literal translation is 'expenses and charges resulting from the operation of a company'). It follows that, contrary to the EU's contention, the phrase '*costs associated with the production and sale of the product under consideration*' refers to actual expenses incurred by producers under investigation for the production and sale of the product under consideration. It does not concern a 'normal' economic value or market price of inputs to manufacture. Therefore, Article 2.2.1.1 mandates investigating authorities to calculate production costs on the basis of the records kept by producers under investigation provided that they reasonably reflect producers' expenses associated with the production and sale of products under consideration.

Secondly, the EU's interpretation of Article 2.2.1.1 is based on an erroneous interpretation of Article 2.2, 1st sentence of the ADA and a misconception of the object and purpose of the WTO anti-dumping rules. According to the EU, '*the object and purpose of the WTO anti-dumping rules is to prevent the industries of an exporting country from damaging the industries of an importing country through the use of prices that are artificially low*, because of some abnormal conditions *induced by governmental action*'[44] (emphasis added). The EU does not deny that the primary objective of the ADA is to sanction price discrimination. However, it supports that it is the case only when there are sales of 'like products' in the ordinary course of trade. Otherwise, the objective is allegedly to sanction State intervention through the application of Article 2.2.[45] The EU's stance lacks legal basis. There is no indication in Article VI of the GATT or the ADA that WTO anti-dumping rules aim at sanctioning government interventions in exporting countries. On the contrary, as recalled by the Appellate Body in *US – Zeroing (Japan)*, '*dumping is the result of the pricing behaviour of individual exporters or foreign producers*'.[46] This suggests that irrespective of whether there are sales in the ordinary course of trade or not, dumping is concerned with exporters' pricing behaviours. It follows that any dumping determination requires an investigating authority to '*assess properly the pricing behaviour of an individual exporter or foreign producer*'.[47] As explained in 1.2 above, the fact that there are no sales in the ordinary course of trade of 'like products' in the home market of the exporting country – which is not necessarily the result of State intervention – prevents the assessment of exporters' pricing behaviours. Such a circumstance however does not provide a basis for sanctioning State intervention. Rather, it requires the construction of normal value to allow a proper assessment of exporters' pricing behaviours.

Finally, when it has been established that there are no sales of 'like products' in the ordinary course of trade for the producer concerned in the home market of the exporter, the construction of normal value should be aimed at determining what the price for that product would have been if the buyer and the seller had respected between them the 'usual commercial principles'. In view of what has been explained above, the calculation of a CNV should merely consist in adding up a reasonable amount for profit to actual costs incurred by the producer. Even assuming that subsidization or the regulation of raw material prices constitutes a PMS, CNV must not be used to sanction lower export prices as a result of this PMS by inflating artificially domestic prices with which they will be compared. This approach to the calculation of a CNV precludes a proper or fair comparison between the export price and

**Notes**

[39] *Ibid.*, at para. 7.197.

[40] *Ibid.*, at para.7.199.

[41] *Ibid.*, at paras7.202–7.203.

[42] *See* above n. 26, Petit Robert, at 1093.

[43] *Ibid.*

[44] EU Appelante Submission in *EU – Biodiesel*, para. 208.

[45] EU First Submission in *EU – Biodiesel*, para.49.

[46] Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Review*, WT/DS322/AB/R (9 Jan. 2007), para.111.

[47] *Ibid.*

the CNV to the extent of the different cost bases (i.e. actual production costs vs benchmark prices).

## 4 Conclusion

The EU's newly-proposed approach to antidumping investigations, aiming to tackle state intervention and maintain the same level of protection for domestic industries, seems to be intended to allow the EU authorities to continue the application of the NME methodology. However, unlike the NME methodology which is explicitly allowed under China's Accession Protocol, the new approach must be undertaken in accordance with the ADA and the relevant WTO jurisprudence. It is submitted that the two main circumstances in which domestic selling prices may be disregarded for the purpose of determining normal value under the ADA do not provide room for the EU's intended abuse of the new approach. Specifically, the concept of PMS does not concern distortions or state interventions in the market of raw materials used for the production of the final subject goods per se, but concerns whether such distortions (if any) have affected the domestic selling price of the final goods and ultimately the comparability of the price with export price of the goods. The 'no sales in the ordinary course of trade' option does not concern any types of state intervention unrelated to the process of buying and selling of final goods; hence such state intervention does not constitute a valid ground for resorting to CNV in case of subsidization or regulation of input prices.

In addition, the panel's ruling in *EU – Biodiesel* has unequivocally established that Article 2.2.1.1 of the ADA does not allow for consideration of the reasonableness of an exporter's actual costs so long as the costs are properly recorded in accordance with local generally accepted accounting principles. Accordingly, it imposes a considerable restraint on the use of surrogate costs in the calculation of a CNV and disqualifies the EU's finding of PMS in the market for raw materials from being a valid ground for the use of surrogate costs. Thus, no matter which approach is employed to justify the use of a CNV, i.e. the EU's reliance on 'no sales in the ordinary course of trade' or Australia's reliance on PMS, the determination of CNV must be based on the production costs actually incurred and recorded by producers under investigation. The panel's approach, therefore, has the effect of restraining artificial inflation of CNV and dumping margins through the use of surrogate costs in constructing normal value.

In short, the EU's leeway for sanctioning price distortions resulting from state intervention under the ADA is very narrow. It is logical as the derogation from regular anti-dumping rules contained in China's Accession Protocol would otherwise be meaningless.