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**THE EU'S NEW AMENDED ANTI-DUMPING REGULATION FROM THE VIEW OF
WTO JURISPRUDENCE**

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CONTENTS

- 1. Introduction**
- 2. The Amendments**
 - 2.1. 2(7)**
 - 2.2. 2(6)**
 - 2.3. 2(6) from the view of EU – Biodiesel dispute**
 - 2.3.1. As Such**
 - 2.3.2. As Applied**
 - 2.4. Grandfathering clauses in the New Basic Regulation**
- 3. Why the EU made amendments to the Basic Regulation**
 - 3.1. Is there a possibility that new Basic Regulation would survive dispute settlement in the WTO?**
 - 3.2 Should the SCM agreement be used instead?**
- 4. Conclusion**

1 INTRODUCTION

“For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.”¹

The Article 2.1 of Agreement on Anti-Dumping (ADA) is the main definition in the legal world of what is considered to be dumping. The ADA is an agreement in the World Trade Organization (WTO), which sets significant boundaries for international trade law. Even though the definition seems to be clear at first sight, this paragraph is a source for number of disputes, not least because there are subjective words such as “normal” and “ordinary”. As of 1st of December 2017 there have been 534 disputes brought to the dispute settlement body in the WTO. Out of these 534 disputes, 120 cases cite the ADA on their request for consultations.²

The obligations set in the ADA are also binding for the European Union (EU), which the EU acknowledges in the Treaty of European Union, which states that: *“It shall contribute to... to the strict observance of and the development of international law.”*³. With this in mind, the EU amended its anti-dumping regulation 2016/1036 most notably on the parts of articles 2(6a) and 2(7). This necessity came from the expiration on 11.12.2016⁴ of the provisions of subparagraph (a)(ii) in Section 15 of China’s Accession Protocol to the WTO. The expiration was agreed on paragraph 15(d) of the protocol that says: *“The provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession.”*. As seen later there is an ongoing dispute of this expiration, the main question being if this expiration led to the expiration of section 15(a) as a whole, or if the rest of the section of 15(a) remains in force and only (a)(ii) expired on 11.12.2016.

¹ Article 2.1 of ADA

² www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm

³ Article 3 of TEU (ex Article 2)

⁴ Appellate Body Report, EC – Fasteners (China), para. 289.

Even though the necessity of change is arguable, as the EU is still defending the existing legislation of old article 2(7) in the dispute European Union – Measures Related to Price Comparison Methodologies (DS516) against China⁵, there is clear evidence that even the EU leaders recognized the need to change the legislation protecting European industries with anti-dumping measures due to expiry of the section 15(a)(ii). This intention can be found from the document “Common Core Demands from Germany and France on modernizing Trade Defence Instruments (TDI) of the European Union” as argued by David Kleimann, a research associate at the European Centre for International Political Economy (ECIPE). He highlights in his paper that in the document German and French ministries of Economic and Trade affairs request that: “*the EU must further explore and use the possibilities of China’s WTO Accession Protocol not to use the standard calculation methodology to the extent the producers under investigation can not clearly show that market economy conditions prevail in the industry...*”⁶ also EU states that its specific objectives for the proposal on the amendments to the Basic Regulation are to: “*deal adequately with the expiry of certain provisions of Section 15 of China’s Accession Protocol to the WTO*”⁷ and they note in the Impact Assessment of possible change in the calculation methodology of dumping regarding the People’s Republic of China that: “*Option 1 (“baseline”) would most likely be subject to litigation, before the WTO*”.⁸ Option 1 meaning that the EU would not react to the expiry of the expiration of the Article 15(a).⁹

The problem with the old regulation was the Article 2(7) that provided rules for disregarding standard methodology in calculating normal value for non-market economies. Instead of using home market prices of producers, the EU would use surrogate prices and costs, without adjustments, in calculating the normal value of the producers. This method was used against China, which was deemed as a “non-market economy” as defined in subparagraph 2(7)(b) of the Basic Regulation. This

⁵ European Union – Measures Related to Price Comparison Methodologies, First Written Submission by the European Union

⁶ The Vulnerability of EU Anti-Dumping Measures against China after December 11, 2016. David Kleimann July 11, 2016

⁷ SWD(2016) 370 Final, 9.11.2016 p.21

⁸ SWD(2016) 370 Final, 9.11.2016 p.31

⁹ SWD(2016) 370 Final, 9.11.2016 p.23

treatment by the EU was allegedly only allowed due to the Accession Protocol's section 15 (a)(ii) that states:

“The importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product.”¹⁰

As mentioned before this is exactly the paragraph that expired and thus obliged the EU to change its legislation.

This paper attempts in its first part to bring clarity on how the EU's Anti-Dumping regulation was amended. In the second part, there will be analysis of the criticism towards the new legislation. The second part focuses on the new Article 2(6) and Articles 11(3) and 11(4), as some legal scholars have argued them to be WTO inconsistent, especially from the view of the decisions made by the Appellate Body in the European Union – Biodiesel (DS473) dispute. In the third part, there will be analysis of why the EU has changed its legislation to such an extent and what other measures it could use against imports that have been affected by government distortions. Finally, I will summarize to what extent the EU's basic regulation might have problems in adhering its obligations from the view of Accession Protocol and the WTO jurisprudence.

What got me interested in the subject was my internship at The Permanent Mission of Finland, Geneva, where I worked at the trade and economic sector, thus attending the meetings of the WTO. At the beginning of my internship I was *Tabula Rasa* on the subject of international trade law, therefore learning more about the extent of protectionist practices in the EU started to intrigue me. Especially the subjects of EU – Biodiesel dispute and the dispute about China's Market Economy Status taught me, that it is not just the Trump administration that should be blamed for being a threat to

¹⁰ ACCESSION OF THE PEOPLE'S REPUBLIC OF CHINA, WT/L/432, 23.11.2001

the international trade and globalization. These two disputes are conveniently linked to the new Basic Regulation of the EU as will be shown in this thesis.

