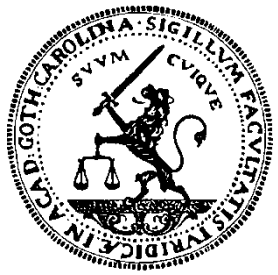

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The EU Trade Defence Improvements under Global Challenges

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Content

Summary

The amendments for the EU anti-dumping and anti-subsidy rules in 2017 and 2018 show a great change compared to the original ones. This paper will focus on two controversial parts among them, namely the normal value construction under the "*significant distortions*" and adjustment on the lesser-duty-rule. Besides, lawfulness under the WTO law with these two parts will respectively be discussed. Since China has played an important role in the first amendments, this paper tries to analyse whether the EU can justify its application of new normal value calculation method to exports from China. Finally, there may exist some problems with such tightening trade defence measures in the Member States due to different industry structures, especially the chemical industry.

The paper draws the conclusion that the "*significant distortions*" situation remains vagueness in legal perspective, which have to be examined in particular case whether they will be consistent under WTO laws. However, the cost adjustment in normal value calculation seems to already breach the WTO laws in terms of its legislative intention. Although disapplication of the lesser-duty-rule itself will be WTO-compliant, combined with the high dumping margin, new problem "*double remedies*" will occur, which is not allowed by WTO. In the context of irreversible internationalism with the active participation of China, adopting such tightening trade defence rules will eliminate competitive advantages from exports of third countries, but this will also have negative influence on the Union's export-oriented industries, such as the chemical industry. In this way, Member States which have export-oriented industry with high competitive advantage would not be an active supporter for such trade defence rules.

Abbreviations

TFEU	Treaty on the Functioning of the European Union
EU	The European Union
WTO	The World Trade Organization
ADA	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (WTO Anti-Dumping Agreement)
ASCM	WTO Agreement on Subsidies and Countervailing Measures (WTO Anti-Subsidy Agreement)
CAP	The Protocol on the Accession of the People's Republic of China
NME	Non-market economy
MES	Market economy status
The Union	The European Union
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
CCP	Common commercial policy
TDI	Trade defence instruments
EC	European Community
Basic Anti-dumping Regulation	EU's codification regulations on protection against dumped imports from countries not members of the EU

1 Introduction

1.1 Background

According to Article 3 of TFEU, the EU's common commercial policy (CCP) is one of the areas where the Union has a full and exclusive competence. The CCP focuses on promoting fair and free trade, further market access and contributing to the multilateral, rules-based trading system.[1] In order to arrive at these objectives, the Union, running as a single actor at the WTO and is represented by the Commission, applies a variety of legislative tools and defends the Union's interests before the WTO Dispute Settlement Body on behalf of all 27 Member States.[2]

The most basic form of trade liberalisation is the removal of tariffs, which are duties or taxes to be charged for an import. Apart from this, trade liberalisation also pursues to remove non-tariff barriers in trade, including protectionism measures favouring domestic producers, subsidies, technical barriers, phytosanitary requirements and so on. Lower non-tariff barriers can facilitate cross-border trade, which plays a significant role in overall EU trade. In this way, trade defence instruments (TDIs) enable the EU to take action for example, to dumping or countervailable subsidies in trading partner countries, and that forms the protective shield of the EU trade policy.[3]

The TDIs were modernised in 2017 and 2018 in the need of further protection for the Union industries against unfair practice. One main change is a new methodology for calculating dumping margins applying to WTO members not granted as market economy status. It is stipulated in Regulation (EU) 2017/2321[4], largely pushed by the European Council and the powerful industry associations, and was motivated to deal with the dumped exporting products from China. Noticeably, with reference to environmental and social protection in multilateral environmental agreements as well as international labour conventions which regarded as new "fairness", EU emphasizes them to the dumping laws especially in the new approach, showing a major overhaul of the original rules.[5]

Once applying this method, it will directly influence the amount of the dumping margin,

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[1] Jana Titievskaia, 'EU Trade Policy: Frequently Asked Questions' Members' Research Service (European Parliamentary Research Service Blog, 17 October 2019) <https://epthinktank.eu/2019/10/17/eu-trade-policy-frequently-asked-questions/> accessed 29 August 2020.

[2] The European Union and the World Trade Organization <www.europarl.europa.eu/factsheets/en/sheet/161/the-european-union-and-the-world-trade-organisation> accessed 11 September 2020.

[3] ibid

[4] Regulation (EU) 2017/2321 of the European Parliament and of the Council of 12 December 2017 amending Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European Union and Regulation (EU) 2016/1037 on protection against subsidised imports from countries not members of the European Union [2017] OJ L338.

[5] Wolfgang Müller, 'The EU's New Trade Defence Laws: A Two Steps Approach' [2018] The Future of Trade Defence Instruments 52.

which will be kept at a high level. In this way, third countries may challenge EU's anti-dumping measures before the WTO, claiming the concerned measures are not WTO-compliant to force EU revise its measure. So, whether the new method is consistent with WTO law will be discussed in details in the following chapter. As the main target of this method, China will have a special position distinguished from other third countries, China has required the EU to recognize its market economy status (MES) in order to avoiding high anti-dumping duties by relying on the China's Accession Protocol to WTO. Therefore, this paper will also illustrate if the application of the new methodology to dumped imports from China will be accepted by WTO.

The second main change is related to the lesser-duty-rule, namely the injury margin establishment and the disapplication of lesser-duty-rule in context with subsidy and dumping, provided in Regulation (EU) 2018/825.[6] The Commission usually will apply the lesser-duty-rule in anti-dumping or anti-subsidy cases. The rule will impose a duty lower than the amount of full dumping margin or the subsidy. Instead, it is based on the injury margin which can adequately and sufficiently cover the injury of the Union producers. So, the adjustment on the rule is sure to result in a higher anti-dumping or countervailing duty than before indirectly. Although the modification of lesser-duty-rule itself will not be easily challenged before the WTO because it is not mandatory, with the combination of the high anti-dumping duty, new problems will appear such as "*double remedies*" concerning with subsidy-induced dumping, which is not allowed by WTO. This problem will be probably serious with China for its market distortions under state subsidies, which will be discussed in the paper.

It is obvious the EU has adopted a tightening trade defence policy to restore fairness and "*a level of playing field*" between domestic and foreign producers. The Commission has to make sure that all EU interests has been taken into account. For example, the steel industry calls for the tightening TDIs and imposed a strong pressure on the Commission to not grant China's MES for a considerable global overcapacity in steel production.[7] However, as every coin has two sides, some problems may occur due to new trade defence rules. China is also the second-biggest export market to the EU.[8] On one hand, due to over two decades' goods exchange between two markets, raised prices of Chinese products by anti-dumping or countervailing duties may harm the interests of the Union producers using such goods for processing or production as well as all the EU end consumers. On the other hand, this paper takes the Union chemical industry for example to illustrate that as in industry with high competitive advantage, its dependency on export asks for a further trade liberalisation, which will

[6] Regulation (EU) 2018/825 of the European Parliament and of the Council of 30 May 2018 amending Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European Union and Regulation (EU) 2016/1037 on protection against subsidised imports from countries not members of the European Union [2018] OJ L143

[7] Christian Tietje and Vinzenz Sacher, 'The New Anti-Dumping Methodology of the European Union: A Breach of WTO Law?' [2018] The Future of Trade Defence Instruments 90

[8] EU's Trade Policy with China <https://ec.europa.eu/trade/policy/countries-and-regions/countries/china/> accessed 12 September 2020.

be contrary to the current trade defence policy.[9]

The EU has paid increasing attention to a trade policy which protecting in the way of trade threats from the US and meanwhile, pursue "*level the global playing field*" as well as mutually beneficial trade in terms of China. The Parliament, the Council and the Commission all have strengthened that the face of global trade challenges is a first priority of EU trade policy.[10]

1.2 Purpose and Research Questions

The aim of this paper is to evaluate whether the controversial EU trade defence improvements are lawful under the WTO laws in terms of new methodology of normal value construction and adjustments on the lesser-duty-rule. Due to China's special role in this trade defence improvements as well as its strong influence in world trade, this paper will additionally focus on how EU's new trade defence rules work on the exporting producers from China. As a consequence of the foregoing, this paper further aims at analysis what potential problems will such tightening trade defence measures bring about within the EU.

In light of the purpose, the following research questions will be reached throughout the paper:

- *How are the improvements of EU's trade defence instruments regulated regarding the methodology of normal value construction and adjustments on the lesser-duty-rule and whether are they WTO-compliant especially when China as a complaint before the DSB?*

- *What possible problems will such tightening trade defence rules lead to within the EU industry considering internationalism with China?*

1.3 Methodology and Materials

In order to resolve the research questions, this paper will employ several legal research methodologies throughout its sections and chapters. First, the traditional legal dogmatic method is applied to clarify how the particular rules regulated in EU basic anti-dumping regulation and the corresponding rules in WTO ADA. Secondly, a historical method is employed to illustrate the development of the China's market status. In addition, an interdisciplinary approach, combining the international economy with EU trade

[9] Brian Petter and Reinhard Quick, 'The Politics of TDI and the Different Views in EU Member States: Necessary Safety-Valve or Luxurious Rent-Seeking Device?' [2018] The Future of Trade Defence Instruments 19
[10] ibid

defence laws, is used in elaborating the possible problems of EU trade defence rules with the influence of global value chain.

Most relevant EU law sources as regards this paper are the EU basic anti-dumping regulation and the basic anti-subsidy regulation. Besides, WTO laws mainly includes the GATT 1994, Anti-Dumping Agreement, Agreement on Subsidies and Countervailing Measures and the Protocol on the Accession of the People's Republic of China. Two Appellate Body reports are discussed in details to discuss the lawfulness of EU trade defence measures under the WTO. Finally, a lot of academic articles are involved to support the arguments in this paper.

