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The New Anti-Dumping Methodology of the European Union – A Breach of WTO-Law?

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by

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TABLE OF CONTENT

A. Introduction

Recent trade relations between China and the European Union are stressed by continuing disputes over the European Union's treatment of dumped imports originating in China.[1] In the past, the Commission treated China as a non-market economy, based on the famous Article 15 of China's Accession Protocol (CAP) to the WTO, which previously allowed for an alternative approach to determining normal value in anti-dumping investigations.[2] In the wake of Article 15(a)(ii) CAP's expiration in December 2016, China expected the European Union to change its treatment of Chinese imports and to turn to the standard procedures of determining normal value under the WTO's Anti-Dumping Agreement (ADA). The European Union, on the other hand, persistently refuses to acknowledge China as a market-economy for political reasons.[3] Due to dramatic worldwide overcapacities in steel production, predominantly but not exclusively caused by subsidised Chinese producers, the pressure of the domestic European steel industry on the Commission is very strong.[4] Consequently, the Commission faced the substantive challenge to rework the EU's Basic Anti-Dumping Regulation, giving weight to the expiry of Article 15(a)(ii) CAP on the one hand and the remaining thread for the domestic industry due to unfair trade practices on the other.

Finally, the Commission published a long-awaited proposal for reworking the respective Regulation in November 2016. After intensive discussions with representatives of the parliament and the council, the legislative organs of the European Union agreed on a final text by end of 2017, which entered into force on 20 December 2017.[5] This

1 *Euractiv*, China frets over new EU anti-dumping duties on steel. Euractiv.com with Reuters, 28 February 2017, available on the internet: <https://www.euractiv.com/section/economy-jobs/news/china-frets-over-new-eu-anti-dumping-duties-on-steel> (visited14 May 2018).

2 In detail on China's Accession Protocol: *Qin*, Journal of World Trade 37 (2003), 483 (487ff.); concerning the legal status of WTO Accession Protocols: *Kennedy*, Journal of World Trade 47 (2013), 45 (58ff.); *Liu*, Journal of World Trade 48 (2014), 751.

3 The European Parliament explicitly opposed to a recognition of China as a market economy in May 2016 and requested the Commission to handle possible anti-dumping duties strictly, see: *European Parliament*, Resolution on China's market economy status, 2016/2667(RSP), 12 May 2016, available on the internet: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2016-0223+0+DOC+XML+V0//EN> (visited 14 May 2018); the Council on the other hand published a more careful statement: "In this context the European Council believes that unfair trade practices need to be tackled efficiently and robustly. (…) This requires a (…) modernisation of all trade defence instruments by the end of 2016.", *European Council*, Conclusions on meeting 20-21 October 2016, EUCO 31/16, 21 October 2016, available on the internet: <http://www.consilium.europa.eu/media/24257/20-21-euco-conclusions-final.pdf> (visited 14 May 2018), p. 5; EU-Commissioner for Trade, *Cecilia Malmström* even said: "Yet China is far from being a market economy", The future of EU trade policy, Brussels, 24 January 2017, available on the internet: <http://trade.ec.europa.eu/doclib/docs/2017/january/tradoc_155261.pdf> (visited 14 May 2018).

4 World Steel Production has doubled in the last twenty years, whereas China's market share grew from 15 to nearly 50%: World Steel Association, World Steel in Figures 2017, available on the internet: <https://www.worldsteel.org/en/dam/jcr:0474d208-9108-4927-ace8-4ac5445c5df8/World+Steel+in+Figures+2017.pdf> (visited 14 May 2018), p. 6.

5 Regulation of the European Parliament and of the Council annending Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European Union and

final text abolishes the traditional distinction between "market" and "non-market economies" in EU law and stipulates a new country-neutral approach in determining normal value based on "significant distortions" of the price of the product, similar to the methodology of Australia and the USA.[6]

After giving a brief insight in the problems, occurring in wake of the expiry of Article 15(a)(ii) CAP (2), this paper seeks to provide an analysis of the new provisions of the EU's Basic Anti-Dumping Regulation (3) and assesses its conformity with WTO-law, especially in the light of the recent EU-Biodiesel decision of the Appellate Body (4).

B. The Expiry of Article 15(a)(ii) of China's Accession Protocol

In the context of WTO law, a product is considered to be "dumped" if it is "introduced into the commerce of another country at less than its normal value" (Article 2.1 ADA; Article VI:1 GATT). Consequently, a finding of dumping requires a comparison between the actual import price of a product and its normal value. Whereas the actual price is usually a matter of fact, the determination of the normal value comes along with several difficulties.

