REGULATING ABERRATION: TAPPING INTO THE ORDINARY COURSE OF TRADE TEST VIS-À-VIS STATE-CAUSED DISTORTIONS IN COMMERCE

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ABSTRACT

In trade law and practice, anti-dumping measures are the most widely used tool in counteracting government-caused distortions in trade. The primary value of anti-dumping measures in this regard is to alleviate negative trade effects on importing countries and cushion the multilateral trading system against regime frictions. For anti-dumping measures to serve this role, a mechanism to identify and assess government-caused distortions in business operations and net out their distorted domestic prices is pivotal. However, the conventional legal basis for this mechanism is now in limbo. The article presents the "ordinary course of trade" (hereinafter "OCT") test as an alternative framework. The article contends that the OCT test permits assessing the normality and commerciality of state-owned enterprises and transactions, taking into account government-granted competitive advantages and state interference. It offers importing countries a reasonable means to reject the skewed sales without identifying their home country's market as distorted ex ante*, hence having particular merits in mitigating regime conflicts.*

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KEYWORDS: *antidumping, state-owned enterprise, ordinary course of trade test, distortion, particular market situation, world trade organization, significant market distortion, non-market economy*

臺灣大學學術期刊資料庫

Table of Contents

I. Introduction....317
II. Normative Premises for Regulating State-Owned Business Under Anti-Dumping Law....321
A. The Interface Mechanism....321
B. The Primary Grievances: SOEs as Unfair Competitors....322
C. Commerciality and State Control....322
III. Anti-Dumping Measures vis-à-vis State-Owned Business....324
A. The *Sine Qua Non*: Surrogate Method....324
B. Individual Analyses Under the Umbrella of the NME Status....325
C. Market-Focused Analysis: The Significant Distortions Test....328
IV. The PMS Test: Legal Framework for Market-Focused Analysis....330
V. An Alternative Course: The OCT Test and State-Related Business 331
A. The OCT Test in the WTO Anti-Dumping Law....332
B. The OCT Test in Identifying State-Related Unfair Trading....333
1. The OCT Test and Non-Commercial Predatory Pricing....333
2. The OCT Test and Competitive Advantages....334
3. The OCT Test and Commerciality....336
C. The Alternative Path: Merits and Limits....338
VI. Conclusion....343

I. INTRODUCTION

Today, the term state-caused distortion is often used to portray a complex of challenges presented for the international economic order and governance by the rise of state-owned commercial activities.[1] The establishment and operation of public assets are primarily the institutional choice of the sovereign. However, the entangled functions and interests between the state and enterprises often result in cross-border spillovers and regulatory conundrums. This tension arguably challenges the tenets of the neoliberal economic legal order and especially casts doubt on the resilience and capability of the World Trade Organization (hereinafter "WTO") in the face of regime conflicts.[2] Effectively regulating the externalities of state interference in commerce requires a nuanced approach that achieves

[1] *See generally* CEPR PRESS, TRADE WAR: THE CLASH OF ECONOMIC SYSTEMS ENDANGERING GLOBAL PROSPERITY (Meredith A. Crowley ed., 2019).
[2] *See generally* PETROS C. MAVROIDIS & ANDRÉ SAPIR, CHINA AND THE WTO: WHY MULTILATERALISM STILL MATTERS (2021); Gregory Shaffer, *Governing the Interface of US-China Trade Relations*, 115(4) AM. J. INT'L L. 622 (2021).

臺灣大學學術期刊資料庫

equilibrium and fair distribution of responsibilities among nations with varying regulatory regimes.[3]

Given the significance of this subject, there is a plethora of literature on the (in)adequacy of trade rules.[4] Among all, trade defense measures, in particular anti-dumping and countervailing duties, take pride of place.[5] As such, these measures address unfair trade practices and shield domestic industries from the harmful effects of dumped or subsidized imports. In dealing with non-market economy (hereinafter "NME") issues, trade defense measures serve as principal "interface" mechanisms that mitigate the destabilizing impacts of regime friction on the WTO system.[6] Since its inception, the WTO has witnessed over 7,270 trade remedy investigations, resulting in approximately 4,300 measures, with China being the most affected, accounting for 28% of all initiations.[7] More than 7% of China's exports to the Group of twenty countries have been subject to trade remedies.[8] Among all the trade defense measures, anti-dumping duties are responsible for the bulk of actions against state-owned enterprises and are likely to continue in this capacity.[9] It is worth noting that although subsidy

[3] *See generally* Shaffer, *supra* note 2.

