Why is the USA threatening to close down WTO dispute settlement? One explanation

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For business firms concerned about behaviour of foreign governments restricting market access

- It has been possible to ask your government to bring a complaint against the other government in WTO dispute settlement.
- The USA is threatening to close that down by refusing to agree to the appointment of new members of the WTO Appellate Body as the terms of existing Members expire.
- Since 11 Dec 2017 , only 4 AB Members plus 2 continuing to serve on appeals to which they were appointed before expiry of their term
- 30 Sept 2018 – expiry of term of Mr Servansing, leaving only 3 Members
- 10 December 2019 – expiry of terms of Mr Bhatia and Mr Graham, leaving only 1 Member
- Why would the USA want to shut the system down?

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What reasons does the USA give?

- That it disagrees with the AB deciding that Members can continue to serve on appeals to which they were appointed before the expiration of their term – it should be a decision of the WTO Dispute Settlement Body;
- So it refuses to vote for appointing new AB Members until resolution of the disagreement about who can make decisions to allow AB Members to continue working on appeals to which they were appointed before the expiration of their term.

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Other reasons for animosity to WTO

- US concerns about WTO AB decisions going beyond what is necessary for resolving the dispute, deciding on issues that the parties have not appealed, adjudicating on what is legal under domestic law, and applying legal standards that neither party has argued.
- Concerns that the state of trade liberalization achieved through the WTO is not reciprocal
- Or a general shift from multilateralism to bilateralism
- Or a desire that it should be the US which writes the rules of the world trading system
- Or …

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Is there another explanation?

- Or Is It just ordinary protectionist conduct: a group of local producers pressuring the US government to act in their interest
- that USA manufacturers, particularly steel and aluminium manufacturers, are worried that WTO Dispute Settlement rulings will find that that methods used by the USA for determining the size of antidumping duties are not WTO consistent.

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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 prices 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 sales in export sales to importing country (export price)
- = Margin of dumping
- = maximum permissible antidumping duty

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But USA determines 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*)
- - Less
- Exporter's sales in export sales to importing country (export price)
- = Margin of dumping
- = maximum permissible antidumping duty

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Why?

- Because China is a "Non-Market Economy"
- Prices in China are unreliable because of the intervention of the government in the economy;
- So a comparison between an exporter's prices in domestic sales in the exporting country and the exporter's prices in export sales does not indicate whether that exporter is dumping, i.e., price discriminating between domestic sales and export sales.

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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.
- 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 a useful indication of whether the exporting firm is price discriminating between domestic sales and export sales.

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Is NME Methodology WTO consistent?

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

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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."

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Commencement of WTO

- All WTO Members are bound by:
- GATT 1994 which includes the provisions of GATT 1947 which includes Article VI on antidumping
- *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*

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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. … "

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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 the level of antidumping duties on imports from China.
- Upon China becoming a WTO Member, other WTO Members could not charge ordinary duties in excess of bound rates and could not charge antidumping 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 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 GATT rules to apply.
- The compromise was Article 15 of the *Protocol of Accession of China to the WTO* which permitted Members to use the surrogate pricing method for Chinese imports for 15 years until 11 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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After China's accession, several WTO Members granted market economy status to China

- Including Australia in 2005
- 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.

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On 12 December 2016 , China filed a request for consultations with the USA under WTO dispute settlement *United States – Price Comparison Methodologies*, WT/DS515

- 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.
- Under s773(18)(c) a determination that a country is a "non-market economy" stands until the DOC revokes it.
- On 12 December, 2016, the USDOC had not revoked the determination.
- 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.
- ***United States – Measures Related to Price Comparison Methodologies***, Request for Consultations by China, WT/DS515/1, 15 December 2016.
- 29 March 2017, USDOC initiates a review of whether China is a market economy
- 30 October 2017, USDOC finds that China is still a non-market economy
- China reissued its Request for Consultations so that it also challenges the 30 October 2017 finding.

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US threatens cataclysmic consequences for the WTO if it loses

- June 2017 United States Trade Representative Robert Lighthizer tells US Senate Finance Committee that he has told the Director-General of the WTO that it would be cataclysmic for the WTO to rule in favour of China in this case.
- "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/
- 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 also filed a Request for Consultations with the European Union

- 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 economics 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.
- On 15 December 2016, China filed a complaint EU Regulation 2016/1036 violates provisions of the Antidumping Agreement and GATT Article VI and were no longer justified under paragraph 15.
- *European Union – Measures Related to Price Comparison Methodologies*, Request for Consultations by China, WT/DS516, 15 December 2016.

