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Geneva Jean Monnet Working Papers

01/2019



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Cover : Andrea Milano

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Université de Genève - [UNI MAIL](#)

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ISSN 2297-637X (online)
© Pieter Van Vaerenbergh 2019
Université de Genève – Centre d'études juridiques européennes
CH-1211 Genève 4

The Geneva Jean Monnet Working Papers Series is available at:
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Publications in the Series should be cited as:
AUTHOR, TITLE, Geneva Jean Monnet Working Paper No ./YEAR [URL]

EU Trade Defence Policy Against Unfair Trade From Chinese SOEs: Unilateral or Multilateral Approaches?

by

Pieter Van Vaerenbergh *

Abstract

In the challenging relationship to an unconventional WTO trading partner such as China, the EU searches for effective tools to address trade-distortive effects of foreign state ownership on the internal market. By imposing additional duties, anti-dumping and anti-subsidy action can level the playing field in trade with China. The legal framework does, however, only foresee limited possibilities to address specifically the issue of non-market economies or trade with state-owned enterprises. This paper contrasts the anti-dumping and anti-subsidy policy of the EU in relation to Chinese imports. In the frequently used anti-dumping instrument, the EU has foreseen unilaterally legislative amendments to the domestic legal framework to address non-market economy situations. By contrast, anti-subsidy investigations are far less used and the Commission calls for multilateral debate on the WTO rules to ensure a strengthened tool against unfair trade from Chinese SOEs, notably with regard to different obstacles including a burdensome definition of a public body, limited calculation methodologies and lack of transparency in China.

Keywords: Trade defence instruments – Trade remedies – China’s accession protocol – European Union – State-owned enterprises – Non-market economies – NME methodology – Significant distortions – Public body – Unilateralism

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I. Introduction

On 12 March 2019, the European Commission set out its ‘strategic outlook’¹ for the future of the bilateral EU-China relations, building further on the 2016 Strategy on China² and the 2020 EU-China Strategic Agenda.³ Covering areas such as multilateralism, climate change, peace and security, sustainable economic development, infrastructure and technologies, the plan also includes concrete action points regarding trade, investment, competitiveness and level playing field issues. According to Action 8, the EU aims to “identify how the EU could appropriately deal with the distortive effects of foreign state ownership and state financing of foreign companies on the EU internal market” before the end of 2019.

The Commission recognises the need to differentiate tools and modalities of EU engagement with China depending on the issues at stake. When capturing trade effects stemming from the Chinese state structure, non-market economy character and trade distortions from Chinese State-Owned Enterprises (SOEs), the Commission rolled out a wide array of unilateral measures for a proactive approach to strengthen the EU’s competitiveness and protect the internal market. The recently adopted investment screening rules target particularly investments from Chinese SOEs in an ex ante scrutiny procedure for security risks posed by foreign investments.⁴ The Commission also published guidance on the legal framework on participation of foreign bidders and goods in the EU market to eliminate influence of dumped or subsidised goods on the EU procurement market.⁵ State aid rules could furthermore allow cover also third country aid, ‘European Champions’ could face competition

¹ EU-China – A Strategic Outlook, Joint Communication to the European Parliament and the Council, 12 March 2019, JOIN(2019) 5 final.

² Elements for a new strategy on China, Joint Communication to the European Parliament and the Council, 22 June 2016, JOIN(2016) 30 final, and Council Conclusions on EU Strategy on China of 18 July 2016.

³ EU-China 2020 Strategic Agenda for Cooperation, 23 November 2013, available at <https://ec.europa.eu/sites/ecas/files/20131123.pdf> (consulted on 21 September 2019).

⁴ See Regulation (EU) 2019/4552 of the European Parliament and of the Council of 19 March 2019 establishing a legal framework for the screening of foreign direct investments into the Union, [2019] OJ L79/1.

⁵ *European Commission*, Guidance on the participation of third country bidders and goods in the EU procurement market, C(2019) 5459 final, 24 July 2019.

with Chinese SOEs,⁶ merger control rules could allow the EU to block transaction of acquisition of a European company by a Chinese SOE on the ground that that company has benefited from government support.

Among those unilateral tools, the basic anti-dumping (BADR) and basic anti-subsidy regulation (BASR) give the EU the capacity to capture unfair trade from Chinese SOEs through imposition of additional duties.⁷ However, the application of Trade Defence Instruments (TDI) against China has been identified as one of the most challenging problems in current WTO law, largely related to the inapt legal framework in the WTO and the EU.⁸ According to the Commission, the current TDI rules cannot cover all potential effects of state financing in China on the internal market. This paper reviews the legal hurdles preventing such effective application. In anti-dumping investigations, the current debate revolves around the possibility of using non-market economy (NME) methodologies in the calculation of duties (II). In the field of anti-subsidy, there are several more hurdles, including the public body notion, design of NME methodologies and the lack of transparency play parts for the Commission's investigations, but the capacity of the procedure is left largely unexplored in the EU (III). Albeit both unilateral instruments, the EU adopts a different stance in anti-dumping policy as opposed to anti-subsidy: anti-dumping rules are amended on the domestic level, whereas anti-subsidy rules subject to multilateral debate (IV). This paper finishes with a conclusion (V).

II. Anti-dumping rules and Chinese SOEs

A. Focus on anti-dumping investigations against Chinese SOEs

Anti-dumping investigations are the core of the TDI strategy in relation to China. With 86 definitive anti-dumping duties from the EU against Chinese imports currently in place, China is the prime target of the EU's anti-dumping practice.⁹ The WTO legal framework on anti-dumping foresees NME methodologies. According to the Ad Note to Article VI:1

⁶ See lately the Commission prohibited the Siemens/Alstom merger (Commission decision of 6 February 2019, see http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8677) and the ThyssenKrupp/Tata Steel merger (Commission decision of 11 June 2019, see http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8713). A group of 19 Member States has signed a joint statement that it will propose new rules to the new European Commission to "better take into account international markets and competition in merger analysis." See Friends of Industry, Joint statement, 18 December 2018, available at https://www.bmw.de/Redaktion/DE/Downloads/F/friends-of-industry-6th-ministerial-meeting-declaration.pdf?__blob=publicationFile&v=6 (consulted on 21 September 2019).

⁷ See Regulation (EU) 2016/1036 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, [2016] OJ L 176/21, codified version available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02016R1036-20180608&from=EN> (consulted on 21 September 2019); Regulation (EU) 2016/1037 of the European Parliament and of the Council on protection against subsidised imports from countries not members of the European Union, [2016] OJ L 176/55 codified version available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02016R1037-20180608&from=EN> (consulted on 21 September 2019).

⁸ See WU Mark, *The "China, Inc." Challenge to Global Trade Governance*, HILJ (2016), pp. 261-342, p. 300.

⁹ 36th Annual Report from the Commission to the European Parliament and the Council on the EU's Anti-Dumping, Anti-Subsidy and Safeguard activities (2017), Working Staff Document, 31 July 2018, SWD(2018) 392 final, Annex O: Definitive anti-dumping measures in force on 31 December 2017, available at http://trade.ec.europa.eu/doclib/docs/2018/july/tradoc_157218.pdf (consulted on 21 September 2019).

GATT and Article 2.7 ADA, domestic prices can be disregarded in “a country which has a complete or substantially complete monopoly of its trade and where domestic prices are fixed by the State” to such extent that “a strict comparison with domestic prices in such a country may not always be appropriate.” This provision seems to only capture the most extreme cases of state intervention, namely a complete or substantially complete monopolistic market. It was included against the background of transition economies in post-Soviet times.¹⁰ These provisions form the legal basis for WTO Members to justify special treatment of non-market economies in their anti-dumping practices.

Nevertheless, by the time China acceded the WTO in 2001, WTO Members understood that these rules would not suffice to capture a socialist market with specific characteristics and a size such as the Chinese market. The US negotiated additional commitments China had to agree upon, which were multilateralised into China’s Accession Protocol (CAP). The CAP provides for a unique situation in WTO law: China has accepted to be treated automatically as a non-market economy for the purposes of anti-dumping duty calculation for a period of up to 15 years after its accession. The wording of Section 15(a)(ii) CAP is inspired on the provision of the Ad Note:

The importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product.¹¹

For 15 years, this legal presumption temporarily relieved investigating authorities (IAs) such as the Commission from proving the Chinese domestic prices were distorted and allowed to disregard domestic Chinese prices.¹² Alternative methodologies may be used when the Commission can “clearly show” that market conditions do not prevail, namely the surrogate country method, or the constructed normal value (CNV) determination.¹³ This formed the basis for the EU’s old ‘analogue country’ method under (old) Article 2(7) BADR.

