Normal Value, Significant Distortions, and the Limits of Cost Adjustment under the WTO Anti-Dumping Agreement

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Abstract. State intervention and industrial policies are standing out as the global trade system changes. Anti-dumping measures have shifted from their original role of fixing price discrimination to being an important tool for international competition. This paper examines the European Union's significant distortions approach, focusing on the practice of replacing the actual costs recorded in the exporting country with surrogate costs when constructing normal value, and evaluates whether that practice is consistent with the WTO Anti-Dumping Agreement. The paper first clarifies the meaning of normal value under the Anti-Dumping Agreement. It then explains how the European Union reformulated the basis of normal value after the expiry of Article 15(a)(ii) of China's WTO Accession Protocol through the significant distortions framework. It next identifies three main WTO law constraints on investigative discretion. On that basis, the paper argues that current EU practice often seeks to eliminate, rather than reflect, market distortions. The paper concludes that anti-dumping rules should remain focused on harmful dumping and should not be used as a broader instrument for reshaping other economies.

Keywords: EU anti-dumping regulation, normal value, particular market situation.

1. Introduction

In the context of deepening globalization and the increasing integration of the world market, anti-dumping measures have become one of the most frequently used trade remedy tools for regulating international competition. On the surface, anti-dumping laws aim to address situations in which goods are exported at prices lower than their normal value, thereby causing material injury to domestic industries. Under the framework of the World Trade Organization's Anti-Dumping Agreement (ADA), that goal is pursued through rules on price comparison, cost determination, and injury assessment. In practice, however, anti-dumping measures have often moved beyond the role of a neutral mechanism for correcting unfair pricing and have increasingly functioned as instruments of market regulation and legal structural protectionism.

These contradictions are particularly evident in the anti-dumping practice of the European Union, one of the most active users of trade defence instruments in the world. Unlike systems in which anti-dumping powers are exercised by individual member states, the EU exercises this power at the supranational level, making anti-dumping a core element of its external economic policy. In acceding to the WTO, China undertook far-reaching commitments in its Accession Protocol. That Protocol is distinctive in both length and scope. It is the most extensive of all WTO accession protocols and contains a wide range of WTO-plus obligations that go beyond those assumed by other WTO members [1]. Article 15(a)(ii) of the Protocol formerly allowed WTO members to use an analogue methodology not based on domestic prices in China in anti-dumping cases. After the expiry of that provision on 11 December 2016, however, the EU no longer had a clear legal basis under WTO rules for continuing to apply the surrogate country methodology. As a result, the EU attempted to reformulate its method for calculating normal value through concepts such as special market circumstances, severe distortions, and, most controversially, input cost adjustment.

Under this approach, EU investigating authorities may reject the actual costs recorded by exporting producers on the ground that certain input prices, such as raw materials or energy, are allegedly distorted by government intervention. When determining normal value, those authorities may then substitute the recorded costs with benchmark prices drawn from third countries or international

markets. While this method is put forward to make costs rationally represent production conditions, these adjustments often result in a large overestimation of normal value, and that expands the dumping margin. Even with a different legal label, this method can, in essence, have effects like those of the surrogate country methodology no longer allowed by WTO law. A big legal controversy has emerged over whether this method meets WTO law requirements.

These developments show the deeper structural tensions inside the anti - dumping system. The WTO framework, on one hand, tries to limit discretion by legal constraints and keep the non - discrimination principle. In a global economy full of differences, anti - dumping law gives members a flexible means so they can protect domestic industries. And what's the proper role of anti - dumping law in the modern world trade system.

2. Normal Value in Distorted Markets

The normal value is used as a reference in the anti-dumping law to determine whether there is a dumping situation for the exported goods [2]. Since it is at the heart of the work of the anti-dumping system, a uniform and legally sound understanding of the normal value needs to be achieved for the system to work correctly. Although the problem of defining a normal value is generally regarded as a technical one and can be solved by all sorts of calculation rules, with the increase in the severity of normativity, questions have begun to be raised about the concept of normality itself, especially in the case of what is known as market distortion.