WTO law stipulates that "normal value" shall principally be based on the price of the product when destined for consumption in the exporting country (Article 2.1 ADA), but also recognises for certain situations where this approach might not be appropriate (Article 2.2 ADA). In the case of non-market economies, WTO law provides an exemption clause which allows for an alternative approach in determining normal value – the so called "analogue" or "third-country method" (Second Ad Note to Article VI GATT).[7] Hereby, a WTO Member may simply refer to the price of the product in question in a third country as "normal value" instead of the price in the respective non-market economy. This method is obviously open to abuse, since a deliberate selection of the third country might result in a very high normal value and thereby in a very high dumping margin.[8] Thus, the requirements of these provisions are so narrow that,

Regulation (EU) 2016/1037 on protection against subsidised imports from countries of the European Union from 12 December 2017, L 338/1, available on the internet: <file:///C:/Users/agmba.XD/Downloads/Official%20Journal.pdf> (visited 24.05.2018).

6 In detail on the Australian Approach: *Zhou*, Journal of World Trade 49 (2015), 975 (980); Australia did recognise China formally as a Market Economy in the wake of the negotiations on a Free Trade Agreement, though: 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 April 2005, <https://web.archive.org/web/20171020063258/http://dfat.gov.au/trade/agreements/chafta/Documents/mou_aust-china_fta.pdf> (visited 24 May 2018).

7 In detail on this provision: Snyder, European Law Journal, 369 (380 et seq.); *Polouektov*, Journal of World Trade Law 36 (1, 2002), 1 (6 ff.).

8 BKP Development Research & Consulting, Evaluation of the European Union's Trade Defence Instruments, Final Evaluation Study Volume 1, 292; *Stevenson/et al.*/Mayer, Brown, Row & Maw LLP, Evaluation of EC Trade Defence Instruments, December 2005, Final Report; *De Kok*, JIEL 19 (2, 2016), 515 (519).

presently, not a single WTO Member would qualify as a non-market economy anymore.[9]

Nevertheless, the "analogue method" could still be used in relation to a WTO Member if the Accession Protocol of this member explicitly provides for it.[10] In the case of China, Article 15 of its Accession Protocol inter alia stated the following:

> "(a) In determining price comparability (…), 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**:
> If the producers under investigation can clearly show that market economy conditions prevail (…), the importing WTO Member shall use Chinese prices or costs (…);
> 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 (…)." (emphasis added)

The second subparagraph of Article 15(a) hence provided the possibility for the application of the "analogue method". However, this exact subparagraph expired 15 years after China's accession to the WTO on 11 December 2016. Nevertheless, there has been a frequent and longstanding discussion regarding the effect of the remaining chapeau of Article 15(a) CAP.[11]

[9] *Adamantopoulos*, in: Wolfrum/Stoll/Hestermeyer (eds), WTO – Trade in Goods. Max Planck Commentary on World Trade Law, Art. VI GATT, para. 24; *Tietje/Nowroth*, Myth or Reality? China's Market Economy Status under WTO Anti-Dumping Law after 2016, 10; *Yan*, Anti-dumping in WTO/EU/China, 162; also see the obiter dictum of the Appellate Body in the *EC – Fasteners* decision: "We observe that the second Ad Note to Article VI:1 refers to a "country which has a **complete** or substantially complete **monopoly of its trade**" and "where **all domestic prices are fixed** by the State" (emphasis added), WTO, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, Report of the Appellate Body from 15 July 2011, WT/DS397/AB/R, para. 285 and fn. 460.

[10] *Tietje/Nowroth*, Myth or Reality? China's Market Economy Status under WTO Anti-Dumping Law after 2016, 4; WTO, *China – Measures Related to the Exportation of Various Raw Materials*, Report of the Appellate Body from 30 January 2012, WT/DS394/AB/R, para. 278; WTO, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, Report of the Appellate Body from 15 July 2011, WT/DS397/AB/R, para. 289.

[11] Recently among others: *Zhou/Peng*, Journal of World Trade 52 (3, 2018), 1 (7); *Sacher*, Neuer Kurs im Umgang mit China?, 20; *Yu/Guan*, Global Trade and Customs Journal 12 (1, 2017), 16; *Depayre*, Global Trade and Customs Journal 11 (2, 2016), 42; *Miranda*, Global Trade and Customs Journal 11 (5, 2016), 244; *Miranda*, Global Trade and Customs Journal 9 (3, 2014), 94; *Miranda*, Global Trade and Customs Journal 11 (10, 2016), 447; *Miranda*, Global Trade and Customs Journal 11 (7/8, 2016), 306; *Gatta*, Global Trade and Customs Journal 9 (2014a), 144; *Gatta*, Global Trade and Customs Journal 9 (2014b), 165; *Graafsma/Kumashova*, Global Trade and Customs Journal 9 (4, 2014), 154; *Stewart/Fennel/Bell/Birch*, Global Trade and Customs Journal 9 (6, 2014), 272; *Vermulst/Sud/Evenett*, Global Trade and Customs Journal 11 (5, 2016), 212; *Zhenghao*, Global Trade and Customs Journal 11 (5, 2016), 229; *Noel*, Global Trade and Customs Journal 11 (11/12 2016), 296; *Searles*, Global Trade and Customs Journal 11 (10, 2016), 430; *O'Connor*, Global Trade and Customs Journal 10 (5, 2015), 176; *O'Connor*, The EU Does Not Have to Make China a Market Economy in 2016; *O'Connor*, The Myth of China and Market Economy Status in 2016; *O'Connor*, Market-economy status for China is not automatic, CEPR's policy portal.