1.4 Delimitations

This paper will be limited to two controversial aspects of the modernised TDIs, namely the new methods of normal value establishment and the adjustment on the lesser-duty-rule. There have been other significant developments in TDIs in terms of trade unions and SMEs, interim reviews, accepting undertaking and so on. These are not discussed in this paper. Besides, although rules on safeguards are also revised in the modernised TDIs, as its totally different underlying logic compared to anti-dumping and anti-subsidy, it will not be touched upon here.

1.5 Outline

Apart from the introductory and conclusive section, the paper consists of three charpters. Chapter two clarified two typical aspects in EU's trade defence improvements and related issues for their vagueness from legal perspective: a. the new methodology of constructing normal value under "significant distortions" in anti-dumping proceedings; b. new rules in calculating injury margin as well as situations for disapplication the lesser-duty-rule. Chapter three is dealing with the compliance of WTO law: a. in line with the Case DS 516, to consider whether rejecting China as Market Economy Status is compliant under the WTO law; b. a discussion on whether EU's "significant distortions" circumstance is consistent under Article 2.2 of WTO Anti-dumping Agreement; c. focus on Article 2.2.1.1 of ADA and *EU-Biodiesel (Argentina)* to assess the calculation on normal value is compliant with WTO law; c. the disapplication of lesser-duty-rule itself is hard to challenge before WTO, but it will make the "double remedies" problem worse, which is prohibited by WTO. Chapter four is connected with the EU trade defence measures in a global respective to illustrates its potential problems: a. possible divergence in the Member States on the Union industries due to the tightening trade defence measures in the context of global value chain; b. elaboration further by a special example: chemical industry, which is not its interest to adopt a tightening trade defence policy.

2 EU trade defence improvements

EU trade policy, or CCP, has considerably been identified is an obligation to more open and free trade, which is commonly accepted to bring about economic growth and jobs. Since 1980s, the Commission has generally sought to market access and trade liberalisation. [11] Compared to the EU's multilateral trade relationship, such as membership under the WTO, and its bilateral trade agreements with third countries, the TDIs of EU can be regarded as unilateral measures to protect its internal market in the environment of open markets. It has to be noticed that TDIs are not protectionism measures because they are transformed from WTO rules into EU legal order, especially the WTO Anti-dumping Agreement (ADA) and Agreement on Subsidies and Countervailing Measures (ASCM).[12]

2.1 Why the EU has Adopted a Tightening Trade Defence Instruments?

The reason for this question has to be considered in the context of current international trade situation. The Commission finds that if applying actual production costs and prices of Chinese exporters in anti-dumping investigations, anti-dumping duties would be reduced by around 30%. As a result, the injury caused by the dumped imports cannot be effectively covered. What is more, low Chinese prices even if with addition to anti-dumping duties will result a sharp increase in Chinese exports (18-28%), which indirectly with a consequence of considerable job losses.[13]

According to a specific analysis reported by EU anti-dumping proceedings, EU did not have a comparative advantage in more than 75% of all cases mostly concerning with metal and chemical industries from 2000 to 2013.[14]

An obvious reason why the producers in EU have to apply a relatively high price on the relevant products is that they need to cover high costs due to complying with kinds of high social and environmental standards imposed by EU, which made the Union industries lose competitive advantage in pricing. Thus, the new regulations lay emphasis on several aspects (will be discussed later: such as finding a substitute third country with adequate environmental and social level).

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[11] Titievskaia, 'EU Trade Policy' 1
[12] Titievskaia, 'EU Trade Policy' 19
[13] Petter and Quick, 'The Politics of TDI' 35
[14] *Issabekov and Suchecki (2016), pp. 58–59.* As cited by Petter and Quick, 'The Politics of TDI' 22, 23

Besides, on average EUR 10 billion of imported products yearly were subject to restrictions of anti-dumping, which is an extraordinary figure if one thinks that more than 10% of the EU's budget is paid by customs duties imposed on imported goods. What is more, revenues originating from customs duties, including anti-dumping duties, grew to roughly EUR18 billion in the year of 2016.[15] As a result of new regulation which discussed above mainly new approach of normal value establishment and improved lesser-duty-rule, a higher anti-dumping and anti-subsidy duty is absolute in the future. Thus, it is possible that higher or more frequent such duties could form a long-term EU fiscal strategy. Furthermore, it is questionable whether this can be the motivation for the Commission to commerce investigations against the third countries rather than in order to protect the domestic industries from injury of unfair trade. Although it remains doubtful because of a lack of information and transparency in the EU public budget[16], it is noticeable that the Commission has the right in the absence of an official request form the Union industry to initiate anti-dumping measure against exporting countries according to Article 5(6) the Basic Anti-dumping Regulation: "*If, in special circumstances, the Commission decides to initiate an investigation without having received a written complaint by, or on behalf of, the Union industry for the initiation of such an investigation, this shall be done on the basis of sufficient evidence of dumping, injury and a causal link, as described in paragraph 2, to justify such initiation. The Commission shall provide information to the Member States once it has determined the need to initiate such investigation*."

2.1 New Method for Constructing Normal Value

Dumping happens when foreign exporting products are sold at an artificially low price in the internal market of EU. The reason causing an artificially low price is various, for example, the exporting products are supported by distorting subsidies or other government preferential policies. Also, it can be that the foreign producers want to seizing a market share or sometimes for balancing temporary product surplus. In order to counter this, the Commission will begin an anti-dumping investigation to examine whether the Union industry is suffered material injury caused by the foreign products at issue. Finally, the Commission will impose an anti-dumping duty on the dumped products, which is in practice the most commonly way to apply TDIs.[17] Besides, according to the lesser-duty-rule, the Commission can choose to impose a duty which is lower than the anti-dumping duty but have to adequately cover the injury of the EU producers.

An amended EU Regulation concerning with a new methodology of constructing normal value in anti-dumping proceedings was enacted in December 2017. The new

[15] Petter and Quick, 'The Politics of TDI' 20.
[16] ibid
[17] ibid

method replaced the old analogue country approach which was applied to non-market economy (NME) countries in WTO members. According to the analogue country method, the Commission will establish the dumping margin based on the prices or costs in a chosen market economy third country, and then apply to all exporting products in question from third countries with NME.[18] As a result, the margin between the constructed value and the exporting price, namely the dumping margin, will be huge. The International Bar Association in its 2010 report stated that the analogue country method appears to be "*arbitrary*" or "*inappropriate*" because the Commission has a preference to choose the information from companies in Turkey or the US where the manufacturing costs tend to be greatly higher than in China.[19]

As dumping happens when the exporting price of the product is lower than exporting producers' home market price. However, according to Article 2.6a(a) "*In case it is determined, when applying this or any other relevant provision of this Regulation, 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 within the meaning of point (b), the normal value shall be constructed exclusively on the basis of costs of production and sale reflecting undistorted prices or benchmarks, subject to the following rules.* (…)", if the exporting country is of significant distortions, its domestic price cannot reflect the dumped products' actual cost or value. Thus, the Commission will construct the normal value instead of the domestic price to calculate the dumping margin. In other words, that whether the exporting country is regarded as significant distortions or not by the EU is the key to the dumping determination for the exporting country.

2.1.1 Under What Circumstance is New Method Applied----"*Significant Distortions*"

As stated in Article 2.6a, the use of price and cost in the exporting producers' home market is not appropriate if the exporting country imposes intervention in its economy in a way which goes significantly beyond the regulatory function of the government. Article 2.6a(b) "*Significant distortions are those distortions 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. In assessing the existence of significant distortions regard shall be had, inter alia, to the potential impact of one or more of the following elements:*

— the market in question being served to a significant extent by enterprises which operate under the ownership, control or policy supervision or guidance of the authorities of the exporting country;

— state presence in firms allowing the state to interfere with respect to prices or costs;

[18] Petter and Quick, 'The Politics of TDI' 21.
[19] ibid 22.

— public policies or measures discriminating in favour of domestic suppliers or otherwise influencing free market forces;
— the lack, discriminatory application or inadequate enforcement of bankruptcy, corporate or property laws;
— wage costs being distorted;
— access to finance granted by institutions which implement public policy objectives or otherwise not acting independently of the state." provided a further clarification of the concept of distortion which will result in the fact that the domestic market is not the direct reflection of market forces, namely supply and demand.

Notably, the purpose of a straight-forward listing for the costs of raw materials and energy in the Article is mainly to deal with the so-called cases "*input-dumping*" --- the domestic manufacturers are capable to produce at relatively more competitive prices where the exporting country exerts powerful influence on the raw-materials or energy market.[20] It was quite obvious that China is the main target for the reason that the report on the significant distortions of China issued by the Commission particularly examined the specific sectors has existed market distortions, including aluminium, steel, chemical as well as ceramics industries.[21]

In addition, the wording "*inter alia*" indicates that the description of elements of distortions set in Article 2.6a(b) is not exhaustive. For example, Recital 4 in fine of Regulation (EU) 2017/2321 stipulates that when *"assessing the existence of significant distortions, relevant international standards, including core conventions of the International Labour Organisation (ILO) and relevant multilateral environmental conventions, should be taken into account, where appropriate."* This may serve as a complement to the Article 2.6a(b) on the condition that "*where appropriate*" which means it cannot be applied to the investigation of every case. So, more interpretations and practice are needed to make it clear. [22]

The listed criteria for evaluate the existence of significant distortions stay vagueness and may need clearer threshold.[23] Taking the first element as an example, the wording "*to a significant extent*" appears again but leaves no clarification in details such as an objective standard or percentage. Similarly, the remaining elements listed include neither concrete nor predictable approach to measure significant distortions, which gives the Commission a much broader discretion on determination of significant distortions. Thus, its ambiguous wording renders the Commission an expansive interpretation on a case -specific basis which may lead to discriminatory.[24]

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[20] Tietje and Sacher, 'The New Anti-Dumping Methodology' 96.
[21] *Eur. Commission (EC), Corrigendum to Commission Staff Working Document on Significant Distortions in the Economy of the People's Republic of China for the Purposes of Trade Defence Investigations, SWD (2017) 483 final/2 (Dec. 20, 2017).* As cited by Jeffrey M. Telep and Richard C. Lutz, 'China's Long Road to Market Economy Status' [2018] Georgetown Journal of International Law 705.
[22] Müller, 'the EU's New Trade Defence Laws' 50.
[23] Edwin Vermulst and Juhi Dion Sud, 'The New Rules Adopted by the European Union to Address "Significant Distortions" in the Anti-Dumping Context' [2018] The Future of Trade Defence Instruments 75.
[24] ibid

2.1.2 Calculation of Normal value

The Commission will replace domestic prices and costs of the exporting products with the constructed normal value in case of relevant distortions. Article 2.6a(a) lists 3 sources without containing a strict hierarchy[25] for the Commission when considering normal value of the products at issue, respectively a) "*corresponding costs of production and sale in an appropriate representative country with a similar level of economic development as the exporting country*", b) "*undistorted international prices, costs, or benchmarks*" and c) "*domestic costs, but only to the extent that they are positively established not to be distorted, on the basis of accurate and appropriate evidence*".