The legal research of this thesis focuses on the questions of “Why the EU amended its legislation?” and “Whether it is suited for the present conditions?”, which are argued to be the key questions of legal research/methodology.¹¹ To answer these questions, I have embarked in systematic fact finding on what exactly the obligations are that the new Basic Regulation needs to comply with and to what extent can it be considered to comply with these obligations.

Both the EU – Biodiesel and China’s MES dispute have been examined by legal scholars in their papers, which are one of the main sources of this fact finding. In the EU – Biodiesel dispute there exists the Appellate Body report, that has been part of my research as it has also been for those previously mentioned legal scholars. The report sheds light on the prevailing WTO jurisprudence concerning Anti-Dumping Agreement. Regarding the new Basic Regulation I will use sources from lawyers from law firms such as Van Bael & Bellis and NCMT and the publications from the EU, also there will be predictions from prior research that is based on the proposed amendments. These proposed amendments remained almost unchanged to the final text. It should be noted though, that Van Bael & Bellis was working on Argentina’s side in the EU – Biodiesel dispute, so there might exist a bias.¹² And obviously, there is a bias in the papers published by the EU.

¹¹ S N Jain, *Legal Research and Methodology*, 14 *Jr of Ind L Inst* 487 (1972), at 490

¹² <http://www.vbb.com/trade-customs/trade-defense>

2 THE AMENDMENTS

2.1 2(7)

”In Article 2, paragraph 7 is replaced by the following:

In the case of imports from the countries which are, at the date of initiation of the investigation, not members of the WTO and listed in Annex I to Regulation (EU) 2015/755 European Parliament and of the Council normal value shall be determined on the basis of the price or constructed value in an appropriate representative country, or the price from such a third country to other countries, including the Union, or where those are not possible, on any other reasonable basis, including the price actually paid or payable in the Union for the like product, duly adjusted if necessary to include a reasonable profit margin.”¹³

As EU recognized that the now previous Article 2(7) might be inconsistent with General Agreement on Tariffs and Trade 1994 (GATT 1994) paragraph I:1, which is more commonly known as Most-Favoured-Nation treatment (MFN), the old article was replaced. The old article included a list of non-market economies where China was specifically named as one in the section 2(7)(b). Thus China was removed from the scope of Article 2(7). The Article is not in itself of great interest for this paper, as its subjects are the countries that are not members of the WTO. Still this change in legislation certainly supports the arguments that the EU acknowledged the need to come up with a new set of rules against China. Consequently, the EU also amended 2(6a).

¹³ L 388, Official Journal of the European Union, volume 60, 19.12.2017

2.2 2(6)

2(6a)(a)

“In Article 2, the following paragraph is inserted:

- (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.”*¹⁴

As seen from the paragraph 6a(a) the EU adds market distortions to the scope of what is considered to be the standard/first methodology for determining anti-dumping. The standard methodology consists of Articles 2(1) – 2(6), and after the amendment it also includes measures that arguably *De Facto* replace the old Article 2(7) in their effect.¹⁵ Due to the change, the EU is allowed to use inside its own jurisprudence a similar method as it used before in calculating the normal value based on surrogate prices when dealing with “non-market economies”. But the difference from before is that the amended Basic Regulation is no more naming China or other non-market economies specifically. Instead it uses the surrogate prices when there is a significant distortion, without the need to name a country specifically in its legislation. It can still be said that *raison d’etre* for the change of legislation was to continue same Anti-Dumping measures against China that were used before the expiration of the protocol. This can be seen from “Common Core Demands from Germany and France on modernizing Trade Defence Instruments (TDI) of the European Union” and EU’s specific objectives as shown before and as

¹⁴ L 388, Official Journal of the European Union, volume 60, 19.12.2017

¹⁵ The new EU anti-dumping methodology and other upcoming changes to the EU anti - dumping rules, Van Bael & Bellis, 20th December 2017

was argued also by Van Bael & Bellis in their paper regarding the new Basic Regulation.¹⁶

2(6a)(b)

“(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”¹⁷*

In the amendment, the EU has clarified what constitutes such a significant distortion that it would allow the EU to use the surrogate prices and costs. From the view of WTO jurisprudence, especially the Appellate Body report in EU – Biodiesel, the use of the measures against distortions caused by a government intervention as applied is problematic at best as argued by Weihuan Zhou and Chinese Ministry of Commerce.¹⁸¹⁹ In the following section I will consider the arguments on the EU’s new methodologies WTO consistency more thoroughly from the view of the Appellate Body statements in the EU – Biodiesel case.

2.3 2(6) from the view of EU – Biodiesel dispute

The dispute between Argentina and the EU called the European Union – Anti-Dumping Measures on Biodiesel from Argentina (DS473), in short EU – Biodiesel, brought some clarity on the use of anti-dumping measures against market distortions when there is no Accession Protocol to allow NME treatment, as was the case with Argentina. The Articles 2.2 and 2.2.1.1 of the ADA played central role in the dispute.

¹⁶ The new EU anti-dumping methodology and other upcoming changes to the EU anti - dumping rules, Van Bael & Bellis, 20th December 2017

¹⁷ L 388, Official Journal of the European Union, volume 60, 19.12.2017

¹⁸ Appellate Body Report on EU-Biodiesel: The Future of China’s State Capitalism Under the WTO Anti-Dumping Agreement, Weihuan Zhou, CTEI-2017-11

¹⁹ http://news.xinhuanet.com/english/2017-12/04/c_136800213.htm

In particular the interpretation of “*in the ordinary course of trade*” in 2.2 and “*reasonably reflect the costs associated the costs associated with the production.*” in 2.2.1.1. as will be shown below.

