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From 'Non-market Economy' to 'Significant Market Distortions': rethinking the EU anti-dumping regulation and China's state interventionism

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This article questions the consistency of the EU anti-dumping regulation with the WTO Anti-dumping Agreement. It argues that with the expiry of paragraph 15(a)(ii) on 11 December 2016, China's WTO Accession Protocol may no longer provide the legal basis for the EU to set aside Chinese domestic prices in determining normal value of Chinese products. Moreover, given that the European Commission has consistently used costs that are not actual costs of Chinese producers in constructing normal value of Chinese products, the EU anti-dumping practice runs the risk of being inconsistent with WTO law since the WTO Anti-dumping Agreement does not allow for such flexibility when determining costs of production in the exporting country. Drawing on Jackson's interface theory, this article further argues that the EU's introduction of the new concept 'significant market distortions' to anti-dumping practices should be conceptualized as an effort to reconstitute alternative interface mechanisms when old ones are no longer applicable. The dubious legality of the EU's new anti-dumping regulation is simply a symptom of a long-brewing tension in the multilateral trade system: how can the WTO accommodate systemic friction between heterogeneous economic models?

I. INTRODUCTION

Dumping is a situation of international price discrimination where the export price of a product is less than its 'normal value', that is, the domestic price of the like product in the exporting country. WTO law does not prohibit dumping. However, an importing country is permitted to take anti-dumping measures in the form of additional duties to neutralize material injury caused by dumping to the competing domestic industry. The amount of such anti-dumping duties normally corresponds to a 'dumping margin', which is the difference between the normal value and the export price. Although much ink has been splashed on its

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glaring lack of economic rationale, anti-dumping regulation has been a cornerstone of the world trading system since its inception after the Second World War.[1]

China has been by far the biggest target of anti-dumping investigations. In 2020 alone, 87 anti-dumping investigations were launched against China, accounting for almost one fourth of the anti-dumping investigations worldwide.[2] One important factor why China is subject to voluminous anti-dumping investigations is that China has long been considered a non-market economy (NME) in the sense that domestic prices in China are not freely determined by the interaction of supply and demand in a marketplace. Instead, Chinese domestic market is perceived as distorted because the government of China exerts a decisive influence on the allocation of resources and prices. Consequently, it is alleged that domestic prices in China are artificially low due to significant government intervention and that they could not be a reliable yardstick of the normal value of Chinese exports.[3] To counteract the unfair competitive advantage of NMEs in international trade, the European Union (EU), like many other WTO Members, permits the use of a special methodology not based on domestic prices in China when calculating the normal value of Chinese products. Instead, the EU applies a method of constructing the normal value of Chinese products based on prices or costs in a surrogate market economy third country (the NME methodology).[4] The use of the NME methodology has led to hugely inflated anti-dumping duties because the selected surrogate country often has a totally different cost structure from China.[5] For instance, the EU anti-dumping margins against Chinese products are on average almost as twice high as for other targeted countries.[6]

When China acceded to the World Trade Organization (WTO) in 2001, the NME methodology was formally incorporated in paragraph 15(a) of the Protocol on the Accession of the People's Republic of China (China's Accession Protocol), with the caveat that the practice must terminate 15 years after China's accession to the WTO, ie, after 11 December 2016. However, the EU has continued to apply the NME methodology after 11 December 2016, insisting that the NME Methodology permitted in China's Accession Protocol has not expired. In response, China challenged the consistency of Articles 2(1) to 2(7) of the EU Basic Anti-dumping Regulation (BAR)[7] with the terms of China's Accession Protocol and the WTO Anti-dumping Agreement (ADA) in *EU—Price Comparison Methodologies* on 9 March 2017.[8] The dispute attracted widespread attention. Both the EU and China considered that the dispute concerned 'the most important live issue in WTO anti-dumping law'.[9] The US Trade Representative Robert Lighthizer called the dispute 'the most serious

[1] Daniel K Tarullo, 'Beyond Normalcy in the Regulation of International Trade' (1987) 100 (3) Harvard Law Review 546, 605; Alan O Sykes, 'Antidumping and Antitrust: What Problems Does Each Address?' (1998) Brookings Trade Forum 1, 39–42; Wentong Zheng, 'Reforming Trade Remedies' (2012) 34 (1) Michigan Journal of International Law 151, 181–82.

[2] WTO, 'Anti-dumping Initiations: by Exporter, 01/01/1995–31/12/2020' <https://www.wto.org/english/tratop_e/adp_e/AD_InitiationsByExp.pdf> accessed 13 March 2022.

[3] Commission Staff Working Document, 'On Significant Distortions in the Economy of the People's Republic of China for the Purposes of Trade Defence Investigations' (20 December 2017), at 3.

[4] Art 2(7) of Regulation (EU) 2016/36 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union, OJ L 176 (30 June 2016).

[5] Gary Clyde Hufbauer, 'Statement on Market Economy Status for China', Testimony before the U.S. – China Economic and Security Review Commission (February 24, 2016); Hyerim Kim and Dukgeun Ahn, 'Empirical Evidence on Surrogate Country Method for Non-market Economy: US Anti-dumping Policy Towards China' (2019) 42 The World Economy 2452, 2463–64.

[6] Thomas J. Prusa, 'NMEs and the Double Remedy Problem' (2017) 16 World Trade Review 619, 620.

[7] Reg (EU) 2016/36 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union, OJ L 176 (30 June 2016).

[8] WTO, *European Union- Measures Related to Price Comparison Methodologies*: Request for the Establishment of a Panel by China, WT/DS516/9 (9 March 2017).

[9] Zhang Xiangchen, 'Opening Statement by ambassador Zhang Xiangchen as a part of the oral statement of China at the First Substantive Meeting of the Panel in the dispute: European union– measures related to price comparison methodologies' (Geneva, 6 December 2017), at 14 <http://images.mofcom.gov.cn/wto2/201712/20171213174424357.pdf> accessed 12 July 2022.

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litigation matter at the WTO right now' and warned that 'a bad decision with respect to the non-market economy status of China would be cataclysmic for the WTO'.[10]

On 14 June 2019, the Chair of the Panel informed the WTO Dispute Settlement Body that the Panel had granted China's request that the proceedings of *EU–Price Comparison Methodologies* be suspended.[11] It was reported that China decided to seek suspension because the results of the interim report, which has never been made public, were unfavourable to China.[12] The suspension has left the critical legal question raised in the dispute unanswered: with the expiry of paragraph 15(a)(ii) of China's Accession Protocol after 11 December 2016, is the EU still permitted to use the NME methodology in constructing the normal value of Chinese products in anti-dumping investigations?[13] From China's perspective, the answer must be negative because otherwise WTO Members would effectively be conferred a permanent right to discriminate against China as a NME in anti-dumping proceedings.[14] Nevertheless, the legal consequence of the suspension of the WTO panel proceeding of *EU—Price Comparison Methodologies* is that there is no authoritative WTO ruling on whether the NME Methodology is still permitted after 11 December 2016. In fact, the EU and other WTO Members are still applying the NME methodology to Chinese products for the purpose of anti-dumping investigations up to date.[15]

In the meantime, the European Commission adopted the amended BAR on 20 December 2017.[16] Central to the EU's amendment of the BAR was the abolishment of the traditional distinction between market economy and NME countries and the provision of a new non-discriminatory, country-neutral approach in establishing the normal value of products. Consequently, the European Commission now enjoys the liberty of setting aside domestic prices of *any* exporting country should it find 'significant distortions' exist in that country.[17] But is the EU's new methodology consistent with the requirements of the WTO ADA? As WTO commentators pointed out, the EU's new methodology is to put old wine in a new bottle.[18] Not surprisingly, WTO Members have raised precisely such concerns in the WTO Committee on Anti-Dumping Practices.[19] In *EU–Cost Adjustment Methodologies II (Russia)*, Russia specifically requested the panel to make findings on this issue. However, since the new amendments to the BAR were not included in Russia's original panel request, the panel rejected Russia's request as falling outside its terms of reference.[20]

[10] Shawn Donnan, 'Trump Trade Tsar Warns against China "market economy" Status', *Financial Times* (21 June 2017).

[11] WTO Secretariat, *European Union- Measures Related to Price Comparison Methodologies*: Lapse of Authorities for the Establishment of the Panel, WT/DS516/14 (15 June 2020).

[12] Bryce Baschuk, 'China Loses Landmark WTO Dispute against EU', *Bloomberg* (16 June 2020).

[13] There is a large body of literature on the legal effect of the expiry of para 15(a)(ii) of China's WTO Accession Protocol. On a recent summary of the debate, see Mirek Tobiaš Hošman, 'China's NME Status at the WTO: Analysis of the Debate' (2021) 20 (1) International Trade law and Policy 1; James J Nedumpara and Weihuan Zhou (eds), *Non-Market Economies in the Global Trading System: The Special Case of China* (Springer 2018).

[14] Zhang (n 9) 14.

[15] European Parliament Director-General for External Policies of the Union Policy Department, 'EU-China Trade and Investment Relations in Challenging Times' (May 2020), at 24–25.

[16] Reg (EU) 2017/2321 of the European Parliament and of the Council of 12 December 2017 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 subsidized imports from countries not members of the European Union, OJ L 338 (19 December 2017).

[17] Ibid, Art 2(6a) of the Amended Basic Antidumping Regulation.

[18] Andrei Suse, 'Old Wine in a New Bottle: The EU's Response to the Expiry of Section 15 (a)(ii) of China's WTO Protocol of Accession' (2017) 20 (4) Journal of International Economic Law 951, 951; Patricia Trapp, *The European Union's Trade Defence Modernization Package: A Missed Opportunity at Reconciling Trade and Competition* (Springer 2022) 275–94; Kiliane Huyghebaert, 'Changing the Rules Mid-Game: The Compliance of the Amended EU Basic Anti-Dumping Regulation with WTO Law' (2019) 53 (3) Journal of World Trade 417, 417-432.

[19] Committee on Anti-Dumping Practices, Minutes of the Regular Meeting Held on 28 April 2021, G/ADP/M/59 (26 July 2021) 22–23. In *EU—Price Comparison Methodologies*, China did not request the WTO panel to review the consistency of the EU's new amendment to the Basic Antidumping Regulation with the ADA because the amendment was introduced after China's panel request.

[20] Panel Report, *European Union—Cost Adjustment Methodologies and Certain* Anti-Dumping Measures on Imports from Russia (Second Complaint), WT/DS494/R (24 July 2020), paras 7.67–7.81.

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This article starts by addressing these two outstanding legal questions. It argues that with the expiry of paragraph 15(a)(ii) on 11 December 2016, China's WTO Accession Protocol may no longer provide the legal basis for the EU to set aside Chinese domestic prices in determining normal value of Chinese products.[21] Moreover, given that the European Commission has consistently used costs that are not actual costs of Chinese producers in constructing normal value of Chinese products, the EU's practice runs the risk of being inconsistent with WTO law since the ADA does not allow for such flexibility when determining costs of production in the exporting country.[22]

Moving from practical to conceptual, this article argues that the current debate on the consistency of the EU's new methodology with the WTO ADA has largely overlooked one fundamental question: how can the WTO accommodate systemic friction between heterogeneous economic models?[23] The jurisprudence of the WTO Appellate Body has created a curious paradox. On the one hand, it is widely acknowledged that China' unique economic model, termed variably as 'state capitalism', 'Party-state capitalism', 'Beijing consensus' or 'China, Inc.', has posed serious conceptual and practical challenges to the liberal international trade order.[24] There is a growing perception that current trade rules are neither conceptually coherent nor practically effective in tackling heterodox institutional forms like China's state capitalism.[25] That perception has not only led to the emergence of new trade rules in free trade agreements such as the Comprehensive and Progressive Trans-Pacific Partnership, but also culminated in the paralysis of the WTO Appellate Body and the US–China trade war, only further aggravated by the Covid-19 pandemic.[26] On the other hand, the EU's new methodology is neither textually supported by the WTO ADA, nor is it normatively tenable as it appears to be based on an idealized conception of market free from governmental interventions, which does not exist in reality.[27] Moreover, the EU's unilateral labelling of foreign markets as significantly distorted is almost a recipe for resentment and tit-for-tat countermeasures. For example, China has recently started to take a similar approach in finding that non-market conditions existed in some industrial sectors of even highly developed market economy countries and that domestic prices in those sectors may be disregarded in anti-dumping investigations.[28]

To be sure, the EU–China dispute on whether China's market is 'distorted' or not is not a temporary economic incident, but an outgrowth of a long-brewing tension in the multilateral trade system that has never been properly solved. It was John H. Jackson who coined the term 'interface problem' in the 1970s to describe the problems in international trade caused by differences in economic systems or differences in operations of enterprises among economic systems. He argued that 'interface mechanisms' are needed in international economic legal institutions to allow heterogeneous economic systems to trade together harmoniously.[29] Paragraph 15 of China's WTO Protocol of Accession, for

[21] See Section II.B below.
[22] See Section III.C below.
[23] For an excellent analysis of the EU new methodology from an institutional perspective, see Andrew Lang, 'Heterodox Markets and 'Market Distortions' in the Global Trading System' (2019) 22 (4) Journal of International Economic Law 677, 677–719.
[24] WTO, Communication from the United States, 'China's Trade-Disruptive Economic Model', WT/GC/W/745 (16 July 2018); Mark Wu, 'The "China, Inc." Challenge to Global Trade Governance' (2016) 57 (2) Harvard International Law Journal 261, 300–08; Margaret Pearson, Meg Rithmire and Kellee S Tsai, 'Party-State Capitalism in China' (2020) Harvard Business School Working Paper 21-065, at 6.
[25] USTR, *2021 Report to Congress on China's WTO Compliance* (February 2022) 12.
[26] Petros C Mavroidis and Andre Sapir, *China and the WTO: Why Multilateralism Still Matters* (Princeton University Press 2021) 47–59; Harlan Grant Cohen, 'Nations and Markets' (2020) 23 Journal of International Economic Law 793, 796–97.
[27] Tarullo (n 1) 557-560.
[28] Yanning Yu, 'The Issue of Non-market Economy Status in China's Anti-dumping Investigations Against Imports: A Development for the Implementation of New Rules or A Balancing Strategy?' (2021) 55 (6) Journal of World Trade 943, 954–63.
[29] John H Jackson, *The World Trading System: Law and Policy of International Economic Relations* (2nd edn, The MIT Press 1997) 248.

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example, was precisely such an interface mechanism designed to ameliorate the tensions caused by China's integration into the liberal world trade order. However, with the expiry of paragraph 15(a)(ii) of China's Accession Protocol, the old interface mechanism was arguably no longer applicable to China. Looking at the issue from the interface problem perspective, the EU's introduction of the new concept 'significant distortions' should be understood as an effort to reconstitute an alternative interface mechanism. It is unsurprising that the EU may find it challenging to defend the new interface mechanism under the ADA. The multilateral trade regime that took shape in the post-war period simply did not anticipate many of the special features of China's state capitalism.[30] With the benefit of hindsight, it is also clear that the EU was too optimistic about the future trajectory of China's market-oriented reforms, the very reason why a deadline of terminating the NME methodology was set in China's WTO Accession Protocol.[31] Despite its dubious legality under the WTO law, it seems certain that the EU's new methodology in the amended BAR will be here to stay, given that how to deal with imports from China is a politics-laden issue in Europe and the current paralysis of the WTO Appellate Body.