Since the lapse of the presumption in section 15 CAP in December 2016, the future of the treatment of Chinese imports under the anti-dumping regime are uncertain. Section 15(a)(ii) lapsed almost three years ago and has left a lot of uncertainty on the consequences thereof and the legal value of the remainder of the paragraph. The EU has focussed on other strategic possibilities within the anti-dumping legal framework to address China’s state structure and state financing of SOEs through two legislative amendments to the BADR: the price adjustment method and the new significant distortions methodology.

¹⁰ PALMETER David, *The WTO Antidumping Agreement and the Economies in Transition*, in Cottier Thomas, Mavroidis Petros (eds), “State Trading in the Twenty-First Century: World Trade Forum”, Volume 1, Michigan, University of Michigan Press (1998), pp. 115-119.

¹¹ Section 15(a)(ii), Accession of the People’s Republic of China, Decision of 10 November 2001, WT/L/432, section 15 and Report of the Working Party on the Accession of China, WT/CC/CHN/49, 1 October 2001, para. 150-151. Vietnam accepted the same commitment upon accession. See Report of the Working Party on the Accession of Viet Nam, 27 October 2006, WT/ACC/VNM/48, para. 255.

¹² Appellate Body report, *EC – Fasteners*, WT/DS397/AB/R, 15 July 2011, para. 287. See also ZANG Michelle Q, *EC – Fasteners: Opening the Pandora’s Box of Non-Market Economy Treatment*, JIEL (2012), pp. 869-892.

¹³ *Ibid.*, para. 286.

B. The quest for an effective NME calculation methodology

1. Price adjustments: an early attempt shut down by the Appellate Body

A first measure relates to the inclusion of the possibility of adjustments made to the costs reflected in the records of the producers when constructing the normal value. Irrespective of the notion of NME, the CNV method is allowed under Article 2.2 ADA and Article 2(3) BADR in case (i) there are no sales in the ordinary course of trade (OCT), (ii) when a particular market situation (PMS) precludes a proper comparison, or (iii) when a low volume of sales in the domestic market precludes comparison. In principle, the Commission calculates costs on the basis of the records kept by the producer, provided that such records comply with the generally accepted accounting principles (GAAP) in the country and that the costs of production are reasonably reflected in the records. This language concurs with the ADA provisions (cfr. Article 2(5) BADR and Article 2.2.1.1 ADA).

In 2002, the EU added a provision that if production costs are not reasonably reflected, the EU can apply a price adjustment based on costs of other domestic producers or any other reasonable basis.¹⁴ This ‘Russia Adjustment’ was designed expressly to adjust distorted prices of oil and gas in the Russian energy sector.¹⁵ For years, the EU has applied adjustments in investigations against Russia and other former USSR countries such as Ukraine. Russia did not challenge the measure at the time.

This old measure came back under discussion when the AB condemned it years after it had been introduced in the EU anti-dumping laws. In 2013, the Commission used the price adjustment mechanism in investigations on imports of biodiesel from Argentina and Indonesia to offset the differential export tax system of soybeans, which, according to the Commission, as raw material inputs, depressed the price of biodiesel.¹⁶ Argentina successfully challenged that method in *EU – Biodiesel*.¹⁷ The AB considered that this rule violated the conditions for disregarding costs in the records kept by exporters or producers under Article 2.2.1.1 ADA. It ruled that the ‘reasonableness’ test in the second condition of Article 2.2.1.1 ADA is one whether the costs are reasonably captured, not if the costs are reasonable as compared to hypothetical costs that should have been incurred.¹⁸ Therefore, the EU

¹⁴ Council Regulation (EC) No 1972/2002 of 5 November 2002 amending Regulation (EC) No 384/96 on the protection against dumped imports from countries not members of the European Community, [2002] OJ L 305/1. Further price adjustment clauses in the dumping margin calculation can be found in Art. 2(9) and 2(10) of the BADR, at the stage of the export price determination and the comparability analysis.

¹⁵ The name comes from the fact that this amendment was contained in the very same Regulation, which granted market economy status to Russia. See VAN BAEL & BELLIS, *EU Anti-Dumping and Other Trade Defence Instruments*, Alphen aan den Rijn, Kluwer (2011), p. 60-63; ANTONINI Renato, *A ‘MES’ to be adjusted: past and future treatment of Chinese imports in EU anti-dumping investigations*, GTCJ (2018), pp. 79-94, pp. 82-84.

¹⁶ 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, [2013] OJ L 315/2.

¹⁷ Appellate Body report, *EU – Biodiesel*, WT/DS473/AB/R, 6 October 2016. The Panel in Indonesia followed this decision. See Panel report, *EU – Biodiesel (Indonesia)*, WT/DS480/R, 25 January 2018. The Panel in Russia did not adopt any report. See *EU – Cost Adjustment Methodologies (Russia)*, WT/DS474 (pending).

¹⁸ Appellate Body report, *EU – Biodiesel*, WT/DS473/AB/R, 6 October 2016, para. 6.41.

did not have sufficient basis to disregard the domestic prices solely based on the finding that those prices were lower than international prices due to the tax system.¹⁹

Using price adjustments for distortions in Chinese prices is therefore impossible, since the AB condemned the provision for violating Article 2.2.1.1 ADA, years after it was introduced and applied by the EU. This could have been a useful tool for the Commission to address distorted prices from Chinese imports that is not grounded on the NME methodologies, but is now unavailable.²⁰

2. Significant distortions: salvation through WTO-inconsistent rules?

The second measure marked the start of a different era in EU AD normal value calculation. After the lapse of the transitional period of section 15(a)(ii) CAP, the EU was no longer allowed to resort to an NME methodology against China and thus developed new calculation rules. In December 2017, more than one year after the expiration date of section 15(a)(ii) CAP, a new purportedly country-neutral approach based on the notion of ‘significant distortions’ was introduced for the calculation of the normal value for all WTO members.²¹ Under the new rules, an additional provision for disregarding domestic prices and using the CNV method applies for market economies and NMEs alike exists when significant distortions exist (new Article 2(6a) BADR). Distortions can exist in a sector alone, or a country as a whole. The EU lists the conditions for significant distortions under Article 2(6a)(b) BADR. The Commission essentially wrapped its old criteria for the MET in a new paper by applying them as ‘significant distortions’ to whole sectors instead of individual applicants.²² Normal value calculation is now subject to rules without reference to market economy conditions or not. Instead, to make it the EU industry even easier and targeting China in the first place, the Commission publishes country reports with objective descriptions of sensitive sectors in which distortions may or may not exist, to assist EU industries in making complaints about ‘significant distortions’ (Article 2(6a)(c)). The first report dealt with China.²³ The Commission announced already that the next report will address significant distortions in Russia, but such report has not been published so far.²⁴ Both are notorious targets of NME efforts by the Commission in the past.

¹⁹ *Ibid*, para. 7.2.

²⁰ ANTONINI Renato, *A MES’ to be adjusted: past and future treatment of Chinese imports in EU anti-dumping investigations*, GTCJ (2018), pp. 79-94, p. 85.

²¹ Regulation (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 subsidised imports from countries not members of the European Union, [2017] OJ L 338/1.

²² VERMULST Edwin, SUD Juhi Dion, *The New Rules Adopted by the European Union to Address “Significant Distortions” in the Anti-Dumping Context*, in Bungenberg Marc et al (eds), “The Future of Trade Defence Instruments: Global Policy Trends and Legal Challenges”, Cham, Springer (2018), pp. 63-87, p. 76.

²³ Commission Staff Working Report on significant distortions in the economy of the People’s Republic of China for the purposes of trade defence investigations, 20 December 2017, SWD(2017) 483 final/2.

²⁴ European Commission, EU puts in place new trade defence rules, 20 December 2017, http://europa.eu/rapid/press-release_IP-17-5346_en.htm (consulted on 21 September 2019).

This new methodology is a creative solution of the EU's problem that it can no longer rely on section 15(a)(ii) CAP anymore, but still wants to apply the CNV method as most effective method of anti-dumping duty calculation against China. Also under the new rules, the Commission keeps the biggest freedom in computing the costs necessary to be made in China as a benchmark comparator for the export prices used by the Chinese exporter. In practice, few changes for the Commission.

Nonetheless, commentators seem to agree that such new methodology is not in consistency with the ADA provisions,²⁵ on at least two fronts: first, because the new methodology is no longer vested on the Ad Note and no longer an NME methodology, resorting to the CNV method is only possible if one of the criteria under Article 2.2 ADA is met, and second, disregarding prices of producers is subject to rules under Article 2.2.1.1 ADA which have been strictly interpreted by the AB.