As regards the first source, 3 aspects are concerned for the Commission picking up a representative country: a similar level of economy development; the relevant data are easily available; if more than one country satisfy such two conditions for price comparison, preference will be given to the country complying with core IBO and relevant environmental conventions.[26]

First, it extending the notion of "fairness" through taking social and environmental protection into account.[27] And the language of "*appropriate*" as well as "*adequate"* in the third aspect renders the Commission highly flexible in decision-making process during the investigation, which also leaves uncertainty.

In Hoffmeister' view, it is very difficult and time-consuming for the Commission taking a detailed analysis on the adequate labor and environmental protection of the several candidate countries during the trade defense investigation. Instead, it is more essential to focus on which possible representative country can provide best and most detailed information to establish the normal value.[28]

What is more, Velmust also gave his standpoint that consideration on the social and environmental protection will be in contradiction with its precondition which is a candidate country with a similar economic level. In other word, it is impossible to select a country with its economic development much the same as the exporting country (usually developing countries such as China) while have a relatively high social and environment standards.[29] Therefore, it remains to be seen how this criterion be applied in more practice.

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[25] Müller, 'the EU's New Trade Defence Laws' 58.
[26] Recital 6 of the amending Regulation 2017/2321
[27] Petter and Quick, 'The Politics of TDI' 34.
[28] Frank Hoffmeister, 'The Devil Is in the Detail: A First Guide on the EU's New Trade Defence Rules' [2020] Global Politics and EU Trade Policy 217.
[29] Vermulst and Sud, 'The New Rules Adopted by the European Union' 77.

In terms of the third source, the use of domestic cost of the exporting country is limited under a strict condition --- the Commission confirms the evidence provided by the exporting producers as appropriate and accurate, which to prove the costs of its products are not influenced by significant distortions.[30] From this perspective, the burden proof has been shifted from the Commission to the individual producers. In fact, it would be difficult for them to show evidence for a sector or the economy in comparison to the practice in anti-subsidy investigations which particular exporting producers only can have access to useless subsidy schemes of a specific sector or industry.[31] In addition, as stated in Article 2.6a(e), the exporting producers will be given a very short period, 10 days, to make a comment on the investigation while the evidence (even if they can provide) can only be considered when its verification can be finished "*in a timely manner"* within the investigation.[32] In one word, several barriers that in fact hardly to be overcome by exporting producers render this source exist in a name only. The expected consequence of the new methodology would bring about high anti-dumping duties against third countries.

2.2 Lesser-duty-rule

As specified in both WTO ADA and ASCM, a lesser duty would be "*desirable*" if such duty can adequately remove the injury margin,[33] which means an anti-dumping or anti-subsidy duty is imposed less than full amount of margin of dumping/subsidy. Thus, it is a crucial step to solve the injury margin in the application of the lesser-duty-rule when determining the level of duty in an anti-dumping or anti-subsidy case.

The injury margin means the margin adequate to recover the injury to the industry in imported country, resulted from dumping or subsidized products of exported producers. It is calculated by comparing the exporting price at issue with the non-injurious price (also called target price) of the industry in imported country, and the latter is composed of the cost of the imported country's industry added to a reasonable profit margin.[34]

In terms of the determination of the profit margin of the EU, the guiding rules were indicated by the Court: "*It follows that the profit margin to be used when calculating the target price that will remove the injury in question must be limited to the profit margin that the Union industry could reasonably count on under normal conditions of competition, in the absence of dumped imports. It would not be consistent with Articles 4(1) and 13(3) of the basic regulation to allow the Community industry a profit margin*

[30] Recital 5 of the amending Regulation 2017/2321.
[31] Vermulst and Sud, 'The New Rules Adopted by the European Union' 76.
[32] Ibid 77.
[33] Article 9.1 WTO Anti-Dumping Agreement: "*It is desirable that (...) the duty be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry."* Article 19.2 of WTO SCM Agreements*: "It is desirable (...) that the duty should be less than the total amount of the subsidy if such lesser duty would be adequate to remove the injury to the domestic industry, (...)*"
[34] Commission, 'Draft Guidelines on the Determination of the Profit Margin used in Establishing the Injury Margin' (DG Trade Working Document, 2013) .

that it could not have expected if there were no dumping."[35] According to this, the profit margin for the aim to the injury margin calculation is not always the same with the one desirable to make sure the survival of the industry and/or an adequate return on capital.[36]

Practice showed that these rules established by EFMA cannot track entirely the fundamental economy reality in the EU these years so that the injury caused by the dumping or subsidization cannot be adequately recovered to the EU domestic industry.[37]

2.2.1 New Calculation of the Injury Margin

New rules in the 2018 amendment confirms that EFMA's counterfactual method to calculating the injury margin is no more the exclusive principle. Compared to solely considering profits the industry could make in the absence of dumped imports as required by EMFA under a hypothetical basis, specific rules on the application of injury margin are established to cope with new challenges of global trade.[38]

Article 7.2c of the Basic Anti-dumping Regulation provides a non-exhaustive list with more detailed factors when establishing profit margin, such as "*the level of profitability before the increase of imports from the country under investigation, the level of profitability needed to cover full costs and investments, research and development (R&D) and innovation, and the level of profitability to be expected under normal conditions of competition.*" Besides, it sets a line that the profit margin must be higher than 6%. Thus, it is the duty for the Commission to take account of historic profitability information as well as to conduct a potential analysis on how profitable is "needed" for a company to operate its business at a high-quality level rather than just survival.[39]

With regard to the actual cost of the EU industry in establishing the target price, in line with the new methodology in normal value construction, new rules also attach importance in the extra costs influenced by multilateral environmental agreements and ILO Conventions which EU has the membership.[40] These requirements in practice would impose a lot of workload on the investigators of the Commission and would be time-consuming. It would be difficult to figure out whether the costs are triggered in the need to follow the rules in environmental or labour agreements or in case of efficiency.[41] Furthermore, additional costs caused by the agreements and convention

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[35] *Case T-210/95 European Fertilizer Manufacturer's Association (EFMA) v Council [1999] ECR II3291, para. 60.* As cited in Commission, 'Draft Guidelines'
[36] ibid
[37] Müller, 'the EU's New Trade Defence Laws' 48.
[38] ibid
[39] Hoffmeister, 'The Devil Is in the Detail' 223.
[40] Article 7.2d the Basic Anti-dumping Regulation.
[41] ibid

above that the EU industry will bear in the investigation period (in principle three to four years) need to be fully taken account of.[42] In order to evidence this so-called "future costs", the company also needs to show how its costs will increase in the future under the requirement of these international agreements.

As a consequence whatever, in the anti-dumping cases where applies the lesser-duty-rule, a higher injury margin is absolute result for that new rules set a higher target price with the combination of higher profit margin and cost. It is clear the new mechanism favours the EU industry due to allowing it to claim higher target prices than before.[43]

2.2.2 Two Situations to Disapplication of the Lesser-duty-rule

Through systematically applying the lesser-duty-rule, the EU seems to be lenient to avoid a punitive nature under the WTO obligations to fix anti-dumping or anti-subsidy duty at the minimum level adequately remove the injury of the Union industry. However, under the changing international trade context, the Commission appears to be forced to turn its position by the pressure of several industry associations.[44]

According to Article 7.2a in the Basic Anti-dumping Regulation, when the Commission considers the dumped products in question exists distortions on raw materials under two conditions, the lesser-duty-rule is not applicable. Firstly, once a raw material distortion is contained in the list under Article 7.2a, the lesser-duty-rule will be not sufficient to remove the injury of the EU industry. Notably, if the raw material distortions are in the relevant catalogue of the Organisation for Economic Cooperation and Development (OECD) or to be listed in the future, the Commission is authorised to approve new distortions to become the list in Article 7.2a. Secondly, if the distorted raw material individually accounts for less than 17% of the cost for the production of the dumped products at issue, Article 7.2a will not come to use. The proportion, which is calculated compared to an undistorted price of raw material which established in a representative international market[45], shows that only raw materials significantly influencing the competitiveness of other economic operators can make the lesser-duty-rule disapplied.[46] Additionally, the exporting producer needs to clearly prove that he does not gain benefit from the distorted raw material at issue, then he could request to be excluded from the implementation of Article 7.2a.[47]

Moreover, the test in Article 7.2b demands a positive Union-interest evidence to fix the duty level in Article 7.2a, which means that the Commission need positively show

[42] ibid
[43] Hoffmeister, 'The Devil Is in the Detail' 223.
[44] Petter and Quick, 'The Politics of TDI' 26.
[45] Edwin Vermulst and Juhi Dion Sud, 'Are the EU's Trade Defence Instruments WTO Compliant?' [2020] Global Politics and EU Trade Policy 238.
[46] Müller, 'the EU's New Trade Defence Laws' 49.
[47] Hoffmeister, 'The Devil Is in the Detail' 221.

sufficient evidence of imposing a higher duty outweighing the reasons for application the lower duty level. At the same time, Article 7.2b set out a new default rule: the Commission will draw the conclusion that it is the Union interest to impose a higher duty without any objection from the interested parties in the EU.[48]

Regarding anti-subsidy measures, WTO members have the right to subsidize their domestic manufacturers, but certain subsidies and government measures are excluded in the WTO ACSM. When the Commission considers the Union producers are suffered "*injury*" by the practice of third country, it will examine whether the foreign product in question benefit from countervailable subsidies (defined in the ACSM). Then the EU will put up countervailing measures in line with the EU interest.[49] Similarly to anti-dumping duty, lesser-duty-rule also can be applied to countervailing duty which means the amount of duty will be lower than the amount of subsidy but sufficiently remedy the Union producers.