Whereas several authors hold the opinion that Article 15(a) still provides for the "analogue method" because its chapeau still mentions the possibility to use a methodology that is not based on a strict comparison with domestic prices or costs in China,[12] the majority of commentators are sceptical about the possibility of the analogue method's continuous use.[13] Especially in light of Article 15 CAP's systematic structure, the interplay of both its subparagraphs and its drafting history, it can be concluded that the use of the analogue method is not applicable in relation to China any more.[14]

This exact question is now also in the centre of an ongoing dispute between China and the EU. China initiated a dispute settlement proceeding the day after the expiry of Article 15(a)(ii) and claims that the continuous application of the "analogue method" by the European Union violates its obligations under the WTO-Agreements.[15]

C. The New Methodology of the European Union

I. Overview of the Legislative Procedure

In the run-up to the expiry of Article 15(a)(ii) CAP, increasing attention has been paid to the potential reaction of the European Commission; indeed, there has been much speculation regarding how exactly the new EU anti-dumping law could be composed.[16] After several benchmark-tests, internal discussions, and public consultations, the EU Commission launched its long-expected proposal for a new approach in dealing with potentially dumped imports from China in November 2016.[17] This so-called "November-proposal" basically abolished the "market-economy" doctrine in EU anti-

12 *Miranda*, Global Trade and Customs Journal 9 (3, 2014), 94 (100 et seq.); *O'Connor*, The EU Does Not Have to Make China a Market Economy in 2016; *O'Connor*, The Myth of China and Market Economy Status in 2016; *Posner*, Global Trade and Customs Journal 9 (4, 2014), 146 (149).

13 *Graafsma/Kumashova*, Global Trade and Customs Journal 9 (4, 2014), 154; *Tietje/Nowroth*, Myth or Reality? China's Market Economy Status under WTO Anti-Dumping Law after 2016, 7; *De Kok*, JIEL 19 (2, 2016), 515 (527); *Gatta*, Global Trade and Customs Journal 9 (4, 2014), 165; *Vermulst/Sud/Evenett*, Global Trade and Customs Journal 11 (5, 2016), 212; *Zhou/Peng*, Journal of World Trade 52 (3, 2018).

14 For a detailed analysis of the bilateral drafting history of Article 15 CAP between China and the United States, see: *Zhou/Peng*, Journal of World Trade 52 (3, 2018), 1 (13). With respect to an analysis of the wording of Article 15 see: *Ibid.*, 1 (6); *Sacher*, Neuer Kur sim Umgang mit China?, 20 et seq.

15 WTO, *European Union – Measures Related to Price Comparison Methodologies*, Report of the Panel from 10 March 2017, WT/DS516/9.

16 Among others: *Nicely*, Global Trade and Customs Journal 9 (4, 2014), 160; *De Kok*, JIEL 19 (2, 2016), 515; *Gatta*, Global Trade and Customs Journal 9 (4, 2014), 144; *Searles*, Global Trade and Customs Journal 11 (10, 2016), 430; *Noel/Zhou*, Global Trade and Customs Journal 11 (11/12, 2016), 559; *Rao*, Tsinghua China Law Review 5 (2013), 151 (152); *Noel*, Global Trade and Customs Journal 11 (7/8, 2016), 296.

17 European Commission, Commission opens a public consultation on future measures to prevent dumped imports from China, 10 February 2016, <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1455> (visited 24 May 2018); *European Commission*, Commission Staff Working Document, Impact Assessment, Possible change in the calculation methodology of dumping regarding the People's Republic of China (and other non-market economies) accompanying the document Proposal for a Regulation of the European Parliament and the Council amending Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European Union and Regulation (EU) 2016/1037 on protection against subsidised imports from countries

dumping law and replaced it with a new approach, giving weight to the actual price-distortions in each respective country.[18] Hereby, normal value was supposed to be constructed on the basis of undistorted prices. Unsurprisingly, this proposal was immediately criticised by China and was subject to heated discussions.[19]

The European Economic and Social Committee took a stand on the proposal, suggesting not to limit the distortion-analysis to economic factors, but rather to extend it by also considering compliance with international labour standards and Multilateral Environment Agreements.[20] This point of view also carried through to the legislative process in the European Parliament. Its Committee on International Trade (INTA) worked out several far-reaching amendments and stuck to the proposal of the European Economic and Social Committee. Consequently, it stipulated that, in determining whether a price is distorted, a distinguishing factor shall be whether the country in question complies with core labour standards under the ILO Convention, environmental agreements to which the EU is a party or even relevant OECD conventions pertaining to the field of taxation.[21] Hence, it was the first proposal for a legal text to directly counteract so-called social- or eco-dumping.