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Prospect of USA Losing WTO case on Para 15 of the Chinese Accession Protocol

- In China's complaint against the United States ***(US – Price Comparison DS515),*** China has not yet requested establishment of a Panel.
- In China's complaint against the European Union ***(EU –Price Comparison*, DS516**),
- 9 March 2017, China issued a request for establishment of a panel proceedings 15 December 2016.
- 3 April 2017 WTO DSB established a Panel
- 10 July 2017 WTO Director-General composed the Panel.
- 14 November 2017 – China and EU 1st written submissions
- 21 November 2017 - US 3rd party submission
- 6 December 2017 – 1st meeting with Panel & Oral submissions

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If the WTO rules that WTO Members must cease resort to NME Under the Protocol

- That the expiry of Paragraph 15(a)(ii) means that Paragraph 15 no longer provides a justification; that is, the failure to establish market economy conditions is no longer a justification for using a methodology that is not based on a strict comparison with domestic prices or costs in China
- Will USA and other WTO Members stop using costs in surrogate countries as the basis of determining normal value to be compared with export prices to determine dumping margins?
- Both US and EU are trying an alternative justification.

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

- Usual method is under paragraph 773(a)(1)(B)(i):
- "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 of constructed 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 <u>particular market situation</u> exists such that the cost of materials and fabrication or other processing of any kind does not accurately <u>reflect the cost of production</u> 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]**

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The amendments from s504 first used by USDOC in *Nexsteel* case 2017

- Concerned a review of a US antidumping duty on imports of Oil County Tubular Goods ('OCTG')
- 80% of the cost of making OCTG is the intermediate input called Hot Rolled Coiled steel ('HRC')
- Department of Commerce finds that 4 factors in Korea affect the price of HRC in Korea (making it lower than it would otherwise be)

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DOC finds there is a "Particular Market Situation"

- (1) low price imports of HRC from China into Korea
- (2) Korean government subsidises domestic production of HRC;
- (3) strategic vertical alliances between HRC suppliers in Korea and OCTG Products distort the cost of HRC;
- (4) interventions of the Korean government affect the Korean electricity price.
- Considered together, distort the price of HRC, which is a distortion in the cost of production of OCTG, which amounts to a "Particular Market Situation"

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1st Consequence of finding a Particular Market Situation

- The PMS prevents " a proper comparison with the export price".
- Since the revised definition of ordinary course of trade excludes sales in a situation where there is a PMS that prevents "a proper comparison with the export price"
- Then there are no domestic sales in ordinary course of business
- So under s773(e) normal value cannot be determined using domestic sales and must be determined on basis of a **constructed normal value**.
- **But the test under WTO Law (ADA Art 2.2) is that use of constructed cost instead of prices in domestic sales is permitted only where there is a particular market situation that means that use of prices in domestic sales would not permit a proper comparison between prices in export sales and prices in domestic sales.**
- All of the factors relied on by USDOC would have had an equivalent impact on all units of production regardless of whether they were sold in domestic market or export market, so they would not have had any impact on the margin of dumping arrived at by comparing the prices in domestic sales with prices in export sales.
- So arguably they do not constitute a particular market situation within the meaning of ADA Article 2.2 – if not then the USDOC decision to depart from using prices of OCTG In Korea violates article 2.2.

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2nd Consequence of finding a Particular Market Situation

- There is a PMS such that the cost of materials and fabrication or other processing … does not accurately reflect the cost of production in the ordinary course of trade
- Under s773(e)(1), if there is such a PMS.
- Then the cost of materials and fabrication or other processing can be determined using "any other calculation methodology"

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USDOC Determined Constructed Value of OCTG

- **Used the cost of their input HRC recorded by the Exporters of OCTG, adjusted upward by the amount of the Korean subsidy on HRC**;
- Plus allowance for selling, general expenses
- Plus allowance for profit
- **But the test under WTO law (ADA Art 2.2.1.1) is** that the cost of HRC must be based on the amounts in the records of the exporters of OCTG unless these do not reflect cost of HRC; arguably meaning unless the records do not reflect what the Korean exporters actually paid for the HRC;
- USDOC has departed from basing the cost of HRC on the exporters records, not because the amounts do not reasonably reflect the actual amounts that Korean exporters paid for the HRC but because the amounts in the exporters records do not reflect what those Korean exporters would have paid in the absence of a government distortion – under Art 2.2.1.1, that is not a justification for departing from using the amount in the exporters records.
- So USDOC decision to depart from using the exporters actual cost of HRC may be a violation of article 2.2.1.1.