2.1. Legal Meaning of Normal Value under the ADA

Under the WTO ADA, normal value is defined primarily by reference to the price of the like product in the exporter's domestic market when sold in the ordinary course of trade. This reflects the basic premise that domestic prices formed within the exporter's own economic environment provide the most appropriate benchmark for assessing whether export prices are abnormally low.

Article 2 of the ADA provides that normal value is generally calculated on the basis of the domestic price of the product concerned in the exporting country, unless special circumstances justify departure from that approach. Article 2.2 identifies such circumstances and permits the use of alternative benchmarks for the construction of normal value. In particular, where there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country, or where, because of a particular market situation or the low volume of domestic sales, those sales do not permit a proper comparison, the dumping margin may be determined by reference either to a comparable export price of the like product to an appropriate third country, provided that price is representative, or to a constructed normal value based on the cost of production in the country of origin plus reasonable amounts for administrative, selling and general expenses, as well as profits. Once an investigating authority determines that a particular market situation exists, it may disregard domestic prices and construct normal value, within the limits prescribed by the ADA, for the purpose of determining dumping margins. The Agreement does not, however, define the concept of a particular market situation, thereby leaving investigating authorities a significant degree of discretion. Prior to the current controversy, only one case had been cited under the General Agreement on Tariffs and Trade (GATT) for this concept, and it had not been applied by the WTO dispute settlement system [2].

2.2. EU's Reinterpretation of Normal Value in Distorted Markets

Given the above reasons, the European Union has introduced a new concept of "normal value for allegedly distorted markets". As the expiration of Article 15(a)(ii) in China's Accession Protocol approached, in November 2016, the European Commission introduced a new method that no longer classified a market economy as either a full-fledged market economy or not and instead examined whether prices and costs in the exporting country were under significant distortion [3]. The criteria used to identify significant distortions include, among other matters, the state's presence in or control

over enterprises, the dominant position of state-owned enterprises, government intervention in prices and inputs such as energy and raw materials, and distorted wage and financing conditions [4].

The European Union's shift from the concept of market economy status to the notion of distorted market behaviour is primarily driven by the absence of a clear internal legal framework defining market economy status under EU law. While Article 15 of China's WTO Accession Protocol requires importing WTO members to maintain domestic criteria for determining market economy status, the EU has never developed such criteria at the state level. By contrast, the United States has explicitly defined non-market economy countries in its trade legislation and applies established statutory criteria for determining market economy status. The EU Anti-Dumping Regulation instead provides only a set of criteria for assessing whether market economy conditions exist. Generally speaking, these norms are only at the company level and not implemented nationwide; they are also not listed in binding laws and regulations [3].

The modification does not conform to the provisions of the law. The criteria for determining significant distortion are very broad, and the discretion they confer may become excessive. Government intervention is particularly sensitive in this regard. Although intervention may sometimes mean that prices have been abnormally influenced by external factors, it may also reflect ordinary commercial arrangements intended to make products more competitive. Prices that do not result solely from free market forces do not necessarily mean that transactions have ceased to follow economic logic [4]. Article 2(6a)(b) of the EU Anti-Dumping Regulation may therefore extend beyond the circumstances contemplated by Article 2.2 of the ADA.

3. Boundaries of Legitimate Discretion

The controversy over the EU's post-2016 significant distortions methodology is, at bottom, a dispute about the degree of discretion that WTO anti-dumping law leaves to investigating authorities. The ADA does not freeze anti-dumping analysis in time. It recognises that markets may be disorderly and that domestic prices may sometimes fail to permit a proper comparison. It also disciplines how authorities may respond to those problems.