[4] *See generally* U. MICH. PRESS, STATE TRADING IN THE TWENTY-FIRST CENTURY (Thomas Cottier et al. eds., 1998); Mark Wu, *The "China, Inc." Challenge to Global Trade Governance*, 57(2) HARV. INT'L L.J. 261 (2016); Weihuan Zhou et al., *Building a Market Economy Through WTO-Inspired Reform of State-Owned Enterprises in China*, 68(4) INT'L & COMPAR. L.Q. 977 (2019); Andrea Mastromatteo, *WTO and SOEs: Article XVII and Related Provisions of the GATT 1994*, 16(4) WORLD TRADE REV. 601 (2017); Robert Howse, *Making the WTO (Not So) Great Again: The Case Against Responding to the Trump Trade Agenda Through Reform of WTO Rules on Subsidies and State Enterprises*, 23(2) J. INT'L ECON. L. 371 (2020); Ming Du, *China's State Capitalism and World Trade Law*, 63(2) INT'L & COMPAR. L.Q. 409 (2014).

[5] *See generally* Wu, *supra* note 4; Zhou et al., *supra* note 4; Du, *supra* note 4; Antonia Eliason & Matteo Fiorini, *Australia – Anti-Dumping Measures on A4 Copy Paper: Opening a Door to More Anti-Dumping Investigations*, 20(4) WORLD TRADE REV. 479 (2021).

[6] *See generally* JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 248 (2d ed. 1997); *see also* Chad P. Bown, *Trump Ended WTO Dispute Settlement. Trade Remedies Are Needed to Fix It.*, 21(3) WORLD TRADE REV. 312 (2022).

[7] *See generally Report on G20 Trade Measures*, WORLD TRADE ORG. [hereinafter WTO] (July 7, 2022), https://www.wto.org/english/news_e/news22_e/report_trdev_jul22_e.pdf; Julien Chaisse & Debashis Chakraborty, *Normative Obsolescence of the WTO Anti-Dumping Agreement—Topography of the Global Use and Misuse of Initiations and Measures*, 6(2) ASIAN J. INT'L L. 233 (2016).

[8] Bown, *supra* note 6, at 312.

[9] Xiang Liu & Hylke Vandenbussche, *European Union Anti-Dumping Cases Against China: An Overview and Future Prospects with Respect to China's World Trade Organization Membership*, 36(6) J. WORLD TRADE 1125, 1125 (2002). The WTO jurisprudence has reaffirmed the practice of addressing government-induced market distortion beyond anti-subsidy law. *See* Appellate Body Report, *United States — Definitive Anti-Dumping and Countervailing Duties (China) (US-AD/CVD)*, ¶ 541, WTO Doc. WT/DS379/AB/R (adopted Mar. 25, 2011); *see also* Panel Report, *Australia — Antidumping Measures on A4 Copy Paper*, ¶ 7.5, WTO Doc. WT/DS529/R (adopted Jan. 27, 2020) [hereinafter *Australia — A4 Copy Paper* Panel Report]; see generally Eliason & Fiorini, *supra* note 5, for a useful account for why countries prefer anti-dumping [hereinafter AD] measures over countervailing measures.

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cases have been in the limelight recently, in practice, their numbers remain to be dwarfed by antidumping cases.[10]

The rationale for cross-border regulation for state-caused market distortion is premised on its spill-over adverse effects on international trade.[11] Anti-dumping measures have proven effective in mitigating such effects in the past. Yet, for anti-dumping measures to fulfill this purpose, it is necessary to characterize and evaluate government interference and the resultant negative externalities during investigations. Previously, China's NME status permitted importing countries to conduct such assessments.