The article proceeds as follows. Section II traces the development of how the normal value of Chinese products has been determined in the EU anti-dumping regulation over the past four decades, focusing on the legal implications of the expiry of paragraph 15(a)(ii) of China's Accession Protocol. Section III explains why the EU's new methodology contained in the amended BAR is inconsistent with the WTO ADA in light of the recent WTO case law. Section IV reflects on the wider repercussions of the EU's use of the 'significant distortions' concept in anti-dumping investigations for international trade law. Section 5 concludes the article.

II. FROM 'NON-MARKET ECONOMY' TO 'SIGNIFICANT DISTORTIONS': HOW DID WE GET HERE?

A. China's non-market economy status and paragraph 15 of China's WTO accession protocol

The current WTO rules on anti-dumping are set out in Article VI of the GATT 1994 and the WTO ADA. The normal value of a product is normally the domestic price of the product in the exporting country. However, the ADA also envisages some circumstances in which the domestic price in the exporting country does not represent the reliable normal value for the purpose of comparison with the export price. One such circumstance is products originating from the NMEs.[32] Originally introduced into the GATT in 1955, the second *Ad* Note to Article VI:1 was the first GATT/WTO rule acknowledging that the presence of extensive government intervention may render domestic prices unreliable indicators of the normal value of products. It provides:

> It is recognized that, in the case of imports from a country which has ***a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the state***, special difficulties may exist in determining price comparability... and in such cases importing contracting parties may find it necessary to take into account the possibility that

[30] Mark Wu, 'The "China, Inc." Challenge to Global Trade Governance' (2016) 57 (2) Harvard International Law Journal 261, 285.

[31] Ming Du, 'Explaining the Limits of the WTO in Shaping the Rule of Law in China' (2020) 23 (4) Journal of International Economic Law 885, 905.

[32] Other circumstances include the like product is not sold in the exporting country in the ordinary course of trade, or not in sufficient quantities, or in the event of a particular market situation. See Art 2.2 of the ADA. These circumstances will be addressed in Section IV of the article.

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> a strict comparison with domestic prices in such a country may not always be appropriate (*emphasis added*).

The rationale was that no comparison between the export price and the normal value of a product was possible if the domestic price was not established in the ordinary course of trade, ie, a result of fair competition reflecting the demand and supply in the marketplace but was fixed by the state.[33] The second *Ad* Note to Article VI:1 of the GATT was later incorporated in Article 2.7 of the WTO ADA.[34]

The NMEs in the second *Ad* Note to Article VI:1 referred to former communist countries with centrally planned economies. The only GATT contracting party which was classified as an NME in 1955 was Czechoslovakia. The NME methodology was later codified in the GATT accession documents of Poland, Romania and Hungary.[35] The second *Ad* Note to Article VI:1 essentially opened the possibility that, if an importing country could show that the exporting country meets the definition of NME in the provision, the importing country may use any methodology that it deems appropriate to determine normal value of products originating from the NME. In practice, importing countries have used either domestic price in a surrogate market economy third country, or a constructed value where the prices of the raw materials concerned were obtained from a surrogate market economy third country, as a basis to determine the normal value of products from a NME.[36]

The scope of application of the second *Ad* Note to Article VI:1 of the GATT is an extremely narrow one. As the Appellate Body observed in *EC—Fasteners*:

> . . . [It] appears to describe a certain type of NME, where the State monopolizes trade and sets all domestic prices. . . .[It] would thus not on its face be applicable to lesser forms of NMEs that do not fulfil both conditions, that is, the complete or substantially complete monopoly of trade and the fixing of all prices by the state.[37]

In view of its high threshold, it is unlikely to label China, or indeed any current or future WTO Member, as a NME as defined in the second *Ad* Note to Article VI:1 nowadays.[38] After decades of opening up and economic reforms, the Chinese State had no longer monopolized trade and set all domestic prices even before China's accession to the WTO in 2001.[39] This was precisely the reason why some WTO Members insisted on a clearer legal basis in China's WTO Accession Protocol which would permit the use of the NME methodology to Chinese products in anti-dumping investigations after China's accession to the WTO.[40] As an integral part of the WTO Agreement, paragraph 15 of China's Accession Protocol provided such a legal basis without explicitly labelling China as an NME, which provides:

[33] GATT Document W.9/86/Rev.1 (21 December 1954) 1.

[34] Art 2.7 of the ADA provides: '[Article 2] is without prejudice to the second Supplementary Provision to paragraph 1 of Article VI in Annex I to GATT 1994'.

[35] MM Kostecki, *East/West Trade and the GATT System* (Palgrave Macmillan 1979) 27–29.

[36] For example, Art 2(7) of Regulation (EU) 2016/36 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union, OJ L 176 (30 June 2016).

[37] WTO Appellate Body Report, *European Communities—Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners (EC—Fasteners)*, WT/DS397/AB/R, para 285 and footnote 460.

[38] Christian Tiejie and Karsten Nowrot, 'Myth or Reality? China's Market Economy Status under WTO Anti-Dumping Law after 2016' (2011) Policy Papers on Transnational Economic Law No 34, at 11; Jan Hoogmartens, *EC Trade Law following China's Accession to the WTO* (The Hague 2004) 145.

[39] Council Regulation (EC) No 905/98 of 27 April 1998 amending Regulation (EC) No 384/96 on protection against dumped imports from countries not members of the European Community; Barry Naughton, *The Chinese Economy: Transitions and Growth* (MIT Press, 2007) 85–107; Nicolas R Lardy, *Markets over Mao: The Rise of Private Business in China* (Peterson Institute for International Economics 2014) 12–16.

[40] First Written Submissions by the European Union, *European Union—Measures Related to Price Comparison Methodologies* (DS561) (14 November 2017), at 1–2; Case T-512/09 *Rusal Armenal v Council and Commission*, para 47.

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(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:

i) If the producers under investigation can clearly show that market economy conditions prevail in the industry... the importing WTO Member shall use Chinese prices or costs for the industry under investigation in determining price comparability.
ii) The importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under investigation cannot clearly show that market economy conditions prevail in the industry...

(d) Once China has established, under the national law of the importing WTO Member, that it is a market economy, the provisions of subparagraph (a) shall be terminated provided that the importing Member's national law contains market economy criteria as of the date of accession. In any event, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession. In addition, should China establish, pursuant to the national law of the importing WTO Member, that market economy conditions prevail in a particular industry or sector, the NME provisions of subparagraph (a) shall no longer apply to that industry or sector.

Compared with the second *Ad* Note to Article VI:1, paragraph 15 of China's Accession Protocol ostensibly granted China more favourable treatment because it provided opportunities for both Chinese producers and the government of China to influence how an investigating authority must exercise its choice when deciding which methodology to use in determining the normal value of Chinese products. First, paragraph 15(a)(i) provides Chinese producers with the option to clearly show that market economy conditions prevail in a Chinese industry, even though the whole Chinese economy is not market economy, thereby supporting a valid claim for using Chinese domestic prices or costs in anti-dumping investigations. It is only in the situation in which Chinese producers are not able to clearly show that market economy conditions prevail in the industry that paragraph 15(a)(ii) permits an importing WTO Member to use the NME methodology.[41] Secondly, the first and third sentence of paragraph 15(d) provide the possibility for the government of China, as opposed to Chinese producers in paragraph 15(a)(i), to establish under the national law of an importing WTO Member that either the whole Chinese economy is a market economy or market economy conditions prevail in a particular industry. Once established, the importing WTO Member must use Chinese domestic prices or costs in anti-dumping investigations. Third, a definitive endpoint of terminating the use of the NME methodology to Chinese products is provided in the second sentence of paragraph 15(d).

For a long time, it was widely believed that while paragraph 15(a) permitted WTO Members to apply the NME methodology to imports from China in anti-dumping investigations, the discriminatory practice must terminate 15 years after China's accession to the WTO, i.e., 11 December 2016 as prescribed in paragraph 15(d).[42] However, the precise legal implications of the expiry of paragraph 15(a)(ii) after 11 December 2016 is the subject of intense controversy, an issue will be examined in the next section.

[41] WTO Appellate Body Report, *EC—Fasteners* (n 37) para 286.

[42] Rao Weijia, 'China's Market Economy Status under WTO Antidumping Laws after 2016' (2013) 5 Tsinghua China Law Review 151, 167–68; K William Watson, 'Will Nonmarket Economy Methodology Go Quietly into the Night? U.S. Antidumping Policy toward China after 2016', Cato Institute Policy Analysis Number 763 (28 October 2014) 6–7.

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Despite the possibility of showing that their products were produced under market economy conditions under paragraph 15(a)(i), Chinese producers' efforts in requesting the European Commission to use Chinese domestic prices or costs in calculating the normal value mostly ended up in vain.[43] Similarly, the request of the government of China that it be recognized as a market economy pursuant to paragraph 15(d) of China's Accession Protocol was rejected by the European Commission in 2008. Although it was acknowledged that China had made substantial progress towards fulfilling the EU's then-current technical criteria for market economy status, the European Commission concluded that China had only fulfilled one of the five criteria.[44] Most recently, the European Commission reiterated the conclusion that the Chinese economy is still significantly distorted due to substantial government interference in its first country report under the newly adopted trade defence rules in December 2017.[45]

The EU is not alone in rejecting China's request to be recognized as a market economy. Applying statutory factors that govern NME country designation under section 771(18)(B) of the Tariff Act of 1930, the US Department of Commerce ruled that China should remain an NME for purposes of the US anti-dumping law in 2006 and again in 2017. The decisions were based on the findings that significant market distortions arise from China's institutional structure and the control that the Chinese Communist Party and the government of China exercise through that structure.[46]

The decision to grant market economy status to a particular WTO Member is not only a legal issue but also a political decision. For instance, the EU formally recognized Russia as a full market economy in November 2002.[47] In any event, due to the use of the NME methodology permitted by paragraph 15(a) of China's Accession Protocol, Chinese products have been often subject to hugely inflated anti-dumping duties.[48] The European Commission estimated that if market economy status were granted to China, it would result in anti-dumping duties that are 30 per cent lower than that using the NME methodology. As a result, gross import prices on imported products from China that were subject to anti-dumping duties would fall by 20 percent. The lower anti-dumping duties on Chinese imports would result in 18–28 per cent higher average Chinese imports than what they would be in the NME regime.[49] That explains why it is a high-stake issue for the EU not to apply standard anti-dumping rules to China even after the expiry of paragraph 15(a)(ii) after 11 December 2016.

B. Legal implications of the expiry of paragraph 15(a)(ii) of China' accession protocol

In *EU—Price Comparison Methodologies*, China argued that there was no legal basis for the EU to use the NME methodology to Chinese products after the expiry of paragraph

[43] Market economy treatment was granted in response to only 41 (17 per cent) out of 248 requests received between 2006 and 2015. See Sherzod Shadikhodjaev, 'Non-Market Economies, Significant Market Distortion, and the 2017 EU Antidumping Amendment' (2018) 21 Journal of International Economic Law 885, 888.

[44] Commission Staff Working Document on Progress by the People's Republic of China towards Graduation to Market Economy Status in Trade Defence Investigations, SEC (2008) 2503 final, Brussels, 19/09/2008, 26–27.

[45] European Commission Staff Working Document, 'On Significant Distortions in the Economy of the People's Republic of China for the Purposes of Trade Defence Investigations', Brussels, SWD (2017) 483 final/2, 20 December 2017, 3.

[46] United States Department of Commerce International Trade Administration, 'China's Status as a Non-Market Economy', A-570-053 Investigation Public Document (26 October 2017) 195–6; 'Antidumping Duty Investigation of Certain Lined Paper Products from the People's Republic of China—China's Status as a Non-market Economy (NME)', A-570-901 Investigation Public Document (30 August 2006) 4.

[47] Council Regulation (EC) No 1972/2002 (5 November 2002).

[48] Gary Clyde Hufbauer, 'Statement on Market Economy Status for China', Testimony before the U.S. – China Economic and Security Review Commission (24 February 2016).

[49] Commission Staff Working Document, 'Assessment of the Economic Impact of Changing the Methodology for Calculating Normal Value in Trade Defense Investigations against China', SWD (2016) 372 final, Brussels (9 November 2016) 5.

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15(a)(ii) of China's Accession Protocol.[50] In response, the EU insisted on three claims. First, despite the expiry of paragraph 15(a)(ii) on 11 December 2016, the remaining parts of paragraph 15 still permit the use of the NME methodology to Chinese products if there is an absence of market economy conditions in China. Second, the legal significance of the expiry of paragraph 15(a)(ii) is that there is no longer a China-specific rule which placed the burden of proof entirely on Chinese exporters after 11 December 2016. Third, under the terms of Article VI of the GATT 1994 and the ADA, there are circumstances in which it is permissible for an investigating authority to reject the prices and the costs of Chinese exporters and replace them with data from a third country.[51]

This part addresses the EU's first two claims. The EU's third claim will be addressed in Section III as it relates to the consistency of the BAR with the WTO law. It is submitted that, first, the better view is that the new paragraph 15 cannot provide a legal basis for the continuing use of the NME methodology in determining the normal value of Chinese products after the expiry of paragraph 15(a)(ii). Whether or not market economy conditions prevail in China after 11 December 2016 is no longer a relevant question under the new paragraph 15. Secondly, the claim that the consequence of the expiry of paragraph 15(a)(ii) is nothing more than a shift of the burden of proof is unconvincing.

(i) Is the NME methodology permitted after the expiry of paragraph 15(a)(ii)?

The EU stressed that despite the expiry of paragraph 15(a)(ii) after 11 December 2016, the remaining parts of paragraph 15, in particular 15(a)(i), 15(b) and 15(d) remain valid. To conclude otherwise would require the expiry of whole paragraph 15(a). For the new paragraph 15 to have any meaning, they must still permit the use of a methodology that is not based on a strict comparison with domestic prices or costs in China in some circumstances, for example, a lack of market economy conditions and the presence of special difficulties.[52] However, there is no legal basis to assume that, since only paragraph 15 (a)(ii) expired, the NME methodology must be permitted after 11 December 2016. It is entirely possible that the expiry of paragraph 15(a)(ii) renders it impossible to apply the NME methodology to Chinese exporters under any circumstances. It would be illogical to assume the continuing use of the NME methodology, even if the assumed applicability may fly in the face of treaty language.

