The Intractable Problem of Some WTO Member States Inflating the Size of Dumping Duties on Imports from China

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Failure of WTO Members to Conclude Trade Negotiations

- Since the conclusion of the Protocols on Telecoms Services and on Financial Services in 1997/1998, WTO Members have not agreed on any liberalization of market access in:
  - Non- Agricultural Market Access
  - Agricultural Trade
  - Trade in Services
- almost reaching agreement in July 2008 but have not been close since then.

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Failure of China to Contribute Proposals for Trade Liberalization to WTO Negotiations

- **To date, China has not taken a leadership role in making proposals for trade liberalization; China has not authored any proposals in WTO negotiations for the general approach and ambition of trade liberalization for all WTO Members including itself.**
- China had signed onto a G20 proposal on agriculture that asked others but not the G20 to liberalize
- By July 2008 China had negotiated itself into a position under the draft Doha Round agreements in which it would hardly have to liberalize anything.
- China's biggest contributions to the WTO have been arrangements among LDCs, and among Acceding Members but these mostly help certain countries to avoid trade liberalization – following the old (EU) approach of building a constituency of countries that can be relied on not to push for too much liberalization from China (or in the EU case, a constituency of ACP countries that can be relied on not to push for the EU to liberalize agricultural trade)
- **China has frequently claimed it was pushed to hard in its accession negotiation but this claim has to be considered in the context of China's accession negotiation delivering to China all of the accumulated market access that other WTO members had granted over the previous 53 years. China received market access and China gave market access. There was a balance of obligations and concessions.**

Is China getting the balance of obligations and concessions that it negotiated in 2001?

- Chinese exporters are regularly having inflated anti-dumping duties imposed on their exports to a number of countries especially the United States, the EU customs union, and Australia.
- Is this detracting from the negotiated balance of obligations and concessions?
- If so, is that a factor which at least partially explains China's failure to take a leading role in proposing trade liberalization in multilateral negotiations in the WTO.

What are anti-dumping duties?

- WTO Members are allowed to impose antidumping duties (in addition to the maximum, that is, bound rate of import duties permitted for that country for that product) in response to a firm in another country price discriminating between its higher priced domestic sales and low priced export sales, where the dumped export sales are causing material injury to a domestic industry producing the like product.
- Dumping duties can be as big as, and no bigger than, the margin of dumping between higher priced domestic sales and low priced export sales.
- An anti-dumping duty is a response by an importing country to an action of a private firm in an exporting country (not a response to an action of a foreign government)
- The WTO allows responses to subsidies of foreign governments in a different way, using countervailing duties.

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Usually a Margin of Dumping is

- Exporter's prices in domestic sales in the exporter's country (normal value)
- - Less
- Exporter's prices in export sales to importing country (export price)
- = Margin of dumping
- = maximum permissible antidumping duty

But USA does and EU used to determine the Margin of Dumping for imports from China as:

- Constructed cost of production in a selected surrogate country (normal value) (s773(c) of US *Tariff Act of 1930*) (*EU Regulation 2016/1036* (the Basic Regulation) Article 2(7))
- - Less
- Exporter's prices in export sales to importing country (export price)
- = Margin of dumping
- = maximum permissible antidumping duty

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Why?

- Because, in the US law, China is designated as a "Non-Market Economy" and, in the EU law, because the particular product was not proved to have been produced and sold in 'Market economy conditions"
- Prices in China are unreliable because of the intervention of the government in the economy;
- So cannot make a comparison between an exporter's prices in domestic sales in the exporting country and the exporter's prices in export sales. Need to ask why not?

Does that make sense?

- If an individual firm is operating in a market in which the prices of various inputs and costs are influenced by government policies, the individual firm can still choose either:
  - To sell at the same price in domestic sales and export sales (not to dump); or
  - to sell at lower prices in export sales than in domestic sales (to dump).
- So regardless of the presence of governmental interventions, it is still necessary that the method of determining the existence of dumping and the size of dumping margins can provide a reliable indication of whether the exporter is or is not dumping (selling at a lower price in export market than in domestic market), and a reliable indication of the size of any dumping margin.
- The problem with comparing a constructed price based on costs in a surrogate country with the export price is that such a comparison does not provide any useful indication of whether the exporting firm is price discriminating between domestic sales and export sales. (but it does result in a bigger dumping duty than if domestic prices were compared with export prices)

Is NME Methodology WTO consistent?