First, Article 2.2 of the ADA foresees three limitative situations in which recourse to the CNV method for normal value determination are allowed. The new methodology of the EU must thus be allowed under one of those categories: no sales of the like product in the ordinary course of trade, a particular market situation renders comparison inutile, or a low volume of the sales does not permit a proper comparison. None of these options seem to be fulfilled at present, the new methodology would not be justifiable under these exceptions. The PMS concept is not defined in WTO law, but the BADR clarifies that a PMS exists *inter alia* in case of artificially low prices, significant barter trade or non-commercial processing arrangements.²⁶ The list of significant distortions of Article 2(6a)(b) BADR may or may not fall in full or in part under this notion of 'particular market situation'. Furthermore, it is important to note that a PMS in itself is not sufficient, but an influence on *only* domestic prices (not domestic and export prices equally) needs to be established. Under the new rules, this would be covered by the chapeau of Article 2(6a)(b) BADR already, which refers to the effect of significant distortions on prices and costs.

Second, the AB interpreted the conditions under which the domestic prices of the producer/exporter may be disregarded restrictively in *EU – Biodiesel*. Does the new methodology of the EU respect these conditions? Under Article 2.2.1.1 of the ADA, an IA cannot just disregard the producers' prices and use international prices. Only when the records kept by the producer or exporter do not comply with the generally accepted accounting

²⁵ See for instance TIETJE Christian, SACHER Vinzenz, *The New Anti-Dumping Methodology of the European Union: A Breach of WTO Law?*, in Bungenberg Marc et al (eds), "The Future of Trade Defence Instruments, Global Policy Trends and Legal Challenges", Cham, Springer (2018), pp. 89-105; VERMULST Edwin, SUD Juhi Dion, *The New Rules Adopted by the European Union to Address "Significant Distortions" in the Anti-Dumping Context*, in Bungenberg Marc et al (eds), "The Future of Trade Defence Instruments: Global Policy Trends and Legal Challenges", Cham, Springer (2018), pp. 63-87; HUYGHEBAERT Kiliane, *Changing the Rules Mid-Game: The Compliance of the Amended EU Basic Anti-Dumping Regulation with WTO Law*, JWT (2019), pp. 417-432; AKRIDITIS Vasilis, SNEIJ Florentine, *The Shake-Up of the EU Institutions' Dumping Calculation Methodology and the Compatibility of a Market-Oriented Concept of Normal Value with WTO Law*, GTCJ (2018), pp. 129-140; LI Ye, *Normal Value in Anti-Dumping Proceedings: Is Surrogate Value No Longer Applied Exceptionally?*, GTCJ (2018), pp. 435-441; SHADIKHOD-JAEV Sherzod, *Non-Market Economies, Significant Market Distortions, and the 2017 EU Anti-Dumping Amendment*, JIEL (2018), pp. 885-905.

²⁶ Art. 2(3) second paragraph BADR.

principles and costs of production are not reasonably reflected, the Commission can reject these costs. Rejection of producers' cost cannot be based on comparison to hypothetical costs. The new rules foresee that costs would be disregarded if they do not reflect free market prices when affected by substantial government intervention. This is exactly what is not allowed in the AB's interpretation.

At least for these two reasons, the new significant distortions methodology of the EU could be found incompatible to WTO law by a Panel.

The introduction of this new methodology influenced the challenge brought by China of the old NME rules.²⁷ China had explicitly enlarged its claims to the (then pending) legislative amendments. According to China, the end of the analogue country methods against China was merely a matter of time: after 15 years, China should enjoy the same rights as other WTO Members in anti-dumping proceedings.²⁸ The EU argued that the lapse of the provision merely means that the burden of proof falls back on the IA to provide proof that a country is an NME, but not that the NME methodology itself against China would be unavailable to the Commission.²⁹ In the second round of submissions by the EU, after the entry into force of the new provisions in Article 2(6a) and (7) BADR, a new argument was brought forward to the Panel: the EU argued that Panels are prohibited to decide on laws that are not anymore in place.³⁰ It requested the Panel to render a separate report on the question whether the old rules were repealed. In the argument of the EU, if the Panel would agree that the old rules were repealed, the rest of China's claims would be devoid of purpose. This probably led China to withdraw from the dispute and suspend the proceedings. Indeed, on 17 June 2019, the Panel communicated that the proceedings were suspended until further notice upon request of China.³¹ According to Article 12.12 of the DSU, if the suspension lasts more than 12 months, the authority of the Panel lapses.

It is therefore uncertain when – or whether at all – the Panel will deliver a report. The Panel would have had to deliver important interpretations on section 15 CAP and potentially determine the future of TDI against China. Should the Panel not to address the new significant distortions rules or ends up not delivering a report at all, then maybe it can be expected that China will launch a claim against the new methodology. It seems, however, that this

²⁷ Request for Consultations by China, *EU – Price Comparison Methodologies*, WT/DS516/1, 12 December 2016. China simultaneously launched a case against the US, *see* Request for Consultations by China, *US – Price Comparison Methodologies*, WT/DS515/1, 12 December 2016.

²⁸ 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 (DS516), pp. 12-13, available at <http://img.mofcom.gov.cn/wto2/201712/20171213174424357.pdf> (consulted on 20 June 2019).

²⁹ First Written Submission by the EU, para. 95 et seq. Confirmed in Second Written Submission by the EU, para. 315. For a critique, *see* ZHOU Weihuan, PENG Delei, *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*, JWT (2018), pp. 505-534.

³⁰ Second Written Submission by the EU in the World Trade Organization Panel proceedings European Union – Measures Related to Price Comparison Methodologies (DS516), para. 59-85. The EU relies on the AB case law that a no recommendations should be made by a Panel on repealed measures. *See* Appellate Body report, *US – Certain EC Products*, WT/DS156/AB/R, 11 December 2000, para. 81.

³¹ Communication from the Panel, *EU – Price Comparison Methodologies*, WT/DS516/13, 17 June 2019.

will not be the case any time soon. In the meantime, the Commission applies the significant distortions methodology in expiry review procedures on dumped products from China.³²

III. Anti-subsidy rules and Chinese SOEs

A. Strengthening anti-subsidy rules against Chinese SOEs

Anti-subsidy action has long been left unexplored against NMEs, but the Commission is gaining experience in CVD proceedings against China. The Commission has only imposed nine definitive CVD duties against China.³³ It was only in the 2011 *Coated Fine Paper* case that the Commission imposed for the first time a definitive CVD duty against China.³⁴ The EU followed a worldwide development, particularly after the US decided on a change in policy and conducted its first anti-subsidy investigation against China in 2007.³⁵

Underlying this policy change is the question whether distortions from Chinese SOEs should be addressed through anti-dumping or anti-subsidy action? In NMEs, the entire market, or at least substantial parts of it, are dominated by SOEs. Therefore, inherent government influence in the market renders the difference between subsidisation (government action) and dumping (private action) meaningless.³⁶ In the past, it was argued that ties between governments and SOEs are intertwined to such an extent that individual subsidies cannot be isolated to investigate its trade-distortedness.³⁷ In addition, it was argued that subsidies could never be distortive since there was no market benchmark to compare with.³⁸ As market forces entered the Chinese market and the ties between the government and the market untangled, IAs including the Commission initiated anti-subsidy investigations in several sectors as of the early 2000s.

³² The first decision applying the methodology was Commission Implementing Regulation (EU) 2019/687 of 2 May 2019 imposing a definitive anti-dumping duty on imports of certain organic coated steel products originating in the People's Republic of China following an expiry review pursuant to Article 11(2) of Regulation (EU) 2016/1036 of the European Parliament and of the Council, [2019] OJ L 116/5.

³³ 36th Annual Report from the Commission to the European Parliament and the Council on the EU's Anti-Dumping, Anti-Subsidy and Safeguard activities (2017), Working Staff Document, 31 July 2018, SWD(2018) 392 final, Annex P: Definitive anti-subsidy measures in force on 31 December 2017, available at http://trade.ec.europa.eu/doclib/docs/2018/july/tradoc_157218.pdf (consulted on 21 September 2019).

³⁴ Council Implementing Regulation (EU) No 452/2011 of 6 May 2011 imposing a definitive anti-subsidy duty on imports of coated fine paper originating in the People's Republic of China, [2011] OJ L 128/18.

³⁵ US International Trade Commission, Coated Free Sheet Paper From China, Indonesia, and Korea, 13 December 2007, 72 Fed. Reg. 70,892, Investigation No. 701-TA-444-446 (Final) and 731-TA-1107-1109 (Final). In the end, no CVDs were imposed due to absence of material injury. For an overview, see CHIANG Ting-Wei, *Chinese State-owned Enterprises and WTO's Anti-subsidy Regime*, GJIL (2018), pp. 845-877, pp. 853-857.

³⁶ QIN Julia Ya, *WTO Regulation of Subsidies to State-Owned Enterprises (SOEs) – A Critical Appraisal of the China Accession Protocol*, JIEL (2004), pp. 863-919, pp. 870-871.

³⁷ *Georgetown Steel Corporation, et al. v. United States*, 801 F.2d 1308, 8 ITRD 1161, 4 Fed. Cir. (T) 143, 18 September 1986.