As might be expected, this strict approach did not gain the acceptance of the Commission and the Council. In a complicated trilogue between the three organs, an informal agreement was reached which still gave weight to the points of the Parliament, albeit in a different way.[22] This agreement later resulted in the final text, published in the Official Journal of the European Union on 19 December 2017.

not members of the European Union, SWD(2016) 370 final, 9 November 2016, available on the internet: <http://trade.ec.europa.eu/doclib/docs/2016/november/tradoc_155080.pdf> (visited 24 May 2018).

18 *European Commission*, Proposal for a regulation of the European Parliament and the Council amending Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European Union and Regulation (EU) 2016/1037 on protection against subsidised imports from countries not members of the European Union, 9 November 2016, COM(2016) 721 final, available on the internet: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016PC0721&from=EN> (visited 24 May 2017).

19 Global Times, China says EU's proposed anti-dumping rules disappointing. Global Times, 10 November 2016, available on the internet: <http://www.globaltimes.cn/content/1017190.shtml> (visited 24 May 2018); China also refers to the proposal of the Commission in its Request for the Establishment of a Panel: WTO, *European Union – Measures Related to Price Comparison Methodologies*, Report of the Panel from March 10th 2017, WT/DS516/9, para. 12.

20 *European Economic and Social Committee*, Opinion on the Proposal for a Regulation amending Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European Union and Regulation (EU) 2016/1037 on protection against subsidised imports from countries not members of the European Union, 29 March 2017, REX/483-EESC-2017, available on the internet: <http://www.eesc.europa.eu/our-work/opinions-information-reports/opinions/rex483-trade-defence-instruments-methodology> (visited 24 May 2018).

21 Report on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European Union and Regulation (EU) 2016/1037 on protection against subsidised imports from countries not members of the European Union (COM(2016)0721 – C8-0456/2016 – 2016/0351(COD), 27 June 2017, available on the internet: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=//EP//NONSGML+REPORT+A8-2017-0236+0+DOC+PDF+V0//EN> (visited 24 May 2018), 13 et seq.

22 *European Parliament*, EU anti-dumping measures that protect jobs: MEPs and ministers strike deal, <http://www.europarl.europa.eu/news/en/press-room/20171003IPR85229/eu-anti-dumping-measures-that-protect-jobs-meps-and-ministers-strike-deal> (visited 24 May 2018); Provisional

II. Analysis of the New Provisions of the EU's Basic Anti-Dumping Regulation

Under the new provisions of the EU's Basic Anti-Dumping Regulation, the pre-existing Article 2.7 – which previously stipulated the EU's market-economy doctrine – is drastically narrowed. In relation to any WTO Member, the "analogue method" is no longer applicable. Instead, a new Article 2.6(a) applies; it stipulates the following:

> "(a) In the case it is determined (...) that it is not appropriate to use domestic prices and costs in the exporting country due to the existence (…) of significant distortions (…) normal value shall be constructed (…)"

Consequently, once it is established that "significant distortions" exist in the country in question, the Commission must construct normal value, irrespective of whether the requirements of Article 2.3 of the regulation would be fulfilled. In Article 2.6a lit. (b), the new provision establishes which circumstances qualify for "significant distortions":

> "Significant distortions are those distortions which occur when reported prices or costs, including the costs of raw materials and energy, are not the result of free market forces because they are affected by substantial government intervention."

The explicit listing of costs of raw materials and energy is supposed to cover the cases of so called "input-dumping", a constellation where the state has a strong influence on the energy- or raw-materials-market and, as a consequence, domestic producers are able to produce at much more competitive prices.[23]

The provision then sets up an illustrative list of criteria that indicate the existence of "significant distortions", which includes, inter alia, state presence in firms, allowing for price interference of authorities; dominant position of state-owned or -controlled enterprises; public policies influencing free market forces; and distorted wage costs or access to finance by public bodies. Still, several other criteria could indicate "significant distortions", since the list in subparagraph (b) is non-exhaustive.

To ensure that European producers are not troubled by a high burden of proof regarding the situation in the country in question, subparagraph (c) stipulates that the Commission is obliged to provide detailed information. For this purpose, it shall prepare and publish a comprehensive report describing the specific market circumstances in a given country once it has well-founded indications of the possible existence of significant distortions in that country. When filing in a complaint to initiate anti-dumping proceedings, the respective Union industry may rely on the evidence in the aforementioned report of the Commission.