Paragraph 15(a)(ii) permits importing WTO Members, prior to 11 December 2016, to use the NME methodology in anti-dumping investigations if Chinese producers are not able to prove that market economy conditions prevail in the industry. The second sentence of paragraph 15(d) further stipulates that, *in any event*, paragraph 15(a)(ii) shall expire after a 15-year transitional period. Textually, the expiry of paragraph 15(a)(ii) does not require a WTO Member to grant China market economy status. It simply states that, after 11 December 2016, an importing WTO Member is prohibited from applying the NME methodology to Chinese exporters.[53] It is important to note that the second sentence of paragraph 15(d) does not impose any condition upon the expiry of paragraph 15(a) (ii). The expiry of paragraph 15(a)(ii) is just a matter of time. At least from the text of paragraph 15 (d),

[50] *European Union—Measures Relating to Price Comparison Methodologies*, Request for the Establishment of a Panel by China, WT/DS516/1 (15 December 2016).

[51] First Written Submission by the European Union (Geneva, 14 November 2017) paras 102–18.

[52] Jorge Miranda, 'Interpreting Paragraph 15 of China's Protocol of Accession' (2014) 9 (3) Global Trade and Customs Journal 94, 99; Bernard O'Connor, 'Much Ado About Nothing: 2016, China and Market Economy Status' (2015) 10 (5) Global Trade and Customs Journal 176, 177–78.

[53] Weihuan Zhou and Delei Peng, 'EU-Price Comparison Methodologies (DS516): Challenging the Non-Market Economy Methodology in Light of the Negotiating History of Article 15 of China's WTO Accession Protocol' (2018) 52 (3) Journal of World Trade 505, 513–14.

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whether market economy conditions prevail in a particular Chinese industry or not is no longer a relevant question in anti-dumping proceedings from 11 December 2016 onwards.[54]

If the NME methodology previously permitted by paragraph 15(a)(ii) is no longer available, what methodology should an importing WTO Member use in determining the normal value of Chinese products after 11 December 2016? The chapeau of paragraph 15(a) makes it clear that in determining price comparability, an importing WTO Member has only two choices: either Chinese domestic prices or costs or the NME methodology that is not based on a strict comparison with domestic prices or costs in China. These two choices combined cover the entire set of possible outcomes. When the NEM methodology is no longer available 'in any event', including the situation that China may still not be qualified as a market economy, an importing WTO Member has no other choice but to use Chinese domestic prices or costs in determining price comparability after 11 December 2016.[55]

As the EU argued, paragraph 15(a)(i) survives after 11 December 2016. However, paragraph 15 (a) (i) does not create any exception on its own because the contrary situation is laid out by paragraph 15(a)(ii), which expired on 11 December 2016. To insist that paragraph 15(a)(i) still permits the derogation from the generally appliable anti-dumping rules is tantamount to creating a new exception with no legal basis, ie, the need for China to be qualified as a market economy before general WTO anti-dumping rules apply, by reading into paragraph 15(a)(i) an expired exception. China's WTO Accession Protocol has never imposed such an obligation on China, except the expired, time-limited paragraph 15(a)(ii).[56] That paragraph 15(a) contains only a temporary and limited derogation from the general rules for determining the normal value in anti-dumping investigations was unequivocally endorsed by the Appellate Body in *EC—Fasteners*:

> ... [P]aragraph 15(a) contains special rules for the determination of normal value in anti-dumping investigations involving China. Paragraph 15(d) in turn establishes that these special rules will expire in 2016 and set out certain conditions that may lead to the early termination of these special rules before 2016.[57]

Similarly, the fact that WTO Members are obliged to use Chinese domestic prices or costs, even if China cannot gain market economy status according to national laws of other WTO Members, will not render the surviving text of paragraph 15(d) inutile. Paragraph 15 (d) sets out China's right to request an early termination of the NME methodology if China can complete the economic transformation to a full market economy earlier than 11 December 2016.[58] This reading is also consistent with the second sentence of paragraph 15 (d), which stipulates that 'in any event', the NME methodology would expire after 2016. To be sure, nothing in the surviving paragraph 15 prevents a WTO Member from labelling China as an NME country. But that is a completely different issue from the termination of the NME methodology after 11 December 2016, as required by the second sentence of paragraph 15(d).

[54] Edwin Vermulst, Juhi Dion Sud and Simon J. Evenett, 'Normal Value in Anti-Dumping Proceedings against China Post-2016: Are Some Animals Less Equal Than Others?' (2016) 11 (5) Global Trade and Customs Journal 212, 218.

[55] Stepanie Noel, 'Why the European Union Must Dump So-called "Non-market Economy" Methodologies and Adjustments in Its Anti-dumping Investigations' (2016) 11 Global Trade and Customs Journal 296, 299–300; Fernando González-Rojas, 'All Parts Should Have Meaning: A Proposal on the Correct Interpretation of section 15(a) & (d) of China's Protocol of Accession' (2017) 12 (9) Global Trade and Customs Journal 328, 336–37.

[56] Edwin Vermulst et al (n 54) 217.

[57] AB Report, *EC—Fasteners* (n 37) para 289. The AB's observation concerning para 15(d) is only obiter dicta in legal terms. It nevertheless constitutes a clear legal interpretation that cannot be dismissed out of hand.

[58] Laurent Ruessmann and Jochen Beck, '2016 and the Application of an NME Methodology to Chinese Producers in Anti-dumping Investigations' (2014) 9 (10) Global Trade and Customs Journal 457, 459–60.

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The negotiating history of paragraph 15 of China's Accession Protocol supports the proposition that the NME methodology can no longer be used after 11 December 2016, irrespective of whether China could be recognized as a market economy country or not. According to Ambassador Zhang's account, the United States insisted in the early rounds of the negotiations that China's accession to the WTO would require special rules so that the U.S. would be able to maintain the NME methodology for Chinese imports in anti-dumping proceedings. China initially objected but acquiesced in later rounds with the condition that such special rules must have a definitive endpoint. The USA did try to table a 'review clause' proposal in negotiations that would entitle it to review whether special methodologies would continue to be appropriate after the transition period ended. But this proposal was flatly rejected by China. The standoff had persisted for several rounds until the USA accepted that the NME provision should expire after a transition period. The negotiations then shifted to the appropriate length of time during which the NME methodology would be permitted. The two sides ultimately agreed to a middle ground of fifteen years.[59] After the agreement was reached, both the USA and the EU trade officials confirmed on several occasions that the national laws on the conferral of market economy status and the NME methodology for the determination of normal value would no longer apply fifteen years after China's accession to the WTO.[60]

The EU also sought to support its claim under paragraph 150 of the Working Party Report and paragraph 15 (b) of China's Accession Protocol.[61] Paragraph 150 of the Working Party Report recognized that since China was continuing the process of transition towards a full market economy, special difficulties could exist in determining cost and price comparability in the context of anti-dumping and countervailing duty investigations. In such cases, the importing WTO Member might find that a strict comparison with domestic costs and prices in China may not always be appropriate. In turn, paragraph 15 (b) permits WTO Members to use out of country benchmarks to identify and measure the subsidy benefits in China when there are 'special difficulties' which prevent an importing country from using prevailing terms and conditions in China as appropriate benchmarks. Different from paragraph 15 (a)(ii), paragraph 15 (b) has no time limit. The EU then argues that since 'special difficulties' extend beyond the fifteen-year deadline under paragraph 15(b), the same methodology permitted by 15 (b) in countervailing duty investigations must also extend to determining the normal value in anti-dumping investigations.[62]

The EU's claim may be questioned from several aspects. To begin with, as a legal matter, whatever reasons supporting the application of the NME methodology with no time limit to China in paragraph 15(b) of China's Accession Protocol are only specific to countervailing duty investigations. There is no textual basis to transplant this practice to anti-dumping investigations. Moreover, paragraph 1.2 of China's Accession Protocol makes it clear that only parts that are identified in paragraph 342 of the Working Party Report are an integral part of the WTO Agreement. As paragraph 150 is not referred to in paragraph 342, it cannot be understood to impose a legal obligation on China.[63] Arguably, paragraph 150 may constitute part of the 'context' which shall be considered by treaty interpreters within the meaning

[59] Zhang (n 9) 6; Zhou and Peng (n 53) 518–30.

[60] Charlene Barshefsky, 'Statement of Hon. Charlene Barshefsky, Office of United States Trade Representative before the Committee on Ways and Means House of Representatives' <www.govinfo.gov/content/pkg/CHRG-106hhrg67129/html/CHRG-106hhrg67129.htm> accessed 13 March 2022; The European Commission, Proposal for a Council Decision establishing the Community position within the Ministerial Conference set up by the Agreement establishing the World Trade Organization on the accession of the People's Republic of China to the World Trade Organization, COM/2001/0517 final (26 February 2002) paras 54-55.

[61] The EU submission (n 51) paras 119–28.

[62] Ibid, paras 123–28.

[63] Panel Report, *European Union—Antidumping Measures on Certain Footwear from China*, WT/DS405/R, para 7.181.

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of Article 31.2(b) of the Vienna Convention.[64] Still, the term 'special difficulties' is only used in paragraph 15(b). It is not used in paragraph 15 (a). There is no textual basis to resurrect the NME methodology based on 'special difficulties' in paragraph 15(a). Finally, the conclusion that the NME methodology could no longer be justified with the expiry of paragraph 15(a)(ii) is also supported by paragraph 151 of the Working Party Report. Paragraph 151 states that the representatives of China expressed concerns about WTO Members' treatment of China as an NME in anti-dumping investigations. '*In response to these concerns*', Members of the Working Party confirmed that WTO Members would comply with a number of requirements '*in implementing subparagraph 15(a)(ii) of the Protocol*'. This would suggest that it is paragraph 15(a)(ii) that provides the legal basis for the use of the NME methodology.[65] In other words, any use of the NME methodology permitted by paragraph 15 is an implementation of paragraph 15(a)(ii). If this were not the case, paragraph 151 would refer to paragraph 15(a) instead of paragraph 15(a)(ii) specifically.[66] It follows that when paragraph 15(a)(ii) expired on 11 December 2016, there would be no legal basis for WTO Members to apply the NME methodology to imports from China.

(ii) The 'Shifting of the Burden of Proof' Argument

The EU claims that the consequence of expiry of paragraph 15(a)(ii) is nothing more than a change of the burden of proof in anti-dumping investigations.[67] Under the old paragraph 15(a), unless the NME presumption is rebutted, an investigating authority is permitted to apply the NME methodology to Chinse products. Under the new paragraph 15, by contrast, the presumption that market economy conditions do not prevail in China no longer exists. When assessing evidence of market economy conditions in China, there is no China-specific rule in the new paragraph 15 placing the burden of proof on Chinese exporters. Instead, domestic producers in importing countries are tasked with demonstrating that the individual industries or sectors remain under NME conditions in China. The NME methodology could continue to be applied if NME conditions in China could be convincingly shown.[68]

The fundamental difficulty with the EU's argument above is that paragraph 15(a)(ii) says nothing about shifting the burden of proof.[69] Paragraph 15(a)(ii) only states what an importing country may do if Chinese producers cannot make the necessary showing of market economy conditions. It is impossible to infer from the text of paragraph 15(a)(ii) that, after its expiry, the investigating authority may still apply the NME methodology if petitioners are able to demonstrate that individual Chinese industries or sectors remain under NME conditions. It is also clear from the wording of paragraphs 150 and 151 of the Working Party Report that paragraph 15(a)(ii) deals with the *substance* of the NME methodology, not simply burden of proof.[70]

Moreover, the EU's interpretation of the expiry of paragraph 15(a)(ii) may lead to some perplexing results. Both paragraphs 15(a)(i) and 15(a)(ii) place the burden of proving the existence

[64] Li Zhenghao, 'Interpreting Paragraph 15 of China's Accession Protocol in Light of the Working Party Report' (2016) 11(5) Global Trade and Customs Journal 229, 231–34.

[65] Suse (n 18) 960.

[66] Folkert Graafsma and Elena Kumashova, 'In re China's Protocol of Accession and the Anti-dumping Agreement: Temporary Derogation or Permanent Modification' (2014) 9 (4) Global Trade and Customs Journal 154, 157.

[67] The EU Submission (n 51) paras 116; Jorge Miranda, 'Implementation of the "Shift in Burden of Proof" Approach to Implement Paragraph 15 of China's Protocol of Accession' (2016) 11 (10) Global Trade and Customs Journal 447, 447–49.

[68] The EU Submission (n 51), para 110; Giorgio Sacerdoti, 'Has China Become "Legally" a Market-economy Country on 11 December 2016 under the WTO Antidumping Agreement? Analysing an Open Question' (2017) Yearbook on International Investment Law 356, 356–74; Jeffery M Telep, and Richard C Lutz, 'China's Long Road to Market Economy Status' (2018) 49 Georgetown Journal of International Law 693, 700–01.

[69] Matthew R Nicely, 'Time to Eliminate Outdated Non-Market Economy Methodologies' (2014) 9 (4) Global Trade and Customs Journal 160, 161–2; Theodore R Posner, 'A Comment on Interpreting Paragraph 15 of China's Protocol of Accession by Jorge Miranda' (2014) 9 (4) Global Trade and Customs Law 146, 151.

[70] Graafsma and Kumashova (n 66) 157.

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of market economy conditions on Chinese producers. If the expiry of paragraph 15(a)(ii) would trigger a shifting of the burden of proof, then Chinese producers would under no circumstances bear the burden of proving market economy conditions exist after 11 December 2016. But this conclusion runs squarely against the EU's own argument that paragraph 15(a) (i) is still valid, as the latter explicitly places the burden of proof on Chinese producers.[71]

In essence, the EU's argument takes the recognition of China's market economy status by other WTO Members as a pre-condition to use Chinese domestic prices in antidumping investigations. Since it is entirely within a WTO Member's discretion whether such a recognition is granted, this view has essentially transformed paragraph 15 of China's Accession Protocol from a time-barred transitional arrangement to a permanent modification of the WTO ADA. This article challenges this view. On balance, this article takes the position that a proper understanding of the legal implications of the expiry of paragraph 15(a)(ii) should avoid two confusions. The first confusion results from coupling together China's market economy status and normal value calculation methodologies, which are two distinct concepts under paragraph 15. The second confusion results from treating market economy status not only a concept of national law, but also an autonomous concept of WTO law.

To be clear, the market economy/non-market economy distinction is purely a domestic law issue. Whether China is a market economy or not is unilaterally determined under a WTO Member's national laws.[72] The BAR before its amendment in 2017 was written to the effect that, if the label of NME was attached to a WTO Member, then the European Commission would apply the NME methodology to calculate normal value. Consequently, from the EU's perspective, the termination of applying the NME methodology to Chinese products after the expiry of paragraph 15 (a) (ii) would necessarily require either a grant to China of market economy status or an amendment of the BAR, severing the linkage between China's market economy status and the use of the NME methodology in calculating normal value of Chinese products.[73] However, as a matter of international law, the GATT/WTO law does not define what is market economy, nor does it regulate the market economy or NME classification of WTO Members. Nor is the concept of market economy defined in the ADA or China's Accession Protocol.[74] No WTO Member bears an inherent obligation to prove that it is a market economy under the WTO law. With the expiry of paragraph 15(a)(ii), the refusal to grant market economy status to China, as a matter of the EU's *internal* decision, can no longer justify the EU's application of the NME methodology to Chinese products in anti-dumping investigations.