However, a series of WTO cases in the midst of heightened regime frictions have introduced new uncertainties regarding this practice.[12] China's NME status ceased to be valid in 2016,[13] and the brooding emergence of novel methodologies, based on the particular market situation (hereinafter "PMS") doctrine, is discriminatory and precarious.[14] However, the legality of such measures will remain in limbo due to the crisis facing the WTO. In addition, the WTO judiciary is generally evasive about politically sensitive issues and gingerly treads on precedent setting, a propensity that casts another layer of dubiety on the role of antidumping measures vis-à-vis state-owned enterprises.

Against this background, the article dismisses the current market-based methodology in determining market-distortion, and proposes an entity- and

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[10] In the new investigations initiated by the EU in 2024, there are only two countervailing duties [hereinafter CVD] investigations, much fewer compared to seven AD investigations. Interestingly, all seven antidumping investigations are against China, while there is only one for CVD investigation. *Trade Defence Investigations*, EUR. COMM'N (Dec. 17, 2024), https://tron.trade.ec.europa.eu/investigations/cases.

[11] Shaffer, *supra* note 2, at 630.

[12] See cases included in this article and sources cited *infra* note 14.

[13] Weihuan Zhou & Delei Peng, *EU – Price Comparison Challenging Methodology (DS516): The Non-Market Economy Methodology in Light of the Negotiating History of Article 15 of China's WTO Accession Protocol*, 52(3) J. WORLD TRADE 505, 505 (2018); *see also* Yenkong Ngangjoh-Hodu & Tianzhu Han, *China's Market Economy Dilemma and Its Interplay with EU Anti-Dumping Law*, 27(1) ASIA PAC. L. REV. 102, 102 (2019).

[14] *See generally* SPRINGER, THE FUTURE OF TRADE DEFENCE INSTRUMENTS: GLOBAL POLICY TRENDS AND LEGAL CHALLENGES (Marc Bungenberg et al. eds., 2018). Apart from cases discussed in this article, see also an avalanche of recent cases against major users of PMS test: Request for consultations by the European Union, *European Union — Countervailing and Anti-Dumping Duties on Stainless Steel Cold-Rolled Flat Products from Indonesia*, WTO Doc. WT/DS616/1 (Feb. 18, 2022); Request for Consultations by Argentina, *Peru — Anti-Dumping and Countervailing Measures on Biodiesel from Argentina*, WTO Doc. WT/DS614/1 (Sep. 2, 2022); Request for Consultations by the Kingdom of Saudi Arabia, *European Union — Provisional Anti-Dumping Duty on Mono-Ethylene Glycol from Saudi Arabia*, WTO Doc. WT/DS606/1 (Aug. 17, 2021); Request for consultations by the Russian Federation, *United States — Anti-Dumping Measures on Carbon-Quality Steel from Russia*, WTO Doc. WT/DS586/1 (July 5, 2019); Request for consultations by China, *Australia — Anti-Dumping and Countervailing Duty Measures on Certain Products from China*, WTO Doc. WT/DS603/1 (Sep. 5, 2022); Panel Report, *European Union — Cost Adjustment Methodologies and Certain Anti-Dumping Measures on Imports from Russia — (Second Complaint)*, WTO Doc. WT/DS494/R (circulated July 24, 2020) [hereinafter *EU — Cost Adjustment Methodologies II (Russia)* Panel Report].

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transaction-oriented approach to scrutinizing government-caused distortions in commerce. Further, the article contends that such an approach may be based on the ordinary course of trade (hereinafter "OCT") test in WTO anti-dumping law.

In what follows, the article will use the term state-owned enterprises (hereinafter "SOE") for the sake of simplicity, but it is interchangeable with state-owned enterprises, whether they are financed, controlled, influenced or owned by states.[15] The article demonstrates that the entity- and transaction-oriented approach has a long history in anti-dumping investigations vis-à-vis State-caused distortions. However, the recently emerged methodology in the European Union (hereinafter "EU"), featuring a market-based approach, departs from this established practice. As will be set forth, the EU's market-oriented approach bears severe legitimacy risks. On this basis, the article explores a possibility to revert to an entity- and transaction-oriented approach. It contends that the OCT test in antidumping law provides this option. The OCT test allows for the evaluation of the normality and commerciality of SOE transactions, considering government-granted competitive advantages and state interference. It provides importing nations with an alternative, non-discriminatory way to reject the sales distorted by state interference without labelling the entirety of exporting market as distorted.