Agreement resulting from interinstitutional negotiations, *European Commission*, Proposal for a regulation of the European Parliament and of the Council amending Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European Union and Regulation (EU) 2016/1037 on protection against subsidised imports from countries not members of the European Union, 9 November 2016, COM(2016) 721 final.

[23] In detail on the issues relating to "input-dumping", see: *Tietje/Kluttig/Franke*, Journal of World Trade 45 (5, 2011), 1071; *Pogoretskyy*, Global Trade and Customs Journal 4 (10, 2009), 313; *Shadikhodjaev*, Journal of World Trade 50 (4, 2016), 705.

Once it is established that the respective country suffers from "significant distortions" and it is therefore not appropriate to use domestic prices and costs, normal value is to be constructed

> "(…) exclusively on the basis of costs of production and sale reflecting undistorted prices or benchmarks (…)"[24]

The information the Commission may refer to when constructing undistorted prices is provided in a non-exhaustive list. Besides undistorted international reference prices, the list also provides for the costs of production in an appropriate representative country, with a similar level of economic development as a possible source. With respect to the latter, the provision requires that:

> "(…) where there is more than one such country, preference shall be given, where appropriate to countries with an adequate level of social and environmental protection; (…)"[25]

This phrasing is a direct consequence of the negotiating process between the Commission, the Council, and Parliament. It represents the remains of the strict social- and eco-dumping provisions the European Parliament suggested in their amendment-proposal. Still, the chosen wording leaves much room for interpretation. First, the provision requires more than one potential country with a similar level of economic development to be qualified for price-comparison. Second, the wording of "appropriate" and "adequate" provides a high flexibility for the Commission in its decision-process during anti-dumping investigations.

Finally, the new anti-dumping provisions also entail certain transitional provisions laid down in Article 11 of the Basic Anti-Dumping Regulation. Pursuant to these provisions, the new methodology in Article 2.6a shall only apply to future investigations. Pre-existing anti-dumping measures enacted under the old Article 2.7 by the use of the "analogue-method" shall explicitly stay in force until the first expiry review.

D. Conformity with WTO Law

WTO law allows for the initiation of a dispute settlement proceeding also against an abstract legal provision. According to the Appellate Body, the provision itself (*"as such"*) as well as a certain measure applying the provision (*"as applied"*) may be subject to a legal proceeding.[26] Further, the discretionary nature of a measure is no barrier to an

[24] See the new Article 2.6a (a) Regulation (EU) 2016/1036 of the European Parliament and the Council on protection against dumped imports from countries not members of the European Union, 8 June 2016, L 176/21, available on the internet: <file:///C:/Users/agmba.XD/Downloads/CELEX_32016R1036_EN_TXT.pdf> (visited 24 May 2018).

[25] *Ibid.*

[26] WTO, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, Report of the Appellate Body from 29 November 2014, WT/DS268/AB/R, para. 172; WTO, *United States – Anti-Dumping Act of 1916*, Report of the Appellate Body from 28 August 2000, WT/DS136/AB/R, paras. 60 et seq. and 92 et seq.; WTO, *United States – Continued Existence and Application of Zeroing Methodology*, Report of the Appellate Body from 4 February 2009, WT/DS350/AB/R, paras. 179 et seq.; WTO, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, Report of the Appellate Body from

"as such" challenge.[27] Even though the Appellate Body has not yet established a clear and universal legal framework for a discretionary provision to be WTO-consistent, with respect to Article 2.2 of the ADA, it stated that the provision in question must at least leave room to be applied in a manner consistent with WTO law.[28] Hence, a discretionary provision can only violate Article 2.2 of the ADA *"as such"* if it leaves no room for a WTO law-consistent application.

I. The "Significant Distortions"-Approach

According to the new approach of the EU's Basic Anti-Dumping Regulation, normal value shall be constructed if it is not appropriate to use domestic prices and costs due to significant distortions. Article 2.2 of the WTO Anti-Dumping Agreement, on the other hand, allows for the construction of normal value only in these cases:

> "When there are **no sales** of the like product **in the ordinary course of trade** (1.) in the domestic market of the exporting country or when, because of the **particular market situation** (2.) (…) sales do not permit a proper comparison (…)" (emphasis added)

Hence, the European Union's approach is only WTO-consistent if it is in line with at least one of these Article 2.2 ADA requirements.

1. Ordinary Course of Trade

Even though the ADA does not contain a comprehensive definition of "ordinary course of trade", by applying the Articles 31 et seq. of the Vienna Convention on the Law of Treaties, Article 2.2 of the ADA must be interpreted in good faith in accordance with the ordinary meaning to be given to it in its context and in light of the object and purpose of the ADA.[29]

15 December 2003, WT/DS244/AB/R, para. 81; WTO, *Argentina – Measures Affecting the Importation of Goods*, Report of the Appellate Body Report from 15 January 2015, WT/DS438/AB/R, para. 5.103.