The dispute began on 19th of December 2013 when Argentina requested for consultations regarding European Union’s anti-dumping measures against biodiesel products, which the EU had imposed on 27th of May 2013.²⁰ The anti-dumping measures of the EU had been implemented due to Argentine biodiesel markets being heavily regulated by the State and thus the price of biodiesel were not considered by the EU as being “in the ordinary course of trade”.²¹ It was seen that the Differential Export Tax system (DET) of Argentine would cause distorted raw material prices that would lead to the recorded costs of producers not to: “*reasonably reflect the costs associated with the production of the product concerned.*”²²

In the case of Argentine’s Differential Export Tax system, export taxes for soybeans, which are the main raw material for biodiesel (75-80% of costs)²³, were significantly higher than export taxes for biodiesel. In the EU’s calculation, the difference was 20,42 percentage points between the export tax of soybeans and of biodiesel.²⁴ Because of such a distortion there was a surplus of soybeans in the domestic market due to the fact that exporting raw material would be less beneficial for the producers than exporting biodiesel. Presumably this policy was implemented in order to help Argentinean producers to move up in the value chain.²⁵ It has been claimed that these measures led to prices of soybeans that were even 35% lower than international soybean prices.²⁶ This artificially lower price of raw material for producing biodiesel was interpreted by the EU to mean that: “*the costs of the main raw material were not*

²⁰ https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds473_e.htm

²¹ COUNCIL IMPLEMENTING REGULATION (EU) No 1194/2013, L / 315/2 para 28

²² COUNCIL IMPLEMENTING REGULATION (EU) No 1194/2013, L / 315/2 para 29

²³ Slamming the Door on Trade Policy Discretion? The WTO Appellate Body’s Ruling on Market Distortions and Production Costs in EU – Biodiesel (Argentina), Meredith A. Crowley, Jennifer A. Hillman, 5th October 2017, p.6

²⁴ COUNCIL IMPLEMENTING REGULATION (EU) No 1194/2013, L / 315/2 para 35

²⁵ Slamming the Door on Trade Policy Discretion? The WTO Appellate Body’s Ruling on Market Distortions and Production Costs in EU – Biodiesel (Argentina), Meredith A. Crowley, Jennifer A. Hillman, 5th October 2017, p.6

²⁶ Slamming the Door on Trade Policy Discretion? The WTO Appellate Body’s Ruling on Market Distortions and Production Costs in EU – Biodiesel (Argentina), Meredith A. Crowley, Jennifer A. Hillman, 5th October 2017, p.6

*reasonably reflected in the records kept by the Argentinean producers under investigation.”*²⁷

2.3.1. As Such

Ultimately the Appellate Body ruled in favor of all as applied claims against the EU in the dispute, but not in favor of Argentina’s as such claim that the second paragraph of the EU’s Basic Regulation 2(5) is WTO inconsistent.²⁸ The Appellate Body notes in its report that the second paragraph of the Basic Regulation 2(5) does not correspond directly to the Article 2.2.1.1 of Anti-Dumping Agreement, which was the target of Argentina’s claim,²⁹ and which can also be seen from the table 1. The as such claim by Argentina concerns specifically the mandatory nature of the second paragraph of 2(5). In their claim, they contested that “*the EU authorities must use information from other representative markets*”.³⁰ Both Panel and Appellate Body rejected this view of Argentina. In the Appellate Body’s view there is the option in the second paragraph that the 2(5): “*do not exclude that the authorities could adapt out-of-country information to ensure that it reflects the cost of production in the country of origin.”³¹ From the paragraph 6.242 of the Appellate Body report in EU – Biodiesel Weihuan Zhou concluded that the Appellate Body allows “*use of out-of-country information to establish productions costs as long as necessary adjustment are made to ensure the costs reflect the costs of production in the country of origin*”³².*

²⁷ COUNCIL IMPLEMENTING REGULATION (EU) No 1194/2013, L / 315/2 para 38

²⁸ Appellate Body Report, EU – Biodiesel (Argentina)

²⁹ Appellate Body Report, EU – Biodiesel (Argentina) 6.173

³⁰ Appellate Body Report, EU – Biodiesel (Argentina) 6.233

³¹ Appellate Body Report, EU – Biodiesel (Argentina) 6.242

³² Appellate Body Report on EU-Biodiesel: The Future of China’s State Capitalism Under the WTO Anti-Dumping Agreement, Weihuan Zhou, CTEI-2017-11 p. 7

Table 1

Article	Anti-Dumping Agreement	Article	EU Basic Regulation
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 are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration. ...	2(5)	Costs shall normally be calculated on the basis of records kept by the party under investigation, provided that such records are in accordance with the generally accepted accounting principles of the country concerned and that it is shown that the records reasonably reflect the costs associated with the production and sale of the product under consideration. <u>If costs associated with the production and sale of the product under investigation are not reasonably reflected in the records of the party concerned, they shall be adjusted or established on the basis of the costs of other producers or exporters in the same country or, where such information is not available or cannot be used, on any other reasonable basis, including information from other representative markets.</u>

Source: Appellate Body Report, EU – Biodiesel (Argentina) p.23

Thus the Appellate Body continued allowing discretion for the WTO member's authorities if there is no mandatory requirement to be found in the legislation that would lead to as such violation.³³ It is expected from legal professionals such as lawyers in Van Bael & Bellis and Weihuan Zhou that the EU's new legislation might

³³ Appellate Body Report on EU-Biodiesel: The Future of China's State Capitalism Under the WTO Anti-Dumping Agreement, Weihuan Zhou, CTEI-2017-11 p. 7

face similar as such claims on its WTO inconsistency.³⁴ Zhou states in his paper prior to the publication of the final Basic Regulation that: “*Whether an “as such” breach could be established will depend on the exact wording of the EU law which incorporates the new methodology*”³⁵. After going through why the EU was WTO inconsistent as applied in the EU – Biodiesel dispute I will consider these claims by Weihuan Zhou and Van Bael & Bellis more in detail.