The article will proceed as follows: Section II examines the role of anti-dumping measures in regulating SOEs, accounting for their purpose as a buffer mechanism against the negative externalities of unfair trading. This section also dissects the externalities to lay down an analytical framework. Section III demonstrates the application of anti-dumping measures in this context, highlighting the importance of the surrogate method in regulating anti-dumping for SOEs. Additionally, the section identifies a perilous shift in investigations against SOEs, from an individual approach to a market-based approach. Section IV explores the legal status of the market-based methodology under WTO rules and highlights its precarious status and legitimacy issues. Finally, Section V proposes the OCT test as an alternative framework for assessing and countering the negative effects of government-caused distortions in cross-border business operations. Section VI concludes.

[15] The forms and types of state influence in companies are of no decisive importance for the administration of antidumping rules; it is the effects derived from such influence, as spelled out in Section I, that matter.

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II. NORMATIVE PREMISES FOR REGULATING STATE-OWNED BUSINESS UNDER ANTI-DUMPING LAW

SOE issues are multifaceted,[16] and few would dispute that we do not expect anti-dumping measures alone could address the entirety of the problem. It is therefore useful to sharpen our discussion by focusing on a teleological dimension of antidumping measures in terms of SOE regulation. This section demonstrates that anti-dumping measures are intended to serve as a buffer mechanism to counteract the adverse trade effects arising from NME trading. As a result of intractable government-enterprise connections, such negative effects frequently originate from two sources: SOEs' competitive advantages and non-commercial behaviours. Hence, a rational and effective system should allow for identification, assessment and rectification of adverse effects derived from these two identified sources.

A. The Interface Mechanism

In response to NMEs acceding to the WTO, Jackson proposed trade defense measures as an "interface" machinery.[17] This mechanism suggests the utilization of traditional trade remedies such as emergency safeguards, anti-dumping, and countervailing duties to address structural variance between economies. This disposition aims to moderate latent frictions caused by regime disparities while preserving the market economy ethos of the multilateral trading system.[18] Importantly, the proposed "interface" tools are intended to alleviate the trade harms arising from unbridled government assistance to and interference in commerce as a prevailing practice within NMEs.[19] Hence, regulating SOEs through anti-dumping measures, whether one agrees with its propriety or not, can only be justified based on SOEs' unnatural advantages, as opposed to their commercial, and thus "natural", endowments.[20]

It should be further noted that, similar to other unfair trade rules, anti-dumping duties target the "effect" rather than the "cause" of a trade predicament.[21] In other words, anti-dumping measures are indifferent to the structural heterogeneity of trading nations; they distribute the adjustment

[16] Robert Howse, *Official Business: International Trade Law and the Resurgence (or Resilience) of the State as an Economic Actor*, 43(4) U. PA. J. INT'L L. 821, 832 (2022).
[17] Jackson, *supra* note 6, at 1-21; *see generally* U. MICH. PRESS, *supra* note 4.
[18] Petros C. Mavroidis & Merit E Janow, *Free Markets, State Involvement, and the WTO: Chinese State-Owned Enterprises in the Ring*, 16(4) WORLD TRADE REV. 571, 571-72 (2017).
[19] See Zhou et al., *supra* note 4, at 1006, for antidumping rules specific to NMEs.
[20] *See generally* Daniel K. Tarullo, *Beyond Normalcy in the Regulation of International Trade*, 100(3) HARV. L. REV. 546 (1987).
[21] *See generally* Bernard Hoekman & Petros Mavroidis, *Dumping, Antidumping and Antitrust*, 30(1) J. WORLD TRADE 27 (1996).

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costs among trading countries rather than eradicating regime differences. Therefore, the rational objection to SOEs' unnatural advantages under anti-dumping law is predicated on their resulting cross-border externalities. This essentially implies that the regulation of SOEs under antidumping law necessitates the identification of the sources of their externalities as opposed to a distinction between their originating regimes. In light of this, the following discussion explores the patterns and sources of externalities arising from the global trading activities of SOEs.