³⁸ ANTONINI Renato, *A 'MES' to be adjusted: past and future treatment of Chinese imports in EU anti-dumping investigations*, GTCJ (2018), pp. 79-94, p. 86-88.

B. Capturing Chinese SOEs as subsidy-granting entities

1. The troublesome definition of a ‘public body’

SOEs cannot only be on the receiving end of subsidies, they also grant them. The notion of ‘public body’ in the definition of a subsidy allows for subsidies granted by SOEs to be captured by anti-subsidy rules. According to Article 1.1(a) ASCM, a subsidy is a financial contribution by a government ‘or any public body’ that confers the recipient a benefit.³⁹ That notion of a public body was included in the ASCM to capture subsidising SOEs.⁴⁰

No definition of a ‘public body’ is provided by the ASCM. It is therefore up to the IAs to present argumentation on whether an entity is a public body or not. The AB has formulated three possible criteria.⁴¹ Under the criterion of ‘government control’, a government must hold control over an entity in order to be qualified as a public body. Conflicting schools of thought on this criterion place emphasis either solely on a majority of shares held by the government, or require additional evidence apart from state-shares to prove an entity is a public body.⁴² Under the ‘government function’ criterion, SOEs classify as public bodies when they perform governmental functions. This would require the (express) delegation of such powers by the government. Finally, the ‘government authority’ criterion of the landmark case *US – ADD and CVD (China)*, means that an enterprise is a public body when it “possesses, exercises or is vested with governmental authority.”⁴³ This amounts essentially to a combination of the control and the function criterion. IAs must lay out a holistic approach where all relevant elements are identified and balanced against each other: including ownership of shares, right to appoint a board member, influence on the day-to-day activities and the requirement to follow government policy documents. To ‘clarify’ this holistic approach, the AB added that (i) authority conferred in statutory provisions can indicate government authority over an entity, that (ii) the exercise of government functions and particularly the exercise of meaningful control over an entity can be relevant, and finally that (iii) mere formal links such as ownership may not suffice, unless “formal indicia of government control are manifold, and there is also evidence that such control has been exercised in a meaningful way, then such evidence may permit an inference that the entity concerned is exercising governmental authority.”⁴⁴

³⁹ In addition, also private bodies can be subsidy-granting entities on the condition that they are “entrusted or directed” by the government (Art. 1.1(a)(1)(iv) ASCM).

⁴⁰ See CARTLAND Michel, DEPAYRE Gérard, WOZNOWSKI Jan, *Is something Going Wrong in the WTO Dispute Settlement?*, JWT (2012), pp. 979-1016, p. 1002.

⁴¹ See generally MÜLLER Wolfgang, *WTO Agreement on Subsidies and Countervailing Measures: A Commentary*, Cambridge, Cambridge University Press (2017), pp. 66-73.

⁴² DING Ru, ‘Public Body’ or Not: *Chinese State-Owned Enterprise*, JWT (2014), pp. 167-190, pp. 173-174.

⁴³ Appellate Body report, *US – ADD and CVD (China)*, WT/DS379/AB/R, 11 March 2011, para. 317-318.

⁴⁴ *Ibid.*

Do Chinese SOEs fulfil the criteria as formulated by the AB in practice? Whereas some authors do see sufficient clarity and capacity for the capturing of SOEs,⁴⁵ others are less positive about the quality of the criterion established by the AB.⁴⁶ Particularly hard on this AB report were three negotiators of the ASCM, who condemned the “disputable” definition of the term public body.⁴⁷

In the EU, the Commission uses the same definition of a subsidy including the notion of a ‘public body’.⁴⁸ Similar to the ASCM, the BASR also does not contain a definition of the notion. The Commission has set out criteria in *Korea DRAMs* for the assessment of a public body,⁴⁹ including “pursuance of public policy objectives which go beyond the normal remit of a private organization”. This criterion relates to the government function criterion in the AB jurisprudence but focusses on taking into account interests other than commercial interests in the operation of the entity. In addition, the Commission regards “government control going beyond of ownership” to be indicative of a public body. Here, the government control becomes apparent depending on the factors to be taken into consideration: government ownership, influence on appointments, review of results and involvement in individual investment or business transitions by the government. In *Coated Fine Paper*, the Commission made use of these criteria as developed in the practice and concluded that there was a public body because the government held 50% ownership and hence controlled the SOE.⁵⁰ In later applications, the Commission referred to the criteria set out by the AB under the ‘government authority’ test. So far, the Commission has so far always concluded that the entity involved was a public body – if not, at least in the alternative a private body entrusted or directed with governmental tasks.⁵¹

2. EU proposals for clarification

The EU shares the criticism that the current interpretation of the public body notion is too uncertain and that a clarification of the criteria would be necessary. It has argued for clarification on the current AB jurisprudence, notably regarding (1) what is a government function is or when government policy exercising amounts to governmental control and (2)

⁴⁵ ZHOU Weihuan, GAO Henry, BAI Xue, *Building a Market Economy Through WTO-Inspired Reform of State-Owned Enterprises in China*, ICLQ (2019), pp. 977-1022, pp. 1017-1019; CHIANG Ting-Wei, *Chinese State-owned Enterprises and WTO's Anti-subsidy Regime*, GJIL (2018), pp. 845-877, p. 873.

⁴⁶ WU Mark, *The “China, Inc.” Challenge to Global Trade Governance*, HILJ (2016), pp. 261-342, p. 301-305; EVENETT Simon J, *Triage? Assessing the EU's Modernisation Proposals for the WTO*, Intereconomics (2018), pp. 253-256; DING Ru, ‘Public Body’ or Not: Chinese State-Owned Enterprise, JWT (2014), pp. 167-190, p. 188; BHALA Raj, KIM Nathan Deuckjoo DJ, *The WTO's Under-Capacity to Deal with Global Over-Capacity*, AJWH (2019), pp. 1-32, pp. 19-20.

⁴⁷ CARTLAND Michel, DEPAYRE Gérard, WOZNOWSKI Jan, *Is something Going Wrong in the WTO Dispute Settlement?*, JWT (2012), pp. 979-1016, pp. 1001 et seq.

⁴⁸ Art. 3 BASR on the definition of a subsidy is identical to Art. 1 ASCM.

⁴⁹ Council Regulation (EC) No 1480/2003 of 11 August 2003 imposing a definitive countervailing duty and collecting definitively the provisional duty imposed on imports of certain electronic microcircuits known as DRAMs (dynamic random access memories) originating in the Republic of Korea, [2003] OJ L 212/1.

⁵⁰ Council Implementing Regulation (EU) No 452/2011 of 6 May 2011 imposing a definitive anti-subsidy duty on imports of coated fine paper originating in the People's Republic of China, [2011] OJ L 128/18, para. 90.

⁵¹ See SUD Juhí Dion, VERMULST Edwin, *Anti-subsidy Law and Practice of the European Union*, in Hofmann Herwig CH, Micheau Claire (eds), “State Aid Law of the European Union”, Oxford, Oxford University Press (2016), pp. 508-563, pp. 517-519

what the criterion of exercising ‘meaningful control’ over the enterprise means.⁵² A broader definition of the term would help the Commission capture more effectively Chinese SOEs. The wording ‘*any* public body’ supports that an open definition must be wielded, which the AB now makes impossible due to a high burden on IAs to prove government authority and meaningful exercise of government functions.

Creating a criterion, which allows for all types of government influence to be captured is difficult. The AB could confirm the application of the ‘government authority’ criterion and stress the fact that a balancing exercise of all available elements must be made on a case-by-case basis. Indeed, statutory powers or ownership may not mean that the government effectively grants authority, and by contrast the appointment of one director in the board might already suffice by itself. In any case, the AB will have to provide an explanation on the meaning of the new criteria of ‘indicia of government control are manifold’ and how to exercise control ‘in a meaningful way’. The AB has clarified in *US – Carbon Steel (India)* that showing the existence of control does not suffice but also how it is exercised must be proven.⁵³ From this application, it appears that as long as no proof is brought forward as to the exercise, all other elements will be downgraded to formal indicia which do not suffice to prove government authority. Also, the role of government ownership was downplayed, but it appears that a re-shift of focus more on the government control criterion, including the government ownership, would be useful for IAs such as the Commission in their determinations of public body.⁵⁴ A list (exemplary list) of what are government functions could also bring clarifications to the applicable criterion. At the very least, the burden of proof of such burdensome test could be shifted to the SOE in question or the country arguing in the dispute.⁵⁵ A more radical approach could be for the AB to swipe all existing interpretations off the table and introduce a new criterion to delineate between a public and a private body.

C. NME methodologies for the calculation of CVDs on China

1. Calculation of the amount of subsidies in terms of benefit conferred

Unlike anti-dumping rules, the ASCM does not have an NME methodology for the calculation of the amount of subsidy. Under Article 14 ASCM, the principle is held that the amount of countervailable subsidy must be calculated in terms of the benefit conferred. The provision sets out a negative list of rules to be taken in to account for four categories

⁵² EU concept paper on WTO reform, July 2018, available at http://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157331.pdf (consulted on 21 September 2019).