- Is it WTO consistent
- to work out the margin of dumping using a comparison between:
- A Normal Value which is a constructed cost based on costs in a selected surrogate country
- And
- Export prices?
- (that is, to use Non-Market Economy Methodology, or NME methodology)

GATT Article VI

(from the text of the original 1948 *GATT* text)

- Margin of dumping is price difference between the export price and:
- "the comparable price, in the ordinary course of trade for the like product when destined for consumption in the exporting country" (called the "normal price")
- or "in the absence of such domestic price", the margin of dumping is the price difference between the export price and either
- (i) the highest comparable price for the like product for export to any third country in the ordinary course of trade: or
- (ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit."
- (i.e., 2 alternative ways of determining the "normal price")

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GATT Art VI:1 has Footnote 2 (added in 1955)

- Provides an exception but only to a narrow class of countries: those with a substantial monopoly of their foreign trade and where all domestic prices are fixed by the State.
- FN2 to Art VI:1
- "It is recognized that, in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability for the purposes of paragraph 1, and in such cases importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate."

Commencement of WTO

- All WTO Members are bound by:
- GATT 1994 which includes the provisions of GATT 1947 which includes Article VI on antidumping; and
- *Agreement on Implementation of Article VI of the GATT 1994* (the *Anti-Dumping Agreement*)
- So Members are bound by both the provisions of GATT Article VI (as set out above) and the provisions of the *Anti-Dumping Agreement*

WTO *Antidumping Agreement*

- Article 2.1 sets out the general rule that dumping margins are the difference between export price and "the comparable price, in the ordinary course of trade, for the like product" in domestic sales
- Article 2.2 permits using a "cost of production in the country of origin" instead of the prices of domestic sales "when there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of sales in the domestic market of the exporting country, such sales do not permit a proper comparison …"
- Article 2.7 This article is without prejudice to the [2nd footnote] to GATT Article VI:1.

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WTO *Anti-dumping Agreement*

- Article 2.2.1 permitted, in limited circumstances, for sales in domestic market that are below cost not to be counted as being in the ordinary course of trade.
- Article 2.2.1.1 “For the purposes of paragraph 2, costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation provided that such records are in accordance with the [GAAP] principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration. … ”

WTO commenced 1 January 1995 but China did not become a member until 10 December 2001

- **So until 10 December 2001, WTO Members could charge any duties or charges they wanted on imports from China.**
- So the application of anti-dumping duties over and above ordinary customs duties on imports from China was not subject to WTO rules
- So certainly could not be WTO inconsistent for the USA to use non-market methodology in determining the margin of dumping – effectively determining the level of antidumping duties on imports from China.
- **Upon China becoming a WTO Member, other WTO Members would not be permitted to charge ordinary customs duties in excess of bound rates in China's Schedule and would not be permitted to charge antidumping duties in excess of those permitted under Article VI of the *General Agreement on Tariffs and Trade* and the WTO *Agreement on Implementation of Article VI of the GATT* (known as the WTO *Antidumping Agreement* or *ADA*).**

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When China acceded to the WTO,

- Some countries, particularly the USA, wanted to continue determining the margin of dumping by comparing Chinese export prices with constructed prices based on costs in a surrogate country instead of with prices in Chinese domestic sales;
- China wanted ordinary WTO rules to apply.
- The compromise was Article 15 of the *Protocol of Accession of China to the WTO* which permitted Members to use the Non-Market Economy methodology for Chinese imports for 15 years **until 10 December 2016**.

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Paragraph 15 of the Protocol provides:

- (a) In determining price comparability under Article VI of the GATT 1994 and the Anti-Dumping Agreement, the importing WTO Member shall use either Chinese prices or costs for the industry under investigation or a methodology that is not based on a strict comparison with domestic prices or costs in China based on the following rules:
  - (i) If the producers under investigation can clearly show that market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product, the importing WTO Member shall use Chinese prices or costs for the industry under investigation in determining price comparability;
  - (ii) The importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product.
- (d) Once China has established, under the national law of the importing WTO Member, that it is a market economy, the provisions of subparagraph (a) shall be terminated provided that the importing Member's national law contains market economy criteria as of the date of accession. In any event, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession. In addition, should China establish, pursuant to the national law of the importing WTO Member, that market economy conditions prevail in a particular industry or sector, the non-market economy provisions of subparagraph (a) shall no longer apply to that industry or sector.

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The 15 year transition period under article 15 of the Protocol for China's accession expired on 10 December 2016

- The 15 years under paragraph 15 expired on 10 December 2016.
- On 10 Dec 2016, the USA and the EU were continuing to apply Non-Market Economy methodology to antidumping investigations of imports from China.
- But both USA and the EU had made preparations for the possible inability to continue to use NME methodology ……

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US Tariff Act of 1930, section 773(a)(4)

- Usual method is under paragraph 773(a)(1)(B)(i): normal value is
- "The price … in the exporting country … in the ordinary course of trade"
- (a)(4) "If the administering authority determines that the normal value of the subject merchandise cannot be determined under paragraph (1)(B)(i) [by usual method using prices in domestic sales] , then … the normal value of the subject merchandise may be the constructed value of that merchandise, as determined under subsection (e).'