As explained in recital 10 of amending Regulation 2018/825, the countervailable subsidies granted by third countries are regarded as particularly distortive of trade by the EU. As a result, EU will no longer adopt the lesser-duty-rule in determination of the countervailing duty level. Therefore, the Union industry will also be benefited due to the fact that the countervailing duty will not be limited to the injury margin[50] while the consumers in the EU relatively will not enjoy a lower price from the imported products. What is more, for companies in EU who prefer to import subsidized inputs to reduce to cost for comparative price would lose this advantage, which will also make the consumers buy the consequence of higher price.

In short, the grounds for the EU to adopt lesser-duty-rule possibly is for a balance between the protection on profits of Union producers against injury form dumping or subsidy and the interests of users from the downstream in the EU.[51] Nevertheless, abolition of the lesser-duty-rule in structural raw materials as well as subsidies appears aiming to punish producers from third countries who taking advantage form such distortions and subsidies.[52] This shows an essential step for the EU to fight against unfair competition worldwide.

3 WTO Compliant

GATT 1994 Article VI stipulates basic rules on impose anti-dumping or countervailing

[48] ibid 222.
[49] ibid.
[50] ibid
[51] *DG Growth of the EU has spent significant time on developing a policy ensuring better access to raw materials for US producers, see, e.g.* https://ec.europa.eu/growth/sectors/raw-materials/policystrategy_en. As cited by Vermulst and Sud, 'The New Rules Adopted by the European Union' 84.
[52] ibid

measures. Also, the ADA[53] gives further explanations on the basic rules and provides substantive requirements to be met in imposition of anti-dumping measure. Thus, when a third countries without MES challenges the EU's anti-dumping or countervailing measure before the DSB, related rules as mentioned will be employed to evaluate whether the measure is lawful and then whether the concerned implement measure on the anti-dumping should be revised by EU.

3.1 Is the New method of Constructing Normal Value WTO Law Consistent?

Distinguished from other third countries without MES, China may rely on the its special article provided in its WTO accession protocol to argue the new method of normal value establishment cannot apply to its exporting products although this new method is designed to cope with China exports originally. As a WTO member, the EU also have to respect the specific accession protocols when introducing and implementing EU anti-dumping regulation.[54]

The amendment for the EU basic anti-dumping regulation 2016/1036, adopted on 19 December 2017, which contains the new methodology of constructing normal value, was the outcome forced by the deadline set in China's WTO accession protocol. On the next day of the expiry of the particular article in The Protocol on the Accession of the People's Republic of China (CAP), China issued the *Case EU — Price Comparison Methodologies* against the EU on its use of analogue country method in anti-dumping duty calculation. However, the problem of expiry of the related article is controversial so that two parties hardly reached a negotiated settlement and there is no panel report due to the complexity of the case. Therefore, next section tries to illustrates why the EU can justify the application of the new method to China under the expiry of the Article in CAP.

3.1.1 Case WT/DS516: *EU — Price Comparison Methodologies*; Section 15 CAP

On 12 December 2016 China challenged the EU to the WTO for the reason that the EU's continuous use of analogue country methodology to calculate normal value in its antidumping proceedings was in violation with its international obligation.[55] This is because that Section 15a(ii) of CAP, which authorised other WTO members to establish

[53] Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (WTO Anti-Dumping Agreement)
[54] Article XVI: 4 WTO Agreement
[55] Request for Consultations by China, European Union – Measures Related to Price Comparison Methodologies, WT/DS516/1, 15 December 2016.

normal value with the alternative benchmark approach against China, would expired on 15 years after the accession, namely 11 December 2016. This is stated in the Section 15d CAP, which set that: "*(…) In any event, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession (…)*"

AB once held the view in Case WT/DS397 that the Section 15a created particular rules for the resolution of normal value regarding the anti-dumping investigations against China. At this point, the Section 15d established that these special rules would become expired in 2016 and gave the specific conditions which may result in the early termination of such special rules before 2016.[56] This viewpoint in a way backed up China's position which claimed the Section 15 was only a short-term and restricted derogation from the provisions in the Anti-Dumping Agreement in the fixing of the normal value against the imports from China.[57]

Furthermore, the Section 15a(ii) created a China-specific standard of evidence: if the Chinese producers can not provide a clear evidence which "*market economy conditions prevail in the industry producing the like product*", the importing country who considers China's NME can adopt the analogue country method to normal value calculation. At the same time, the domestic industry of the importing country would not be taken on any burden of proof.[58]

In China's view, once the Section 15a(ii) expired, there is no need for Chinese exporting producers to demonstrate evidence to prove that their products operating in the market economy condition during the anti-dumping investigation. And this would indirectly grant China's market economy status (MES) for the fact that the domestic costs or prices would be automatically applied to calculating the normal value without evidence provided by the EU.

Nevertheless, according to the EU, it advocated that the legal position in terms of the burden proof stated in Section 15 altered significantly, but, this cannot justify that China graduates to MES. For now, no such rule will be put on Chinese producers. Instead, the rule of burden proof provided in the ADA will be applied,[59] which the relevant provision (Article 2.4) is that the interested parties fairly afford the burden of proof.[60]

For the author's perspective, in order to determine whether should China graduate to

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[56] *Appellate Body Report, European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China, WT/DS397/AB/R, adopted 15 July 2011, DSR 2011:II, para. 289.* As cited by Dong Fang, 'EU – Price Comparison Methodologies (DS516): Interpretation of Section 15 of China's WTO Accession Protocol' [2018] The Future of Trade Defence Instruments 115.

[57] *Appellee Submission of China, European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China, WT/DS397/AB/8, para. 49.* As cited by Fang, 'EU – Price Comparison Methodologies' 115.

[58] ibid 111.

[59] *European Union First Written Submission, European Union – Measures Related to Price Comparison Methodologies, WT/DS516/1, para. 110.* As cited by Fang, 'EU – Price Comparison Methodologies' 111.

[60] Article 2.4 Anti-Dumping Agreement: "(…) *The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.*"

MES or not, it may come to some ideas from the intention of formulating the Section 15a and 15d when China's accession to the WTO.

Before the China's accession to WTO, the US has already regarded China as NME to establish normal value during the anti-dumping investigations. As a consequence, Chinese producers experienced a hard time to acknowledge the input costs and the price of the comparable producers in surrogate nations in order to avoid dumping in the US, which render the China government bear huge loss in foreign trade volume.[61]

To settle this situation, China negotiated the Section 15 by creating ways to apply domestic costs and prices and setting the Section 15d to make a time limit which meant that the importing country in no event would use the analogue country method 15 years later.

It is worthy to be noticed that this period of time witnessed the course of enforcement of three Five-Year Plans for China national economy (2001-2016). Actually, from the time China commenced the negotiation of the accession to the WTO, namely 1986, China began to carry out the Seventh Five Year Plan which attached emphasis on two main parts in economy structure reformation: enterprise system and market price. For the former, it aimed to strengthen the independence of the enterprise, relatively being free from the hand of the government; the latter's purpose was to establish the resource allocation combined with market-oriented and government control.[62] As a result, according to the 2008 Commission report showed a common recognition on China's "*considerable progress"* in realizing MES as well as making its economy as a *"modern and increasingly market -based system*."[63]

From this perspective, China is expected to show the result of its economic reformation to become more open-up and more market-oriented in 2016. It is fair to say that the 15 years' period sounds like more a commitment of China made to the WTO which is to complete the reformation to a market economy than a restriction for other WTO importing countries to use analogue country method.

However, some changes recently show that China may go to the direction opposed to which when it planned during its accession to the WTO. Compared that the obvious part of a State-owned Enterprise (SOE) was composed of a Chinese entity or its investment department in the past, the provisions of association of SOEs have been amended to recognize the position of the Communist Party (CCP). Differing from the Chinese government depriving its interference in the wide range of industries, lately the CCP forced to divergence that more officially acknowledged its leading role in

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[61] Telep and Lutz, 'China's Long Road' 696.

[62] The report on the Thirteenth Five Year Plan, Chapter 6; Chapter 45, Section 2 <http://guoqing.china.com.cn/shisanwu/2017-01/17/content_40119603_14.htm> accessed 20 August 2020.

[63] *European Commission, Commission Staff Working Document on the progress by the People's Republic of China towards graduation to market economy status in trade defence investigations, 19 September 2008, SEC(2008) 2503 final, http://trade.ec.europa.eu/doclib/docs/2009/june/tradoc_143599.pdf, pp. 4 and 26.* As cited by Petter and Quick, 'The Politics of TDI' 28.

making the direction, undertaking the general situation and assuring implementation in those industries.[64]

According to this, under the current leadership of CCP, the concerned policies and regulations ruined the development of China's market economy which is claimed China-specialized market economy, far away to the level of market freedom of the EU or the US.

Hence, with the silent termination of the case DS 516 (expiry of 12 months of the suspension of the panel's work at China's request), it is apparent China cannot fulfil its commitment on the transformation to MES in the foreseeable future, which to some extent give the EU discretion to interpret on the remaining part of the Section 15.