B. The Primary Grievances: SOEs as Unfair Competitors

The primary concerns regarding SOEs revolve around the competitive advantages granted by governments and their tendencies towards rent-seeking behavior. Arguably, SOEs often benefit from administrative and financial favoritism provided by governments.[22] Even in purely commercial transactions, non-public market participants may treat SOEs more preferably due to the latter's ties with governments. These inherent edges serve as resources for SOEs, skewing up their domestic upsides and driving down their domestic input costs, eventually translating into SOEs' deep pockets, soft budget constraints, and advantageous competitive positions. When SOEs go global, the undue competitive advantages have a direct, and often imminent, bearing on competitors. Higher domestic advantages and the concomitant aggregated turnover allow SOEs to sustain marginal or predatory cost pricing for exports. Distorted low costs enable exporting SOEs to offer artificially low-priced products, which although not constituting predatory pricing, could equally cause economic dislocations and consequently dismay local businesses and industries.[23] Particularly, the influx of low-priced products onto the global market could prejudice international competitors via price or volume effects, such as price-undercutting, market replacement or investment retardation.

C. Commerciality and State Control

The second concern, which is more complex, relates to the influence of states in commercial decisions.[24] Unlike the issue of competitive advantages,

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[22] Hans Christiansen & Yunhee Kim, *State-Invested Enterprises in the Global Marketplace: Implications for a Level Playing Field* 13 (Org. for Econ. Coop. & Dev., OECD Corporate Governance Working Papers No. 14, 2014), https://www.oecd-ilibrary.org/governance/state-invested-enterprises-in-the-global-marketplace-implications-for-a-level-playing-field_5jz0xvfvl6n w-en.

[23] *See generally* Greetje Everaert & Hylke Vandenbussche, *Does Protection Harden Budget Constraints?* (LICOS Ctr. for Insts. & Econ. Performance, LICOS Discussion Paper No. 98, 2001), https://www.econstor.eu/handle/10419/74953.

[24] For the complexity of the issue, see generally Li-Wen Lin, *A Network Anatomy of Chinese State-Owned Enterprises*, 16(4) WORLD TRADE REV. 583 (2017).

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state manipulation or influence on and of its own does not directly distort market. Assuming that a state's influence over public or even private businesses does not change their pattern of behavior, it is unlikely to have an impact on other market operators. Hence, the genuine economic externalities arise from the distorted commerciality or potential absence thereof due to state influence on business operations and decisions.

Although it is challenging to provide a stringent definition, mention of commerciality is typically made to the attributes inherent to a commercial entity. It signifies a company's pursuit of profit maximization, responsiveness to market signals, and exercise of autonomous commercial decisions.[25] SOEs' commercial activities, or *acta jure gestionis*, in the meaning given within immunity or state responsibility rules,[26] are not absolutely free from state interference. The reason is simple: States may act as stakeholders rather than sovereign powers but simultaneously bring public and societal goals to bear on the commercial conduct of enterprises. For instance, when states, as the principal shareholders of SOEs, do not demand recoupment or a commercially sustainable rate of return, SOEs are relieved of financial constraints and thus placed in an advantageous competitive position. In the absence of the ultimate objective of cost recovery, even enterprises without a dominant market position can engage in predatory pricing tactics prejudicial to their rivals.[27] Moreover, when government control fundamentally plagues the commerciality of enterprises, it often results in their sluggish response to negative demand shocks and, as an undesirable corollary, production overcapacity. Ultimately, companies in a free market are forced to bear the costs of SOEs' unresponsiveness to global market signals.[28] In these scenarios, market impact invariably results.

Nevertheless, it is crucial to note that state influence and commercialization are not strictly correlated.[29] There are multiple ways state influence may distort commerciality of pertinent entities. Even with loose, hands-off state management, an SOE can be deprived of commerciality.[30] Conversely, if the government prioritizes profit maximization as a

[25] In Article XVII of the General Agreement on Tariffs and Trade [hereinafter GATT], commercial considerations are defined as following several commercial standards in the course of decision making. *See generally* Xueji Su, *From Effect to Behavior – Regulating State-Owned Enterprises as Competitors in Trade Agreements*, 57(3) J. WORLD TRADE 531 (2023).