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Definition of "ordinary course of trade" in s771 of *Tariff Act of 1930* is amended by s504 of the *Trade Preferences Extension Act of 1915*

- The term "ordinary course of trade" means the conditions and practices which, for a reasonable time prior to the exportation of the merchandise, have been normal in the trade under consideration with respect to merchandise of the same class or kind. The administering authority shall consider the following sales and transactions, among others, to be outside the ordinary course of trade:
- …
- **(C) Situations in which the administering authority determines that the particular market situation prevents a proper comparison with the export price or constructed export price." [i.e., comparison of the Prices in domestic sales with the export price]**

- So if DOC finds there is a particular market situation, then there are no sales in the ordinary course of business
- Then under section 773(a)(4), DOC will find that the normal value cannot be determined under paragraph (1)(B)(i) [by usual method using prices in domestic sales] and can be determined using constructed value under section 773(e).

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Method of determining constructed normal value under section 773(e) of the *Tariff Act of 1930*

- Section 773(e) The constructed normal value is
- Section 773(e)(1) "the cost of materials and fabrication or other processing of any kind employed in producing the merchandise, …"
- Plus selling, general and administrative expenses
- plus allowance for profit.

- Constructed cost is normally based on the cost of inputs in the records of the exporter.
- Section 773(f)(1)(A) " Costs shall normally be calculated based on the records of the exporter or producer of the merchandise, if such records are kept in accordance with the generally accepted accounting principles of the exporting country … and reasonably reflect the costs associated with the production and sale of the merchandise. …"

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Method of determining cost of production under section 773(e) of the *Tariff Act of 1930* amended by s504 of the *Trade Preferences Extension Act of 2015*

- Section 773(e) the constructed normal value is
- Section 773(e)(1) "the cost of materials and fabrication or other processing of any kind employed in producing the merchandise, …"
- Plus selling, general and administrative expenses
- plus allowance for profit.

- **"For purposes of paragraph (1), if a particular market situation exists such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade, the administering authority may use another calculation methodology under this subtitle or any other calculation methodology. [inserted by s504]**

- **NOTE: The USA first used these provisions in a case involving imports from Korea. The USA has not used these provisions in the case of imports from Ch8ina. The US continues to apply its other provisions permitting the use of Non-Market Methodology.**

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What about the EU?

- EU also has a Basic Regulation.
- Normal value is based on prices in domestic sales
- Permits normal value to be based on constructed cost in limited circumstances
- Also has a default rule that constructed costs should be based on the records of the exporter with an exception where records do not reasonably reflect costs
- But with a specific provision for non-market economies – permitting normal value to be based on prices in a surrogate country
- The EU prepared for expiry of para 15 by preparing a revised basic regulation.

European Union Antidumping Regulation (EU 2016/1336) prior to 20 Dec 2017

- Article 2(1) normal value is normally prices in exporting country
- Article 2(3) Can use constructed cost of production instead of domestic prices if no or insufficient domestic sales or "because of the **particular market situation**, [domestic sales] do not permit a proper comparison"
- "A particular market situation for the product concerned within the meaning of the first subparagraph may be deemed to exist, inter alia, when prices are artificially low, when there is significant barter trade, or when there are non-commercial processing arrangements."
- Article 2(5) "**Costs shall normally be calculated on the basis of records kept by the party under investigation**, provided that such records are in accordance with the GAAP principles of the country concerned and that it is shown that the records reasonably reflect the costs associated with the production and sale of the product under consideration.
- If costs associated with the production and sale of the product under investigation are not reasonably reflected in the records of the party concerned, they shall be adjusted or established on the basis of the costs of other producers or exporters in the same country or, where such information is not available or cannot be used, on any other reasonable basis, including information from other representative markets."

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Significant WTO ruling during 2016 on when it is permissible not to use information in records of the exporter to work out the cost of productions

- EU had found that the intervention of the Argentine government in the market for soya beans was a particular market situation which justified the EU using constructed cost instead of prices of domestic sales in Argentina to determine the margin of dumping.
- EU had found that in constructing the cost of biofuel it did not have to use the information in the exporters' records as to the cost of acquiring soya beans since the records did not reflect the costs of soya beans because they deviated from representative benchmark world prices of soya beans.
- Panel finds the second part of the determination was a violation of Article 2.2.1.1

Did the exporters records "reasonably reflect the cost" of the input, soya beans?