2.3.2. As Applied

In the dispute, the Panel and the Appellate Body shed light on the question of “to what extent is a state allowed to have measures against government intervention under the ADA articles 2.2.1.1, 2.2 and 2.4.” This discretion allowed for the countries authorities was narrowed down by the Panel’s decision on as applied claims and upheld by the Appellate Body. Ultimately the decision meant that the EU will have very few options on how to use its legislation against China, if the Accession Protocol is not allowed to be used together with the ADA in the measures that could be used against China’s significant distortions.

The Article 2.2.1.1 of the ADA

Concerning 2.2.1.1, the dispute was about the scope of what is considered reasonable. In the EU’s view the costs of the producers could be regarded as being in the scope of the reasonableness test in the Article 2.2.1.1³⁶

“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 are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration.”

³⁴ The new EU anti-dumping methodology and other upcoming changes to the EU anti - dumping rules, Van Bael & Bellis, 20th December 2017

³⁵ Appellate Body Report on EU-Biodiesel: The Future of China’s State Capitalism Under the WTO Anti-Dumping Agreement, Weihuan Zhou, CTEI-2017-11 p. 25

³⁶ Appellate Body Report, EU – Biodiesel (Argentina) 6.11

The Appellate Body and the Panel were both against the arguments of the EU in their decisions. In the Panel review it was stated that:

*“the object of the comparison is to establish where the records reasonably reflect the costs that actually incurred and not hypothetical costs that might have been incurred under a different set of conditions or circumstances and which the investigating authority considers more “reasonable” than the costs actually incurred.”*³⁷

This view was upheld by the Appellate Body and thus it was established that the EU acted inconsistently with the Article 2.2.1.1 in calculating the costs of production. In the Appellate Body’s view the word ‘reasonable’ in this context is an adverb for the verb ‘reflect’ and not for the costs, and thus that “abstract standard” for the reasonableness of the costs themselves is out of the scope of the article 2.2.1.1.³⁸ Weihuan Zhou interpreted paragraph 6.30 of the Appellate Body report in the EU - Biodiesel to have wider impact on not just how to deal with distortions caused by export taxes under the ADA, but also on how to deal with other market distortions caused by government actions.³⁹ This decision was a landmark case because it made clear that the Anti-Dumping Agreement, at least from this part, is not meant to deal with government distortions as the reasonableness of costs in an economy is not to be considered in the Article 2.2.1.1. Against this backdrop, it is hard to see how the EU could use its anti-dumping legislation against prices that have been caused by government distortions, which the EU regarded in this dispute as a Particular Market Situation (PMS).⁴⁰

Even though the EU’s new legislation does not specifically use the definition Particular Market Situation, it defines in the Article 2(6a)(a) that the undistorted prices or benchmarks shall be used if significant distortions cause domestic prices to be inappropriate. The definition of *significant distortions* from 2(6)(b) is “when

³⁷ Appellate Body Report, EU – Biodiesel (Argentina) 6.41

³⁸ Appellate Body Report, EU – Biodiesel (Argentina) 6.37

³⁹ Appellate Body Report on EU-Biodiesel: The Future of China’s State Capitalism Under the WTO Anti-Dumping Agreement, Weihuan Zhou, CTEI-2017-11 p. 9

⁴⁰ L / 315/2 para 30

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.” . The Argentina’s DET system would clearly be a significant distortion in the EU’s new legislation as the reported costs of soy beans (raw material) are not a result of free market forces and thus if it was regarded as one and the calculations were made without sufficient adjustment, it would most likely lead to an as applied inconsistency. In assessing claims regarding article 2.2 the AB clarified what these necessary adjustments would be when surrogate prices are used in the construction of the normal value.

The Article 2.2 of the ADA

When considering an “as applied” inconsistency regarding Article 2.2 of the ADA the AB clarified what adjustments need to be made when surrogate prices are used in order to make them reflect the cost of production in the country of origin. The Panel and the AB found out that the normal value constructed by the EU using surrogate prices was not the cost prevailing in the country of origin, and thus it was inconsistent with Article 2.2.⁴¹ Even though the costs need to reflect the actual costs in the country of origin, the Panel and the AB interpreted Article 2.2 and Article VI:1(b)(ii) of the GATT 1994 to allow sources outside of the country of origin when constructing the normal value.⁴² But in the same paragraph it is noted that “*whatever information or evidence is used to determine the "cost of production", it must be apt to or capable of yielding a cost of production in the country of origin*”

⁴³

This decision by the AB was interpreted by Weihuan Zhou to mean that the ADA is not intended to deal with government-caused price distortions unless otherwise specified in the agreement.⁴⁴ In this case, there was no dispute on the existence of Particular Market Situation, but still even when PMS exists, under the Agreement

⁴¹ Appellate Body Report, EU – Biodiesel (Argentina) 6.63

⁴² Appellate Body Report, EU – Biodiesel (Argentina) 6.70

⁴³ Appellate Body Report, EU – Biodiesel (Argentina) 6.70

⁴⁴ Appellate Body Report on EU-Biodiesel: The Future of China’s State Capitalism Under the WTO Anti-Dumping Agreement, Weihuan Zhou, CTEI-2017-11 p. 13

investigating authorities need to make necessary adjustments in order for the cost of production to reflect the cost in the country of origin. By these adjustments, the constructed normal value *de facto* needs to be adapted to include possible price distortions that are prevailing in the country of origin.

This decision efficiently undermines the EU's new 2(6a), especially on how they could apply: "Normal value shall be constructed exclusively on the basis of costs of production and sale reflecting undistorted prices or benchmarks". When clearly exclusively using undistorted prices is against the ADA as interpreted by the AB.