In coping with the possible dumped imports originating from China, the so-called "November-proposal" primarily eliminated the "market-economy" doctrine in EU anti-dumping law and applied a new methodology through imposing importance on the actual price-distortions in the particular exporting country.[65]

Although the EU made it clear that the new methodology on constructing normal value is country neutral by subtly avoiding the use of analogue country method and the language of NME or MES, it is mainly targeted to China for the fact that the first country report on significant distortions of China has carried out.

In line with WTO laws, an abstract legal provision can be challenged to the dispute settlement proceedings. Though there has not been created a distinct and general legal framework to render the discretionary provision WTO-compliant, in the view of the Appellate Body, a measure's discretionary nature should not restrict the challenge of the provision.[66] As illustrated in the *Case Biodiesel* by the Appellate Body[67], the provision at issue should at least make room for the application on a WTO law being applied in a way compliant to WTO laws, namely the Article 2.2 of the ADA in this case.[68] In other word, the only reason that a provision with discretionary will breach the Article 2.2 of the ADA is that the provision in question is at opposite to the legislative intention of the Article 2.2 ADA or beyond its meaning.

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[64] *CSC Financial Co., Ltd., Announcement: Proposed Amendments to the Articles of Association (Nov. 23, 2017).* As cited by Telep and Lutz, 'China's Long Road' 707.

[65] *Proposal for a regulation of the European Parliament and the Council amending Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European Union and Regulation (EU) 2016/1037 on protection against subsidized imports from countries not members of the European Union, COM(2016) 721 final, 9 November 2016.* As cited by Tietje and Sacher, 'The New Anti-Dumping Methodology' 94.

[66] ibid 97.

[67] *Appellate Body Report, European Union – Anti-Dumping Measures on Biodiesel from Argentina, WT/473/AB/R, adopted 6 October 2016, DSR 2016:IV, paras. 6.281 et seq.* As cited by Tietje and Sacher, 'The New Anti-Dumping Methodology' 97.

[68] Tietje and Sacher, 'The New Anti-Dumping Methodology' 97.

3.1.2 Significant Distortions under the WTO Rules

The Article 2.2 of the ADA only allows its member countries to establish the normal value in three situations: a. "*When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country*"; b. "*or when, because of the particular market situation*"; c. "*or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison*".[69] Therefore, according to Article 2.6a(a)(b) of EU Basic Anti-dumping Regulation, the significant distortions need to be in line with either one of the situations above. As for the third case, it is a criterion with accurate number (below 5%) which is out discretion, it will not be discussed here.

Besides, the first sentence Article 2.2.1.1 of the ADA also stipulates that on condition that the records kept by the investigated producer or exporter are consistent with the exporting country's general accepted accounting principles (GAAP) and within reason reflect the costs related to the manufacture and sale of the product under consideration, the investigating authority shall calculate the cost of the product at issue on the basis of the domestic costs. In other word, when an investigation authority thought that the actual records for the costs from the exporting producer are unreasonable or inconsistent with the GAAP or the concerned data from the investigated producer is not accessible, alternative sources may be recoursed to calculating costs.[70]

The Appellate Body discussed in *EU-Biodiesel (Argentina)* that although the both obligations mentioned above apply in harmony for the investigating authority to determine the normal value, the scope of the obligation to establish the cost of production in the country of origin in Article 2.2 is wider than the scope of the obligation to figure out the costs based on the records in the first sentence of Article 2.2.1.1.[71] Therefore, Article 2.2 is used to assess whether EU's new methodology concerned with significant distortions is WTO law compliant here.

As regards the first limb in Article 2.2 "*When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country*", although there appears no explicit definition of "*ordinary course of trade*" in ADA, Article 2.2.1 lists several cases which can be regarded as guidance to interpret the meaning. Article 2.2.1: "*Sales of the like product in the domestic market of the exporting country or sales to a third country at prices below per unit (fixed and variable) costs of production plus administrative, selling and general costs may be treated as not being in the ordinary course of trade by reason of price and may be disregarded in determining normal value only if the authorities determine that such sales are made within an extended period of time in substantial quantities and are at prices which do not provide for the recovery of*

[69] ibid 98.
[70] Appellate Body Report, European Union – Anti-Dumping Measures on Biodiesel from Argentina, WT/473/AB/R, adopted 6 October 2016, DSR 2016:IV, para. 6.73.
[71] ibid

all costs within a reasonable period of time. If prices which are below per unit costs at the time of sale are above weighted average per unit costs for the period of investigation, such prices shall be considered to provide for recovery of costs within a reasonable period of time." Pursuant to its context, emphasis is laid on that the sales can cover all general costs paid by producers, which means that a critical standard to make out the requirement of "*ordinary course of trade*" is their intention to realize a profit during transactions of sales and purchase. Consequently, in line with Article 2.2 ADA, on condition that the sales of like products in home market of the exporting country are uneconomic transactions of sales and purchase, and then the costs and prices will be disregarded. [72]

As mentioned in Chapter 2.1, the EU thinks the use of price and cost in the exporting producers' home market is not appropriate if the exporting country imposes intervention in its economy in a way which goes significantly beyond the regulatory function of the government.

However, in reality, it is exactly the producers' wishes to reduce their costs however resulting from the preference measures of the government so as to earn a higher profit through the transaction. The fact that lower costs or prices because of the interference of the state can not absolutely deduct that the all transactions of the products in question are influenced in a manner that they are outside the economic procedures.[73]

In author's opinion, it all depends on the way in clarification "significant distortions" by the Commission during the particular anti-dumping investigations to figure out whether this new approach can support the "*ordinary course of trade*" requirement. For example, if the Commission can demonstrate the evidence on that the government intervention regards the given products make the producers lose independence in decision-making so that most procedures of economic transaction are not caused by voluntary of producers or out of the willing to making profit. Under this circumstance, the EU's "*significant distortions*" method is within the meaning of Article 2.2 of ADA although in fact it may be very hard to provide such evidence with clear causal link. Otherwise it is difficult for EU to rely on this requirement provided in Article 2.2 of ADA to justify its provision before the DSU.

Then the solely remaining option for EU to establish normal value consistent with WTO law is "*particular market situation*". The WTO ADA does not show any further clarification on this phrase, but, it is common economy knowledge that a normal market is balanced by both supply and demand, of which fluctuations are showed through pricing. In this case, "*particular market situation*" will happen when the pricing is not the result of supply and demand.

As has been discussed, the significant distortions in EU's new method is based on the

[72] Tietje and Sacher, 'The New Anti-Dumping Methodology' 99.
[73] ibid

substantial government interference. There exists doubt that if the substantial government intervention is the only reason to trigger the dysfunction of market force. Apart from this, as Appellate Body stated in *Case US-Zeroing*[74], dumping is caused by the pricing practice of foreign individual exporters. Thus, it is likely to be contrary to the purpose of ADA which attempting to counteract the dumping injury by private exporters.[75]

To elaborate this further in a procedural perspective, the conclusion on significant distortions is very likely to be an inevitable result in EU's anti-dumping cases. Article 2.6a(d) has stipulated that: "*When filing a complaint in accordance with Article 5, or a request for a review in accordance with Article 11, Union industry may rely on the evidence in the report referred to in point (c) of this paragraph, where meeting the standard of evidence in view of Article 5(9), in order to justify the calculation of the normal value.*" Once the complaints in EU claim the existence of dumping depending on the specific country reports by the Commission to easily be qualified the evidence standard in Article 5(9) of the Basic Anti-dumping Regulation, it can be expected that the Commission takes such allegation and then find the significant distortions in investigation according to Article 2.6a(e): "*Where the Commission finds that there is sufficient evidence, pursuant to Article 5(9), of significant distortions within the meaning of point (b) of this paragraph and decides to initiate an investigation on that basis, the notice of initiation shall specify that fact. The Commission shall collect the data necessary to allow the construction of the normal value in accordance with point (a) of this paragraph.*". This follows the fact that several initial investigations as well as expiry reviews against Chinese exporting producers after the effectiveness of the new EU regulations, the Commission has investigated the allegations on significant distortions claimed by EU internal industry on the basis of the China report.[76]

Since it is remotely possible for the Commission to overturn the evidence in its own report, the positive finding on significant distortions in dumping investigations appears to be a definite outcome. This also results from the fact that the Commission impose the burden of proof on the exporting manufacturers and the exporting country to rebut such claims.[77] So, it is to some degree on the opposite side to the idea of "dumping" (the pricing behaviour of private foreign producers) by disapplying domestic prices and costs in the exporting country because of a conclusion of sector-wide or country-wide distortions.[78]

In terms of the government intervention, it must give rise to the dysfunction of supply

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[74] *Appellate Body Report, United States – Measures Relating to Zeroing and Sunset Reviews, WT/ DS322/AB/R, adopted 9 January 2007, DSR 2006:V, para. 111.* As cited by Vermulst and Sud, 'The New Rules Adopted by the European Union' 78.

[75] Tietje and Sacher, 'The New Anti-Dumping Methodology' 100.

[76] *Original investigations against China: Hot-rolled steel sheet piles from China [2018] OJ C177/6; Steel road wheels from China [2019] OJ C60/19; and Glass fibre fabrics from China [2019] OJ C68/29.* As cited by Vermulst and Sud, 'Are the EU's Trade Defence Instruments WTO Compliant?' 235.

[77] Vermulst and Sud, 'Are the EU's Trade Defence Instruments WTO Compliant?' 236.

[78] ibid

and demand instead of simply its existence can be found as particular market situation. Although Article 2.6a(b) lists several types of state behaviours, there must be a positive evidence that the pricing of the exporters is the result of the government intervention rather than supply and demand of the domestic market.[79]

At this point, at least from the context of the Article 2.6a(a)(b) EU basic anti-dumping regulation, it is focus on the state behaviour rather than the link between the individual pricing and government interference. Thus, it remains to see how the Commission make the explanation during the anti-dumping investigations.