- **Panel:** Article 2.2.1.1 permits departure from the records if the records do not reasonably reflect the cost actually incurred. Art 2.2.1.1 is not concerned with whether the recorded costs were reasonable.
- **Panel:** the fact that the cost of soyabeans recorded in the records of the Argentine exporters was less than international prices was not a basis for concluding that the exporter's records did not reasonably reflect the costs of soyabean and discarding the information in the exporter's records.
- AB agreed. Reports of Panel and AB adopted 26 October 2016. (WT/DS473/R & WT/DS473/AB/R)

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European Union Antidumping Regulation (EU 2016/1336) prior to 20 Dec 2017

- Article 2(7)(a) In the case of imports from non-market economies [FN: including Albania, Armenia, Azerbaijan, Belarus, Georgia, Kyrgyzstan, Moldova, Mongolia, North Korea, Tajikistan, Turkmenistan and Uzbekistan], the **normal value shall be determined on the basis of the price or constructed value in a market economy third country**, or the price from such a third country to other countries, including the Union, or, where those are not possible, on any other reasonable basis, including the price actually paid or payable in the Union, for the like product, duly adjusted if necessary to include a reasonable profit margin.
- An appropriate market-economy third country shall be selected in a not unreasonable manner, due account being taken of any reliable information made available at the time of selection. …"
- Article 2(7)(b) In anti-dumping investigations concerning imports from the People's Republic of China, Vietnam and Kazakhstan and any **non-market-economy** which is a member of the WTO at the date of the initiation of the investigation, the normal value shall be determined in accordance with paragraphs 1 to 6, if it is shown, on the basis of properly substantiated claims by one or more producers subject to the investigation and in accordance with the criteria and procedures set out in point (c), that market-economy conditions prevail for this producer or producers in respect of the manufacture and sale of the like product concerned. When that is not the case, the rules set out under point (a) shall apply.
- Article 2(7)(c) sets out criteria for determining whether market economy conditions prevail for a producer or producers.

- **In Dec 2017, a amendment removes the concept of Non-Market economy**
- Replaces Article 2(7). The new Article 2(7) applies only to non-WTO Members. This rule permits normal value to be determined on the basis of price or constructed value in a market economy third country.
- **Adds a new Article 2(6a), a rule that applies where significant distortions in the exporting country render it inappropriate to use domestic prices and costs to determine normal value**. This rule permits normal value to be determined on the basis of costs of production price or constructed value in a market economy third country

EU Regulation (EU 2016/1336 amended by 2017/2321 of 12 Dec 2017 in force 20 Dec 2017)

- Article 2(6a)(a) "In case it is determined … that it is not appropriate to use domestic prices and costs in the exporting country due to the existence in that country of significant distortions … the normal value shall be constructed exclusively on the basis of costs of production and sale reflecting undistorted prices or benchmarks …'
- The sources the Commission may use include:
- - corresponding costs of production and sale in an appropriate representative country with a similar level of economic development as the exporting country …; where there is more than one such country, preference shall be given … to countries with an adequate level of social and environmental protection;
- - if it considers appropriate, undistorted international prices, costs, or benchmarks
- 2(6a)(b) "Significant distortions are those which occur when reported prices or costs, including the costs of raw materials and energy, are not the result of free market forces, because they are affected by substantial government intervention. …"

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What about Australia?

- Australia used to say that since China was a non-market economy, then Margin of dumping
- is not domestic Chinese prices minus export prices
- But instead
- is the constructed cost of production in a selected surrogate country minus export prices

- In 2005, when Australia opened FTA negotiations with China, Australia agreed not to treat China as a "Non-Market Economy" any more and amended the *Customs Act*.
- But Australia has found other techniques to maximize the size of the margin of dumping:

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Australia changed to a different method of inflating the margin of dumping for allegedly dumped imports from China

- Australia has developed a practice of finding:
- that the existence of certain governmental interventions affecting the market or an upstream market means that there is a particular market situation which justifies determining normal value on the basis of constructed cost instead of prices in domestic sales; and
- Then that the existence of the governmental interventions also means that the information in the records of the exporter about the cost of inputs does not have to be used to work out the constructed cost because that information did not reasonably reflect the “competitive market cost” of those inputs.
- For example:

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E.g. ADC Final report REP177 (7 June 2012) in *Certain Hollow Structural Sections from China and other countries*

- Chinese Government policies affect the price of steel so there is a market situation which justified departing from determining normal value for the Chinese exporters on basis of prices in domestic sales and using constructed cost instead
- The amounts recorded in the records of the Chinese exporters did not reflect "competitive market costs" of the input steel so ADC did not have to use those amounts in working out the constructed cost of hollow Structural Sections.
- (Federal Court rejected the argument that these were errors of law in *Dalian Steelforce v ADC,* [2015] FCA 885.)