C. The new methodology of the EU basic anti-dumping regulation

Paragraph 15(a)(i) and (ii) of China's Accession Protocol essentially reflected the former Article 2(7) of the BAR, which contains specific rules on the determination of the normal value in anti-dumping investigations involving NMEs.[75] Article 2(7)(b), which applies to imports from China, provides that if it is shown by one or more producers subject to the investigation that market economy conditions prevail for them, normal value would be

[71] Ibid, at 156.

[72] Judgement of the Court of 16 July 2015, *Commission v Rusal Armental*, paras 53 and 59. Michelle Q Zang, 'The WTO Contingent Trade Instruments against China: What Does Accession Bring?' (2009) 58 (2) International and Comparative Law Quarterly 321, 329.

[73] Brian Gatta, 'Between Automatic Market Economy Status and Status Quo: A Commentary on "Interpreting Paragraph 15 of China's Protocol of Accession"' (2014) 9 (4) Global Trade and Customs Journal 165, 166–67.

[74] Edwin Vermulst et al, 'Normal Value in Anti-Dumping Proceedings against China Post-2016: Are Some Animals Less Equal Than Others?' (2016) 11 (5) Global Trade and Customs Journal 212, 213. Yenkong Ngangjoh-Hodu and Tianzhu Han, 'China's Market Economy Dilemma and its Interplay with EU Anti-dumping Law' (2019) 27 (1) Asia Pacific Law Review 102, 104.

[75] Laura Puccio, 'Granting Market Economy Status to China: An Analysis of WTO Law and of Selected WTO Members' Policy' (2015) European Parliament Research Service 13.

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determined for those producers in accordance with the rules applicable to market economies. A market economy claim under Article 2 (7) (b) must be properly substantiated in accordance with the criteria and procedures set out in Article 2(7)(c).[76] Article 2(7)(b) further provides that, when this is not the case, domestic prices in China will be set aside and normal value should be determined on the basis of the price or constructed value in a market economy third country.

The EU's new methodology was introduced at a time when the old NME Methodology embodied in China's WTO Accession Protocol was expected to expire after 11 December 2016. The European Commission was under tremendous political pressure to create an alternative approach to deal with imports from China.[77] The amended BAR abolished the distinction between market economy countries and NMEs. Instead, the new Article 2(6a)(a) provides a country-neutral approach in establishing normal value in case of 'significant distortions' in the market of an exporting country as follows:

> In case it is determined... that it is not appropriate to use domestic prices and costs in the exporting country due to ***the existence in that country of significant distortions***... the normal value shall be constructed exclusively on the basis of costs of production and sale reflecting ***undistorted prices or benchmarks***...

Consequently, the amended BAR no longer discriminates, *de jure*, against any WTO Member.[78] Nevertheless, the European Commission enjoys even more flexibility in constructing the normal value of imported products in anti-dumping proceedings compared to the old rules. This is because the European Commission now enjoys the liberty of setting aside domestic prices and costs of *any exporting country* should it find inappropriate to use such prices or costs due to the existence of 'significant distortions'. Whether an exporting country is a market economy or not, at least ostensibly, is no longer a relevant issue in the EU anti-dumping investigations.

On how to determine whether 'significant distortions' exist in a particular market, Article 2 (6a) (b) provides that they may 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'. A non-exhaustive list of six factors that indicate the existence of 'significant distortions' include:

- the market in question being served to a significant extent by enterprises which operate under the ownership, control or policy supervision or guidance of the authorities of the exporting country;
- state presence in firms allowing the state to interfere with respect to prices or costs;
- public policies or measures discriminating in favour of domestic suppliers or otherwise influencing free market forces;

[76] The five substantive criteria are: (i) decisions of firms regarding prices, costs and inputs, including for instance raw materials, cost of technology and labour, output, sales and investment, are made in response to market signals reflecting supply and demand, and without significant State interference in that regard, and costs of major inputs substantially reflect market values; (ii) firms have one clear set of basic accounting records which are independently audited in line with international accounting standards and are applied for all purposes; (iii) the production costs and financial situation of firms are not subject to significant distortions carried over from the former non-market economy system, in particular in relation to depreciation of assets, other write-off, barter trade and payment via compensation of debts; (iv) the firms concerned are subject to bankruptcy and property laws which guarantee legal certainty and stability for the operation of firms; and (v) exchange rate conversions are carried out at the market rate.

[77] European 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)', SWD (2016) 370 final, Brussels (9 November 2016), at 7–9.

[78] Suse (n 18) 964.

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- the lack, discriminatory application or inadequate enforcement of bankruptcy, corporate or property laws;
- wage costs being distorted;
- access to finance granted by institutions which implement public policy objectives or otherwise not acting independently of the state.

It is widely accepted that the criteria listed in Article 2(6a)(b) of the BAR are ultimately the same as those already contained in the old Article 2(7)(c).[79] As the list is non-cumulative, not all the elements need to be proven in a target country for a finding of 'significant distortions'. Moreover, the same factual circumstances may be used to demonstrate the existence of one or more of the elements in the list. The overall assessment of the existence of 'significant distortions' may also take into account the general context and situation in the exporting country, in particular where the fundamental elements of the exporting country's economic and administrative set-up provide the government with substantial powers to intervene in the economy in such a way that prices and costs are not the result of the free development of market forces.[80]

In contrast to old rules which required producers from NMEs to prove that they operate under market economy conditions, the burden of proof under the new methodology is now shifted to the European Commission and the EU producers to prove the existence of 'significant distortions' in the exporting country. To ensure that European petitioners, in particular small and medium-sized enterprises, are not unnecessarily hindered by a high burden of proof, Article 2(6a)(c) stipulates that the European Commission shall produce a report describing the specific market circumstances in a certain country or sector where well-founded evidence of 'significant distortions' exist. The respective EU industry may rely on the evidence in the aforementioned report when filing in a complaint to initiate anti-dumping proceedings. Consistent with Article 2(6a)(c), the European Commission has issued the first country report on China on 20 December 2017.[81] The report aims to demonstrate that there are significant distortions in Chinese market because the government of China continues to exert decisive influence on the allocation of resources and prices. Despite the availability of the country report, the Commission stresses that it 'will examine whether distortions exist in each and every case based on its own merits' and that 'the application of the alternative methodology is not automatic for any country'.[82]

On precisely how to construct the normal value of products on the basis of undistorted prices or benchmarks in a scenario where the Commission finds 'significant distortions', Article 2(6a)(a) provides an illustrative list of sources that the European Commission may use, including (i) undistorted international reference prices; (ii) domestic costs but only to the extent that they are positively established on the basis of accurate and appropriate evidence not to be distorted; or (iii) costs of production and sale in an appropriate representative country. On how to select a representative third country, the Commission has specified

[79] Edwin Vermulst and Juhi Dion Sud, 'The New Rules Adopted by the European Union to Address "Significant Distortions' in the Anti-Dumping Context" in Marc Bungenberg et al (eds), *The Future of Trade Defence Instruments: Global Policy Trends and Legal Challenges* (Springer 2018) 63, 76.

[80] Commission Implementing Regulation (EU) 2019/1693 of 19 October 2019 imposing a provisional anti-dumping duty on imports of steel road wheels originating in the People's Republic of China, OJ 2019 L 259/22, recital 52.

[81] Commission Staff Working Document, On Significant Distortions in the Economy of the People's Republic of China for the Purposes of Trade Defence Investigations (20 December 2017) <http://trade.ec.europa.eu/doclib/docs/2017/december/tradoc_156474.pdf>. Another report on Russia was published in October 2020 <https://trade.ec.europa.eu/doclib/docs/2020/october/tradoc_158997.pdf> accessed on 12 July 2022.

[82] European Commission's Fact Sheet, 'The EU's new trade defence rules and first country report' (20 December 20, 2017) <europa.eu/rapid/press-release_MEMO-17-5377_en.pdf> accessed 13 March 2022.

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four criteria: (i) the representative country must have the same level of economic development as determined on the basis of gross national income per capital; (ii) it must produce the product under review; (iii) it must have readily available relevant data; and (4) 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. The innovative fourth criterion represents a compromise between the Commission, the Council, and Parliament.[83] It would likely lead to higher anti-dumping duties, as more stringent social and environmental policies are often linked to countries with higher domestic prices and costs. However, in practice, the first three criteria have carried by far the greatest weight and the fourth one only given short shrift. The Commission found either that there was no need to analyse the question of social and environmental protection or that it was only applicable in cases where no country can be selected based on the first three criteria.[84]

Since the new methodology came into force in 2017, the Commission applied it to more than a dozen anti-dumping investigations concerning China.[85] In each of these cases, the Commission relied heavily on the findings of its China Country Report and found that 'significant distortions' exist in China. The Commission has then consistently used constructed normal value based on undistorted costs of production and sale in an appropriate representative country as the preferred method for the determination of the normal value.[86] It is immediately clear that the new EU anti-dumping rules bear significant resemblance to the abolished surrogate country methodology as defined in the original Article 2.7 of the BAR. The *only* material change was the shifting of the burden of proof. The country report on China arguably shows that there are significant distortions in Chinese domestic market. To avoid the discriminatory treatment, Chinese producers need to prove that their prices are not distorted despite significant distortions in Chinese economy.[87] The bottom line remains that the European Commission is able to determine the normal value of Chinese products by reference to prices or costs not occurring in China, not based on a strict comparison with Chinese domestic prices. The impact assessment also shows that anti-dumping duties under the new methodology would on average only be 3.86 per cent lower than the ones obtained by applying the old NME methodology.[88]

[83] Christian Tietje and Vinzenz Sacher, 'The New Anti-Dumping Methodology of the European Union: A Breach of WTO Law?' in Marc Bungenberg et al (eds), *The Future of Trade Defence Instruments, European Yearbook of International Economic Law* 89 (2018) 96.

[84] Commission Implementing Regulation (EU) 2019/1693 of 9 October 2019 imposing a preliminary antidumping duty on imports of Steel Road Wheels originating in the People's Republic of China, OJ L 259 (10 October 2019), para 134; Commission Implementing Regulation (EU) 2019/1198 of 12 July 2019 imposing a definitive antidumping duty on imports of ceramic tableware and kitchenware originating in the People's Republic of China, OJ L 189 (15 July 2019), para 145. Marcus Gustafsson and Victor Crochet, 'At the Crossroads of Trade and Environment: The Growing Influence of Environmental Policy on EU Trade Law' in Amandine Orsini and Elena Kavvatha (eds), *EU Environmental Governance: Current and Future Challenges* (Taylor & Francis 2020) 187–206.

[85] Philipp Reinhold and Pieter Van Vaerenbergh, 'Significant Distortions under Article 2(6a) BADR: Three Years of Commission Practice' (2021) 16 (5) Global Trade and Customs Journal 193, 202.

[86] Ibid, 201. On the most recent example, see Commission Implementing Regulation (EU) 2022/191 of 16 February 2022 imposing a definitive antidumping duty on imports of certain iron or steel fasteners originating in the People's Republic of China, OJ L 36 (17 February 2022) 25–37.

[87] Very few Chinese companies claimed that their domestic costs were undistorted, presumably because of the perception that the Commission would not accept such claims. See Commission Implementing Regulation (EU) 2020/1534 of 21 October 2020 imposing a definitive antidumping duty on imports of certain prepared or preserved citrus fruits originating in the People's Republic of China, OJ L 351, para 111; Commission Implementing Regulation (EU) 2020/1336 of 25 September 2020 imposing a definitive antidumping duty on imports of certain polyvinyl alcohols originating in the People's Republic of China, OJ L 315, para 172.

[88] EU Commission Staff Working Document, 'Assessment of the Economic Impact of Changing the Methodology for Calculating Normal Value in Trade Defense Investigations against China', SWD (2016) 372 final, Brussels (9 November 2016) 7.

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III. THE LEGALITY OF THE EU NEW METHODOLOGY UNDER WTO LAW

It is submitted in Section II.B that paragraph 15 of China's Accession Protocol may no longer provide the legal basis for the EU to apply the NME methodology to Chinese products after 11 December 2016. On the other hand, the expiry of paragraph 15(a)(ii) does not create any special rights for China but just put China on an equal footing with other WTO Members. Since then, the EU is obliged to apply the generally applicable anti-dumping rules, including Article VI of the GATT 1994 and the ADA, to Chinese products.[89]

Central to the EU's new methodology is to permit the use of out-of-country prices or costs when determining the normal value of imports if 'significant distortions' are found in an exporting country. An implied assumption of the EU's new methodology is that there is an *a priori and permanent obligation* for all WTO Members to ensure that their domestic markets are not distorted, otherwise adjustments may be made to ensure price comparability. In *EU—Price Comparison Methodologies*, the EU argued that properly interpreted, the generally applicable provisions of Article VI of the GATT 1994 and Article 2 of the ADA would permit the use of a methodology not based on a strict comparison with domestic prices or costs in the exporting country if market economy conditions do not exist there due to government interference.[90]

But is the EU's new methodology in the BAR consistent with WTO law? This would be a two-step analysis. First, is it permissible for the EU to use 'significant distortions' as a justification for adjusting normal value of products in the exporting country under the ADA? Secondly, assuming that such adjustment is permitted, is it consistent with the ADA for the EU to resort to out-of-country prices or costs when calculating the cost of production in the exporting country? These two issues have been regularly raised in the WTO Committee on Anti-Dumping Practices.[91]

A. 'Significant distortions' as a justification for constructing normal value

Article 2.1 of the ADA defines the normal value of a product as 'the comparative price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country'. In other words, the normal value usually refers to the price of the exported product in the home market of the exporter or producer. Nevertheless, Article 2.2 of the ADA allows for adjustments to domestic price in limited circumstances, including (i) there are *no sales of the like product in the ordinary course of trade*; (ii) there is *a particular market situation* so that it is not possible to make a proper comparison; and (iii) the low volume of the sales in the domestic market of the exporting country do not permit a proper price comparison. As the panel pointed out in *US—Oil Country Tubular Goods Sunset Reviews*:

> As Article 2.1 makes clear... the concept of dumping is, in the first instance, a comparison of home market prices and export prices. ***Only in the circumstances set forth in Article 2.2*** may an investigating authority look to alternative bases to home market prices, such as costs, when determining normal value.[92]

[89] Terence P Stewart et al, 'The Special Case of China: Why the Use of a Special Methodology Remains Applicable to China after 2016' (2014) 9 (6) Global Trade and Customs Journal 272, 277.

[90] Second Written Submission by the European Union (Geneva, 27 December 2018) para 177.