27 WTO, *United States – Anti-Dumping Act of 1916*, Report of the Appellate Body from 24 August 2000, WT/DS136/AB/R, fn. 59; WTO, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, Report of the Appellate Body 15 December 2003, WT/DS244/AB/R, para. 89; WTO, *European Union – Anti-Dumping Measures on Biodiesel from Argentina*, Report of the Appellate Body from 6 October 2016, WT/473/AB/R, paras. 6.229, 7.271; in detail on this issue also: *Kang*, Journal of World Trade 46 (4, 2012), 879; *Lockhart/Sheargold*, JIEL 13 (2, 2010), 379; Naiki, JIEL 7 (1, 2004), 23 (52); *Howse/Staiger*, World Trade Review 5 (1, 2006), 254; *Lester*, JIEL 14 (2, 2011), 369 (372); *Bhuiyan*, JIEL 5 (3, 2002), 571.

28 WTO, *European Union – Anti-Dumping Measures on Biodiesel from Argentina*, Report of the Appellate Body from 6 October 2016, WT/473/AB/R, paras. 6.281 et seq.

29 According to Article 3.2 DSU WTO-law shall be interpreted "(...) in accordance with customary rules of interpretation of public international law." The Appellate Body clarified that this provision allows for the Articles 31 et seq. of the Vienna Convention on the Law of Treaties to be used for interpreting WTO-law: WTO, *United States – Standards for Reformulated and Conventional Gasoline*, Report of the Appellate Body from 20th May 1996, WT/DS2/AB/R, para. 17.

Turning to its ordinary meaning, the wording of "ordinary course" means "belonging to the regular or usual order or course of things."[30] The regular or usual course of trade is, by transactions of sale and purchase, characterised by the seller's intent to realise a profit. Consequently, whenever a product is transferred outside of this regular course, i.e. in the case of transfers within segmentations of a global enterprise, it shall be regarded outside the "ordinary course of trade". This interpretation can also be based on the more accurate French version of the legal text which translates "ordinary course of trade" as "au cours d'opération commerciales normales".[31] The wording of "opération commerciales" implies a stronger connection to the commercial interests of the parties of the transaction.[32]

Turning to its context, Article 2.2.1 gives a certain guidance to the meaning of this requirement. Even though this provision does not constitute a comprehensive legal definition,[33] it states that sales of a product may be treated as not being in the ordinary course of trade and disregarded

> "only if (...) such sales are made within an extended period of time in substantial quantities and are at prices which do not provide for the recovery of all costs (…)"[34]

Consequently, since uneconomic transactions shall be regarded outside the ordinary course of trade, the intent to make profit with a transaction is indeed a decisive criterion when handling the requirement of "ordinary course of trade".

Pursuant to Article 2.2 ADA, there *must not be any sales* in the ordinary course of trade in the respective country in question to allow for the construction of normal value. Therefore, due to a certain set of circumstances, any transaction of a given product must not be economic transactions of sale and purchase. According to the EU's approach, normal value may already be constructed once it is established that it is not appropriate to use domestic prices and costs due to significant distortions. Such distortions shall exist, i.e. when reported prices or costs are not the result of free market forces because they are affected by government intervention. However, lower prices due to government intervention do not necessitate the conclusion that all transactions of the product itself are affected in a way that they are not traded in an economic transaction of sale and purchase. To the contrary, the lower price results in a higher competitiveness of the product in question, which is actually the overall goal of its producer *due to* the producer's intent to make a profit with the transaction. In other words: A price resulting

30 See <http://www.oed.com/view/Entry/132361> (visited 24 May 2018).

31 According to Article 33(1) of the Vienna Convention on the Law of Treaties, the text of a treaty is equally authoritative in each language. The Appellate Body consistently refers to the Spanish or the French version in interpreting the WTO-Agreements, see i.e.: WTO, *European Communities – Measures Affecting Asbestos and Products Containing Asbestos*, Report of the Appellate Body from 12 March 2001, WT/DS135/AB/R, para. 91; WTO, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, Report of the Appellate Body from 30 April 2008, WT/DS344/AB/R, fn. 200.

32 *Noel*, Global Trade and Customs Journal 11 (7/8, 2016), 296 (303).

33 WTO, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, Report of the Appellate Body from 24 July 2001, WT/DS184/AB/R, para. 139.