3.1. Primacy of Exporters' Records

Article 2.2.1.1 of the ADA establishes the basic rule that, when normal value is constructed under Article 2.2, costs should normally be calculated on the basis of the records kept by the exporter or producer, provided that those records accord with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration [5].

This provision has two functions. First, it focuses on the actual position of firms. The question is whether the producer actually incurred the relevant costs in producing the product, not whether those costs appear sufficiently market-based from the perspective of the investigating authority [6]. Secondly, the provision confines departures from recorded costs within a narrower legal structure and does not permit a generalised rejection of costs simply because broader distortions are alleged. A broad reading of distortion would be inconsistent with the original design of the ADA and would deprive Article 2.2.1.1 of much of its practical effect.

The EU Anti-Dumping Regulation attempts to justify its interpretation of distortion by invoking the ADA provisions on particular market situation (PMS). A correct interpretation of PMS, however, indicates that the concept concerns whether domestic sales are suitable as a benchmark for normal value because those sales are not representative or are subject to restrictions affecting the formation of normal prices. PMS does not automatically authorise the replacement of the exporter's recorded input costs with the reference prices of a third country when constructing normal value [6].

This distinction clarifies the boundary between two different forms of discretion. Deciding whether domestic prices or sales are representative is one discretionary power. Reconstruction of the normal value by means of systematic cost substitution. If the standard of price comparability is

extended to cover the latter power, an exceptional mechanism will be established; this general authority will permit investigating organs to reset the normal value whenever they deem the market structure unreasonable.

This means that for the EU, Article 2(6a) of the Basic Regulation cannot be applied automatically as a presumption of disadvantage to undertakings under national coordination when the Commission finds that there is a national impediment. In accordance with the ADA, the Commission still needs to explain why the exporter's records in a particular investigation do not meet the requirements of Article 2.2.1.1 and why an alternative method is required to restore comparability [7].

3.2. EU-Biodiesel and Evidentiary Discipline

The first significant WTO test of cost substitution in the EU-Argentina biodiesel dispute. Therefore, the Appellate Body did not accept the EU's attempt to disregard the recorded soybean input costs of Argentine producers and substitute them with a benchmark of international prices. The Appellate Body determined that a reasonable reflection need not be the market price. Otherwise, it does not know if the records show the costs that producers have actually borne in production [8].

The EU-Biodiesel case also shows that, to be classified as a dumping case, the evidence must meet a certain standard for the export transaction. The investigating authority needs to link any alleged defects in the records to the product being investigated and to the constructive inferences it hopes to draw, rather than using broad policy statements about the economic system of the exporting country [8].

In addition, the EU's way is to rule out market distortions rather than address them; thus, it is not in line with WTO rules. According to the interpretation of the Appellate Body in EU-Biodiesel, the aim of constructing a normal value is to reflect the actual production cost situation in the country of origin as accurately as possible [4].

Therefore, even if there are distortions in the export country's market due to government intervention, these distortions will still exist in practice. If the investigating authority selects third-country data or international reference prices instead of data from the country of origin, it should not be assumed that these external prices can be used directly. It should be shown that the method still reflects the actual distortions in the market of the country of origin. In short, the rules of the WTO are relatively flexible and do not promote the development of a free-market system. On the other hand, the EU does not assume that after a considerable distortion in the exporting country is found, a normal value must be established solely by reference to costs or benchmarks that reflect undistorted conditions. The first kind of way is to not deal with the distortion, but rather to ignore it. That Logic is inconsistent with the WTO Rules.

3.3. Symmetry and the Legitimacy of the Remedy

Legitimate Discretion is not absolute. In addition to being bound by the rules for the construction of the normal value, investigating authorities must also meet the broader obligation of fairness under the ADA. Article 2.4 sets a reasonable margin above the normal value for the export price. If the authorities artificially increase the normal value by adding substitute costs but do not raise the export price, then comparison will lose its symmetry and cannot be considered equitable.