[26] *See generally* Yohei Okada, *Can* Acta Jure Gestionis *Be Attributable to the State? A Restrictive Doctrine of State Responsibility*, 34(2) EUR. J. INT'L L. 383 (2023).

[27] In accordance with antitrust law, only predatory pricing alone would not raise competition concern; there must be realistic expectations for recoupment and a dominant market position that would signal the possibility of prospective predation.

[28] *See, e.g.*, Bown, *supra* note 6, at 322-23; *see generally* David H. Autor et al., *The China Shock: Learning from Labor Market Adjustment to Large Changes in Trade*, 8 ANN. REV. ECON. 205 (2016).

[29] *See generally* Curtis J. Milhaupt & Wentong Zheng, *Beyond Ownership: State Capitalism and the Chinese Firm*, 103 GEO. L.J. 665 (2015).

[30] *See id.*

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shareholder, even tight state control may not divert an entity from its commercial nature. Therefore, when assessing whether government interference undermines the commerciality of a company or that of its specific decision, case-by-case analysis is indispensable.[31] Failure to properly handle this distinction between state control and commercialization could lead to the pitfalls of overgeneralization and subsequent over- or under-inclusiveness in SOE regulation, as we can see in the following analysis.

In summary, externalities arising from state-enterprise relations in the global marketplace stem from two sources: government-granted or rent-seeking competitive advantages and government influence that distorts the commerciality of enterprises. In both scenarios, state-owned enterprises, due to their relationships with the government, may offer artificially low or lower prices than they would in a competitive market, resulting in negative externalities. Consequently, an ideally rationalized and effective system to address these externalities should allow for fact-dependent identification and assessment of government-induced competitive advantages and non-commercial behavior. In the following sections, the adequacy of anti-dumping rules for SOE regulation will be examined on this basis.

III. ANTI-DUMPING MEASURES VIS-À-VIS STATE-OWNED BUSINESS

As noted, when it comes to SOEs, the value of anti-dumping measures lies in countering the negative spillover arising from government-enterprise relations. As will be laid forth in this section, in order for antidumping measures to achieve this effect, the employment of the surrogate method is imperative. Previously, importing countries typically turned to a market-centric approach such as the NME status of a member state as a legal basis for this purpose. Drawing on the EU's anti-dumping practice as paradigmatic of a hallmark legislative amendment, this section highlights the legitimacy issues caused by the continued reliance on the market-centric approach.

A. The Sine Qua Non*: Surrogate Method*

Arguably, the WTO's antidumping rules chiefly address dumping as a result of price discrimination. In line with this rationale, dumping as provided in WTO law occurs when a foreign product is introduced into another country's market at a price lower than its normal value. That is, the product's domestic market price.[32] If an SOE receives preferential financing,

[31] This issue is more extensively discussed in the field of competition law. *See generally* Angela Huyue Zhang, *The Antitrust Paradox of China, Inc.*, 50(1) N.Y.U. J. INT'L L. & POL'Y 159 (2017).
[32] Agreement on the Implementation of Article VI of GATT 1994, 1868 U.N.T.S. 201, art. 2.1; General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A11, 55 U.N.T.S. 194, art. VI:1.

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tax exemptions, or other benefits that lower its production costs and prices, allowing it to sell products below their true market value, regular WTO anti-dumping rules would consider the skewed low domestic prices as the "normal value" for ascertaining and calculating anti-dumping duties. Anti-dumping rules are of limited use here to identify and negate government-caused trade distortions. Therefore, a mechanism to assess the state's influence over businesses' production and sales and, on that basis, justify the rejection of skewed domestic prices and the subsequent use of market-based alternative bases is imperative.

As a rule of thumb, rejecting domestic prices and using surrogate market-based external values or constructed normal values (hereinafter "CNVs") allows importing members to drive up dumping margins and impose higher anti-dumping duties.[33] This mechanism offers importing countries a means to handle the externalities resulting from government-imposed distortions in parallel with the harm caused by price discrimination.