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ADC Final Report REP237 (3 June 2015) Alleged Dumping and Subsidisation of Silicon Metal Exported from the PRC

- That Chinese government policies distorted the price of input electricity So there was a market situation justifying departing from using prices in the domestic market to determine normal value of Silicon Metal and using Constructed Value instead
- The amounts recorded in the records of the Chinese exporters did not reflect "competitive market costs" of the input electricity so ADC did not have to use those amounts in working out the constructed cost of Silicon Metal.

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Response of Chinese government (Investigation on Imports of Silicon Metal, public file doc no 016, letter 18 April 2014)

- That Australian decisions using the concept of Particular Market Situation and the concept of reflecting competitive market costs violate WTO rules.
- From now on, in all future cases, China is not going to make any more submissions on these legal points and is not going to answer any questions from the ADC that relate to these issues
- China reminds Australia to take its international obligations into account.

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So that was the position when the 15 year period under Paragraph 15 of the Protocol expired on 10 Dec 2016:

- (a) In determining price comparability under Article VI of the GATT 1994 and the Anti-Dumping Agreement, the importing WTO Member shall use either Chinese prices or costs for the industry under investigation or a methodology that is not based on a strict comparison with domestic prices or costs in China based on the following rules:
  - (i) If the producers under investigation can clearly show that market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product, the importing WTO Member shall use Chinese prices or costs for the industry under investigation in determining price comparability;
  - (ii) The importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product.
- (d) Once China has established, under the national law of the importing WTO Member, that it is a market economy, the provisions of subparagraph (a) shall be terminated provided that the importing Member's national law contains market economy criteria as of the date of accession. <u>In any event, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession.</u> In addition, should China establish, pursuant to the national law of the importing WTO Member, that market economy conditions prevail in a particular industry or sector, the non-market economy provisions of subparagraph (a) shall no longer apply to that industry or sector.

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Did para 15 prohibit use of NME Methodology after expiry of the 15 years?

- The text came from a US – China bilateral agreement in 1999.
- It was copied over into the Protocol of Accession in 2001.
- **The drafting of par 15 is WEIRD**. It is an exception to usual WTO rules but it is not drafted in terms of when WTO rules will not apply. Instead it is drafted in terms of the concept of "non-market economy" that appear in US and EU domestic law but not in WTO law.
- Reports from the US executive to the US legislature, soon after the Chinese accession in 2001, indicated that the US would be allowed to use NME methodology until Nov 2016.
- As the date came closer, some commentators close to the US steel industry began to circulate arguments that the 15 year phase out provision in the Protocol did not actually prohibit the US from using NME methodology after November 2016. The fact that such arguments only surfaced toward the end of the 15 year phase out period was politely ridiculed by a conservative trade policy scholar, Claude Barfield.

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Did para 15 prohibit use of NME Methodology after expiry of the 15 years?

- "Under the terms of China's accession to the WTO in 2001, because of the size of the Chinese markets and existing price distortions in the domestic economy, it was agreed that for 15 years China would be subject to NME status — after that, it would graduate to market status. In the decade that followed, no WTO member challenged this interpretation of the accession agreement. Only in the past few years, led by lawyers for companies and sectors demanding continued protection, has this agreement been challenged."
- (from Claude Barfield, "Robert Lighthizer and the Cataclysmic threat to the WTO" (AEIdeas, 23 June 2017, American Enterprise Institute) at http://www.aei.org/publication/robert-lighthizer-and-the-cataclysmic-threat-to-the-wto/

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On 12 December 2016 , China initiated WTO dispute settlement against the US by requesting consultations: *United States – Price Comparison Methodologies*, WT/DS515

- China cited the US law providing for application of NME methodology to imports from China
- Section 773(1) of US *Tariff Act* – provided for countries designated by the US as a "non-market economy": if Department of Commerce finds that information available does not permit determination of normal value using usual methods, then DOC can use value of production in a surrogate country.
- **China complains that the US laws violate several provisions of the Antidumping Agreement and GATT Article VI, and were no longer justified under paragraph 15.**
- So far China has not requested the establishment of a Panel on this complaint against the US.