2.4 Grandfathering clauses in the new Basic Regulation

Even though the Basic Regulation has been amended, the old Article 2(7) will remain in force for many years to come due to grandfathering provisions adopted by the EU.

In the amended Articles 11(3) and 11(4) it is stated that when reviewing dumping in changed circumstances, the existing anti-dumping measures calculated under the old Article 2(7) will not be replaced by the new methodology before the first expiry review of those measures.⁴⁵ Thus *de facto* EU's anti-dumping measures that are based on the old 2(7) would be in force till 2022 when the last definitive anti-dumping duties on imports of trichloroisocyanuric acid originating in the People's Republic of China would have expiry review.⁴⁶ This is because anti-dumping measures are usually imposed for 5 years.

Also, EU has made it clear in its Recital 9 of Amending Basic Regulation that the transition itself from normal value calculated under the old 2(7) to the new methodology is not sufficient evidence within the meaning of Article 11(3), which is the article governing initiation of interim reviews, for launching a new interim

⁴⁵ L 388, Official Journal of the European Union, volume 60, 19.12.2017

⁴⁶ L 319/10, COMMISSION IMPLEMENTING REGULATION (EU) 2017/2230

review.⁴⁷ Thus, Chinese producers could not ask for an interim review based on the change of regulation.

Article 4 of the provision on the entry into force of the Regulation that amends the Basic Regulation also states that:

“This Regulation shall apply to all decisions on the initiation of proceedings, and to all proceedings, including original investigations and review investigations, initiated on or after the date on which this Regulation enters into force.”

This leads to a conclusion that the new Basic Regulation does not govern proceedings initiated before the new regulation entered into force 20th of December 2017. Thus if an ongoing investigation would come to the decision that new measures will be imposed or an existing measure will be extended, it would be governed by the old Article 2(7). These new measures would be in force for 5 years from the date of imposition till expiry review. It would mean that there might be even three more years after 2022 that the old article 2(7) would remain in force.

⁴⁷ L 388, Official Journal of the European Union, volume 60, 19.12.2017

3 WHY THE EU MADE AMENDMENTS TO THE BASIC REGULATION

As seen from section 2 of this paper, it is quite clear that the EU's new amendments would be inconsistent with the WTO as applied. Even though as such violation depends on the mandatory nature of the regulation, it still raises a question as of why EU seems to have changed from one WTO inconsistent methodology to another one. Or perhaps there is a possibility that the EU will be able to win the dispute European Union – Measures Related to Price Comparison Methodologies (DS516), which is related to the case as it is the dispute about the EU's old article 2(7). After the dispute it is likely that China will be having a new dispute against the new amended Basic Regulation. If the EU was to win these disputes or gain otherwise significant decisions from the Appellate Body perhaps its new legislation would become more clearly WTO consistent.

Regarding the reasons why the EU has had to act to keep its anti-dumping legislation effective, it is quite clear that there was a threat of a negative impact to the EU's economies if the EU would not have taken mitigating measures to the expiry of the provisions of subparagraph (a)(ii) in Section 15 of China's Accession Protocol to the WTO. This assessment of the impact can be found from an external study, which the Commission commissioned in 2015 in order to analyze possible solutions for the expiration. Main findings of the study are that the EU would lose at most 211,000 jobs and at least 63,600 jobs based on the data available in 2015 with the adjustments made from job creation of cheaper imports.⁴⁸ It is interesting to note that based on the report if the upper end of job loss would happen, Finland would lose 689 jobs based on 2015 calculations.⁴⁹ Even more interesting is that a similar report was conducted by Economic Policy Institute (EPI), which is an independent American non-profit think tank. In their study they claimed that there would be 1,7 million to 3,5 million potential jobs lost if the EU recognized China as a market economy.⁵⁰ But these calculations from EPI were criticized as the study "*assumes that MES*

⁴⁸ Change in the methodology for anti-dumping investigations concerning China, 3.2.2016, http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154241.pdf

⁴⁹ Change in the methodology for anti-dumping investigations concerning China, 3.2.2016, http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154241.pdf

⁵⁰ Unilateral Grant of Market Economy Status to China Would Put Millions of EU Jobs at Risk 18.9.2015

methodology would lead to a decrease in duties for all imports from China.” Even though in reality the EU only had 52 active anti-dumping measures against China, which means that only 1,38% of duties against China were anti-dumping duties in 2015.⁵¹ Perhaps one explaining factor for this difference in calculations is, that the “independent study” from EPI (as claimed by Aegis Europe) was commissioned by Aegis Europe, which is an EU industry consortium.⁵² On the other hand Bernard O’Connor, a lawyer from NCTM, has argued that the very reason why anti-dumping measures cover such a small portion of duties is, because of the effective trade defence instruments that have a deterrent effect on dumping from China.⁵³

Even though there are different calculations and results about the effects, it is still clear that the EU has an incentive not to allow a market economy status treatment to China. Indeed these calculations confirm the previously mentioned view that the Amendments are mainly aimed at China, even though it is not exactly mentioned in the final form of the amended basic regulation, but instead more discreetly as: “*In view of developments with respect to certain countries*”.⁵⁴ Also one factor more that speaks for the intention of the new Amendments to mainly work against China is that on the same day as the new anti-dumping legislation entered into force, the EU published a 465 page report named: “ON SIGNIFICANT DISTORTIONS IN THE ECONOMY OF THE PEOPLE'S REPUBLIC OF CHINA FOR THE PURPOSES OF TRADE DEFENCE INVESTIGATIONS”.⁵⁵ There has been no other reports and it seems like there are no clear plans as of yet to publish new reports.⁵⁶

As already previously shown from Common Core Demands from Germany and France on modernizing Trade Defence Instruments (TDI) of the European Union and Aegis Europe there is political will to avoid granting standard methodology treatment for Chinese imports. Cecilia Malmström and Jean-Claude Juncker both made

⁵¹ Change in the methodology for anti-dumping investigations concerning China, 3.2.2016

⁵² Change in the methodology for anti-dumping investigations concerning China, 3.2.2016

⁵³ [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/535023/EXPO_STU\(2016\)535023_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/535023/EXPO_STU(2016)535023_EN.pdf) , For the Committee on International Trade (INTA) WORKSHOP Market Economy Status for China after 2016?