⁵³ Appellate Body report, *US – Carbon Steel (India)*, WT/DS436/AB/R, 8 December 2014, para. 4.37.

⁵⁴ DING Ru, ‘Public Body’ or Not: *Chinese State-Owned Enterprise*, JWT (2014), pp. 167-190, p. 183.

⁵⁵ CARTLAND Michel, DEPAYRE Gérard, WOZNOWSKI Jan, *Is something Going Wrong in the WTO Dispute Settlement?*, JWT (2012), pp. 979-1016, p. 1011.

of subsidies (equity capital, loans, loan guarantees and government purchases) of situations which are *not* considered to confer a benefit, *unless* certain conditions are met.

China is also in CVD calculation procedures in a special situation because it accepted in the CAP that domestic prices may be disregarded (section 15(b) CAP). Contrary to its ‘sister’ provision in anti-dumping, this provision is not to expiry and therefore IAs can rely upon it without time-limitations. This provision seems to follow loosely the patterns of the Ad Note to Article VI:1 GATT which allows for NME methodologies in anti-dumping investigations.⁵⁶

[...] if there are special difficulties [...], the importing WTO Member may then use methodologies for identifying and measuring the subsidy benefit which take into account the possibility that prevailing terms and conditions in China may not always be available as appropriate benchmarks. In applying such methodologies, where practicable, the importing WTO Member should adjust such prevailing terms and conditions before considering the use of terms and conditions prevailing outside China.⁵⁷

Under Article 14(d), the ASCM provides that for provision or purchase of goods is not considered to confer a benefit, unless no adequate remuneration in relation to the prevailing market conditions in the country of provision or purchase is paid. This means that IAs must look at other prices in private sectors in the country to determine a fair market price for the sold or purchased goods. Nonetheless, the AB in *US – Softwood Lumber IV* decided that sometimes, such in-country benchmarks may be disregarded if (i) prices are distorted because of the government’s predominant role in providing those goods and (ii) in the alternative country market conditions prevail.⁵⁸ Such prevailing market conditions are the generally accepted characteristics of an economic area; it is a market-oriented concept. If no prevailing market conditions exist in the market, private players – as well as other government entities playing under market rules – must be considered as benchmarks for price adjustments, and only thereafter out-of-country prices can be used.

The EU has the same provision in Article 6(d) of the BASR, but was moved to add a paragraph (ii) including such wording that “when appropriate, the terms and conditions prevailing in the market of another country or on the world market which are available to the recipient shall be used.”⁵⁹ The considerations explain that indeed the hierarchy stands: first adjustments, only then out-of-country benchmarks.⁶⁰ This wording was added in 2002, before such interpretation by the AB and not coincidentally after China acceded to the WTO. The wording of the provision is inspired by paragraph 15(b) of the CAP: “prevailing terms and conditions in China may not always be available as appropriate benchmarks” which is in turn inspired by the Ad Note to Article VI:1 GATT on NME calculation methods in anti-dumping investigations. This provision entitles the Commission to adjust the

⁵⁶ QIN Julia Ya, *WTO Regulation of Subsidies to State-Owned Enterprises (SOEs) – A Critical Appraisal of the China Accession Protocol*, JIEL (2004), pp. 863-919, pp. 891-892.

⁵⁷ Section 15(b) CAP.

⁵⁸ Appellate Body report, *US – Softwood Lumber IV*, WT/DS257/AB/R, 19 January 2004, para. 100-103.

⁵⁹ Council Regulation (EC) No 1972/2002 of 5 November 2002 amending Regulation (EC) No 384/96 on the protection against dumped imports from countries not members of the European Community, [2002] OJ L 305/1.

⁶⁰ Consideration (6) of the BASR.

existing terms and conditions before considering the use of terms and conditions prevailing outside China.

The AB has only extended this possibility to Article 14(b) ASCM: in *US – ADD and CVD (China)*, the AB upheld the finding of the Panel that there might be a possibility to use out-of-country benchmarks under this paragraph (b).⁶¹ Here, the language of the ASCM is different: a loan is not to be considered to confer a benefit unless a “comparable commercial loan” would be granted under conditions that are more advantageous, compared to “adequate remuneration in relation to prevailing market conditions” under Article 14(d) ASCM. Another difference is that Article 14(d) ASCM refers to another geographical market per se, whereas Article 14(b) ASCM does not contain a territorial notion but rather generally refers to disregarding the prices. The AB saw no burden in these differences and approved the application of out-of-country benchmarks. IAs must (i) do a progressive search in ‘concentric circles’ for a comparable loan in terms of recipient, timing, structure, maturity, size and currency for a loan to be comparable to; (ii) investigate whether a financial return, a profit is aspired for the commercial character; and (iii) for it to be obtainable on the market, to examine the borrower’s risk profile.⁶²

In the EU, no amendment of Article 6(b) BASR was implemented to reflect this jurisprudence. The provision is an exact copy of its source in the ASCM. The non-binding Commission Guidelines of 1998 nonetheless did already hint in that direction.⁶³

The limited practice of the EU in the calculation of CVDs in relation to China can be characterised as staying close to the provisions of Article 14 ASCM. Generally, the Commission uses Taiwan, Chinese Taipei or Hong Kong as appropriate third country to determine the prices under Article 6(d) ASCM and out-of-country export credits from the US Import and Export Bank to determine the commercial reasonableness benchmark under Article 6(b) BASR; in addition, Bloomberg ratings identify the ‘normal’ investment conditions under Article 6(a) ASCM and in the practice of the EU.⁶⁴

2. A full NME methodology in AS?

When stated that no NME methodology exists in anti-subsidy duty calculation, this is both true and false. The AB jurisprudence already interpreted the circumstances to disregard domestic prices in some cases. It can hence be argued that a lenient interpretation by the AB on the remaining paragraphs of Article 14 ASCM would be accepted. In addition, in

⁶¹ Appellate Body report, *US – ADD and CVD (China)*, WT/DS379/AB/R, 11 March 2011, para. 490.

⁶² *Ibid.*, para. 471-490. See also MÜLLER Wolfgang, *WTO Agreement on Subsidies and Countervailing Measures: A Commentary*, Cambridge, Cambridge University Press, 2017, pp. 446-450.

⁶³ Information from the Commission, Guidelines for the calculation of the amount of subsidy in countervailing duty investigations, [1998] OJ C 394/6.

⁶⁴ SU379/AB/R, 11 March 2011D Juhi Dion, VERMULST Edwin, *Anti-subsidy Law and Practice of the European Union*, in Hofmann Herwig CH, Micheau Claire (eds), “State Aid Law of the European Union”, Oxford, Oxford University Press (2016), pp. 508-563, pp. 537-541.

relation to China, the CAP provides a strong legal basis to apply NME methodologies in the calculation of CVDs.

Could support be found for such extension towards the other paragraphs of Article 14 ASCM using the reasoning of the AB? Those have not yet been tested in the jurisprudence of the AB.⁶⁵ First, Article 14(c) ASCM deals with loan guarantees and uses a similar language as loans under Article 14(b) ASCM that the difference with a “comparable commercial loan” constitutes the amount of benefit. That similarity can be explained from the fact that a loan guarantee is just one step away from a loan itself. The market-based character has already been noted.⁶⁶ Such similarities in concept and wording make it likely that the AB would also accept an extension to paragraph (c). The reasoning of the AB can be transposed into Article 14(c) ASCM. Second, Equity capital under paragraph (a) uses different language: no benefit is conferred unless the investment decision of the government is “inconsistent with the usual investment practice”. The ‘usual practice’ describes what is common or customary conduct of private investors in respect to equity investment, more precisely the investment decision (ex ante approach).⁶⁷ Here too, the market standard is relevant. Similarly to paragraph (d), there is a direct reference to the territory in the Member, which serves as an additional argument in favour of out-of-country benchmarks. Therefore, argument could be brought that also for the other subparagraphs the AB would accept out-of-country benchmarks for when market conditions are not prevailing in NMEs in the CVD calculation. Moreover, reference to the territory of the WTO Member is made and not merely to the prices.