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Will Korea (or another country) challenge application of this method of determining dumping margins?

- The Korean Exporters have challenged the DOC decision before the US Court of International Trade.
- Even if the Korean exporters are unsuccessful before the USCIT, it remains possible that Korea will bring a WTO challenge alleging the USDOC decision:
  - breaches art 2.2 because there is no particular market situation; and
  - breaches art 2.2.1.1 because they have departed from using the information about costs in the records of the exporter for a reason not covered by art 2.2.1.1.
- (if not Korea in this case, then some other country in another case – DOC has made similar findings against Argentina and Indonesia on biofuels; but not against China because for imports from China, USDOC is using NME)

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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 no reasonably reflect costs
- But with a specific provision for non-market economies – permitting normal value to be based on prices in a surrogate country
- But unlike the USA, the EU prepared for expiry of para 15 by preparing a revised basic regulation.

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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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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

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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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So what is the current position with the EU?

- The EU has removed its old Non market economy methodology.
- It is still defending the WTO complaint brought by China but the practical significance of a loss would only affect the transitional application of the old NME test in matters where investigations were commenced under the old law.
- Under the new regulation:
- The EU may depart from using prices in domestic sales to determine normal value where it is not appropriate to use them because of the existence of significance distortions
- But the WTO rule (ADA Art 2.2) is that departure from using prices in domestic sales is permitted only where there is a particular market situation such that it is not possible to compare prices in domestic sales with prices in export sales
- If the EU bases a departure from using prices in domestic sales upon the existence of significant distortions which do not have any impact on the margin of dumping arrived at by comparing the prices in domestic sales with the prices in export sales, then it may violate Article 2.2
- If the EU uses a constructed cost method, the EU may depart from using the cost of an input recorded in the exporters records if that recorded costs does not reflect the undistorted cost.
- But the WTO rule (ADA Art 2.2.1.1) is that departure from using costs in the exporter's records is permitted only if those recorded costs do not reflect cost of the input; arguable meaning unless the records do not reflect what the exporters actually paid for the input;
- If the EU departs from basing the cost of an input on the exporters records, not because the amounts do not reasonably reflect the actual amounts that the exporters paid for the input but because the amounts in the exporters records do not reflect what those exporters would have paid in the absence of a government distortion – under Art 2.2.1.1, that is not a justification for departing from using the amount in the exporters records.
- So any such EU decision to depart from using the exporters actual cost of an input may be a violation of article 2.2.1.1.

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Argentina complains to WTO about EU ADD on Biodiesel and wins

- 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. it did since the price
- Panel finds the second part of the determination was a violation of Article 2.1.1.1

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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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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 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 cost of those inputs.
- For example:

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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.
- (Fed Court rejected 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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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)
- Intervention of the Indonesian government in the market for timber logs was a "market situation" justifying using constructed cost instead of domestic prices to determine dumping margins on exports of A4 paper
- The deviation of recorded costs of wood pulp for 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 2017 – Minister adopted the ADRP report rejecting the appeal on those points (followed Fed Court decision in *Dalian Steelforce*)
- 16 March 2017 – 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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Hypothesis

- The US is not threatening to bring the WTO dispute settlement system to a standstill because it has a technical concern that it should be the DSB rather than the AB which decides if a retiring AB Member can continue to serve on appeals to which the Member was assigned before the expiration of their term.
- The US government is threatening to bring the WTO dispute settlement to a standstill because it is susceptible to political pressure from steel and aluminium manufacturers (and possibly some other manufacturers) to do whatever it can to avoid having the WTO rule that the US cannot continue to use methods for inflating dumping margins and dumping duties, particularly on, but not only on, imports from China.