⁵⁴ L 388, Official Journal of the European Union, volume 60, 19.12.2017

⁵⁵ ON SIGNIFICANT DISTORTIONS IN THE ECONOMY OF THE PEOPLE'S REPUBLIC OF CHINA FOR THE PURPOSES OF TRADE DEFENCE INVESTIGATIONS

⁵⁶ EU to single out Chinese imports in report on market distortions, Reuters, 6.10.2017

statements on 5th of December 2017 that the new anti-dumping legislation has been made in order to protect the interests of workers and companies in the EU. Cecilia Malmström ended her speech with: “*We are and we will continue to stand up for companies and workers suffering from unfair competition*”.⁵⁷

3.1 Is there a possibility that the new Basic Regulation would survive dispute settlement in the WTO?

Even though the Appellate Body jurisprudence is not binding, it is hard to see how the EU’s new Basic Regulation could be applied under the anti-dumping agreement. It seems to be the case also from many legal scholars’ view, for example lawyers in Van Bael & Bellis consider it highly unlikely that the new rules would survive WTO dispute settlement,⁵⁸ whereas Weihuan Zhou states that the new EU legislation is in even more overt breach than similar laws from the USA and Australia.⁵⁹ Thus the arguments on the consistency of new measures tend to focus on the interpretation of what expired in the Accession Protocol, the main question being was it only 15(a)(ii) that expired and would other parts of section 15(a) remain in force, therefore granting the EU the right to calculate costs by using the surrogate method. This view is supported by *inter alia* the European Union⁶⁰, Prof. Bernard O’Connor⁶¹ and by F. Martin Malvarez.⁶²

For greater clarity in considering the different interpretations of the Accession Protocol, the whole of section 15 is below.

⁵⁷ European Parliament Press release, IP/17/5136, 5.12.2017

⁵⁸ Van Bael & Bellis, 20.12.2017, The new EU anti-dumping methodology and other upcoming changes to the EU anti -dumping rules

⁵⁹ Appellate Body Report on EU-Biodiesel: The Future of China’s State Capitalism Under the WTO Anti-Dumping Agreement, Weihuan Zhou, CTEI-2017-11 p. 13

⁶⁰ European Union – Measures Related to Price Comparison Methodologies, First Written Submission by the European Union, para 7

⁶¹ [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/535023/EXPO_STU\(2016\)535023_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/535023/EXPO_STU(2016)535023_EN.pdf) , For the Committee on International Trade (INTA) WORKSHOP Market Economy Status for China after 2016?

⁶² China’s NME treatment after December 2016

ACCESSION OF THE PEOPLE'S REPUBLIC OF CHINA

Section 15:

“Article VI of the GATT 1994, the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement") and the SCM Agreement shall apply in proceedings involving imports of Chinese origin into a WTO Member **consistent with** the following:

- (a) In determining price comparability under Article VI of the GATT 1994 and the Anti-Dumping Agreement, the importing WTO Member **shall use either** Chinese prices or costs for the industry under investigation **or a methodology that is not based on a strict comparison with domestic prices** or costs in China **based on** the following rules:
- (i) If the producers under investigation can clearly show that **market economy conditions prevail in the industry producing** the like product with regard to the manufacture, production and sale of that product, the importing WTO Member shall use Chinese prices or costs for the industry under investigation in determining price comparability;
- (ii) **The importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs in China** if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product.
- (d) Once China has established, under the national law of the importing WTO Member, that it is a market economy, the provisions of subparagraph (a) shall be terminated provided that the importing Member's national law contains market economy criteria as of the date of accession. **In any event, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession.** In addition, should China establish, pursuant to the national law of the importing WTO Member, that market economy conditions prevail in a particular industry or sector, the non-market economy provisions of subparagraph (a) shall no longer apply to that industry or sector.”⁶³

The arguments made by Bernard O'Connor focus on the chapeau and the sections 15(a) and 15(a)(i). The main findings of his are that: A) the burden of proof on Market Economy Status will remain on the producers due to section 15(a)(i) as it

⁶³ ACCESSION OF THE PEOPLE'S REPUBLIC OF CHINA, WT/L/432, 23.11.2001

clearly says that the producers are the ones who have the burden to show that such conditions prevail in the industry. B) Reading “consistent with” from the Chapeau together with 15(a) obligation allows for another application of the measures that are not based on strict comparison, because “*based on is not the same as applying rule rigidly*.”⁶⁴ These findings show that there are tricky interpretative issues for the Panel and the Appellate Body on this subject, which also Bernard O’Connor acknowledges.⁶⁵

With these arguments, O’Connor challenged the ruling of the Appellate Body on European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China (DS397), EC – Fasteners in short. In EC – Fasteners the AB ruled that Paragraph 15(d) would lead to the expiration of the whole section 15(a).⁶⁶ In the EU – Price Comparison Methodologies (DS516) the European Union has also made a written statement that only the burden of proof shifts due to the expiry of 15(a)(ii), but the other parts continue to apply,⁶⁷ in the author’s view it is unlikely that the AB would rule against its own jurisprudence, even though it is permitted to do so. In the EU’s view the other parts that continue to apply are: 1) Article VI of the GATT and the ADA will continue to be applied in the proceedings regarding China consistent with the section 15. 2) The provisions will apply in “determining price comparability”, 3) The provisions are to apply with respect to the use of domestic prices or costs in China, 4) They are to apply with respect to the industry under investigation, 5) They are to apply with respect to the issue of market economy conditions and the presence of special difficulties, 6) they permit the use of a methodology not based on a strict comparison with domestic prices or costs in China.⁶⁸ If these arguments are accepted by the Panel and the Appellate Body in the dispute EU – Price Comparison Methodologies, then the EU’s new legislation could