3.1.3 Normal Value Calculation under the WTO Rules

Regarding the creation of the cost of production, Article 2.2.1.1 considers the records kept by the investigated producer or exporter under normal circumstances as the only source for cost of production establishment on condition that the records are consistent with the exporting country's GAAP and within reason reflect the costs related to the manufacture and sale of the product under consideration. It implies the ADA still leaves room for alternative sources to be considered in establishing normal value.[80] Furthermore, the Appellate Body underlined in the *EU-Biodiesel (Argentina)* that in some situations, investigating authorities are not restricted to the choice of the sources of data used for the calculation of normal value, such as the sources from outside the country of origin.[81]

To clarify further in *EU-Biodiesel (Argentina)*, by relying on the second condition in the first sentence of Article 2.2.1.1, the Commission did not apply the costs of soya beans (the key raw material in making biodiesel) provided by Argentine producers in establishing normal value for the reason that the distortion caused by Argentine export system made the prices of soya beans in home market lower than the international prices, which was unreasonable. Instead, the Commission used international prices by resorting to the average reference price of soya beans produced by the Argentine Ministry of Agriculture.[82] In EU's view, which is also one of the main disputing issues

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[79] Tietje and Sacher, 'The New Anti-Dumping Methodology' 100.

[80] ibid 101.

[81] Appellate Body Report, European Union – Anti-Dumping Measures on Biodiesel from Argentina, WT/473/AB/R, adopted 6 October 2016, DSR 2016:IV, para. 6.71. "*Turning to the relevant context, we recall that Article 2.2.1.1 of the Anti-Dumping Agreement identifies the "records kept by the exporter or producer under investigation" as the preferred source for cost of production data to be used in such calculation. We do not see, however, that the first sentence of Article 2.2.1.1 precludes information or evidence from other sources from being used in certain circumstances. Indeed, it is clear to us that, in some circumstances, the information in the records kept by the exporter or producer under investigation may need to be analysed or verified using documents, information, or evidence from other sources, including from sources outside the "country of origin". While such documents, information, or evidence are from outside the country of origin, they would, nonetheless, be relevant to the calculation of the cost of production in the country of origin. These considerations support the understanding that the determination of the "cost of production in the country of origin" may take account of evidence from outside the country of origin.*"

[82] *Council Implementing Regulation (EU) No 1194/2013 of 19 November 2013 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of biodiesel originating in Argentina and*

in this case, the language "associated" in second condition in the first sentence of Article 2.2.1.1 ("*For the purpose 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 (...) reasonably reflect the costs associated with the production and sale of the product under consideration*.") meant that the EU had fully discretion on the choice for which costs could pertain or relate to the production and sale of biodiesel in the absence of the distortion resulted from Argentine differential export tax system.[83] Besides, another main argument made by the EU was that the "reasonableness" standard in Article 2.2.1.1 allows an investigating authority to reject the records kept by the producers when it considers such actual recorded costs are unreasonable and then to replace those costs in a reasonable manner.[84]

However, the Appellate Body first pointed out that the second condition in the first sentence of Article 2.2.1.1 referred to "*whether the records kept by the exporter or producer suitably and sufficiently correspond to or reproduce those costs incurred by the investigated exporter or producer that have a genuine relationship with the production and sale of the specific product under consideration.*"[85] Based on this, it did not support neither of the EU's argument. In terms of the "*reasonableness*" condition, it did not allow the EU authority to decide which costs would pertain to the manufacture and sale of biodiesel without the claimed distortion brought from Argentine export tax system; on the contrary, in this particular case, the costs incurred by the investigated producer which are genuinely link to the production of the product under consideration.[86] What is more, the Appellate Body did not see any extra or abstract standard of "*reasonableness*" that ruled the meaning of "*cost*" in the above condition which allows the investigating authority to reject the records kept by the producer provided that it considers that the recorded costs are not reasonable.[87]

Accordingly, the Appellate Body agreed with the Panel that the EU performed inconsistent with Article 2.2.1.1 due to insufficiency in the reason to reject the producer's records of production when establishing the normal value.[88]

In this case the Appellate Body later established that even when the investigation authority thinks that the actual records for the costs from the exporting producer are unavailable or unreasonable or distorted, it does not plainly mean that the investigating authority may disregard the costs from investigated producers. Instead, as is set in

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Indonesia, OJ 2013 L 315/2, Recitals 35–40. As cited by Vermulst and Sud, 'The New Rules Adopted by the European Union' 80.

[83] *European Union's appellant's submission, para. 170.* As cited in Appellate Body Report, 'European Union – Anti-Dumping Measures on Biodiesel from Argentina' para. 6.28

[84] *European Union's appellant's submission, paras. 153, 159, and 210.* As cited in Appellate Body Report, 'European Union – Anti-Dumping Measures on Biodiesel from Argentina' para. 6.35

[85] ibid para. 6.26

[86] ibid para. 6.30

[87] *Appellate Body Report, European Union – Anti-Dumping Measures on Biodiesel from Argentina, WT/DS473/AB/R, adopted 6 October 2016, DSR 2016:IV, para. 6.37.* As cited by Vermulst and Sud, 'The New Rules Adopted by the European Union' 81.

[88] Appellate Body Report, 'European Union – Anti-Dumping Measures on Biodiesel from Argentina' para. 6.55

Article VI:1(b)(ii) of the GATT 1994: "(…) *For the purposes of this Article, a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another (b) in the absence of such domestic price, is less than either (…) or (ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.* (…)", the language of both Article 2.2 ADA[89] and Article VI:1(b)(ii) of the GATT 1994 draws an exact line for determination of normal value which is the investigating authority must ensure that such data of sources is used to arrive at the "*cost of production in the country of origin*". As required by this obligation, an investigation authority has to "*adapt*" the data collected from alternative sources.[90] In other word, when an investigation authority collects information from sources outside the investigated country, for example, a representative country or international benchmark, such information needs to be modified to be suitable in a way reflecting the current distortions in the home market at issue.[91]

When there exists a distortion in the domestic market due to the preference of the government directives which not giving favourable treatment to particular company, the investigated private producers hence can make their products' price in more competitive way due to lower costs. In this regard, the government intervention can be regarded as an objective factor which is not out of the producers' intention, and the producers take part in the economy activities following the policies of the state passively. Since the purpose of the ADA is connected with individual pricing behaviour instead of action of state, this special distorted costs or prices has to be taken into consideration in order to arrive at "*cost of production in the country of origin*"[92] For example, in *EU-Biodiesel (Argentina),* the Commission amended the anti-dumping duty rates for the Argentina producers in order to implement the ruling of the Appellate Body mentioned above. In the amended regulation, the Commission clearly precluded that the distortion caused by Argentine export tax system could constitute the sufficient reason for cost adjustment under Article 2.2.1.1 of ADA.[93] Accordingly, it implied that "*the EU could not disregard the costs actually incurred and accurately recorded when constructing the normal value of biodiesel in Argentina on the basis of distortions stemming from the mere existence of the Argentina export tax system*.[94]" In short, on condition that the records of producers are suitably and sufficiently consistent to or reproduce those costs incurred by the investigated producers that is genuinely related

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[89] Pursuant to Article 2.2 ADA, the margin of dumping can be constructed compared to "t*he cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits*" to substitute sales of the like product which fail to reflect the normal value.

[90] Appellate Body Report, 'European Union – Anti-Dumping Measures on Biodiesel from Argentina' para. 6.73; Tietje and Sacher, 'The New Anti-Dumping Methodology' 101.

[91] Tietje and Sacher, 'The New Anti-Dumping Methodology' 102.

[92] ibid

[93] *Commission Implementing Regulation (EU) 2017/1578 of 18 September 2017 amending Implementing Regulation (EU) No 1194/2013 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of biodiesel originating in Argentina and Indonesia, OJ 2017 L 239/9, Recital 68: "… the operation of the export tax system in Argentina cannot 'as such' trigger a cost adjustment under Article 2.2.1.1 ADA however well-reasoned or documented its distortive effects may be…"* As cited by Vermulst and Sud, 'The New Rules Adopted by the European Union' 81.

[94] ibid

to the production and the sale of the particular product under consideration[95], even if the investigating authority considers there exists well-reasoned distortion created by government interference, the original costs of producers have to be used in construction the normal value.

On the other hand, if the producers at issue are under the control of the government department in whatever forms, it is clear that the costs of the producers cannot be regarded as actually incurred or accurately recorded as mentioned above. Since any distortion in the domestic market at issue is a situation in the country of origin that must be considered, it still needs further clarification on to what extent and kind of adaptation required to the out-of -country source. For example, it is doubtful how the distorted prices or costs are included in calculation the normal value or just involving some production factors value in the specific amount since they proportionally join in the national manufacturing process[96].

Although much will depend on the specific situation in different cases as stated in Appellate Body report, EU's new methodology on calculation of the normal value appears to be incoherent with the amended regulation by the Commission mentioned above.[97] As ruled in Article 2.6a(a) of the EU basic anti-dumping regulation, the normal value is established exclusively based on costs of production and sale reflecting undistorted prices from a representative third country or domestic market or benchmarks. The wording of the Article clearly allows the disapplication of the actual costs recorded by the producers in establishment of the normal value if the Commission determines the investigated country or industry qualified "*significant distortio*n" conditions. In line with this, the significant distortions created by the government interference form a basis for cost adjustment[98]. Besides, the intention of the Article 2.6a(a) is likely to avoid the reflection of the prevailing distortions in the investigated country rather than adapting the information from the alternative sources. Thus, Article 2.6a(a) is not only inconsistent to the ruling of the Appellate Body in *EU-Biodiesel (Argentina)* but also its own regulation.

In conclusion, it is obvious that the EU tries to create "*a global level playing field*". In this way, anti-dumping measures with cost adjustment under "*significant distortions*" render competitive advantages less possible and guarantee the fair competition in the trade between EU and third countries.