In any case, with regard to China, such extension is already foreseen in paragraph 15(b) of the CAP. This provision allows for all Chinese subsidies, regardless the type, to disregard domestic prices and make adjustments/use other prices. Contrasted to its ‘brother provision’ section 15(a)(ii) CAP on anti-dumping calculation, there is no expiry date for this CVD provision. Some argue that this is an editorial mistake and section 15(b) CAP is also to expire,⁶⁸ but thus far from a plain reading of section 15(d) CAP this is not the case. The drafters had no intention to let section 15(b) expire. In addition, the negotiating history shows this is not an editorial error but a deliberate choice.⁶⁹ Arguably, this gives IAs a strong weapon against NMEs in CVD calculation, given that out-of-country prices may be used at all time in a WTO-consistent manner. In addition, IAs do not have to fulfil the criteria of AB jurisprudence on Article 14 ASCM, but can simply rely on “special difficulties” when

⁶⁵ The AB did already hint that alternative benchmarks would be equally applicable to Article 14 ASCM in its entirety. See Appellate Body report, *US – ADD and CVD (China)*, WT/DS379/AB/R, 11 March 2011, para. 10.122.

⁶⁶ Panel report, *Canada – Aircraft Credits and Guarantees*, WT/DS222/, 28 January 2002, para. 7.345.

⁶⁷ Panel report, *EC and certain member States – Large Civil Aircrafts*, WT/DS316/R, 30 June 2010, para. 999 et seq.

⁶⁸ QIN Julia Ya, *WTO Regulation of Subsidies to State-Owned Enterprises (SOEs) – A Critical Appraisal of the China Accession Protocol*, JIEL (2004), pp. 863-919.

⁶⁹ MÜLLER Wolfgang, *The EU's Trade Defence Instruments: Recent Judicial and Policy Developments*, in Bungenberg Marc et al. (eds), “European Yearbook of International Economic Law 2017”, Cham, Springer (2018), pp. 205-225, p. 219. See <https://archive.org/stream/AgreementOnMarketAccess/Us-chinaBilateralAgreementProtocols#page/n3/mode/2up> (visited on 21 September 2019).

disregarding domestic prices and applying out-of-country benchmarks, including for instance even the lack of information or difficulties collecting information.⁷⁰

Arguably, NME possibilities for China can be vested both on the CAP and the jurisprudence of the AB. This still gives rise to the exact design of the NME methodology. What benchmark prices can be used instead?⁷¹ Current alternatives in anti-subsidy practice include adjustments and if that is not possible out-of-country benchmarks. Adjustments are impracticable according to the AB.⁷² Practice of other players on the market usually as well, especially in China, since subsidization affects the conduct of all players – including those which are not subsidized. Alternatively, comparison to world prices was argued to be the most valuable alternative.⁷³ Could the Commission change its approach, bringing anti-dumping and CVD duty calculation closer together, by introducing a CNV method in subsidies? The CNV method of the Commission in anti-dumping is the preferred method to address the NMEs in AD. It would make a calculation of the normal price of the subsidized goods and compare that to the export price. Whether this can be read into the provisions of the ASCM, however, is doubtful. An alternative NME-methodology can be proposed in which NMEs are always treated like that and whereby the subsidising government can apply for a MES, comparable to the request for market economy treatment under the old NME methodology in AD.

D. Need for increased transparency obligations on China

In order to conduct anti-subsidy investigations more effectively, the EU also advocates for greater transparency and notification obligations on China.⁷⁴ Unclear legal relationships between the government and SOEs also limit the Commission's ability to calculate the amount of subsidy under Article 14 ASCM. Under the ASCM, a triple notification obligation exists: for subsidies (Article 25.2), countervailing duties (Article 25.2), and competent authorities and domestic procedures (Article 25.12). As an additional notification obligation, the EU could propose rules for China to disclose the level and degree of state control in SOEs.

Furthermore, additional transparency obligations on subsidy notification for China could salvage difficulties in examining subsidy schemes. It would help the Commission greatly in its investigation procedure of whether an entity is a public body vested with government

⁷⁰ ZHOU Weihuan, GAO Henry, BAI Xue, *Building a Market Economy Through WTO-Inspired Reform of State-Owned Enterprises in China*, ICLQ (2019), pp. 977-1022, pp. 1014-1017.

⁷¹ For a full analysis, see MÜLLER Sophia, *The Use of Alternative Benchmarks in Anti-Subsidy Law. A Study on the WTO, the EU and China*, Cham, Springer (2018), pp. 203-212.

⁷² Appellate Body report, *US – Softwood Lumber IV*, WT/DS257/AB/R, 19 January 2004.

⁷³ MÜLLER Sophia, *The Use of Alternative Benchmarks in Anti-Subsidy Law. A Study on the WTO, the EU and China*, Cham, Springer (2018), p. 212.

⁷⁴ EU concept paper on WTO reform, July 2018, available at http://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157331.pdf (consulted on 21 September 2019). See also for instance, Communication from the European Union, Improving Disciplines on Subsidies Notification, TN/RL/GEN/188, 29 May 2017.

authority. Indeed, also for NME calculation methodologies, a lack of information is playing parts for the IAs.⁷⁵ China's track record of notifications includes a full transparency on the laws and authorities, but only notification on the subsidy programs between 2009 and 2014 have been notified. The EU advanced concrete proposals to enhance notification obligations enforcement. The EU proposes to introduce a rebuttable presumption that all non-notified subsidies are actionable and a degrading system of non-notifying members in the ASCM Committee to 'inactive' member scheduled to talk last.

If the Commission disposes of such information due to enforceable transparency obligations, investigations would be more workable. Commission currently relies heavily on the 'facts available' mechanism under Article 12.7 ASCM and Article 29 BASR, which allow for the Commission to make determinations in the positive or the negative when the investigated country fails to provide information or obstructs the investigation. Although explicitly allowed, there is rightly not the strongest position for an IA to make use of. But it is a necessary tool for instance to draw conclusions when government authority is exercised behind closed doors.⁷⁶ This has been criticized from Chinese side in as far it amounts to an automatic application of the mechanism regardless the effort put into cooperation by China.⁷⁷

IV. Evaluating the EU's approach in TDI policy: multilateral debate, domestic changes or bilateral negotiations?

The application of TDIs against unfair trade from China is an effective unilateral tool to ensure a level playing field in the trade relation with China. However, the investigation procedure also knows hurdles. Overcoming such legal hurdles and making the legal framework more effective, the EU has adopted two contrasting strategies. In anti-dumping, the Commission adopted a strategy of unilaterally amending the domestic legal framework, independently from discussions on the multilateral level. By contrast, it took a multilateral stance as regards anti-subsidy reform, urging for dialogue and negotiation at the WTO level.

The EU goes through a lot of effort to maintain anti-dumping as the centrepiece of TDI action against Chinese imports. Two unilateral domestic changes to the TDI rules have been implemented one-sided by the EU legislator and applied by the Commission. The option to allow making price adjustments to the producer's records when constructing the normal value was explicitly condemned by the AB.⁷⁸ More recently, in 2017, the Commission formulated a whole new significant distortions methodology. Although not yet subject

⁷⁵ See also BHALA Raj, KIM Nathan Deuckjoo DJ, *The WTO's Under-Capacity to Deal with Global Over-Capacity*, AJWH (2019), pp. 1-32.

⁷⁶ CHIANG Ting-Wei, *Chinese State-owned Enterprises and WTO's Anti-subsidy Regime*, GJIL (2018), pp. 845-877, pp. 874-875.

⁷⁷ QIAN Wenjie, *The Dilemma of China as Respondent to Anti-Subsidy Proceedings – A Study of the First EU Anti-Subsidy Investigation against China*, JWT (2012), pp. 961-978.

⁷⁸ See section II.B.a above.

to the legal scrutiny of the WTO adjudicator, several grounds for inconsistency have been raised in legal literature.⁷⁹ Anti-dumping investigations are the core of the EU's TDI practice, relatively easy to conduct and target companies' behaviour rather than a state measure. The anti-dumping rules are focal and the instrument must be kept effective in the EU regardless the developments on the WTO level.

In anti-subsidy matters, the EU takes the opportunity of addressing the shortcomings to the legal framework to capture Chinese SOEs to promote a multilateral stance and encourages discussion and negotiations at the WTO level.⁸⁰ The EU is not as active in anti-subsidy investigations against Chinese imports and CVDs are not as imminent as anti-dumping duties.

Nonetheless, besides promoting the multilateral debate in the WTO, it is recommended that the EU also shift focus also to anti-subsidy duty imposition against China. Current practice already combines parallel anti-dumping and anti-subsidy proceedings. The EU has a strong legal argument to apply NME methodologies in China on the basis of section 15(b) CAP which could lead to relief in the long term. Section 15(b) CAP does not expire, and alternatively, NME calculation methodologies already included in BASR. The Commission could expand the jurisprudence to Article 6 BASR unilaterally without facing WTO challenges. Even the public body definition could be stretched through application in investigations. A unilateral strengthening of the anti-subsidy could be more opportune, but must be complemented by multilateral efforts in terms of WTO dispute settlement and negotiations, arguably with regard to transparency obligations.