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The US steel and aluminium industry provides political support for:

- 1. the US government denying that the expiration of the period under para 15 of the Chinese accession Protocol means the US should stop using Non-Market methodology (even contrary to the governments own public statements at the time of the protocol);
- 2. the US government enacting and using the amendments to the *Tariff Act* by the *Trade Preferences Extension Act of 2015* which allow other methods: treating government interventions as justification for not using prices in domestic sales; and as justification for not using the actual costs of inputs.

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The Australian government could help:

- 1. reminding the US government that everyone did agree that the use of NME methodology would only be permitted until 10 Dec 2016 - & lodging 3rd party submissions to that effect in the Chinese complaints against USA and EU;
- 2. arguing generally for sensible interpretations of the ADA provisions which fit with their object and purpose which is to ascertain whether a particular exporter is price discriminating between domestic sales and export sales and to determine what the margin of dumping is.
- That means that particular market situation under Art 2.2 cannot include any situation in a market that has no bearing on the calculation of the margin of dumping arrived at by comparing prices in domestic sales with prices in export sales
- That means that the rule about reasonably reflecting costs under Article 2.2.1.1 is aimed at using the best evidence of the actual costs incurred in producing all units, regardless of whether they were sold domestically or exported, so the fact that the actual costs were different to what they would have been in the absence of a government intervention or distortion is irrelevant and not a justification for not using the actual costs recorded by the exporter.

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But the Australian government does not help because:

- Australian steel and aluminium producers provide political support for the Australian government continuing to provide inflated dumping duties to protect Australian steel and aluminium producers from imports from China (and possibly other countries) duties; and
- Australian steel and aluminium producers would prefer that the WTO does not rule :
  - against the USA on NME ; or
  - against the broader recourse to particular market situation under art 2.2 and to higher input cost values under art 2.2.1.1
- So the Australian government can join proposals to make appointments of new AB Judges
- But the Australian government chooses not to push for the appropriate resolution of the conflicts over specific issues of antidumping law that would remove the reasons for the US steel and aluminium lobby groups to be pressuring the US government to threaten the WTO dispute settlement system.
- So the WTO DSS may grind to a halt as it runs out of AB judges.

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Why is the USA threatening to close down WTO dispute settlement? One explanation, How Australia could help, and why it chooses not to.

Dr Brett Williams
Principal, Williams Trade law
Honorary Senior Lecturer, University of Sydney Law School
These slides available from www.williamstradelaw.com

Appendix: further observation on the s232 tariffs on steel and aluminium in March 2018

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US steel and Aluminium manufacturers are still not satisfied that they have enough import protection! – enter national security!

- 3rdly US steel and aluminium manufacturers pressured the US government to investigate the impact of imported steel and aluminium on national security
- 19 April 2017 - US gov opened inquiry under s232
- 24 May 2017 - one day of public hearing
- 31 May – closed to submissions
- 8 March – President proclaimed that tariffs of 25% on steel and 10% on aluminium would be imposed from 23 March – on the grounds or protection of essential security interests.

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Australia could have helped, and still could:

- Australia could have informally cautioned the US against pushing the boundaries of the exception in GATT for measures for protection of essential security interests;
- Australia could have requested consultations under the WTO Dispute Settlement Understanding in order to encourage manifestation of political forces to counterbalance the political pressure of the steel and aluminium industry on the US government.
- On 5 April China has requested consultations with the US over the s232 tariffs- Australia could request it be joined in the consultations. Unfortunately China is threatening to retaliate without waiting to see if it wins the DSU case and can obtain authorisation for retaliation.

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But the Australian government chose not to help:

- The Australian steel and aluminium producers provided political support for:
- the Australian government negotiating with the US government to obtain an exemption from the tariffs on steel and aluminium on the basis of national security considerations;
- And not challenging the USA's recourse to the GATT exception for restrictions on grounds of protecting essential security interests.

- So just as Australia is not prepared to do anything to address the political cause of the US threats to the WTO dispute settlement system – because it cannot stand up to protectionist pressures from Australian manufacturers
- SO also Australia is not prepared to do anything to address the detriment to the viability of the entire WTO system that arises from:
- Having a major power push the boundaries of the national security exception
- Having another major power push the boundaries of the rule that requires Members to go through dispute settlement and obtain authorisation before imposing retaliation.
- - because it cannot stand up to the political pressures from Australian manufacturers in order to support the sustainability of the WTO system.

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