[91] Committee on Anti-Dumping Practices, Minutes of the Regular Meeting Held on 28 April 2021, G/ADP/M/59 (26 July 2021) 22–23.

[92] WTO Panel Report, *US—Sunset Review of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina–*Recourse to Art 21.5 of the DSU by Argentina (30 November 2006), para 7.76.

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In essence, the EU's new methodology assumes that 'significant distortions' fall within one of the circumstances set forth in Article 2.2. Then the fundamental question is: could the terms 'in the ordinary course of trade' or 'particular market situation' be interpreted to cover the EU's requirement that domestic market of an exporting country must not be 'significantly distorted'?

(i) No sales in the ordinary course of trade

Article 2.1 of the ADA mandates that sales not made in the ordinary course of trade may be disregarded in determining the normal value, which would then be determined on the basis of remaining sales. The ADA does not define the term 'in the ordinary course of trade'. In *US—Hot-Rolled Steel*, Japan and the USA agreed on the following definition:

> Generally, sales are in the ordinary course of trade if made under conditions and practices that, for a reasonable period of time prior to the date of sale of the subject merchandise, have been *normal* for sales of the foreign like product.[93]

The purpose of the requirement is to ensure that normal value be based on sales transactions that are concluded on *normal* commercial practice.[94] Article 2.2.1 of the ADA provides for a method to determine whether sales below cost are in the ordinary course of trade.[95] However, Article 2.2.1 does not purport to exhaust the full meaning of the term. The Appellate Body envisages different types of transactions that are not in the ordinary course of trade, such as sales between affiliated parties within a single economic enterprise, aberrationally high-priced sales and abnormally low-priced sales.[96]

The limited GATT/WTO case law provides no guidance on whether 'significant distortions' in the marketplace due to government intervention would render relevant sales fall outside the ordinary course of trade. In view of the examples that the Appellate Body has explicitly identified above, some commentators argued that the intent to make profit with a transaction is a decisive criterion when interpreting the requirement of 'in the ordinary course of trade'. Only transactions having characteristics that are extraordinary for the market in question, notably in terms of profitability, shall be considered as being outside the ordinary course of trade.[97] According to this view, the phrase 'in the ordinary course of trade' takes the overall market structure of an exporting country as given. Lower prices due to significant government intervention do not make transactions not in the ordinary course trade so long as they are still economic transactions in line with the usual pricing practices in the domestic market of an exporting country.

However, the state practice has belied this academic view. The European Commission has regularly relied on a finding that there are 'no sales in the ordinary course of trade' due to significant state intervention as ground for the use of constructed normal value. In some disputes, this finding was not even contested.[98] To conduct the ordinary course of trade test, the recorded costs of production paid by the exporter, including input costs, were examined

[93] 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 139.

[94] Ibid, para 140.

[95] Art 2.2.1 makes it clear that pricing below cost alone is not sufficient. Such sales must be made within an extended period of time (normally one year but shall in no case be less than six months) in substantial quantities and are at prices which do not provide for the recovery of all costs within a reasonable period of time.

[96] AB Report, *US—Hot-Rolled Steel* (n 93) para 146.

[97] Tietje and Sacher (n 83) 99; Stephanie Noel (n 55) 303-304.

[98] For example, Council Implementing Regulation (EU) No 1194/2013 of 19 November 2013 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of biodiesel originating in Argentina and Indonesia, OJ L 315, para 28.

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to determine whether they reasonably reflected the cost of production.[99] If this were not the case, the recorded costs would be disregarded and replaced with surrogate prices. For example, in an anti-dumping investigation on imports of certain welded tubes and pipes of iron originating from Russia, it was found that the domestic gas price paid by the exporting Russian producers was around 30 per cent of the export price of natural gas from Russia. All available data indicated that domestic gas price in Russia was regulated prices, which were far below market prices paid in unregulated export markets. The European Commission then used the price of Russian gas when sold for export at the German/Czech border (Waidhaus), adjusted for local distribution costs.[100]

In the USA, section 771(15) of the Tariff Act 1930 defines 'in the ordinary course of trade' as excluding below cost sales and transactions between affiliated parties that deviate from arm's length market prices. In 2015, section 504 of the Trade Preference Extension Act (TPEA) expanded the definition of 'in the ordinary course of trade' and explicitly incorporated the existence of a 'particular market situation' (PMS) as an example of circumstances that are outside the ordinary course of trade.[101] The Statement of Administrative Action from the Uruguay Round Agreement Act further elaborates that a PMS may exist for sales 'where there is government control over pricing to such an extent that home market prices cannot be considered competitively set'.[102]

In practice, that significant government intervention may constitute a PMS and in turn lead to no sales 'in the ordinary course of trade' in the exporting country is well established in the US anti-dumping regulation. For instance, in an anti-dumping investigation concerning imports of biodiesel from Indonesia in 2017, the Department of Commerce found that the government of Indonesia's pervasive regulation of the domestic biodiesel market amounted to a PMS because the government set low mandatory prices and sales quotas for vast majority of Indonesian biodiesel consumption. Further, the Department of Commerce also found that a PMS existed in Indonesia with regard to the cost of crude palm oil as a key component of the cost of manufacturing for biodiesel because the government restrained the exports of crude palm oil with an export tax and levy, thereby distorting the cost of crude palm oil in Indonesia. Due to distorted home market biodiesel prices as well as distorted crude palm oil input prices, the Department of Commerce decided that it was appropriate to use constructed normal value because there were no sales in the ordinary course of trade in the domestic market of Indonesia.[103]

In summary, neither the text of Article 2.1 of the ADA nor the relevant GATT/WTO case law can provide a definitive answer to whether 'significant distortions' due to government intervention would cause international sale of goods 'not in the ordinary course of trade'. That said, both the EU and the US have consistently used 'no sales in the ordinary course of trade' as a ground to adjust domestic prices of exporting countries in determining the normal value of products. In particular, the existence of a PMS is considered as one of the circumstances that are outside the ordinary course of trade in the USA, thus merging the two different conditions.

[99] Commission Implementing Regulation (EU) 2015/110 of 26 January 2015 imposing a definitive anti-dumping duty on imports of certain welded tubes and pipes of iron or non-alloy steel originating in Belarus, the People's Republic of China and Russia and terminating the proceeding for imports of certain welded tubes and pipes of iron or non-alloy steel originating in Ukraine following an expiry review, OJ L 20, paras 67–70.

[100] Ibid, para 69.

[101] Mikyung Yun, 'The Use of "Particular Market Situation" Provision and its Implications for Regulation of Antidumping' (2017) 21(3) East Asian Economic Review 231, 243.

[102] Statement of Administrative Action from the Uruguay Round Agreements Act, HR DOC No 103-116, 103rd Congress, 2nd Session (1994).

[103] Department of Commerce, *Biodiesel from Indonesia: Preliminary Affirmative Determination of Sales at Less Than Fair Value*, Federal Register, Vol 82, No 209 (31 October 2017).

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(ii) Particular market situation

According to Article 2.2 of the ADA, the existence of a PMS also provides a legal basis to justify the use of constructed normal value. Then does the term PMS cover 'significant distortions' in the exporting country? The ADA does not offer any interpretation of what constitutes a PMS, nor does a review of the negotiating history of Article 2.2 reveal any shared understanding among GATT/WTO Members on what situations the PMS exception was designed to address.[104]

In a GATT dispute *EEC—Cotton Yarn*, Brazil alleged that the EC had failed to consider the exchange rate freeze and high inflation in Brazilian domestic market as a PMS. The panel did not consider the meaning and scope of a PMS. However, the panel found that to have the recourse to the use of constructed value, the issue was not whether a PMS existed *per se*. A PMS was only relevant insofar as it had the effect of rendering the domestic sales themselves unfit to permit a proper comparison with the export price.[105] Since Brazil failed to demonstrate that the alleged PMS had distorted the cost of raw materials used in manufacture of cotton yarn or rendered the domestic sale price of cotton yarn unfit for comparison, the panel rejected Brazil's claim.

Despite the ambiguity of its meaning, the existence of a PMS has been frequently used by national investigating authorities to justify the use of constructed normal value when domestic price can no longer be said to prevail in normal competitive market due to government influence.[106] For instance, in determining whether a PMS exists in an exporting country, the Australian Anti-Dumping Commission may consider the effects of government influence on the domestic product price or the input price, both of which can result in the artificially low pricing of the product.[107] Australia's use of PMS was recently challenged by Indonesia and the WTO panel report in *Australia—A4 Copy Paper* marks the first time a WTO panel has ruled on the meaning of PMS in Article 2.2 of the ADA.[108]

In *Australia—A4 Copy Paper*, the Indonesian government had implemented programs and policies, such as providing land for plantations and an export ban on logs, that exerted a significant influence over the Indonesian timber industry. Pulp is made from timber and a key raw material input in the production of A4 copy paper. The Australian Anti-Dumping Commission found that the support of the Indonesian government constitutes a PMS, making domestic price for A4 copy paper artificially low thus inappropriate for determining normal value. Indonesia challenged Australia's methodology, arguing that Australia incorrectly interpreted the term PMS.

The panel found that the term PMS did not 'lend itself to a definition that foresees all the varied situations that an investigating authority may encounter that would fail to permit a proper comparison [of domestic price in the exporting country and export price]'. Therefore, market distortion arising in whole or in part from government action is not necessarily disqualified from constituting a PMS.[109] Moreover, the panel found that the existence of a PMS is a distinct issue from whether the PMS permits a proper comparison of domestic price and export price. Article 2.2 requires not only a finding that a PMS exists, but also a further finding that the domestic sales in the exporting country do not permit a proper

[104] Weihuan Zhou and Andrew Percival, 'Debunking the Myth of "Particular Market Situation" in WTO Antidumping Law' (2016) 19 Journal of International Economic Law 863, 872–77.

[105] GATT Panel Report, *EEC—Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil*, 42S/17 (29 October 1995) para 478.

[106] Yu Yessi Lesmana and Joseph Wira Koesnaidi, 'Particular Market Situation: A Newly Arising Problem or a New Stage in the Anti-Dumping Investigation' (2019) 14 (2) Asian Journal of WTO & International Health Law and Policy 405, 413.

[107] Australian Antidumping Commission, *Antidumping and Subsidy Manual* (November 2018) 36.

[108] Panel Report, *Australia—Anti-Dumping Measures on A4 Copy Paper (Australia- A4 Copy Paper)*, WT/DS529/R (4 December 2019).

[109] Ibid, paras 7.56.

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comparison with the export price because of the PMS.[110] That is because the existence of a PMS (e.g., artificially low input price due to government intervention) may have no effect on export prices or alternatively, reduce not only domestic price of the final product—the A4 copy paper—but also its export price. If a PMS has same effects on the domestic price and export price, then it would not render the proper comparison impossible.[111] In practice, this requires the investigating authority to conduct fact-specific and case-by-case analysis of how a PMS affects domestic and export prices and give a reasoned and adequate explanation if it concludes that, because of the PMS, a proper comparison of the domestic price and export price is not permitted.[112] Since the Australian Anti-Dumping Commission mistakenly assumed that the mere existence of a PMS would necessarily prevent a proper comparison between domestic price and export price, the panel found the methodology used by Australia inconsistent with Article 2.2 of the ADA.[113]

Article 2(3) of the BAR defines PMS as being deemed to exist, *inter alia*, 'when prices are artificially low, when there is significant barter trade, or when there are non-commercial processing arrangements'. In *EU—Cost Adjustment Methodologies II (Russia)*, Russia claims that the EU's definition of PMS is inconsistent with Article 2.2 of the ADA because a PMS refers exclusively to the specific circumstance described in the second *Ad* Note to Article VI:1 of the GATT 1994, ie, 'a country which has a complete, or substantially complete, monopoly of its trade and where all domestic prices are fixed by the State'. The panel rejected Russia's narrow interpretation of PMS.[114] In the same vein, the panel found there is no basis that Article 2.2 prohibits an investigating authority from undertaking an analysis of whether artificially low prices may constitute a PMS on the basis of an examination of supply and demand signals in markets, of alleged market distortions, or of product or input prices as compared to prices in world markets or representative markets.[115] Finally, the panel clarified that no sales in the ordinary course of trade and PMS are two separate grounds for using alternative methods to determine normal value. Thus, the fact that sales prices reflect the ordinary course of trade in the exporting country cannot, by itself, exclude the possibility that a PMS nevertheless exists, and that the PMS would not permit a proper comparison in a particular case.[116]

In summary, even though the ADA does not offer any interpretation of what constitutes a PMS, WTO panels have taken a liberal understanding of the term and held that market distortion arising from government intervention may constitute a PMS. Nevertheless, the existence of a PMS is a distinct issue from whether the PMS permits a proper comparison of domestic price and export price. The latter must be independently ascertained by an investigating authority.

B. The flexibility in constructing normal value under Article 2.2 of the WTO Anti-dumping agreement

(i) The landmark EU—biodiesel (Argentina) case

If it is found that there are no sales in the ordinary course of trade or that a proper comparison between domestic price and export price of a product cannot be made because of a

[110] Ibid, para 7.27.

[111] Ibid, para 7.80. The Panel stressed that, even where there is an equal decrease in input costs, a proper comparison may still not be possible because there are multiple factors that may affect how domestic prices and export prices are affected. See also Antonia Eliason and Matteo Fiorini, '*Australia—Anti-Dumping Measures on A4 Copy Paper*: Opening a Door to More Anti-Dumping Investigations' (2021) 20 World Trade Review 479, 487–88.

[112] Panel Report, *Australia—A4 Copy Paper* (n 108) para 7.76.

[113] Ibid, para 7.90.

[114] *European Union—Cost Adjustment Methodologies and Certain* Anti-Dumping Measures on Imports from Russia (Second Complaint), WT/DS494/R (24 July 2020), paras 7.193.

[115] Ibid, para 7.197.

[116] Ibid, para 7.198.