In conclusion, a symmetric model can also be employed. The further the normal value deviates from the actual market conditions in the exporting country, the more difficult it will be for the investigating authorities to explain why their method is still appropriate for comparison. If the above explanation is not sufficient, the anti-dumping measure may not be viewed as a trade remedy for specific and harmful dumping, but rather as another way to limit or adjust the economic impact of unilateral economic modelling by other countries [6].

4. Anti-Dumping in Trade Governance

The legal discussion of serious distortion cannot be separated from the broader issue of the role that anti-dumping should play in a trading system that is being reshaped by industrial policy, state capitalism, supply-chain security and geopolitical competition? If anti-dumping is used to deal with non-market factors at the exporting country level, then the constraining effect of Article 2 of the ADA will be diminished. If WTO law does not address persistent state intervention, then members may believe that the rules are no longer suitable for the current state of trade. Therefore, the middle ground needs to be found at this time.

4.1. Anti-Dumping as a Limited Trade Remedy

At present, the anti-dumping measures in the system should enable members to respond to price discrimination causing injury within a reasonable range and in accordance with the law. Therefore, it will comply with the ADA. The trigger is a fall and injury, determined by a set of rules for comparison, not a general assessment of whether another person's economy is sufficiently market-oriented [6].

Therefore, the EU's desire to use considerable distortions as a system-wide filter is understandable but also risky. Where the Commission substitutes recorded costs with international benchmarks to approximate a favourable market counterfactual, anti-dumping measures are heading towards an industrial policy shortcut. This is precisely the type of methodological drift that the WTO adjudicators have been avoiding because it may upset the balance set out in Article 2.2.1.1 and reduce the transparency and predictability of the remedy.

If the basic policy problem in the EU is competitive harm resulting from foreign subsidies, preferential access to inputs or structural support for overcapacity provided by the state, then applying WTO subsidy rules and the relevant countervailing measure system would be more appropriate; otherwise, an anti-dumping measure cannot be employed as it falls outside the scope of this arrangement. Articles 1 and 2 of the Agreement on Subsidies and Countervailing Measures specifically refer to the problems mentioned above, including whether there has been government financial support or income/price support, whether a benefit has been granted as a result, and whether the measure is particular [9]. Only after the above enquiries have been carried out is there a question of the legality of the countermeasure. The framework is not the same as the Anti-Dumping Agreement; it does not require a comparison of prices and generally does not need to use the exporter's own records, provided they meet the requirements of domestic accounting standards and reasonably reflect production costs [10]. Where the actual complaint is that state intervention has artificially lowered production costs, the Agreement on Subsidies and Countervailing Measures directly addresses this problem, but anti-dumping law does not.

The EU's laws are the same. Article 1(1) of Regulation (EU) 2016/1037 of the European Parliament and of the Council provides that, in cases where subsidised imports cause damage to EU industry, countervailing duties may be imposed to offset the subsidies granted directly or indirectly [11]. Thus, the distorting effect of state support is avoided, and an undistorted normal value is not to be recovered via an alternative benchmark. When the anti-dumping law is applied to control subsidies, it is no longer clear whether a subsidy should be deemed "dumping". A regime aiming for export-oriented pricing will also be a broad-ranging instrument of foreign economic reform. The Appellate Body's reasons for EU-Biodiesel (Argentina) show why that way is unreasonable. It has been confirmed that Article 2.2.1.1 does not permit an investigating authority to disregard a producer's records solely on the grounds that domestic input prices appear distorted, and further clarified that Article 2.2 requires the authority to determine the cost of production in the country of origin rather than substituting an abstract external benchmark [10].

If the EU wishes to address the problem of foreign subsidies or state-supported overcapacity, it should be more systematic in applying counteracting measures when the legal conditions are met, or it can explore negotiated reforms of the WTO trade remedy rules. The determination of the normal value should not be converted into an indirect method for subsidy adjustment. At the same time, it is not generally justifiable; this may cause confusion in the institutional boundary between the Anti-

Dumping Agreement and the Agreement on Subsidies and Countervailing Measures, and there is a risk of converting anti-dumping from a limited remedy for injurious dumping into a unilateral tool of economic restructuring.