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On the same day, 12 December 2016, China initiated WTO dispute settlement against the EU: *European Union – Measures Related to Price Comparison Methodologies*, Request for Consultations by China, WT/DS516, 15 December 2016

- China cited the EU regulation that provided for application of NME methodology to imports from China:
- *EU Regulation 2016/1036* (the Basic Regulation) Article 2(7) provides that for imports from China: if the producer cannot establish that "market economy conditions prevail in the manufacture and sale of the product then normal value shall be determined on basis of prices or constructed value in a surrogate "market-economy" third country instead of under the ordinary rules that apply under Article 2(1)(to (6).
- 9 November 2016, the European Commission made a proposal to EU Member States to amend Regulation 2016/1036 to remove the special rules for non-market economies and establish new rules for situations involving government intervention.
- **On expiry of paragraph 15(a)(ii) on 10 December 2018, the EU had not amended the Regulation.**
- **China complained that EU Regulation 2016/1036 provisions using NME methodology violate provisions of the Antidumping Agreement and GATT Article VI and were no longer justified under paragraph 15.**
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Different views on whether para 15 meant that NME methodology was prohibited after 10 December 2016

- E.g.
- Edwin Vermulst, Juhi Dion Sud & Simon J. Evernett, "Normal Value in Anti-dumping Proceedings Against China Post-2016: Are Some Animals Less Equal Than Others", 11(5) *Global Trade Cust J.* 224-240 (2016).
- Saying it would be disingenuous to suggest that China agreed to NME methodology forever
- Contrast with:
- Jorge Miranda, "A Comment on Vermulst's Article on China in Anti-Dumping Proceedings after December 2016" *Global Trade and Customs Journal*
- Saying it would be disingenuous and delusional to suggest that Members would give up NME methodology if they still needed it.

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The unissued Panel Report in DS516 and the lapse of the Complaint against the EU

- It is usual for a Panel to give its report to the parties to give them an opportunity to comment before releasing the Report to all WTO Members.
- Upon receipt of the report, China suspended Complaint No 516 against the EU.
- 12 months later, the Complaint lapsed.

ADC first used same method for a country other than China in ADD on A4 Paper from Indonesia

- Preliminary Affirmative Determination Nov 2016 (PAD341A)
- Final Determination April 2017 (REP341)
- It was an application for dumping duties on imports of A4 paper from Indonesia.
- **The ADC said Intervention of the Indonesian government in the market for timber logs distorted the price of pulp which was a "market situation" justifying using constructed cost instead of domestic prices to determine dumping margins on exports of A4 paper**
- **And that the deviation of costs of wood pulp in records of Indonesian paper producers from regional benchmark prices of wood pulp justified departing from using the exporter's recorded costs of pulp in determining the cost of production of A4 paper.**
- May 2017 - Indonesian exporters appealed both points to the Australian Anti-dumping Commission in May 2017
- August 2017 – Indonesian government requested consultations with the Australian government under WTO Dispute settlement
- October 2017 – Australia holds consultations with representatives of Indonesia, also US, EU and China participating as 3rd parties
- 9 March 2018 – Minister adopted the ADRP report rejecting the appeal on those points (followed Fed Court decision in *Dalian Steelforce*)
- 16 March 2018 – Indonesia requests establishment of a panel to decide whether Australia is in breach of ADA Article 2.2 (determination of particular market situation) and ADA Article 2.2.1.1 (that exporters records do not reasonably reflect costs)

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WTO Panel (DS529) finds Australia's resort to Constructed normal Value in breach of the WTO Agreement but …

- To use the "particular market situation", the AD authority assess two steps:
- - existence of a particular market situation; and
- - that the PMS prevented a proper comparison between prices in domestic sales and prices in export sales.
- That Australian ADC had not dealt with the 2nd step, so Australia's departure from using prices in domestic sales as the normal value breached Article 2.2
- But Panel found it unnecessary to decide what is meant by preventing a proper comparison between prices in domestic sales and prices in export sales

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But

- Indonesia also asked Panel to find that a situation affecting the cost of an input for production of all goods regardless of whether they end up being sold in domestic market or export market could never be a situation that prevents a proper comparison
- Panel did not agree
- Even though the Panel said it was unnecessary to decide the precise meaning of preventing a proper comparison, the Panel engages in some imprecise discussion of how a proper comparison might or might not be prevented

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WTO Panel (DS529) finds Australia's calculation of cost of input pulp in breach of the WTO Agreement but …

- ADC had found that the cost of pulp in records of Indonesian exporters was not a "competitive market cost" so ADC did not have to use that cost in calculating the cost of A4 copy paper.
- Indonesia argued that the departure from using cost in exporters records was not permitted under either of the two provisos in ADA Article 2.2.1.1, first sentence
- 1st proviso – applies only if exporters records do not comply with accounting standards
- 2nd proviso – applies only if exporter's records do not reasonably reflect what the cost the exporter actually incurred (as stated in *EU – Biofuels from Argentina* case].
- And Article 2.2.1.1 did not allow for any other circumstances in which the AD authority could depart from using the costs in the exporters' records.
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Art 2.2.1.1, 1st sentence: Australia's argument in A4 paper case