Notably, disciplines on TDI can also be addressed on a bilateral level. Negotiations on an FTA between the EU and China are nowhere near to be initiated, thus rendering this option hypothetical at this time. The EU envisages a two-stage approach, whereby negotiation on an investment agreement should be concluded before trade talks start.⁸¹ Nevertheless, bilateral commitments can complement unilateral and multilateral efforts in reforming TDI. The recently concluded Comprehensive and Progressive Trans-Pacific Partnership (CPTPP) chapter on SOEs is an important example of setting the trend.⁸² It adds onto the uncertainties in the text of the ASCM and the AB jurisprudence, although it could have gone even further.⁸³ The EU itself has not taken such innovative SOE chapters influencing

⁷⁹ See section II.B.b above.

⁸⁰ EU concept paper on WTO reform, July 2018, available at http://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157331.pdf (consulted on 21 September 2019).

⁸¹ CHI Manjiao, *The China-EU BIT as a Stepping Stone Towards a China-EU FTA: A Policy Analysis*, in Bungenberg Marc et al (eds.), "European Yearbook of International Economic Law 2017", Berlin/Heidelberg, Springer, 2017, pp. 475-490.

⁸² CPTPP Chapter 17.

⁸³ LEE Jaemin, *Trade Agreements' New Frontier – Regulation of State-Owned Enterprises and Outstanding Systemic Challenges*, AJWH (2019), pp. 33-72; WILLEMEYNS Ines, *Disciplines on State-Owned Enterprises in International Economic Law: Are We Moving in the Right Direction?*, JIEL (2016), pp. 657-680; MATSUSHITA Mitsuo, *State-Owned Enterprises in the TPP Agreement*, in Chaisse Julien et al. (eds), "Paradigm Shift in International Economic Rule-making: TPP as a New Model for Trade Agreements?", Singapore, Springer (2017), pp. 187-203.

anti-subsidy disciplines yet, although CETA, Vietnam and Japan and Mexico already include some language, for instance defining SOEs.⁸⁴ Besides SOE chapters, nothing much is to be expected from TDI chapters, since the EU usually retains the right to resort to TDI in accordance to the WTO rules, and at the most agrees to additional procedural limitations.⁸⁵ Hence, in the long term, certain disciplines can be included in Chinese FTAs regarding state ownership and state financing of enterprises. Far-going commitments to SOEs in such FTA are unlikely to be concluded and hard to predict. Initial focus of negotiations on trade would centre on GPA accession and market access for strategic services sectors.⁸⁶ These options remain hypothetical in the current state of affairs of the EU-China trade relations, although the Action Plan might say something about it?

V. Conclusion

The EU is concerned about the consequences on the internal market of trade with China and Chinese SOEs. Through the imposition of TDI duties, the EU restores a level playing field against the trade distortions Chinese imports cause by means of a unilateral tool. However, ineffective multilateral rules hinder the EU developing a fully functioning instrument to tackle the specific state structures in China, including its NME status and multitude of SOEs in the market.

Traditionally, the EU uses anti-dumping duties against imports from Chinese SOEs. It has creatively worked around the limitations of the ADA rules by unilaterally introducing NME-targeting measures surrounding the calculation of normal value in its domestic legal framework. After the expiry of section 15(a)(ii) of the CAP, which foresaw a presumption that China could be treated as an NME, the future of such methodologies is uncertain. The Panel charged with the review of the old EU methodology after the expiration date had to suspend its activities on the request of China. It is unlikely the Panel will provide interpretations on the application of section 15 CAP after 11 December 2016. Meanwhile, the EU can continue to apply anti-dumping duties against Chinese imports from SOEs under the new but arguably WTO-inconsistent ‘significant distortions’ methodology, unless China decides also to challenge the new rules.

Arguably, the fact that Section 15(b) CAP contains an NME presumption for anti-subsidy that will not expire provides a strong legal argument in favour of anti-subsidy action against China. However, the absence of a developed methodologic NME methodology in anti-subsidy investigations and a burdensome definition of a ‘public body’ lead to an increasingly

⁸⁴ See CETA Chapter 18; Vietnam Chapter 11; EU-Japan FTA Chapter 13; Mexico Chapter 12.

⁸⁵ MÜLLER-IBOLD Till, *EU Trade Defence Instruments and Free Trade Agreements: Is Past Experience an Indication for the Future? Implications for Brexit?*, in Bungenberg Marc et al (eds), “The Future of Trade Defence Instruments: Global Policy Trends and Legal Challenges”, Cham, Springer (2018), pp. 191-231.

⁸⁶ PELKMANS Jacques et al. and FRANCOIS Joseph et al., *Tomorrow’s Silk Road. Assessing an EU-China Free Trade Agreement*, CEPS Working Paper, 2016, pp. 188-192.

onerous and uncertain procedure at this moment. The EU pursued a multilateral approach by proposing necessary modernisations to the anti-subsidy rules at the WTO level. Nonetheless, through continued CVD investigations on Chinese SOEs and subsidy schemes in China, the EU can gain experience with creative solutions within the current legal framework. Broader public body definitions can be applied and NME calculation methods inspired from anti-dumping rules tested without legislative modifications. Additional transparency obligations can assist the Commission to create such effective tool against China, but should be agreed upon multilaterally or bilaterally.

Whereas the EU promotes multilateral discussion and negotiation to strengthen anti-subsidy proceedings, the Commission should use the possibility to develop its anti-subsidy instrument unilaterally in law and in practice in conformity with WTO rules.

* * *

List of abbreviations

AB	Appellate Body
AD	Anti-Dumping
ADA	Anti-Dumping Agreement
ADD	Anti-Dumping Duty
AS	Anti-Subsidy
ASCM	Agreement on Subsidies and Countervailing Duties
BADR	Basic Anti-Dumping Regulation
BASR	Basic Anti-Subsidy Regulation
CAP	China's Accession Protocol
CETA	Comprehensive Economic and Trade Agreement
CNV	Constructed Normal Value
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
CVD	Countervailing Duty
GAAP	Generally Accepted Accounting Principles
GATT	General Agreement on Tariffs and Trade
GPA	(Revised) Government Procurement Agreement
IA	Investigating Authority
EU	European Union
FTA	Free Trade Agreement
MES	Market Economy Status
MET	Market Economy Treatment
MFN	Most Favourite Nation
NME	Non-Market Economy
OCT	Ordinary Course of Trade

PMS	Particular Market Situation
SOE	State-Owned Enterprise
TDI	Trade Defence Instruments
TR	Trade Remedies
US	United States
WTO	World Trade Organization

Bibliography

Literature

AKRIDITIS Vasilis, SNEIJ Florentine, *The Shake-Up of the EU Institutions' Dumping Calculation Methodology and the Compatibility of a Market-Oriented Concept of Normal Value with WTO Law*, GTCJ (2018), pp. 129-140.

ANTONINI Renato, *A 'MES' to be adjusted: past and future treatment of Chinese imports in EU anti-dumping investigations*, GTCJ (2018), pp. 79-94.

BHALA Raj, KIM Nathan Deuckjoo DJ, *The WTO's Under-Capacity to Deal with Global Over-Capacity*, AJWH (2019), pp. 1-32.

CAI Yan, KIM Eun-Mi, *Analyzing China's Non-Market Economy Status: A Focus on Anti-Dumping Measures*, JITC (2016), pp. 131-150.

CARTLAND Michel, DEPAYRE Gérard, WOZNOWSKI Jan, *Is something Going Wrong in the WTO Dispute Settlement?*, JWT (2012), pp. 979-1016.

CHI Manjiao, *The China-EU BIT as a Stepping Stone Towards a China-EU FTA: A Policy Analysis*, in Bungenberg Marc et al (eds.), *European Yearbook of International Economic Law*, Berlin/Heidelberg, 2017, pp. 475-490.

CHIANG Ting-Wei, *Chinese State-owned Enterprises and WTO's Anti-subsidy Regime*, GJIL (2018), pp. 845-877.

EVENETT Simon J, *Triage? Assessing the EU's Modernisation Proposals for the WTO*, Intereconomics (2018), pp. 253-256.

DE KOK Jochem, *The Future of EU Trade Defence Investigations against Imports from China*, JIEL (2016), pp. 515-547.

DING Ru, *'Public Body' or Not: Chinese State-Owned Enterprise*, JWT (2014), pp. 167-190.

HUYGHEBAERT Kiliane, *Changing the Rules Mid-Game: The Compliance of the Amended EU Basic Anti-Dumping Regulation with WTO Law*, JWT (2019), pp. 417-432.

LEE Jaemin, *Trade Agreements' New Frontier – Regulation of State-Owned Enterprises and Outstanding Systemic Challenges*, AJWH (2019), pp. 33-72.

LI Ye, *Normal Value in Anti-Dumping Proceedings: Is Surrogate Value No Longer Applied Exceptionally?*, GTCJ (2018), pp. 435-441.

MATSUSHITA Mitsuo, *State-Owned Enterprises in the TPP Agreement*, in Chaisse Julien et al. (eds), *Paradigm Shift in International Economic Rule-making: TPP as a New Model for Trade Agreements?*, pp. 187-203.