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PMS, adjustment to domestic price is allowed. Article 2.2 of the ADA permits only two alternative methods for determining normal value. There is no preference for one or the other method and the investigating authorities are free to choose which method to use based on their own criteria.[117] The first method is through a consideration of third-country sales, ie, comparable price of the like product when exported to an appropriate third country, provided that this price is representative. In practice, the European Commission seldomly uses this method because such sales might be made at dumped prices too.[118]

The second method is to construct the normal value based on *the cost of production in the country of origin* plus a reasonable amount for administrative, selling and general costs and for profits. Article 2.2.1.1 further states that costs shall *normally* be calculated on the basis of records kept by the exporter or producer under investigation when two cumulative conditions are met. First, such records are in accordance with the generally accepted accounting principles of the exporting country. Secondly, such records '*reasonably reflect*' the costs associated with the production and sale of the product under consideration. If the records are not available or do not meet either of the two conditions, the investigating authority is not required to use those records and may rely on other sources of information as the basis for the calculation of an exporter's cost of production. But Article 2.2 does not specify precisely to what evidence an investigating authority may resort under such circumstances.[119]

How to construct the normal value based on the cost of production in the country of origin was first examined in *EU—Biodiesel (Argentina)*. In that case, relying on Article 2(5) of the BAR, the European Commission decided not to use domestic prices of soybeans, the main raw material in the production of biodiesel, because they were artificially low compared to international prices due to the distortion created by Argentina's differential export tax system. Under the system, Argentina imposed a higher tax on exports of soybeans than the tax imposed on the final exported product of biodiesel. The EU found that such a system discouraged the exports of soybeans, and thereby increasing the quantity of domestic supplies and reducing the price for local biodiesel producers. That in turn caused a lower dumping margin than would have been the case if Argentine producers had paid the international or a non-distorted price for soybeans.[120] Having concluded that the domestic market for soybeans in Argentina was distorted and that the costs of soybeans were not reasonably reflected in the records of the exporting producers because of such distortion, the European Commission replaced the costs of soybeans actually paid by Argentine biodiesel producers and reported in the records with international prices, which Argentine companies would have paid in the absence of the differential export tax system. The European Commission then imposed definitive anti-dumping duties on that basis.[121]

Argentina challenged the consistency of the EU's method in constructing normal value with Article 2.2.1.1 of the ADA because the EU did not construct the normal value of biodiesel on the basis of records kept by the exporter or producer under investigation. The EU contended that the requirement that such records must '*reasonably reflect*' the costs associated with the production and sale of the product under consideration permits an examination of the *general reasonableness* of the recorded costs themselves. In the EU's view, when an

[117] Panel Report, *United States—Anti-Dumping Measures on Certain Oil Country Tubular Goods from Korea*, WTO/DS488/R (14 November 2017), paras 7.16–7.18.

[118] Philippe De Baere, Clotilde du Parc and Isabella Van Damme, *The WTO Anti-Dumping Agreement: A Detailed Commentary* (CUP 2021) 65.

[119] Appellate Body Report, *European Union-Anti-Dumping Measures on Biodiesel from Argentina* (*EU—Biodiesel*), WT/DS473/AB/R (26 October 2016), para 6.73.

[120] Meredith A. Crowley and Jennifer A. Hillman, 'Slamming the Door on Trade Policy Discretion? The WTO Appellate Body's Ruling on Market Distortions and Production Costs in EU-Biodiesel (Argentina)' (2018) 17 (2) World Trade Review 195, 199.

[121] AB Report, *EU—Biodiesel* (n 119) paras 5.6–5.8.

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investigating authority considers that a company's recorded costs are not reasonable, for example, artificially low due to government intervention, the investigating authority has authority to disregard the records and uses an alternative proxy to determine the normal value.[122]

The EU' argument was based on Article 2(5) of the BAR. While the first paragraph of Article 2(5) is taken directly from Article 2.2.1.1 of the ADA, the second paragraph of Article 2(5), which provides alternative proxies in the situation where the costs of the product concerned are not reasonably reflected in the records, is not mentioned in the ADA.[123] The second paragraph of Article 2(5) of the BAR was introduced in 2002 when the EU granted market economy status to Russia. It was expressly designed to make it possible to adjust energy costs in Russia, which do not reasonably reflect the real costs because of a PMS.[124] Thereafter, the European Commission has regularly relied on this provision in a significant number of cases to adjust upwards the cost of energy in anti-dumping investigations on imports from Russia.[125]

The WTO Appellate Body rejected the EU's interpretation and held that the phrase 'reasonably reflect' refers to whether the records kept by the exporter or producer being investigated suitably and sufficiently correspond to or reproduce those costs incurred that have a genuine relationship with the production and sale of the specific product under consideration.[126] This implies that once the costs are recorded in an accurate and reliable manner, the European Commission must accept them no matter how distorted such prices might be. The European Commission is not supposed to examine whether the recorded costs reasonably reflect some hypothetical costs that might have been incurred in a hypothetical market free from government intervention, and which the European Commission considers more reasonable than the cost actually incurred.[127] Thus, the Appellate Body concluded that the European Commission' determination that domestic prices of soybeans in Argentina were lower than international prices due to the Argentine tax system was not, in itself, a sufficient basis for disregarding domestic costs when constructing the normal value of biodiesel.[128]

Article 2.2.1.1 of the ADA identifies the records of the exporter or producer as the *preferred* source for cost of production.[129] However, this does not mean that the sources of information or evidence that may be used in establishing the cost of production in the country of origin is limited to sources inside the country of origin. In circumstances such as relevant information from the exporter or producer under investigation is not available or does not meet the conditions set out in the second sentence of Article 2.2.1.1, an investigating authority may have to rely on information other than that contained in the records kept by the exporter or producer. In such circumstances, the Appellate Body held that both in-country and out-of-country evidence may be relied upon.[130] However, when relying on any out-of-country information, an investigating authority must ensure that such information is used to determine the '*cost of production in the country of origin*', and this may require the investigating authority to adapt that information to the prevailing actual conditions in the exporting country' market.[131] In *EU—Biodiesel (Argentina)*, the EU did not adapt the out-of-country information (ie, international prices) to ensure that it represents the cost of production in Argentina. Instead, the EU authorities selected international price precisely to remove the

[122] Ibid, para 6.39.
[123] Case T-118/10, *Acron OAO* v. *Council*, EU : T : 2013:67, paras 66–71.
[124] Van Bael and Bellis, *EU Anti-Dumping and Other Trade Defence Instruments* (6th edn Aspen Publishers, 2019) s 3.08.
[125] Ibid, footnote 151.
[126] AB Report, *EU—Biodiesel* (n 119) para 6.26.
[127] Ibid, para 6.41.
[128] Ibid, para 6.56.
[129] Ibid, para 6.18.
[130] Ibid, para 6.73.
[131] Ibid, para 6.73.

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perceived distortion in the cost of soybeans in Argentina. Thus, the Appellate Body concluded that the surrogate international price for soybeans used by the European Commission did not represent the cost of soybeans in Argentina for producers or exporters of biodiesel.[132]

As a result of the Appellate Body report on *EU—Biodiesel (Argentina)*, the European Commission initiated a review pursuant to Article 1(3) of the WTO Enabling Regulation, and it recalculated the normal value of soybeans on the basis of actual costs incurred as reflected in the companies' records.[133] Also, the General Court annulled the 2013 regulation imposing definitive anti-dumping duties on imports of biodiesel from Argentina. Interestingly, the General Court annulled the regulation in question on a different basis than that relied upon by the Appellate Body. Rather than finding that the Argentine export tax system was not, in itself, a sufficient basis for concluding that the producers' records did not reasonably reflect the costs of soybeans, the General Court found that the European Commission 'did not establish the effects that the difference between the rate of the taxes on [soybeans] and the rate of tax on biodiesel could have had in itself on the prices of [soybeans] on the Argentinian market'.[134]

(ii) Three unresolved puzzles

The reasoning of the Appellate Body with respect to Article 2.2 and Article 2.2.1.1 in *EU—Biodiesel (Argentina)* has been followed by other WTO panels.[135] However, the current WTO jurisprudence has left three unresolved puzzles. First, recall that Article 2.2.1.1 requires that an investigating authority shall 'normally' rely on records kept by the exporter or producer under investigation if the records meet the two conditions. So, the first puzzle is whether, and if so under what circumstances, the term 'normally' provides a separate basis for an investigating authority to disregard records kept by the exporter or producer, *even if the records satisfy the two explicit conditions*.

In *China—Broiler Products (Article 21.5—US)*, the panel appeared to consider that the *only circumstances* where an investigating authority does not have to use the records kept by exporters or producers are when such records are not in accordance with the GAAP of the exporting country or when they do not reasonably reflect the costs associated with the production and sale of the product under consideration.[136] This position was later reversed by the Appellate Body. In *Ukraine—Ammonium Nitrate (Russia)*, the Appellate Body stated that it *does not exclude* that, even if the records kept by the exporter meeting the requirements, there might be circumstances in which the obligation to base the calculation of costs on the kept records does not apply.[137] Nevertheless, the Appellate Body emphasized that the term 'normally' does not contain an open-ended derogation from the obligation to use the records of the investigated companies. Whether the derogation should be permitted is to be assessed on a case-by-case basis in light of the available evidence.[138] The panel in *Australia—A4 Copy Paper* agreed with the Appellate Body, finding

132 Ibid, para 6.82.

133 Commission Implementing Regulation (EU) 2017/1578 of 18 September 2017 amending Implementing Regulation (EU) No 1194/2013 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of *Biodiesel* originating in Argentina, Indonesia, O.J. L 239, 9–24.

134 Cases T-112/14 to T-116/14 and T-119/14, *Molinos Rio de la Plata v Council*, EU : T : 2016:509, at recital 95; see also Case T-118/14, *LDC Argentina, SA v Council*, EU : T : 2016:502; Case T-117/14, *Gargill SACI v Council*, EU : T : 2016:503; Case T-111/14, *Unitec Bio v Council*, EU : T : 2016:505.

135 Panel Report, *European Union–Antidumping Measures on Biodiesel from Indonesia* (*EU–Biodiesel* (*Indonesia*), WT/DS480/R (25 January 2018), para 7.34; WTO Appellate Body Report, *Ukraine—Anti-Dumping Measures on Ammonium Nitrate (Ukraine–Ammonium Nitrate)*, WT/DS493/AB (12 September 2019); *European Union—Cost Adjustment Methodologies and Certain* Anti-Dumping Measures on Imports from Russia (Second Complaint), WT/DS494/R (24 July 2020), paras 7.107 and 7.131.

136 Panel report, *China—Broiler Products (Article 21.5—US)*, WT/DS427/RW (18 January 2018), para 7.29.

137 AB Report, *Ukraine–Ammonium Nitrate* (n 135) para 6.87.

138 Ibid, para 6.97.

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that the term 'normally' would be redundant if not so interpreted. Moreover, the panel stressed that, to rely on the flexibility provided by the term 'normally', the investigating authority should provide a satisfactory explanation as to why, even if the records kept by the exporter satisfied the conditions prescribed in Article 2.2.1.1, it finds compelling reasons to disregard such records.[139]

Although the Appellate Body did not exclude that there might be other circumstances in which the obligation to base the calculation of costs on the records kept by the exporter or producer does not apply, neither the Appellate Body nor panels have ruled on whether 'significant distortions' created by government intervention may constitute such a circumstance. In *EU—Cost Adjustment Methodologies II (Russia)*, the EU argued that such a circumstance exists where the investigating authority is faced with unreliable cost data arising from market distortions.[140] However, the panel found that the EU had not provided reasoned and adequate explanation of why the fact that the recorded input prices were distorted constituted an abnormal circumstance that justifies the rejection of the recorded costs pursuant to the term 'normally".[141]

The second puzzle is *how* to adjust out-of-country information to construct the cost of production *in the country of origin* under Article 2.2 where an investigating authority is justified in setting aside the exporter or producer's records. Recall in *EU—Biodiesel (Argentina)*, the Appellate Body held that in circumstances where records kept by the exporter or producer under investigation cannot be used, both in-country and out-of-country evidence may be relied upon. Nevertheless, an investigating authority remains subject to the disciplines set out in Article 2.2 regarding the construction of normal value based on the cost of production *in the country of origin*.[142]

The challenge of the Appellate Body's ruling is that, as a practical matter, it is hard to imagine how an investigating authority would ever be able to prove that the domestic prices cannot be used due to significant distortions and, at the same time, resort to out-of-country information or prices that it can prove represents undistorted cost of production *in the country of origin* (ie, exporting country). The only option available would be an econometric approach to estimating the input price in the country of origin in the absence of distortion.[143] An econometric approach would need information on the export supply elasticities facing the exporting country. Export supply elasticities measure the degree of responsiveness of the export supply with respect to a change in the export prices. In *EU—Biodiesel (Argentina)*, for example, an econometric approach would use Argentine data to estimate the export supply elasticity facing Argentina together with information on the differential export tax program to estimate the local input price in the absence of the tax program. A perfectly elastic global export supply implies that the domestic price in the absence of distortions would be the same as international market price. This is precisely what the European Commission used in *EU—Biodiesel (Argentina)* and Ukraine used in *Ukraine—Ammonium Nitrate (Russia)*.[144] However, this situation is rather unrealistic. In practice, there may be a wide range of estimates of export supply elasticities. In the absence of more precise information, the econometric method could be prone to misuse and abuse and only as valid as the underlying assumptions and representativeness of the data.[145]

The third puzzle is the application of Article 2.4 of the ADA which focuses predominantly on the means to ensure fair comparison between the normal value and the export price.[146]

[139] Panel Report, *Australia –A4 Copy Paper* (n 108), para 7.117.
[140] Panel Report, *EU—Cost Adjustment Methodologies II (Russia)* (n 135) paras 7.88–7.90.
[141] Ibid, para 7.106.
[142] AB Report, *EU—Biodiesel* (n 119) para 6.73; AB Report, *Ukraine–Ammonium Nitrate* (n 135) para 6.89.
[143] Crowley and Hillman (n 120) 203–04.
[144] Ibid. See also Cristina Herghelegiu and Luca Rubini, 'Where have all the Distortions Gone? Appellate Body Report, *Ukraine–Ammonium Nitrate*' (2021) 20 World Trade Review 566, 574.
[145] Daniel Ikenson, 'Tariffs by Fiat the Widening Chasm between U.S. Antidumping Policy and the Rule of Law', Cato Institute Policy Analysis Number 896 (16 July 2020) 13–14.
[146] Appellate Body Report, *European Union—Anti-Dumping Measures on Imports of Certain Fatty Alcohols from Indonesia*, WT/DS442/AB/R (5 September 2017), para 5.21.

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In *EU—Biodiesel (Argentina)*, Argentina alleged that, by constructing the normal value on the basis of the surrogate price for soybeans whilst using the export price that still reflected those actual (distorted) costs, the European Commission introduced a difference between the normal value and export price that affected price comparability within the meaning of Article 2.4, for which due allowance should have been made.[147] Indeed, if an exporter's actual cost of production were found to be distorted, it would be reasonable to assume that such a distortion had affected both the export price and the domestic price of the product under investigation, sometimes to the same extent.

The panel in *EU—Biodiesel (Argentina)* ruled that differences arising from the methodology applied for establishing the normal value cannot, in principle, be challenged under Article 2.4 as differences affecting price comparability. However, the Appellate Body cast doubts about the alleged non-application of Article 2.4. In the Appellate Body's view, there is no such general proposition in the ADA. Whether due allowances are to be made must be assessed in light of the specific circumstances of each case.[148] It remains to be seen whether, and if so how, due allowance should be made to the export price and the normal value in order to ensure a fair comparison under Article 2.4 of the ADA.