- "For the purposes of paragraph 2, costs shall ***normally*** be calculated on the basis of records kept by the exporter or producer under investigation provided that
  - [proviso 1] such records are in accordance with the [GAAP] principles of the exporting country and
  - [proviso 2] reasonably reflect the costs associated with the production and sale of the product under consideration. … "
- Australia argued that Australia's decision was not made under the exception in proviso 2
- Australia's decision was made under the exception provided for by the presence of the word "normally".
- Indonesia argues that the word "normally" does not authorise any departure from using the costs in the exporter's records beyond the circumstances covered in the two provisos
- Panel agreed with Australia but said that for an AD authority to claim circumstances were covered by the exception under the word "normally" for situations not covered by the two provisos, it was necessary for the AD authority to first decide that the circumstances did not fall within either proviso (1) or proviso (2). Australia had not done that so the ADC's decision to depart from using the costs in the exporter's records was a breach of Article 2.2.1.1.
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Practice of the Australian Anti-Dumping Commission since DS529

- For decisions to depart from using domestic prices and to resort to a constructed normal value upon the basis of the "particular market exception" in Article 2.2, now the ADC does divide the decision into two clear steps:
- - is there a PMS? – are there government interventions which distort the price of an input;
- - does the PMS prevent a proper comparison between prices in domestic sales and prices in export sales – the ADC assesses (1) how the distorted price of the input affects competition between suppliers of the product in the domestic market; and (2) how the distorted price of the input affects competition between suppliers of the product in the export market. ADC says if (1) is different to (2), then the PMS prevents a proper comparison between
- In essence:
- ADC reasoning → ADC decisions is still:
- GARBAGE IN -→ GARBAGE OUT

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China's Response to the Problem of Inflated Dumping Margins:

- China's Antidumping Regulation also contains a provision authorising departure from basing Normal Value on Price in Domestic sales (governed by ADA Article 2.2 set out above).
  - Article 4(2) where … the price and the quantity of [domestic] sales do not permit a fair comparison, the normal value shall be the comparable price of [exports to a 3rd country] or the cost of production of the like product in the country (region) of origin plus a reasonable amount for expenses and for profits.
- And, in Article, a provision for resort to best available information in cases where the exporter does not supply adequate information in MOFTEC's investigation (governed by ADA Article 6.8)
  - Article 21, 2nd sentence: "In the event that any interested party does not provide authentic information and relevant documentation, or does not provide necessary information within a reasonable time limit, or significantly impedes the investigation in other ways, the Ministry may make determinations on the basis of the facts already known and the best information available."

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Response (1): PRC MOFCOM findings in Investigations of Alleged Dumping of Imports from the USA

- In some investigations of alleged dumped goods imported from the USA, the PRC MOFCOM has found that various government interventions by US governments (affecting upstream markets) have the effect that prices in domestic sales (of the like product to the allegedly dumped product) in the US do not permit a fair comparison with prices in export sales, so MOFTEC can use a Constructed Cost of production as the Normal Value instead of basing Normal Value on prices on domestic sales in the US.
- 1st time in June 2018, MOFTEFC Notice No 43 imposing duties on styrene from US and other countries
- Also MOFTEC Notice 40 (rubber), Notice 80 (Hydriodic Acid), Notice 81 (Ethanolamines)

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Response (2): PRC MOFCOM Investigations of Alleged Dumping of Imports of Barley from Australia

- 9 Oct 2018 China Chamber of International Commerce filed an application for an Investigation of alleged dumping of barley from Australia. The application alleged that various government intervention in the market for barley constituted a situation that rendered prices in domestic sales of barley in Australia from being comparable with prices in export sales.
- Australian exporters of barley had to consider whether MOFTEC might use the same legal mechanisms that the ADC uses with respect to imports from China.
- 18 May 2020 The Final Determination by MOFTEC (No 14 of 2020) did not decide that MOFTEC could depart from basing Normal Value because of a "market situation" preventing proper comparison.
- Instead MOFTEC relied on Article 21 of the PRC Dumping Regulation finding that Australian exporters and producers had not responded satisfactorily to MOFCOM's requests for information and for that reason MOFCOM found it could determine normal value upon the basis of the best information available. Used the price in export sales from Australia to Egypt
- MOFTEC found a dumping margin of 76% - government imposed an anti-dumping duty of 80%.

- Australia brought WTO Complaint:
- *China – ADD on Barley from Australi*a WT/DS598 (requested consultations on ; requested establishment of a panel
- Australia's submissions to the panel are publicly available. China's submissions are not publicly available.

- My prediction: Panel will find <u>at least</u> one violation: that China violated ADA Article 6.8 in dismissing information provided by exporters / products and resorting to other "best available information" so Panel will request China to bring its AD measures into conformity with the WTO AD Agreement.