34 Article 2.2.1 ADA.

from circumstances other than free market forces does not mean that the actual transaction no longer follows economic procedures. Consequently, the EU's approach to construct normal value in the case of significant distortions cannot be based on the "ordinary course of trade" requirement in Article 2.2 ADA.[35]

2. Particular Market Situation

The only remaining possibility to construct normal value under WTO law is in the case of a "particular market situation" that results in sales not permitting a proper comparison. The WTO Anti-Dumping Agreement does not provide any guidance on how to interpret this broad wording in Article 2.2, but there has been increasing discussion regarding the meaning of Article 2.2 among academic authors in recent times.[36]

A "situation" is a "condition or state of something".[37] Related to a market, it refers to the state of the market itself and not to the circumstances leading to the situation. "Particular" means "belonging or relating to one (…) thing as distinguished from another; special."[38] Hence, the specific condition of the market must differ from the normal state of a market. A market is normally balanced by the interplay of free market forces of supply and demand. However, whenever a market situation is particular, pricing is not determined by these market forces but rather influenced by external factors.

Still, the use of the word "situation" narrows this determination down to the actual circumstances of the market itself. A finding of a particular market situation thus cannot be based on the mere existence of government interference alone. Rather, the interference must lead to a dysfunction of free market forces of supply and demand.

This interpretation is also supported by an overarching contextual analysis of the Anti-Dumping Agreement one the one hand and the Agreement on Subsidies and Countervailing Measures on the other. The Anti-Dumping Agreement seeks to provide the possibility to counteract injurious dumping by private actors.[39] The Agreement on Subsidies and Countervailing Measures, however, provides for the challenging or counteracting of state subsidies. Hence, the latter explicitly links to the action of a state, whereas the former ties in with economic actions of individuals. Consequently, it would be contrary to the plain idea of WTO anti-dumping law to base the finding of a particular market situation solely on the behaviour of the state.

The EU's new approach, however, requires construction of normal value

35 For a detailed analysis on this requirement, see: *Sacher*, Neuer Kurs im Umgang mit China?, 25 f.

36 *Zhou/Percival*, JIEL 19 (4, 2016), 863; *Nicely/Gatta*, Global Trade and Customs Journal, 238 (239); *Gatta*, Global Trade and Customs Journal 9 (4, 2014), 165 (170); *Noel*, Global Trade and Customs Journal 11 (7/8, 2016), 296 (303).

37 See <http://www.oed.com/view/Entry/180520> (visited 24 May 2018).

38 *Ibid*.

39 WTO, *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea*, WT/DS464/AB/R, Report of the Appellate Body from 7 September 2016, para. 5.52; WTO, *European Union – Anti-Dumping Measures on Biodiesel from Argentina*, Report of the Appellate Body from 6 October 2016, WT/473/AB/R, para. 6.25.

> "when reported prices or costs (…) are not the result of free market forces because they are affected by substantial government intervention."[40]

Thus, it does simply limit the cases of normal value construction to the situation of substantial government intervention. The intervention itself does not trigger normal value construction though. Rather, there must be a positive finding that pricing is no longer the result of free market forces. This approach can therefore basically find its support in the requirement of "particular market situation" under Article 2.2 ADA. Whether the specific chosen construction method is in line with WTO-law is a distinct question.

II. Normal Value Construction Method

The Anti-Dumping Agreement contains specific provisions on the procedure of constructing normal value. According to Article 2.2 ADA:

> "(...) the margin of dumping shall be determined by comparison (...) 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)

Even though Article 2.2.1.1 stipulates that costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, it still leaves room for other sources to be regarded in constructing normal value. The Appellate Body recently highlighted that investigating authorities are not limited in the sources of information used for the determination of normal value in the *EU – Biodiesel (Argentina)* decision:

> "We do not see, however, that the first sentence of Article 2.2.1.1 precludes information or evidence from other sources from being used in certain circumstances. Indeed, it is clear to us that, in some circumstances, the information in the records kept by the exporter (...) may need to be analysed (...) including (...) sources outside the "country of origin."[41]

Whereas this might at first glimpse seem like an investigating authority is free in determining normal value, the Appellate Body later pointed out correctly that the wording of Article 2.2 ADA marks a strict boundary for constructing normal value:

> "This, however, does not mean that an investigating authority may simply substitute the costs from outside the country of origin for the "cost of production in the country of origin". Indeed, Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 make clear that the determination is of the "cost of production [...] in the country of

[40] Art. 2.6a (b) Regulation (EU) 2016/1036 of the European Parliament and the Council on protection against dumped imports from countries not members of the European Union, 8 June 2016, L 176/21, available on the internet: <file:///C:/Users/agmba.XD/Downloads/CELEX_32016R1036_EN_TXT.pdf> (visited 24 May 2018).

[41] WTO, *European Union – Anti-Dumping Measures on Biodiesel from Argentina*, Report of the Appellate Body from 6 October 2016, WT/473/AB/R, para. 6.71.