C. The consistency of the new EU anti-dumping rules with the WTO Anti-dumping Agreement

The Appellate Body's ruling in *EU—Biodiesel (Argentina)* and ensuing disputes are likely to have significant implications for the legality of the EU's new methodology in the BAR under WTO law. After *EU—Biodiesel (Argentina)*, the Appellate Body's narrow interpretation of the key phrases in Arts 2.2 and 2.2.1.1 of the ADA appears to have shut the door on taking significant distortions into account when determining costs of production in an exporting country. Given that Article 2.5 and Article 2 (6a) of the BAR reserve wide discretion to the European Commission in using costs that are not actual costs of the producer or that are not from the exporting country, it is widely concluded that the amended BAR is inconsistent with Article 2.2 of the ADA.[149] This article argues that the conclusion is at least inaccurate.[150] A detailed legal analysis of what precisely goes wrong with the EU's new methodology from the perspective of WTO law is therefore warranted.

As discussed in Section III.B.2 above, the WTO jurisprudence has left at least three important questions unanswered. In addition, the WTO currently does not have a functioning Appellate Body. As a result, the precedential value of the panel reports such as *Australia—A4 Copy Paper* and *EU—Cost Adjustment Methodologies II (Russia)* may be limited. Despite the caveat, a strong argument could be made that the EU's new methodology in calculating normal value of Chinese products, as embodied in Article 2 (6a) of the BAR, is not inconsistent with the ADA 'as such'. However, the current EU anti-dumping practice almost certainly contravenes Article 2.2 of the ADA 'as applied'.[151]

[147] AB Report, *EU—Biodiesel (Argentina)* (n 119) para 6.85.
[148] Ibid, para 6.87.
[149] Sherzod Shadikhodjaev, 'Input Cost Adjustments and WTO Anti-Dumping Law: A Closer Look at the EU Practices' (2019) 18 (1) World Trade Review 81, 98–101; Weihuan Zhou, 'Appellate Body Report on EU—Biodiesel: The Future of China's State Capitalism under the WTO Anti-Dumping Agreement' (2018) 17 (4) World Trade Review 609, 619; Huyghebaert (n 18) 417; Trapp (n 18) 275–94.
[150] For example, the analyses in the existing literature do not differentiate the inconsistency with the ADA 'as such' or 'as applied'. When such a differentiation is made, they conclude, without little analysis, that it is highly unlikely that the new EU rules could survive WTO dispute settlement proceedings, on either 'as such' or 'as applied' basis. See Van Bael and Bellis (n 124) s 3.11.
[151] In litigation jargon, the distinction between challenging a law independently of its application, on the one hand, and challenging a law as it has been applied in a specific instance, on the other hand, is referred to as challenging the law 'as such' (in the case of the former) or 'as applied' (in the case of the latter). See WTO Secretariat, *A Handbook on the WTO Dispute Settlement System* (Cambridge University Press 2017) 43.

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Why is Article 2 (6a) of the BAR not inconsistent with the ADA 'as such'? To start with, the term 'significant distortions' is not used in the ADA. Should it be challenged, the EU would likely refer to the existence of a PMS or 'no sales in the ordinary course of trade'.[152] The Appellate Body has so far left open the question of the relationship between 'no sales in the ordinary course of trade' and 'significant distortions' arising from government intervention. In practice, the EU's 'no sales in the ordinary course of trade' determinations in anti-dumping investigations have never been formally challenged at the WTO. It is entirely possible for the EU to rely on 'no sales in the ordinary course of trade' to justify its use of 'significant distortions'.

Likewise, the scope of PMS in Article 2.2 is largely unconstrained. In particular, two WTO panels refused to exclude the possibility that market distortion arising in whole or in part from government influence may constitute a PMS.[153] To the extent that the EU not only identifies significant distortions as a PMS, but also analyses how such distortion has affected comparability of domestic and export prices before constructing normal value, the use of 'significant distortions' does not violate Article 2.2. In other words, the existence of 'significant distortions' may justify the European Commission's use of alternative methods to construct the normal value, rather than to always accept domestic prices in an exporting country.

Furthermore, when constructing the normal value, the European Commission should examine whether the records kept by producers or exporters under investigation meet the criteria. Relying on the term 'normally' in Article 2.2.1.1 of the ADA, the Appellate Body explicitly stated that it *does not exclude* that, even if the kept records are valid, there might be circumstances in which the obligation to base the calculation of costs on the kept records does not apply.[154] In order to rely on the exception, the European Commission needs to provide a reasoned and adequate explanation as to why significant distortions constitutes an abnormal circumstance that justifies the rejection of the recorded costs.[155] To be sure, it remains unclear whether significant distortions constitute such an exception as it is a decision to be assessed on a case-by-case basis in light of the available evidence.[156] But the point is that such a possibility exists and that there is no legal basis to reject it as inconsistent with Article 2.2.1.1 *per se*.

Finally, Article 2 (6a) (a) of the BAR states that the normal value may be constructed on the cost of production and sales in a sufficiently representative third country, or on international prices, if significant distortions are found to exist. Article 2.2 of the ADA does not prohibit the use of out-of-country evidence or information. In addition, Article 2 (6a) (a) does not mandate the construction of normal value in a WTO-inconsistent way as it does not rule out the possibility that the European Commission may adapt out-of-country information to reflect the cost of production in the country of origin. Following the Appellate Body report of *EU—Biodiesel (Argentina)*, the mere fact that Article 2(6a)(a) is 'capable of being applied' in breach of Article 2.2 of the ADA is not sufficient for establishing a *prima facie* case of an 'as such' violation.[157]

Even though Article 2 (6a) of the BAR is not inconsistent with the ADA 'as such', it is highly probable that it contravenes WTO law 'as applied' in view of the EU practices since its adoption in 2017. First, like the Australian Anti-Dumping Commission in *Australia—A4 Copy Paper*, the European Commission has focused solely on the existence of significant distortions in China as a basis to justify the use of constructed normal value. The problem is that there was no analysis of

[152] Baere et al (n 118) 62.
[153] Panel Report, *Australia- A4 Copy Paper* (n 108) para 7.56; Panel Report, *EU—Cost Adjustment Methodologies II (Russia)* (n 135) para 7.197.
[154] AB Report, *Ukraine–Ammonium Nitrate* (n 135) para 6.87.
[155] Panel Report, *EU—Cost Adjustment Methodologies II (Russia)* (n 135) para 7.106.
[156] Ibid, para 6.97.
[157] AB Report, *EU—Biodiesel (Argentina)* (n 119) para 6.282.

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how the alleged significant distortions in China might affect the comparability of domestic and export prices.[158] This was the case even when the European Commission recognized that the same significant market distortions equally affected both domestic and export prices.[159] Therefore, to the extent that the European Commission relies on the existence of PMS in Chinese market to justify its use of significant distortions, the EU has violated the first sentence of Article 2.2 of the ADA because it did not make any finding on whether a proper comparison is still permitted despite the PMS, as required by the Panel in *Australia—A4 Copy Paper*.[160]

Secondly, in each of anti-dumping investigations concerning China, the European Commission relied heavily on the findings of its China country report and found that significant distortions exist in China. The European Commission has never examined whether the records kept by Chinese producers or exporters under investigation were in accordance with GAAP in China and reasonably reflected the costs associated with the production and sale of the product under consideration. Nor has the European Commission provided any reasoned and adequate explanation of whether and why the fact that the recorded input prices were distorted constituted an abnormal circumstance that justifies the rejection of the recorded costs.[161] This practice is inconsistent with Article 2.2.1.1 of the ADA, as interpreted by the panels in *Australia—A4 Copy Paper* and *EU—Cost Adjustment Methodologies II (Russia)*.[162]

Third, in each of the anti-dumping investigations concerning China, the European Commission has used out-of-country sources, usually a representative third country, to construct the normal value reflecting undistorted price in China.[163] However, the European Commission has never adapted out-of-country information to reflect the cost of production in China.[164] This practice renders the EU in violation of Article 2.2 the second sentence of the ADA, as interpreted by the Appellate Body in *EU—Biodiesel (Argentina) and Ukraine—Ammonium Nitrate*.[165]

Last but not the least, the European Commission has constructed the normal value of Chinese products on the basis of the surrogate input prices from either representative third countries or international prices whilst using the export price that still reflected actual (distorted) costs in China. This practice does not account for the fact that the allegedly distorted input costs may affect not only the domestic price, but also the export price.[166] Consequently, this practice cannot ensure a fair comparison between constructed normal value and export price, in violation of Article 2.4 of the ADA, as the Appellate Body indicated in *EU—Biodiesel (Argentina)*.[167]

[158] For example, Commission Implementing Regulation (EU) 2021/582 of 9 April 2021 Imposing a Provisional Anti-Dumping Duty on Imports of Aluminium Flat-rolled Products Originating in the PRC, OJ L 124, at 76; Commission Implementing Regulation (EU) 2019/1693 of 9 October 2019 Imposing a Provisional Anti-Dumping Duty on Imports of Steel Road Wheels Originating in the PRC, OJ L 259, at 32.

[159] Ibid. Commission Implementing Regulation (EU) 2021/582 of 9 April 2021, at 80; Commission Implementing Regulation (EU) 2019/1693 of 9 October 2019, at 38.

[160] Panel Report, *Australia—A4 Copy Paper* (n 108) paras 7.27.

[161] Commission Implementing Regulation (EU) 2021/582 of 9 April 2021, 76; Commission Implementing Regulation (EU) 2019/1693 of 9 October 2019, 32.

[162] Panel Report, *EU—Cost Adjustment Methodologies II (Russia)* (n 135) para 7.106.

[163] Reinhold and Vaerenbergh (n 85) 201.

[164] For example, Commission Implementing Regulation (EU) 2021/582 of 9 April 2021, 79–84; Commission Implementing Regulation (EU) 2019/1693 of 9 October 2019, 36–40.

[165] Appellate Body Report, *EU—Biodiesel (Argentina)* (n 119) para 6.73; Appellate Body Report, *Ukraine –Ammonium Nitrate* (n 135) para 6.89.

[166] Commission Implementing Regulation (EU) 2021/582 of 9 April 2021, at 84–85; Commission Implementing Regulation (EU) 2019/1693 of 9 October 2019, at 41.

[167] AB Report, *EU—Biodiesel (Argentina)* (n 119) para 6.85.

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IV. THE SYSTEMIC IMPLICATIONS FOR WORLD TRADE LAW

The EU's introduction of the concept 'significant distortions' to the BAR and accordingly, the replacement of domestic prices in the exporting country with constructed normal value, has raised a range of systemic issues for world trade law. For one thing, the ADA is traditionally understood to address anti-competitive practices by private firms that lead to distorted international prices. In contrast, government-directed distortions that confer financial benefits on exporting firms in international trade is construed as a subsidy that is typically addressed through the application of the Agreement on Subsidies and Countervailing Measures (SCM Agreement). However, in EU Anti-dumping practices, an upstream subsidy to a downstream industry in foreign markets may be tackled by anti-dumping duties as well. More broadly, because of 'significant distortions' in a foreign country due to government intervention, the European Commission is able to use the anti-dumping route to address some may argue essentially a subsidy problem.[168] This strategy may depend on the fact that the ADA is a far more pliable tool, but also on the fact that the legal requirements in the SCM Agreement are more difficult to satisfy.[169] In restricting discretion in constructing the cost of production in exporters' home market for dumping cases, the Appellate Body may be forcing the EU to use countervailing duties when price distortions arise from government action.[170]

Most significantly, the EU's new methodology has revived the conundrum of how to tackle institutional diversity in world trade law, particularly regarding China. On the one hand, there is a widely shared perception that China's unique state capitalism model may render prices in China unreliable benchmarks for the normal value of Chinese products. On the other hand, with the expiry of paragraph 15(a)(ii) of China's WTO Accession Protocol, the European Commission's current practices are likely inconsistent with the EU's WTO obligations. The trickiest point is that it is not clear, as a practical matter, whether the EU can meet the stringent requirements set out by the Appellate Body to take government-created distortions in China into account when calculating normal value of Chinese products without violating WTO disciplines. As the Appellate Body has repeatedly stressed, Article 2.2.1.1 of the ADA requires the European Commission to explain why significant distortions constitute an abnormal circumstance that justifies the rejection of the recorded costs; to account for the fact that significant distortions may affect not only the domestic price but also the export price; and to use the *actual costs* incurred by the exporter or producer, *which were already found distorted*, as a basis to calculate the normal value of Chinese products. Following the Appellate Body's interpretation of Article 2.2 of the ADA strictly, there is a genuine risk that the European Commission may never be able to apply the new methodology in the BAR to correct for market distortions without violating the ADA. In short, there is a disturbing gap in world trade law, ie, no clear rules to address market distortions due to government intervention in anti-dumping investigations if the exporters' home market does not feature 'a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the state' as prescribed in the second *Ad* Note to Article VI:1 of the GATT.

The Appellate Body's strict reading of cost comparisons in the ADA stands in stark contrast to the interpretations it has developed with respect to the SCM Agreement. It is well established in the WTO jurisprudence that, in the subsidy context, the marketplace provides an appropriate basis for comparison in determining whether a benefit to the recipient of a

[168] Country Report on China (n 45) 203–62.
[169] Herghelegiu and Rubini (n 144) 574.
[170] Crowley and Hillman (n 120) 208.

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governmental financial contribution has been conferred. Therefore, the central question is to compare the market price with the amount of the financial contribution to determine whether the recipient was placed in a more advantageous position than otherwise would have been available on the market.[171] Crucially, the Appellate Body in subsidies disputes does not simply assume that prices based on the books and records of any particular company involved are market prices. Instead, outside benchmarks are often used to determine the market prices if an investigating authority reaches the conclusion that in-country private prices are too distorted due to the predominant participation of the government in the market.[172]

In this section, I will first explain why the concept of 'significant distortions' in the EU anti-dumping regulation is problematic. Then I will proceed to explore what the future holds for the EU-China row on how to deal with market distortions in China in anti-dumping investigations.

A. Why is the concept 'significant distortions' in the EU anti-dumping regulation problematic?

First, an implicit assumption of the concept 'significant distortions' in the BAR is the existence of normal or ideal market relations. Significant deviations from this normal or ideal market economy model could be disciplined because they are 'distortions'. But the reality is that there is no consensus on what constitutes a normal or ideal market. All governmental actions affect market outcomes in some way. The distinction between governmental acts that distort markets and governmental acts that are essential to enable markets to function is not amendable to definitive normative or logical principles.[173] The choice of which principles to use is ultimately a choice between heavily contested understandings of what markets are and what sorts of laws are compatible with their existence. This would normatively privilege certain kinds of market models over others, without a clear, or indeed any explicit, justification in either economic theory or shared political values.[174]

Secondly, tracing the evolution of the GATT/WTO system, Mavroidis and Sapir argued that the GATT/WTO system was based on an implicit consensus on a liberal understanding that governments do not pre-empt the market mechanism. Tensions caused by institutional diversity have, for the most part, been solved by gradual institutional convergence around Western market models. The most significant example was the case of Japan.[175] This view was however contested by Lang who argued that the degree of institutional convergence among the majority of GATT contracting parties with market-oriented economies was overestimated. Global capitalisms are highly variegated. Whilst the GATT/WTO system seeks to promote liberal market principles, it has also demonstrated openness and resilience to accommodate a broad diversity of market arrangements, and even economic systems.[176] No matter how one may interpret the fact that there are a variety of different economic systems among the GATT/WTO membership, the implicit liberal understanding identified by Marvroidis and Sapir has never been clearly specified in the WTO Agreement. Given that

[171] Appellate Body Report, *Canada—Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R (2 August 1999), para 157; Appellate Body Report, *US—Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/AB/R (8 December 2014), para 4.123.