Here then comes to a question whether the EU attempt to use the anti-dumping instruments to tackle legitimate comparative advantages in third countries.[99] In other words, apart from definite dumped products under government interference, if a product manufactured from an exporting country without strict environmental and

[95] Appellate Body Report, 'European Union – Anti-Dumping Measures on Biodiesel from Argentina' para. 6.30.
[96] Tietje and Sacher, 'The New Anti-Dumping Methodology' 102.
[97] ibid.
[98] Vermulst and Sud, 'The New Rules Adopted by the European Union' 81.
[99] Petter and Quick, 'The Politics of TDI' 34.

social standards so that price discrimination happens between markets, it is likely that the Commission regards this as anti-dumping behaviour because the exporting products produced with unfair process. In this case, the producers concerned are faced with anti-dumping duties including the extra costs bore by Union producers in complying these rules. As a consequence, taking such "normal competitive market expanding behaviour" as an anti-competitive behaviour may drive exporting producer from third countries out of the EU market and further narrow down the EU market access.[100] Thus, it is likely that the panel or the Appellate Body will support the third country as in the case *EU-Biodiesel (Argentina).*

3.2 Lesser-duty-rule in term of WTO Laws

Since the lesser-duty-rule is not mandatory under WTO Anti-dumping law and Anti-subsidy law, the WTO members have wide discretion to decide whether to apply the rule or not according to the panel report of the *EU-Footwear*. So, it is probably hard to challenge the removal of lesser-duty-rule of EU before the WTO.[101]

However, it is likely that the new methodology of normal value establishment under "significant distortions" and the simultaneous removal of the lesser-duty-rule can bring about the issue of "double remedies", referred to concurrent anti-dumping as well as anti-subsidy investigations in case of the same product due to a normal element of subsidies.[102]

Pursuant to Article VI:4 GATT 1994: "*No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to both anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidization.*", the so-called "double remedies" is not allowed under the WTO law.0 As also clarified in the Appellate Body report on *US – Anti-*

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[100] ibid 39.

[101] *European Union — Anti-Dumping Measures on Certain Footwear from China, WT/DS405/R, 28 October 2011, paras. 920-935, especially paras. 924 and 927: "While the term "lesser duty" is not defined in the AD Agreement, it is clear that this term refers to the concept of an anti-dumping duty less than the full amount of the margin of dumping, as described in Article 9.1. It is also clear from the text of Article 9.1, and China does not dispute, that the imposition of a lesser duty is "desirable", but is not an obligation for WTO Members. Beyond stating that a lesser duty is desirable, if such lesser duty would be "adequate to remove the injury to the domestic industry", Article 9.1 says nothing about how the amount of a lesser duty should be established. . . .In our view it is clear, and indeed, China does not contend otherwise, that Article 9.1 does not prescribe any methodology or criteria for the determination of the amount of a lesser duty, should a Member choose to apply one. (. . .)*" "*We. . .consider that while the imposition of a duty at a level adequate to remove the injury is clearly contemplated by Article 9.1, this does not limit the basis on which an investigating authority may choose to apply a duty less than the full amount of the margin of dumping. Even assuming that, as in this case, an investigating authority's stated basis for application of a lesser duty is to impose a duty at a level adequate to "eliminate the material injury to the. . .industry caused by the dumped imports without exceeding the dumping margins", this does not, in our view, establish that Article 3.1 is relevant to the establishment of the level of lesser duty to be applied. There is, in our view, no basis in the text of Article 3.1 for the conclusion that it requires any particular approach to the calculation of a level of duty that will be sufficient to remove the injury determined to exist.*" As cited by Vermulst and Sud, 'Are the EU's Trade Defence Instruments WTO Compliant?' 238.

[102] Vermulst and Sud, 'The New Rules Adopted by the European Union' 84.

Dumping and Countervailing Duties (China), when the dumping margin is calculated with an NME methodology, not only the price discrimination by the dumping but also *"economic distortions that affect the producer's cost of production*" has been taken into consideration including particular subsidies of the related product. In this way, the resulting dumping margin is based on a constructed normal value in comparison with the exporting price and thus higher than that compared to the actual and subsidized normal value. Therefore, an anti-dumping duty in case of NME may remedy a domestic subsidy for such subsidy has played a part in a lowering of the exporting price. At the same time, the same domestic subsidy is also considered in calculating the rate of subsidization which then resulting in the fact that a subsidy is offset once more by countervailing duty. Notably, according to the Appellate Body, this double remedies situation is not limited to the analogue method of NME, in other word, it may also occur under the domestic subsidies conferred within market economies.[103]

As subsidies are one of the central elements regarded in evaluating "significant distortions", the problem of double remedies could appear for the reason that the subsidy at issue would be considered twice from both dumping margin and subsidy margin. For example, when determining an exporting country is "*significant distortions*" as mentioned above during anti-dumping investigation, it is possible that the countervailing duty is partially remedy to the exporting country which "*access to finance granted by institutions implementing public policy objectives*" or where "public policies or measures discriminating in favour of domestic suppliers or otherwise influencing free market forces". The latter two are main subsidies which the Commission imposed countervailing duty in cases relating to China.[104]

Unlike in the US, such double remedies problem has not been taken place in the EU since the lesser-duty-rule is usually applied and the injury margin caps the amount of anti-dumping and anti-subsidy duties.[105] Take *Tyres from China*[106] for example, both anti-dumping and anti-subsidy investigations has taken on two Chinese companies. The Commission selected Brazil as the alternative country for China and then the normal value was established on the information of a cooperating Brazilian company. This resulted in a huge dumping margins though the subsidy levels (which was the ground to reject the producers' MET claims) were fairly low. In this case, the anti-dumping duties were restricted by the result of the injury margins minus anti-subsidy duty (also subsidy margin in this case).[107] In this regard, it seems resolving the issue of double remedies because of the application lesser-duty-rule from avoiding use of the constructed normal value.

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[103] Appellate Body Report, United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, WT/DS379/AB/R, adopted 11 March 2011, DSR 2010:III, para.543.
[104] Vermulst and Sud, 'The New Rules Adopted by the European Union' 85.
[105] Vermulst and Sud, 'Are the EU's Trade Defence Instruments WTO Compliant?'239.
[106] *Tyres from China [2018] OJ L116/19 (anti-dumping provisional), recitals 86-100; Tyres from China [2018] OJ L116/19 (anti-dumping definitive), recitals 83-89.* As cited by Vermulst and Sud, 'Are the EU's Trade Defence Instruments WTO Compliant?' 240.
[107] ibid

After the updating of anti-dumping regulations, the double remedies issue may be problematic in the absence of lesser-duty-rule. An extreme situation is that when the exporting product from a "significant distortion" country is concerned with structural raw material distortions in anti-dumping investigation and also involved in the anti-subsidy investigation, the injury margin cannot apply in both measures. Consequently, dumping duty calculated under the new methodology of normal value together with anti-subsidy duty with full amount of subsidy will be imposed to the third country at issue. It remains to be seen how the commission will settle the double remedies problem. The simplest way to avoid double remedies can be deducting the anti-subsidy duty directly from the dumping margin when applying the anti-dumping duty. However, in some scholars' view it does not in fact solve the double-counting as the EU new methodology in constructing normal is sure to result in high dumping margins which basically make no difference as the analogy country methodology did.[108]

4 Possible Problems for the EU Shaping a Tightening Trade Policy

Nowadays, China is the EU's largest source of imports and its second-biggest export market.[109] Although the EU has a trade deficit with China in recent years, it has a positive trade balance overall[110]. It is evident that once the EU has adopted a tightening trade defence measures which resulted in high anti-dumping or countervailing duty, exports to China and other third countries is probably affected. Besides, like a tightening TDIs, on the issue of whether should grant China's MES may be divergent among the Member States due to the different industry structure. Will that can be a problem which split the Union for lacking independence on trade policy? Now it is too early to say that because of lacking strong industry with competitive advantage currently to cope with the internationalism. In this degree, the suggestions to rethink the concept of dumping or to narrow the disciplines on the measures of anti-dumping investigations appear far away. Provided the Union economic operators do not put up their voices against stricter regulations, dumping measures will remain and reconsidering on TDIs stays an illusion.[111]

[108] ibid 241.
[109] EU's Trade Policy with China <https://ec.europa.eu/trade/policy/countries-and-regions/countries/china/> accessed 12 September 2020.
[110] ibid
[111] Petter and Quick, 'The Politics of TDI' 41.

4.1 The Divergence between the Member States with Global Value Chain

In fact, more than half of the WTO members such as Switzerland, Russia, Argentina, Brazil and Australia have already regarded China's MES. It is worth mentioning that many of these countries are exported-oriented or commodity suppliers. As viewed by Moore and Dunoff: "*EU members' positions on trade remedy actions can depend importantly on national production patterns and firms' responses to economic pressures from globalisation and the further development of global supply chains.*" Similarly, among EU Member states, such as Italy, Spain, France are firmly objective voices of granting China MES, which would suffer considerable job losses as a result.[112] These Member States have been seriously influenced by the financial crisis and subsequent economy recessions so that rely mostly on the industries affected by the dumped imports. By comparison, Germany has a stable economic structure based on leading exported-oriented sectors. German electronics, cars, mechanical engineering and chemicals are regarded as highly competitive in the changeable global market. Since there also exist import-oriented sectors in Germany, its position in recognition the MES for China sounds like not as firmly as other Member States.[113]

Besides, a notable change of international trade environment is concerned with global value chains. As China has become the EU's second largest trading partner after the US, it is convincing that a lot of Union producers use inputs from China to produce or sale at a relatively low cost for realizing high profits, which among them can be dumped or subsidized imports. In this regard, these producers may view such inputs as less unfair. However, it is foreseeable that the Chinese exporters may become monopoly on raw materials which will eventually have damage on the Union industries. Nevertheless, it is the Commission's duty to make a subtle balance in the different interests of internal industries. In this regard, disapplication of lesser-duty-rule on raw materials as well as all kinds of subsidy sounds like too much to those companies as mentioned. Thus, global value chain enables to incorporate imported components for products eventually destined for exports. Then the exported-oriented industries in EU may buy the bill for this rule.