> origin". Thus, whatever the information that it uses, **an investigating authority has to ensure that such information is used to arrive at the "cost of production in the country of origin**". Compliance with this obligation may require the investigating authority to **adapt** the information that it collects." [42] (emphasis added)

Consequently, in constructing normal value, an investigating authority must never simply substitute the costs of producers by reference to international prices or other information. Any information the authorities refer to must instead be used to arrive at the cost of production in the country of origin. This reading of the Appellate Bodies decision was also identically applied by the Panel in the more recent *EU – Biodiesel (Indonesia)* case.[43]

In consequence, an investigation authority needs to "*adapt*" any collected information from external sources. It is not yet finally clear how far reaching this obligation to "*adapt*" actually is. Does this require that prevailing distortions in a market must be included in order to "*adapt*" an information to arrive at the *"cost of production in the country of origin"* or can the distortions simply be ignored*?* In a more optimistic reading of the Appellate Bodies decision, one might argue that it is sufficient to weight the respective production factors value in the exact amount as they proportionally take in the domestic producers production process. However, this runs afoul the requirement of Article 2.2 ADA because any distortion in the market at issue is a circumstance in the country of origin that needs to be regarded. If normal value construction must be based on the cost of production in the country of origin, this means that prevailing distortions must be included rather than excluded. A simple weighting of production factors still gives no meaning to prevailing distortions in the respective market. As shown above, the Anti-Dumping Agreement – other than the SCM-Agreement – links to actions of individuals and does not sanction state intervention in markets. If there is a distortion in the market at issue, the individual producer can – as a fact – produce cheaper and at a more competitive price. Hence, to arrive at "*cost of production in the country of origin"* this very distortion needs to be taken into account. In short: if an authority collects data from external sources (i.e. third countries or international reference prices) these data have to be adapted in a way that they reflect the prevailing distortions in the market at issue.

However, the new approach of the European Union is composed exactly to the contrary. It governs that, in case of significant distortions, normal value shall be constructed

"**exclusively** on the basis of costs of production and sale reflecting **undistorted** prices or benchmarks (…)"[44] (emphasis added)

[42] WTO, *European Union – Anti-Dumping Measures on Biodiesel from Argentina*, Report of the Appellate Body from 6 October 2016, WT/473/AB/R, 6.73.

[43] WTO, *European Union – Anti-Dumping Measures on Biodiesel from Indonesia*, Report of the Panel from 25 January 2018, WT/480/P/R, para. 7.30.

[44] Art. 2.6a (a) Regulation (EU) 2016/1036 of the European Parliament and the Council on protection against dumped imports from countries not members of the European Union, 8 June 2016, L 176/21, available on the internet: <file:///C:/Users/agmba.XD/Downloads/CELEX_32016R1036_EN_TXT.pdf> (visited 24 May 2018).

Hence, as a result, the constructed normal value must not be distorted any more after it is constructed. The whole purpose of the normal value construction under the EU's approach is to subtract out the distortion in the market at issue. As a consequence, the new methodology of Article 6a of the EU's Basic Anti-Dumping Regulation leaves no room for a WTO-consistent application and therefore "as such" violates Article 2.2 ADA as interpreted by the Appellate Body in the *EU-Biodiesel (Argentina)* decision.

III. Transitional Provisions

Finally, the encompassed transitional provisions of the new EU approach stipulate that pre-existing measures shall stay into force, irrespective of the change of law, at least until their first expiry review. This also and especially applies to the imposed anti-dumping duties on Chinese products, based on the application of the analogue-method under Article 15(a) of China's Accession Protocol. After the expiry of subparagraph (ii) as shown above, this method is no longer applicable. Even under the most optimistic reading of Article 2.2 ADA, the method only allows for a construction of normal value and never – as conducted under the analogue-method – a substitution of domestic with third country prices. Furthermore, Article 18.4 ADA requires WTO Members to permanently ensure the conformity of domestic laws, regulations and administrative procedures with the provisions of the ADA. Therefore, the continuous application or maintenance of a measure, imposed on the basis of the analogue-method in relation to China has violated WTO law since 11 December 2016.

E. Conclusion

Ultimately, it must be concluded that the new approach of the European Union violates WTO Anti-Dumping law. Whereas the general approach of constructing normal value in the case of significant distortions is eligible under WTO law, the chosen construction method violates Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement as well as Article VI:1(b)(ii) of the GATT, especially in the light of the recent Appellate Body decision in *EU – Biodiesel*. From a political point of view, it seems that the EU attempted to find a similar way of essentially continuing its previous practice under the analogue-method.

However, WTO law leaves no room for normal value construction irrespective of the cost of production in the country of origin. Hence, the European Union's approach to subtract out any potential price distortions in constructing normal value cannot be brought in line with WTO law. Consequently, it is highly likely that China will succeed in the current WTO dispute settlement proceedings initiated against the continuous application of the analogue-method since December 2016 and the new provisions of the EU's Basic Anti-Dumping Regulation.

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