⁶⁴ <http://worldtradelaw.typepad.com/files/oconnorresponse.pdf>, The Myth of China and Market Economy Status in 2016,

⁶⁵ <http://worldtradelaw.typepad.com/files/oconnorresponse.pdf>, The Myth of China and Market Economy Status in 2016,

⁶⁶ EC – Fasteners, Para. 289

⁶⁷ European Union – Measures Related to Price Comparison Methodologies, First Written Submission by the European Union, para 7

⁶⁸ European Union – Measures Related to Price Comparison Methodologies, First Written Submission by the European Union, para 107

likely be used as applied against China and also the amended legislation would survive the WTO's dispute settlement system.

However, it is interesting to note that if the EU would lose the dispute EU – Price Comparison Methodologies, China might gain similar recommendations and decisions from the Panel as it has used from EU – Biodiesel and EC – Fasteners.. With these possible rulings, China would be in a better position to challenge the EU's amended legislation and also win the dispute United States – Measures Related to Price Comparison Methodologies (DS515). It will remain to be seen what kind of interpretations the AB will make regarding these subjects, or whether there will even be an Appellate Body to decide on the subject due to the US blocking the recruitment of new Appellate Body Members.⁶⁹

Article 17(1) of the Dispute Settlement Understanding (DSU) states that the Appellate Body consists of seven members. As of now there are only four members remaining, with the first of them having his term expire on 30th of September 2018.⁷⁰ Article 17(1) of the DSU also requires each Appellate Body that hears an appeal to compose of three members. One of the AB members being Chinese, and thus having a conflict of interest under Article 17(3) of the DSU regarding these disputes, this situation would effectively mean that after 30th of September 2018 there would be no possibility of appealing the panel decision under Dispute Settlement Body. What it will mean in practice remains to be seen, and considering it is out of the scope of this thesis.

3.2 Should the SCM agreement be used instead?

At first sight it would seem logical that instead of using the anti-dumping agreement, which is directed to the actions of companies, the EU would use Agreement on Subsidies and Countervailing measures (SCM Agreement), which is directed at actions of governments or government agencies, when acting against distortions

⁶⁹<https://www.bloomberg.com/news/articles/2017-11-08/u-s-block-of-wto-appeals-body-compromises-system-azevedo-says>

⁷⁰ https://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm

created by governments.⁷¹ This is also an action which the EU considered in the EU – Biodiesel case, as the Commission initiated an anti-subsidy case regarding Argentina’s DET system, but the case was terminated already in November 2013.⁷² Now EBB (European Biodiesel Board) is preparing to launch a similar anti-subsidy case against Argentinean biodiesel imports.⁷³ Thus it raises a question of what reasons the EU has not to use SCM agreement also with China’s market distortions, without seeking to interpret the ADA as a way to handle government caused distortions. But as with the ADA, also the SCM agreement has its problems. One of its problems is, that the SCM agreement has strict requirements to deem that a subsidy is actionable.

First of all, there is the requirement that a financial contribution exists (Article 1) or “any form of income or price support in the sense of Article XVI of GATT 1994” (Article 2(a)). Secondly, the financial contribution needs to come from a government or a government agency (Article 1). Thirdly, it needs to confer a benefit (Article 1). Lastly, the subsidy needs to be specific to an enterprise or industry or groups of them (Article 2.1). For example, Meredith A. Crowley, a University Lecturer at the University of Cambridge and Jennifer A. Hillman, a law professor at the Georgetown University Law Center, argued that Argentina DET-system could not have been captured with the SCM agreement, due to its indirect effect to the costs of production. Also in their view DET creates market pressure, but it can not be considered as a direct support from the Government.⁷⁴ Obviously it is hard to show that a financial contribution from the government exists when the instrument is export tax, which is the opposite of contributing to a company.

Perhaps one of the key reasons for the lack of developing the use of the SCM agreement is, that before there has been no need for it due to the Accession Protocols that allowed the use of the ADA against government distortions in China and other

⁷¹ https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm8_e.htm#subsidies

⁷² Slamming the Door on Trade Policy Discretion? The WTO Appellate Body’s Ruling on Market Distortions and Production Costs in EU – Biodiesel (Argentina), Meredith A. Crowley, Jennifer A. Hillman, 5th October 2017, p.13

⁷³ EBB Press Release, 349/COM/17, 27.9.2017

⁷⁴ Slamming the Door on Trade Policy Discretion? The WTO Appellate Body’s Ruling on Market Distortions and Production Costs in EU – Biodiesel (Argentina), Meredith A. Crowley, Jennifer A. Hillman, 5th October 2017, p.13

non-market economies. The Accession Protocols have so far been the main way of treating NME's due to GATT being insufficient in dealing with them. One of the reasons for GATT's insufficiency is that the treaty was concluded only between free market economies. At that point there was no need to agree on rules that would include the treatment of NME's.⁷⁵ But perhaps if the EU fails in defending its new Anti-Dumping legislation, it may be able to use the SCM agreement against the government distortions, as it is urged to do by Weihuan Zhou and David Kleimann.⁷⁶⁷⁷ One of the ways for more favorable use of the SCM agreement from the EU's view would be to have a clear decision that State-Owned Enterprises (SOEs) could be considered as a public body, which would allow applying of the SCM agreement to SOEs. The consideration of SOEs as a public body has been an issue in WTO jurisprudence without a clear answer so far.⁷⁸