[172] Appellate Body Report, *US—Final Countervailing Duty Determination with respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R (14 January 2004), para 102; Appellate Body Report, *US—Definitive Antidumping and Countervailing Duties on Certain Products from* China. WT/DS379/AB/R (11 March 2011), para 453.

[173] Tarullo (n 1) 557–60; William Alford, 'When is China Paraguay? An Examination of the Application of the Antidumping and Countervailing Duty Law of the United States to China and Other Nonmarket Economy Nations' (1987) 61 Southern California Law Review 79, 98–109.

[174] Lang (n 23) 693–701.

[175] Mavroidis and Sapir (n 26) 139–40.

[176] Lang (n 23) 682–87.

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textualism and formalism are the hallmark of the WTO jurisprudence,[177] it is not surprising that the Appellate Body is not yet ready to read into Article 2.2 of the ADA the liberal market economy idea which was not explicitly stated in the WTO text.

Thirdly, the European Commission's unilateral determination of what constitutes 'significant distortions' in a foreign market, with no internationally agreed benchmarks to refer to, is prone to be abused for trade protectionism. The arbitrary criteria may bring about a slippery slope: the existence of any significant institutional difference or regulatory heterogeneity runs the risk of being perceived as a market distortion.[178] For example, the European Parliament proposed that the analysis of 'significant distortions' should not be limited to economic factors, but rather be extended to consider whether the country in question complies with international social and environmental standards.[179] As a result, Recital 4 of the amended BAR states that relevant international standards, including core conventions of the International Labor Organization (ILO) and relevant multilateral environmental conventions should be taken into account where appropriate when assessing the existence of 'significant distortions'.[180]

Some factors listed in Article 2 (6a) (b) of the amended BAR are highly ambiguous and subject to discretionary application. For instance, one factor used to determine significant distortions is 'public policies or measures… influence free market forces'. Arguably such influence exists in every country in the world and in highly regulated EU member states probably more than anywhere else.[181] Indeed, in the WTO Antidumping Committee, WTO Members warned that the term 'significant distortions' should not be interpreted to permit the European Commission to use every market circumstance affecting prices within a WTO Member's market as a basis to replace costs in the actually prevailing competitive conditions with what the EU Commission considered appropriate costs in an idealized world of perfect competition.[182]

Finally, the EU has recently identified China as 'an economic competitor' and 'a systemic rival'.[183] The unilateral labelling of China's market as 'significantly distorted' is simply another example of a complicated and strained relationship between the EU and China.[184] It is no secret that the EU's new methodology in the amended BAR targets China. With the publication of China country report, the finding that China's market is significantly distorted for the purpose of EU anti-dumping investigations has become a self-fulfilling conclusion. The discriminatory treatment of Chinese products is a recipe for resentment and tit-for-tat trade retaliations. WTO observers warned that the suspension of *EU—Price Comparison Methodologies* case in no way meant that China had

[177] Robert Howse, 'The World Trade Organization 20 Years On: Global Governance by Judiciary' (2016) 27 (1) European Journal of International Law 1, 31; Isabelle Van Damme Treaty Interpretation by the WTO Appellate Body' (2010) 21 (3) European Journal of International Law 605, 634–35.

[178] Andrew Lang, *World Trade Law after Neoliberalism* (Oxford University Press 2011) 227.

[179] Committee on International Trade, 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 subsidized imports from countries not members of the European Union (COM (2016)0721—C8-0456/2016–2016/0351(COD)), 27 June 2017, 13–14.

[180] However, Art 2 (6a) (b) does not explicitly include social and environmental standards in the list of elements to be considered. It may be concluded that the European Commission is not strictly obliged to consider them when deciding on the existence of significant distortions. See Van Bael and Bellis (n 124) s 3.11.

[181] Edwin Vermulst, 'The Birth of a Monstrosity: The EU's "Significant Distortions" Proposal' (27 November 2017) <http://regulatingforglobalization.com/2017/11/27/birth-monstrosity-eus-significant-distortions-proposal/> accessed 13 March 2022.

[182] Committee on Anti-Dumping Practices, Minutes of the Regular Meeting Held on 01 May 2019, G/ADP/M/56 (19 July 2019) 13.

[183] European Commission, 'EU-China—A Strategic Outlook' (12 March 2019) 1.

[184] Another recent instance was Members of the European Parliament voted overwhelmingly on 20 May 2021 in support of freezing the legislative process for ratifying the EU–China Comprehensive Agreement on Investment, until Beijing lifts sanctions against members of the European Parliament in retaliation for the European Commission's earlier sanctions against four senior Chinese government officials after accusing them of being responsible for human rights violations in Xinjiang. See Jack Ewing, 'European Lawmakers Block a Pact with China, Citing Human Rights Violations', *New York Times* (20 May 2021).

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accepted the consistency of the EU's new methodology with the WTO law. It is still possible that China will challenge the EU's new methodology at the WTO once the Appellate Body resumes function.[185] In the meantime, China has taken a similar approach as the EU and regularly found that market distortions exist in other developed market economies.[186] Given the paralysis of the WTO Appellate Body and the long-stalled WTO negotiations, such tenacious trade frictions will only further contribute to the backlash against globalization.[187]

B. The way forward

What does the future look like in view of the EU–China row on how to deal with market distortions in China in anti-dumping investigations? Looking at the issue from John H. Jackson's interface problem perspective, legal norms to ameliorate difficulties caused by interdependence among different economic systems should be conceptualized as re-establishing an interface or buffer mechanism to enable different economic systems to share the burdens of adjusting to shifts of world trade flow more equitably.[188]

Broadly, three strands of thought were advanced in the literature. To begin with, faced with insoluble conceptual difficulty of how to define a market distortion, a few prominent international trade law experts have suggested discarding the market distortion test altogether,[189] and substantially reforming or replacing anti-dumping regulation with other legal mechanisms such as competition disciplines or safeguard measures.[190] Yet at present this option is not politically feasible. For one thing, domestic industries, which are accustomed to a nearly automatic protection under anti-dumping remedies without the burden of proving predatory intent under competition laws, would not support such a legislative change, which would be fatal to their interests.[191]

An alternative strand of thought was proposed by Mavroidis and Sapir, who called for a WTO 2.0, translating some of the GATT liberal understanding, ie, embedded neoliberal economic model, into legal, contractual language. In other words, this approach seeks to double down on the WTO with new rules that limit the role of state in the economy. The hope is that the WTO 2.0 would constrain distinctive features of China's political economy and bring China closer to the Western liberal market economic model.[192] A multilateral approach was also favoured by some WTO Members. For example, Thailand called upon WTO Members to discuss and reach an understanding on the notions of PMS and 'ordinary course of trade' to ensure that these concepts are used in limited circumstances involving only very significant distortions.[193] More specifically, it was suggested that Article 2.2 of the ADA should be amended to permit market-oriented adjustments to input costs as well as other components of the normal value affected by

[185] Stephanie Noel and Weihuan Zhou, 'EU's New Anti-dumping Methodology and the End of the Non-market Economy Dispute' (2019) 14 (9) Global Trade and Customs Journal 417, 423–24.

[186] Chinese Ministry of Commerce, *The Preliminary Determination on the Anti-dumping Investigation Against Imports of n-propanol from the US* (17 July 2020) 40–41; *The Final Determination on the Anti-dumping Investigation Against Imports of EPDM from the US, South Korea and the EU* (18 December 2020) 41. So far, no Chinese industries alleged that NME conditions exist in the EU. See *The Final Determination on the Anti-Dumping Investigation Against Imports of M-cresol from the US, the EU, the United Kingdom and Japan* (14 January 2021).

[187] Stefanie Walter, 'The Backlash Against Globalization' (2021) 24 Annual Review of Political Science 421, 422.

[188] Jackson (n 29) 244.

[189] Tarullo (n 1) 557–60; Alan O Sykes, 'The Questionable Case for Subsidies Regulation: A Comparative Perspective' (2010) 2 (2) Journal of Legal Analysis 473, 504–11.

[190] Bernard M Hoekman and Petros C Mavroidis, 'Dumping, Antidumping and Antitrust' (1996) 30 Journal of World Trade 27, 30; Tania Voon, 'Eliminating Trade Remedies from the WTO: Lessons from Regional Trade Agreements' (2010) 59 International and Comparative Law Quarterly 625, 630–31; Zheng (n 1) 182–83.

[191] Sungjoon Cho, 'Anticompetitive Trade Remedies: How Antidumping Measures Obstruct Market Competition' (2009) 87 North Carolina Law Review 357, 399.

[192] Mavroidis and Sapir (n 26) 174–75.

[193] Committee on Anti-Dumping Practices, Minutes of the Regular Meeting Held on 01 May 2019, G/ADP/M/56 (19 July 2019), at 13.

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market distortions.[194] However, it is highly doubtful why China would agree to tie its hands with the proposed new rules which are designed to discriminate and constrain China's successful development model. In fact, China's Ministry of Commerce has made it clear in its official position paper on WTO reform in 2018 that 'the reform should respect members' development models' and that 'China opposes special and discriminatory disciplines against state-owned enterprises in the name of WTO reform'.[195] Furthermore, given the WTO's current institutional structure, in particular decision making based on consensus, and the stalemate of WTO reforms, it is not clear how the WTO system would be adaptable to such a controversial issue.[196]

Finally, Shaffer proposes 'rebalancing within a multilateral framework' to apply broadly to the interface of heterogenous national systems in the context of geoeconomics competition. Shaffer starts from the proposition that different countries favour different approaches to organizing their economies in light of their contexts, values and preferences. There is no one form of economic governance that promotes development across national contexts. Countries can learn from a diversity of approaches, and that such diversity enhances the global economy's resilience and durability. Therefore, multilateral trade rules must be sensitive to different economic, political and social choices. China should be free to pursue particular interventionist development policies and China does not need to change and become more like Europe or the United States.[197] On the other hand, Shaffer contends that the Western countries are right to be concerned about the impact of China's economic rise on their domestic policies. They are entitled to take measures to protect themselves and their domestic social bargains from the externalities of China's practices. Crucially, the existing WTO legal framework must be applied in a more deferential manner, providing policy space for countries to protect their constituents through unilateral measures as well as bilateral and plurilateral bargains. Nevertheless, it must be ensured that unilateral responses are proportionate and that bilateral deals do not prejudice third parties, subject to the scrutiny of the WTO.[198] In the same vein, Lang advocated an approach to give each state relatively broad freedom to take unilateral defensive action based on its own vision of what constituted fair and unfair trade. Such defensive measures, as long as they were kept within certain bounds through the review of WTO dispute settlement body, could act as a crude but good enough instrument to address a highly sensitive issue and help hold together the multilateral trading system.[199]

As Jackson explained, in the context of institutional diversity, establishing a consensus view of what constitutes 'fair' trade—in the sense of establishing a single baseline of universal market institutions—is simply impossible.[200] Given the politics-laden nature of the dispute, it would be impractical to hope that the EU would revoke the new methodology in the amended BAR any time soon. China and other WTO Members will likely challenge how the EU's new methodology is used before both EU domestic courts and the WTO. As analysed in Part III.C of this article, the EU's new methodology is not inconsistent with the ADA *per se*, and modifications may be necessary to reach new normative settlements conducted under the umbrella of the multilateral trading system.

194 Shadikhodjaev (n 149) 104.
195 Ministry of Commerce. 'China's Position on WTO Reform' (17 November 2018) <https://www.mfa.gov.cn/ce/celt//eng/xwdt/t1616985.htm> accessed 13 March 2022.
196 Robert Howse, 'The Limits of the WTO' (2022) Beyond' (2022) 116 AJIL Unbound 41, 44.
197 Gregory Shaffer, 'Governing China-US Trade Relations' (2021) 115 (4) American Journal of International Law 622, 625.
198 Ibid, 629–34.
199 Lang (n 23) 710–19.
200 Jackson (n 29) 218.

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V. CONCLUSION

How forty years of reform and opening up and twenty years of formal WTO Membership have transformed China? If we approach the question from the EU anti-dumping law perspective, the answer is a disappointing 'not much'. From the NME methodology to the new tool of 'significant distortions', the European Commission has consistently rejected China's domestic prices as a reliable yardstick of the normal value of Chinese exports due to significant intervention of the government of China in Chinese market. Instead, the European Commission applied a method of constructing the normal value of Chinese products based on prices or costs in a surrogate market economy third country. The discriminatory treatment to imports from China in anti-dumping investigations has been a perennial dispute in EU–China trade relations, even though China is now the EU's biggest trading partner, overtaking the USA in 2020.[201] Given that China has never agreed to transform itself to a western market economy but a 'market economy with Chinese characteristics', a disturbing question emerges: Will China ever be a market economy country as defined by the EU?

I have argued in this article that with the expiry of paragraph 15 (a) (ii) on 11 December 2016, China's WTO Accession Protocol could no longer provide the legal basis for the EU to set aside domestic prices in China in determining the normal value of Chinese products. From 11 December 2016 onwards, the European Commission is obliged to apply the generally applicable anti-dumping rules, including Article VI of the GATT 1994 and the ADA, to imports from China. Moreover, given that the amended BAR permits the European Commission to choose the method of constructing the normal value, including the use of costs that are not actual costs of Chinese producers, it is inconsistent with the EU's WTO obligations since the ADA does not allow for such flexibility when determining costs of production in an exporting country. As other WTO Members such as the United States and Australia have adopted similar practices as the EU, this conclusion also applies to the similar practices in these WTO Members.

The conclusion that the amended BAR is inconsistent with the WTO law leaves one key issue unanswered: how can the WTO accommodate systemic friction between heterogeneous economic models? Borrowing Jackson's interface theory, I argue that the EU's introduction of the new concept 'significant distortions' should be understood as an effort to reconstitute alternative interface mechanisms when old interface mechanisms such as the second *Ad* Note to Article VI:1 of the GATT and paragraph 15(a)(ii) of China's Accession Protocol are no longer applicable. Despite its dubious legality under the WTO law, it seems certain that the EU's new methodology in the amended BAR will be here to stay, and the boundaries of its application will be contested before the WTO dispute settlement body for a long time to come.

[201] BBC, 'China Overtakes US as EU's Biggest Trading Partner (17 February 2021) <https://www.bbc.co.uk/news/business-56093378> accessed 13 March 2022.

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