MIRANDA Jorge, *Interpreting Paragraph 15 of China's Protocol of Accession*, GTCJ (2014), pp. 94-103.

MÜLLER Sophia, *The Use of Alternative Benchmarks in Anti-Subsidy Law. A Study on the WTO, the EU and China*, Cham, Springer (2018), 257 p.

MÜLLER Wolfgang, *WTO Agreement on Subsidies and Countervailing Measures: A Commentary*, Cambridge, Cambridge University Press (2017), 736 p.

MÜLLER Wolfgang, *The EU's Trade Defence Instruments: Recent Judicial and Policy Developments*, in Bungenberg Marc et al. (eds), "European Yearbook of International Economic Law 2017", Cham, Springer (2017), pp. 205-225.

MÜLLER-IBOLD Till, *EU Trade Defence Instruments and Free Trade Agreements: Is Past Experience an Indication for the Future? Implications for Brexit?*, in Bungenberg Marc et al (eds), "The Future of Trade Defence Instruments: Global Policy Trends and Legal Challenges", Cham, Springer (2018), pp. 191-231.

PALMETER David, *The WTO Antidumping Agreement and the Economies in Transition*, in Cottier Thomas, Mavroidis Petros (eds), "State Trading in the Twenty-First Century: World Trade Forum", Volume 1, Michigan, University of Michigan Press (1998), pp. 115-119.

PELKMANS Jacques et al. and FRANCOIS Joseph et al., *Tomorrow's Silk Road. Assessing an EU-China Free Trade Agreement*, CEPS Working Paper, 2016.

QIAN Wenjie, *The Dilemma of China as Respondent to Anti-Subsidy Proceedings – A Study of the First EU Anti-Subsidy Investigation against China*, JWT (2012), pp. 961-978.

QIN Julia Ya, *WTO Regulation of Subsidies to State-Owned Enterprises (SOEs) – A Critical Appraisal of the China Accession Protocol*, JIEL (2004), pp. 863-919.

SUD Juhi Dion, VERMULST Edwin, *Anti-subsidy Law and Practice of the European Union*, in Hofmann Herwig CH, Micheau Claire (eds), "State Aid Law of the European Union", Oxford, Oxford University Press (2016), pp. 508-563.

TIETJE Christian, SACHER Vinzenz, *The New Anti-Dumping Methodology of the European Union: A Breach of WTO Law?*, in Bungenberg Marc et al (eds), "The Future of Trade Defence Instruments, Global Policy Trends and Legal Challenges", Cham, Springer (2018), pp. 89-105.

VAN BAEL & BELLIS, *EU Anti-Dumping and Other Trade Defence Instruments*, Kluwer, Alphen aan den Rijn (2011), 1368 p.

VERMULST Edwin, SUD Juhi Dion, *The New Rules Adopted by the European Union to Address “Significant Distortions” in the Anti-Dumping Context*, in Bungenberg Marc et al (eds), “The Future of Trade Defence Instruments: Global Policy Trends and Legal Challenges”, Cham, Springer (2018), pp. 63-87.

WILLEMEYNS Ines, *Disciplines on State-Owned Enterprises in International Economic Law: Are We Moving in the Right Direction?*, JIEL (2016), pp. 657-680.

WU Mark, *The “China, Inc.” Challenge to Global Trade Governance*, HILJ (2016), pp. 261-342.

ZANG Michelle Q, *EC – Fasteners: Opening the Pandora’s Box of Non-Market Economy Treatment*, JIEL (2012), pp. 869-892.

ZHOU Weihuan, PENG Delei, *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*, JWT (2018), pp. 505-534.

ZHOU Weihuan, GAO Henry, BAI Xue, *Building a Market Economy Through WTO-Inspired Reform of State-Owned Enterprises in China*, ICLQ (2019), pp. 977-1022.

Jurisprudence

WTO

Appellate Body report, *US – Certain EC Products*, WT/DS156/AB/R, 11 December 2000.

Panel report, *Canada – Aircraft Credits and Guarantees*, WT/DS222/, 28 January 2002

Appellate Body report, *US – Softwood Lumber IV*, WT/DS257/AB/R, 19 January 2004.

Panel report, *EC and certain member States – Large Civil Aircrafts*, WT/DS316/R, 30 June 2010.

Appellate Body report, *US – ADD and CVD (China)*, WT/DS379/AB/R, 11 March 2011.

Appellate Body report, *EC – Fasteners*, WT/DS397/AB/R, 15 July 2011.

Appellate Body report, *US – Carbon Steel (India)*, WT/DS436/AB/R, 8 December 2014.

Appellate Body report, *EU – Biodiesel*, WT/DS473/AB/R, 6 October 2016.

Panel report, *EU – Biodiesel (Indonesia)*, WT/DS480/R, 25 January 2018.

US

Georgetown Steel Corporation, et al. v. United States, 801 F.2d 1308, 8 ITRD 1161, 4 Fed. Cir. (T) 143, 18 September 1986.

Legal Texts and Political Instruments

WTO

General Agreement on Tariffs and Trade 1994, LT/UR/A-1A/1, 15 April 1994.

Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, LT/UR/A-1A/3, 15 April 1994.

Agreement on Subsidies and Countervailing Measures LT/UR/A-1A/9, 15 April 1994.

Agreement on Government Procurement, LT/UR/A-4/PLURI/2, 15 April 1994.

Accession of the People's Republic of China, Decision of 10 November 2001, WT/L/432.

EU (published)

Information from the Commission, Guidelines for the calculation of the amount of subsidy in countervailing duty investigations, [1998] OJ C 394/6.

Council Regulation (EC) No 1972/2002 of 5 November 2002 amending Regulation (EC) No 384/96 on the protection against dumped imports from countries not members of the European Community, [2002] OJ L 305/1.

Council Regulation (EC) No 1480/2003 of 11 August 2003 imposing a definitive countervailing duty and collecting definitively the provisional duty imposed on imports of certain electronic microcircuits known as DRAMs (dynamic random access memories) originating in the Republic of Korea, [2003] OJ L 212/1.

Council Implementing Regulation (EU) No 452/2011 of 6 May 2011 imposing a definitive anti-subsidy duty on imports of coated fine paper originating in the People's Republic of China, [2011] OJ L 128/18.

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, [2013] OJ L 315/2.

Regulation (EU) 2016/1036 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, [2016] OJ L 176/21, codified version available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02016R1036-20180608&from=EN> (consulted on 20 June 2019)

Regulation (EU) 2016/1037 of the European Parliament and of the Council on protection against subsidised imports from countries not members of the European Union, [2016] OJ L 176/55 codified version available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02016R1037-20180608&from=EN> (consulted on 20 June 2019).

Regulation (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 subsidised imports from countries not members of the European Union, [2017] OJ L 338/1.

Commission Implementing Regulation (EU) 2019/72 of 17 January 2019 imposing a definitive countervailing duty on imports of electric bicycles originating in the People's Republic of China, [2019] OJ L 16/5.

Regulation (EU) 2019/4552 of the European Parliament and of the Council of 19 March 2019 establishing a legal framework for the screening of foreign direct investments into the Union, [2019] OJ L79/1.

EU (other)

EU-China 2020 Strategic Agenda for Cooperation, 23 November 2013, available at <https://eeas.europa.eu/sites/eeas/files/20131123.pdf> (consulted on 20 June 2019).

Elements for a new strategy on China, Joint Communication to the European Parliament and the Council, 22 June 2016, JOIN(2016) 30 final.

Commission Staff Working Report on significant distortions in the economy of the People's Republic of China for the purposed of trade defence investigations, 20 December 2017, SWD(2017) 483 final/2.

EU concept paper on WTO reform, July 2018, available at http://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157331.pdf (consulted on 20 June 2019).

36th Annual Report from the Commission to the European Parliament and the Council on the EU's Anti-Dumping, Anti-Subsidy and Safeguard activities (2017), Working Staff Document, 31 July 2018, SWD(2018) 392 final, available at http://trade.ec.europa.eu/doclib/docs/2018/july/tradoc_157218.pdf (consulted on 20 June 2019).

EU-China – A Strategic Outlook, Joint Communication to the European Parliament and the Council, 12 March 2019, JOIN(2019) 5 final.

Other

US International Trade Commission, Coated Free Sheet Paper From China, Indonesia, and Korea, 13 December 2007, 72 Fed. Reg. 70,892, Investigation No. 701-TA-444-446 (Final) and 731-TA-1107-1109 (Final).

Friends of Industry, Joint statement, 18 December 2018, available at https://www.bmwi.de/Redaktion/DE/Downloads/F/friends-of-industry-6th-ministerial-meeting-declaration.pdf?__blob=publicationFile&v=6 (consulted on 20 June 2019).



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