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More of Response (2): PRC MOFCOM Investigation of Alleged Dumping of imports of Bottled Wine from Australia

- 6 July 2020 China Alcoholic Drinks Association applies to MOFTEC for an investigation of alleged dumping of bottled wine from Australia. The application alleged that various government intervention in the market for wine constituted a situation that rendered prices in domestic sales of wine in Australia from being comparable with prices in export sales. The application (at para 5.1(1)(2)) alleged that "there are special market conditions in the domestic wine market in Australia resulting in incomparable production costs and prices" and asking MOFCOM to ensure that "the production cost and price data used in determining the normal value are not distorted by the market and are comparable."
- Australian exporters of wine had to consider whether MOFTEC might use the same legal mechanisms that the ADC uses with respect to imports from China.
- 26 March 2021 The Final Determination by MOFTEC sets out a detailed assessment of the impacts of Australian government measures in a manner similar to the way that Australian ADC determinations assess the impacts of Chinese government measures. MOFTEC found that the Australian wine market was affected by some non-market factors but declined to make a finding on whether there was a "special market situation".
- Instead MOFTEC relied on Article 21 of the PRC Dumping Regulation finding that Australian exporters and producers and the Australian government had not responded satisfactorily to MOFCOM's requests for information and for that reason MOFCOM found it could depart from basing normal value on prices in domestic sales and could determine normal value upon the basis of the best information available.
- MOFTEC found dumping margins for sampled producers between 116% and 175%; for all other cooperative producers 167%; for all others 218%.

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More of Response (2) China – ADD on wine from Australia DS602

- Australia requested consultations on and requested the establishment of a Panel on the Chinees duties on wine.
- Australia's submissions are publicly available' China's are not.
- Australia's arguments that China has breached Article 6.8 in dismissing information submitted and resorting to best available information look strong. I predict Panel will find China in breach of Article 6.8 and for that reason alone will rule that China should bring its measures into compliance.
- Much harder to predict outcomes on other contentious issues:
- - the selection of the sample companies to be examined,
- - the choice of products to be compared with each other; Anti-dumping cases do not usually involve markets with such a high level of product differentiation.
- - the determination of the all others rate for the non-sampled companies.

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Response (3): China's WTO Complaints re 3 old ADC decisions on departing from using information on cost of inputs in records of exporters

- *Australia – AD & CVD on Certain Products from China* (complaint by China) WT/DS603, Panel requested on 13 January 2022
- Alleged that Australia breached Article 2.2.1.1., 1st sentence by departing from using the information as to the cost of inputs in the records of the exporters to calculate constructed cost in 3 cases:
  - Wind Towers in ADC Final Report 221, 21 March 2014.
  - Stainless Steek Sinks in ADC Final Report 238, 19 February 2015.
  - Railway Wheels in ADC Final Report 466, 1 March 2019.
- I predict the Panel will find Australian in breach of Article 2.2.1.1 for the same reasons as a breach of that provision was found in the Australia – ADD on A4 paper from Indonesia case. Panel will order Australia to bring the AD measures into conformity with the AD Agreement.

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What is China's Strategy for Responding to these Legal Techniques for Inflating Dumping Margins?

- I do not know BUT:
- May pursue WTO litigation or may pursue negotiations
- After winning DS603 against Australia, PRC might challenge another Australian decision; or might challenge a similar decision in the EU
- PRC might request establishment of panel in USA – DS515 – some risks:
  - We don't' know the reasoning of the panel in the complaint against the EU, DS516.
  - Reasoning in US submissions to the lapsed panel proceedings in the case against the EU argue that even without para 15 of the Protocol, GATT / WTO law had already limited the usual AD rules to market economies. I view these arguments as wrong but we do not know whether the unreleased panel report in DS516 accepted the US arguments.
  - For the US, even the proposition that the object and purpose of the ADA rules is to ascertain the existence of price discrimination may be contentious. In my opinion, US would be wrong but this issue makes requesting a panel in DS515 risky.

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Is it just China's Problem? No. The whole WTO Membership needs to Address this Problem

- The whole membership needs China to contribute more in proposals for all WTO Members to reduce import barriers and other trade liberalization
- The resolution of this significant disagreement about the calculation of the size of dumping duties is probably a necessary condition to inducing China to propose trade liberalization in WTO negotiations
- The whole membership needs this conflict to be resolved because if it is left unresolved, China will not see a benefit in reciprocal liberalization, won't make significant proposals for liberalization and Members won't be able to conclude of a round of multilateral trade negotiations.

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The Intractable Problem of Some WTO Member States Inflating the Size of Dumping Duties on Imports from China

Dr Brett Williams
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These slides available from www.williamstradelaw.com at www.williamstradelaw.com/papers_materials.html

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