Additionally, the EU seems to view the new trade defence instruments as a tool that can resolve everything in terms of trade with third countries regarded as undesirable, for example in the case of China: export subsidies, market access issues, over-capacity industries. This is not a fresh view because as long ago in the 1980, the EC has imposed an unusual approach on dumping margin calculation in order to make a punishment on Japanese exporters. It is resulted from the fact that the distribution system in Japan domestic market vertically integrated by typically a lot of Japanese industries, which

[112] ibid 38.
[113] ibid

according to exporters of EC, precluded their products in the Japanese market.[114] Certainly Japan challenged EC before the WTO, which then required EC make a revision on its practice.[115] Thus, it is imaginable that EU's future trade defence measures will face many WTO disputes brought by third countries and other third countries may have retaliation on the EU's exports.

Thus, along with improvement in market access and foreign direct investment are negotiating between EU and China, the new rules on the trade defence which mainly targeted China may not be a long-term plan according to the Union interest, especially for those rich Member States which are exported-oriented countries.

4.2 The Specialty of Chemical Industry under Global Value Chain

The chemical industry is distinguished from other industries in EU for its contradiction for the need of tightening TDIs. On one hand, companies in chemical industries are one of the most complaints against Chinese exporters received by the Commission[116]; on other hand, it also requires an open environment in global trade.

In recent years, China has replaced the US, becoming the largest chemical production country, followed by Germany and Japan. What is more, China's chemical industry demonstrates the highest growth prospective in international comparison currently.[117] While China still depends on imports of chemicals due to the fact that its chemical industry cannot meet its demand, its chemical exports grew to more than EUR 100 billion, following the EU and Germany closely.[118] It can be predictable that the chemical industries in the US and China will put more pressure on the world market for their comparative advantage on abundant and affordable supply of particular nature resources. [119]

By contrary, the comfortable position of Germany as well as the EU has to change, specifically in basic chemicals. In this regard, Germany is likely to lay emphasis on producing high-value specialty chemicals instead of resource-intensive basic chemicals due to a decrease in competitiveness. Consequently, in the foreseeable future, a considerable rise in imports of basic chemicals will impose pressure on the EU market

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[114] *Marcel F. van Marion, Liberal Trade and Japan: The Incompatibility Issue in Electronics (1993)*. As cited by Vermulst and Sud, 'Are the EU's Trade Defence Instruments WTO Compliant?' 251.
[115] *GATT, EC -- Audio cassettes from Japan, ADP/136, 28 April 1995.* As cited by Vermulst and Sud, 'Are the EU's Trade Defence Instruments WTO Compliant?' 251.
[116] Petter and Quick, 'The Politics of TDI' 25.
[117] ibid 23.
[118] *Verband der Chemischen Industrie e.V., Chemiemärkte weltweit (Teil I). Umsatz, Handel, Verbrauch von Chemikalien und Investitionen in der Chemie, July 2017, https://www.vci.de/ ergaenzende-downloads/chemiemaerkte-weltweit-folien-teil-1.pdf, p. 35.* As cited by Petter and Quick, 'The Politics of TDI' 23.
[119] Petter and Quick, 'The Politics of TDI' 24.

and then bring about a growth of complaints from Union producers and thus of the Commission's anti-dumping investigations. Nevertheless, Germany's chemical industry keeps increasing fast and Germany will continue to have a large trade surplus among the majority of chemical sectors.[120]

In addition, because of long history of internationalism, the distinguished issue of the chemical industry, this industry is beneficial form economic globalization and has managed to adapt major challenges under global economy over the years. Thus, the chemical industry is closely combined with value chain in international trade, which significantly made investments globally. In the past few years, Asia countries has become the second largest recipient financed by German chemical and pharmaceutical industry.[121] Therefore, internationalisation of the German chemical industry not only ensures this industry profitable from the increase in more dynamic markets all over the world but also keep it internationally competitive to a large extent.[122]

For this perspective, it is clear that internationalisation make the position of chemical industry in EU different from others in trade defence. It is necessary for German chemical industry to expect further trade liberalisation in third countries particularly market access, removal of investment restrictions as well as trade barrier elimination. Considering its aggressive exportation, it is very likely to accept anti-dumping investigations and concerning measures from third countries.[123] Especially under the amended EU anti-dumping rules, the Commission may overlook their possible negative effects on EU exporting producers for the reason that countries against these rules are possible to retaliate as well. Also, countries like India, Brazil and Argentina are the main users of trade defence instruments emulating EU law and practice, which also make similar restrictions to EU.[124] As a fact, the EU in addition to its 28 Member States (including the UK), is already become the second place which most targeted WTO member state by means of trade defence investigations all over the world, which would surely damage the EU exporting interests.[125] In this regard, it is the interest of the German chemical industry to be less supportive in such tightening trade defence instruments and require a well-balanced application of EU anti-dumping laws.

5 Conclusion

New improvements in the EU trade defence rules creates many novelties in several

[120] ibid

[121] *Verband der Chemischen Industrie e.V., VCI-Investitionsbericht 2017. Analyse der Investitionstrends der chemisch-pharmazeutischen Industrie im In- und Ausland, 17 July 2017, https://www.vci.de/ergaenzende-downloads/investitionsbericht-2017-1.pdf, p. 5.* As cited by Petter and Quick, 'The Politics of TDI' 24-25.

[122] Petter and Quick, 'The Politics of TDI' 25.

[123] ibid

[124] Vermulst and Sud, 'The New Rules Adopted by the European Union' 87.

[125] Vermulst and Sud, 'Are the EU's Trade Defence Instruments WTO Compliant?' 251.

aspects. The interest of the Union industry is highly protected in not only a more equal playing field in the concept of "fairness" by social and environmental field but also procedural issues such as the relief on burden proof. While at the same time, it will make the Commission involved in a huge amount of technical challenges and time-consuming analysis in investigations. It is no doubt that exporters from third countries will suffer a lot in both substantial and procedural way under the new methodology on normal value construction. However, all the users have to face the new reality and adapt to the new regulations.

It is sure that the position of the EU becomes more aggressive by means of trade defence measures in seeking for higher duties from third countries' exporters as well as a more equal world trade environment. Nevertheless, it still remains to see how the EU interprets these rules in particular anti-dumping or anti-subsidy investigations because of vagueness in the legal contexts since whether is WTO-compliant largely depends on analysis in different cases. But, it is just a matter of time for third countries particularly China to challenge before the WTO.

As a superpower in geopolitics and military as well as centre of production for low or medium price products globally, China has also become an economic giant for one of the biggest countries of imports and exports.[126] However, due to its one-party system of communist, it is almost impossible to be evolved as a market economy as required by western countries. What is worse, it is evident that the role of the party today is far away from that of the chief architect of China's economic reforms[127], which leaves the reduction of government intervention in the domestic market a daydream. In other words, its central leadership may affect the behaviours of companies whatever in the upstream or downstream industries which sometimes without a definite government directive. Almost every private enterprise, even large transnational companies has a party cell which tries to take action in line with the wishes of the party, at least not against. So, the EU's new methodology on "significant distortions" appears to be most suitable way to deal with situation in China from the perspective of the Commission so far where the market is full of specious government interference and the distinction between dumping and subsidies as well as line between will to be profitable simply and preferences of policy stays fuzzy.[128] Also, this can justifies to some extent why the exporters from China has to provide evidence positively proving their products are not distortive during the anti-dumping investigation.

In some degree, the trade defence rules can be considered as an imperfect tool, which does not straight solve the root cause of the dumping but tries to alleviate the symptoms by remedies afterwards to limit particular injurious effects on the Union industry.[129]

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[126] Michael Hahn, 'The Multilateral and EU Legal Framework on TDIs: An Introduction' [2018] The Future of Trade Defence Instruments 6.
[127] ibid
[128] ibid
[129] Till Müller-Ibold, 'EU Trade Defence Instruments and Free Trade Agreements: Is Past Experience an Indication for the Future? Implications for Brexit?' [2018] The Future of Trade Defence Instruments 191ff.

Compared to the anti-dumping or anti-subsidy rules, under the framework of a regional trade agreement, customs duties and all measures having an equivalent effect will be eliminated. In addition, non-tariff obstacles especially the harmonization of various standards will be at least considerably lessened by agreement in advance.

However, without an effective and super-national mechanism, trade defence instruments as a remedy afterwards is the only available tool in most cases.[130] Apart from this reason, it is difficult to negotiate with China in comparison to other third countries. For example, it will make no difference if varieties of forms of state intervention in China's domestic market to be declared as illegal with a strong margining power at hand by China when negotiating. So given the current situation, trade defence measures are a more effective way to create a fair competitive environment between EU and China.

Nevertheless, under the global value chain, the EU has to advance the trade defence interests in a manner with a well balance that not harming the relationship with China. In this regard, regional trade agreement sounds like more tender and trade-enhancing than a unilateral strengthening of the trade defence instruments. But, it is predictable that the negotiation will be extremely tough with a lot of compromises because of huge bargaining power in both sides, which is almost impossible to accomplish in practical.

From an overall perspective, the EU on one hand has engaged in concluding a lot of different agreements for facilitating trade with non-member states, on the other hand, has been one of the most essential users of trade defence measures. So do the US and China. As the Appellate Body itself is endangering due to the uncooperating of the US and divergence of the panel, the era of multilateral relationship of trade negotiations under GATT assured by the WTO is likely to pass. Instead, bilateral agreements will have more priority which will considerably reduce the sacrifice of the bargaining power compared to multilateral action. In the future, it is possible that the EU, US and China rule the world trade relationship, while small countries will have less voice than today.

[130] ibid

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