To conclude, the SCM agreement will not be as effective in dealing with China as the Accession Protocol combined with the ADA has been so far. Still it offers possibilities for wider reach, which the EU might need to examine more thoroughly if they lose the dispute against China on anti-dumping. Also, politically it might be more favorable for EU – China trade relations to use the SCM agreement and other WTO rules instead of trying to keep alive old methodologies, which China considers to be in violation of the EU's *Pacta Sunt Servanda* obligations.⁷⁹

⁷⁵ Mavroidis and Janow, "Chinese State Owned Enterprises (SOEs) in the Ring"

⁷⁶ Appellate Body Report on EU-Biodiesel: The Future of China's State Capitalism Under the WTO Anti-Dumping Agreement, Weihuan Zhou, CTEI-2017-11 p. 29

⁷⁷ The Vulnerability of EU Anti-Dumping Measures against China after December 11, 2016. David Kleimann July 11, 2016 p.9

⁷⁸ Mavroidis and Janow, "Chinese State Owned Enterprises (SOEs) in the Ring" p.6

⁷⁹ New EU anti-dumping law not in compliance with WTO rules: commerce ministry, 11.16.2017, Xinhuanet.com

4 CONCLUSION

To summarize my analysis, the possible problems for the EU's new Basic Regulation consist of 3 factors: the interpretation of Accession Protocol, the interpretation of the Basic Regulation itself, and the WTO jurisprudence related to Anti-Dumping. These all factors could render the Basic Regulation to become inconsistent with the WTO rules. If the Appellate Body upholds the statement from EC – Fasteners, that the whole section 15(a) of the Accession Protocol is considered to have expired,⁸⁰ it would mean that the same rules as in EU – Biodiesel would apply to China. Thus if the WTO jurisprudence prevails and the Appellate Body does not depart from the EU – Biodiesel case, it would seem likely that the new regulation is WTO inconsistent as applied, whereas the inconsistency on as such depends on the interpretation of the Regulations mandatory nature, as was the case with the Basic Regulation 2(5) in the EU – Biodiesel dispute.

In the author's view, it would seem likely that the new legislation is, at least WTO inconsistent as applied, because of the previously mentioned demands for a departure from existing WTO jurisprudence. Even though the WTO jurisprudence can be altered, Mark Daku and Krzysztof J. Pelc have argued, that when the jurisprudential stakes are high, it is less likely that the rulings can be affected by the litigants.⁸¹ Thus when the stakes are at their highest, as is the case with the China MES dispute, it would seem unlikely that the WTO jurisprudence would change its jurisprudence from both EC – Fasteners and EU – Biodiesel. Perhaps this case of Anti-Dumping against Chinese imports, will be a landmark in a sense, that it shows that China has become a great power in shaping the international trade law, in addition to its economic capacity.

⁸⁰ EC – Fasteners, Para. 289

⁸¹ Mark Daku, Krzysztof J. Pelc; Who Holds Influence over WTO Jurisprudence?, *Journal of International Economic Law*, Volume 20, Issue 2, 1 June 2017, Pages 233–255

Based on the unlikelihood of the EU's legislation being in compliance with the WTO rules, it would seem that the European Union has changed from one WTO inconsistent practice to another one. Perhaps the main goal of the EU is to continue applying non-market economy methodology against China for a few years more before losing the disputes, which Van Bael & Bellis seems to consider as the likely result of the new legislation.⁸² Still it is also a possibility that even though there would be a decision against the Basic Regulation, the EU might continue applying anti-dumping measures in overt breach, as is stated by Weihuan Zhou.⁸³ Certainly there is a strong demand for such actions from the EU industries, such as Aegis Europe, and it is not unheard of that countries disregard their treaty obligations. Still when the case concerns two of the biggest players in global economy, the EU might be cautious of being in breach of its obligations regarding China. Also, as stated before, there is a possibility that the Appellate Body will not be able to decide on the anti-dumping legislation related to China due to the USA blocking the recruitment of the new Appellate Body members,⁸⁴ which might mean that China would not have a legal basis on establishing countermeasures against the EU's, and also USA's, WTO inconsistent anti-dumping measures.

Ultimately it remains to be seen from the coming Appellate Body decisions who holds the power in the development of the international law in the case of the Accession Protocol and the interpretation of what we consider dumping. In the past, inside the WTO jurisprudence it has certainly been the USA,⁸⁵ but perhaps the coming decisions will mark shift towards China being the new world leader in the field of international trade law.

⁸² Van Bael & Bellis, 20.12.2017, The new EU anti-dumping methodology and other upcoming changes to the EU anti -dumping rules, p. 5

⁸³ Appellate Body Report on EU-Biodiesel: The Future of China's State Capitalism Under the WTO Anti-Dumping Agreement, Weihuan Zhou, CTEI-2017-11 p. 29

⁸⁴ <https://www.bloomberg.com/news/articles/2017-11-08/u-s-block-of-wto-appeals-body-compromises-system-azevedo-says>

⁸⁵ Jan Klabbers, 'On Rationalism in Politics: Interpretation of Treaties and the World Trade Organization', 74(3/4) *Nordic Journal of International Law* 405 (2005), at 406.

As argued before, the decisions depend on many interpretations, which in this thesis have been considered only briefly. Deeper study of these interpretations and of the WTO jurisprudence where they have been considered by the AB, might give a different view on the prevailing situation, but this goes beyond the scope of my thesis. Also, the possibilities within the SCM agreement are something that should be considered more thoroughly and which is likely to happen if the EU loses its anti-dumping disputes, as stated in chapter 3.2 of this thesis.

To conclude with a statement from Jan Klabbbers:

*'whoever controls this process [of interpretation] controls the meaning of the treaty, and therewith controls whether or not the obligations resting upon him are bearable or onerous'*⁸⁶

⁸⁶ Jan Klabbbers, 'On Rationalism in Politics: Interpretation of Treaties and the World Trade Organization', 74(3/4) Nordic Journal of International Law 405 (2005), at 406.