4.2. Significant Distortions and Current Trade Conflicts

At the same time, there is also a serious problem of trade distortion in the current world situation. Many of the most contentious disputes today no longer fit the traditional model of dumping as firm-level price discrimination. These include state-owned finance, regulatory intervention in the input market, and industrial policies that are not clearly price-conduct or public-sectoral governance. The EU's turn to cost replacement can be seen as an attempt to express those structural problems in the language of Article 2.

The problem is that, when moving from structural issues to anti-dumping measures, such a system applied by one side may be considered unlawful. When the members start to change the cost structure of others according to a pre-agreed norm, it is no longer anti-dumping but a disagreement over economic models. That change is damaging. It is likely to lead to a cycle of escalation, more litigation, and damage the unified system of trade remedies [4].

4.3. WTO Legal Responses

If the current way of handling serious distortions by the EU results in legal problems, then the solution is not to expand the written content of Article 2 of the Anti-Dumping Agreement.

The three components of a coordinated response are as follows: First, Article 2.2.1.1 should be interpreted strictly, and the requirement that producers' records reasonably reflect costs should be understood as a test of whether those records reflect the actual costs of the investigated products, rather than a test of whether the investigating authority believes the costs have been formed under undistorted market conditions. Secondly, if the root cause is indeed the effect of state intervention, such as subsidies, preferential access to inputs or state-supported overcapacity, then the Agreement on Subsidies and Countervailing Measures is more suitable than anti-dumping law. This will keep the separation of dumping control and subsidy regulation and avoid making the determination of normal value an indirect tool for correcting industrial policy. Thirdly, the continuous dispute over a particular market situation and cost adjustment suggests that WTO members may need to clarify, through negotiation or authoritative interpretation, the scope of cost substitution allowed under Article 2 of the Anti-Dumping Agreement. The above clarifications will better meet the demands of the current trade environment and maintain the stability and legitimacy of the anti-dumping system. Therefore, the correct way forward is not to restore the distorted normal value by one-sided means, but to preserve the binding force of Article 2 and address broader structural distortions with legal instruments specially designed for this purpose [12].

5. Conclusion

After 2016, the EU moved away from the method of using a proxy country and introduced substantial distortions to address a policy problem of determining the "normal value" when domestic prices and costs have been altered by government intervention. The ADA addresses this problem by allowing some flexibility in a rule-based system, but it does not grant investigating authorities the power to change the anti-dumping methodology arbitrarily. The limits of the scope for legitimate discretion are set by the primacy of exporters' records in Article 2.2.1.1, the disciplined evidentiary reasoning required by EU-Biodiesel, the limited function of particular market circumstances, and the fairness logic of Article 2.4. Therefore, the authorities may address specific issues of representativeness and reliability in the case. Other than those, a cost-replacement approach has been adopted instead of what the ADA intended to achieve.

At the same time, this case also sheds light on the purpose of anti-dumping in the current trade system. Harmful anti-dumping measures must meet WTO rules. It is not a good general-purpose

instrument of economic regulation or an address for the comparative advantage induced by national policy choices. If the members want to expand the scope of the remedy to address the structural distortions more directly, they can use the legal path of negotiation for reform rather than unilateral reinterpretation. Until then, to maintain the predictability and fairness of Article 2 of the ADA, a technical legal solution is needed to preserve the credibility of trade remedies in the WTO legal system.

With the continuous reform of the world economy and industrial policy by governments around the world, a major source of trade disputes under the WTO regime will remain concerns over cost reduction and value over-the-counter transactions. Therefore, it is gradually necessary for the parties to establish rules of procedure for anti-dumping through multilateral talks rather than introducing new rules unilaterally.

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