The employment of surrogate bases is *lex specialis* in WTO law. In order to invoke surrogate bases, importing countries have long relied on the NME status and the PMS test as legal premises. In the former scenario, if a member state consents to its NME status, other member states could directly rely on the foregoing declaration to apply the surrogate method. In the latter scenario, countries ought to establish that the market conditions of the country of origin are "particular" prior to executing the surrogate method against products therefrom. The instrumental effect of these two methodologies has been to provide a framework for casting aside the unduly low domestic prices as the normal value and netting out the distorted costs in value construction on the grounds of the distorted market conditions of the exporting countries. As China's NME status lapsed in 2016, its major trading partners have predominantly turned to the PMS test. In what follows, the analysis outlines the EU's legislative shift in the antidumping domain to throw light on the pitfalls of adhering to the PMS method in coping with state-owned business.

B. Individual Analyses Under the Umbrella of the NME Status

The entity- and transaction-oriented approach proposed in this article is not novel. In the realm of EU antidumping practice, it formerly operated under the aegis of the market economy treatment (hereinafter "MET") test[34] and individual treatment (hereinafter "IT") test,[35] yet under the umbrella

[33] Appellate Body Report, *European Communities — Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, ¶¶ 93-95, WTO Doc. WT/DS/219/AB/R (adopted Aug. 18, 2003).
[34] Regulation (EU) 2016/1036 of the European Parliament and of the Council, art. 2(7)(c), 2016 O.J. (L 176) 21.
[35] *Id.* art. 9(5).

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premise of the "special market economy status". The status is a rebuttable presumption and hence accompanied by two tests: If individual exporters from a special market economy lodge and succeed in a MET claim, market treatment will apply.[36] Where the exporters fail the MET test but qualify for the IT test, an exporter-specific duty rate will be levied based on the exporter's export prices, other than a frequently higher countrywide duty rate. The MET test and IT test contain a body of similar criteria, including *inter alia* that firms are making decisions based on market signals, avoiding distortions from the previous non-market economy system, and being subject to bankruptcy and property laws. To obtain MET or IT, exporting producers must establish each criterion separately and meet all.[37] These two assessments include customised totality analyses that question individual producers about their particular activities.

As regards SOEs, both MET and IT include an evaluation of state interference in commercial decisions. The first criterion of the MET test specifies that firms should make commercial decisions in response to market signals and which are clear of significant state interference. Under the MET test, assessment of this criterion is typically executed in terms of four aspects: (1) structure and capital of company; (2) company decision; (3) prices and costs; and (4) sales.[38] The Union institutions would examine whether the state in question had de jure or de facto power to influence the producers' decision-making.[39] Although the bar is set as high as requiring the influence to be "significant", it was onerous for SOEs to pass muster with this review.[40] That an SOE participated in domestic or foreign stock exchanges could not overturn this presupposition. The Union institutions also once established state interference based on the terms of the articles of association with state-controlled partners.[41] Nevertheless, state ownership could not fail a MET claim when safeguards are adequate.[42] The Union institutions were poised to thoroughly evaluate how the company carries out its business activities and any agreements, such as those related to oversight by a private parent company.[43] The practice of thorough, totality analysis to ascertain state influence is reaffirmed by the EU courts, who ruled out the possibility of establishing state interference by relying solely on the grounds of ownership. In the *Zhejiang Xinan Chemical Industrial Group Co. Ltd* case, the Chinese

[36] VAN BAEL & BELLIS, EU-ANTI-DUMPING AND OTHER TRADE DEFENCE INSTRUMENTS 163, 165 (5th ed., 2011).
[37] *Id.* at 164-65.
[38] *Id.*
[39] See cases cited in VAN BAEL & BELLIS, *supra* note 36, at 166.
[40] *Id.* and the cases cited therein.
[41] These agreements either contain sales restrictions or allow state-owned enterprise (SOE) partners to claim compensation when certain objectives are not fulfilled. See *id.* at 168 in detail.
[42] *Id.* at 174.
[43] *Id.* at 167.

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state was a primary shareholder of the exporter and had control over its personnel appointments.[44] The General Court considered that state control of an exporting producer does not directly amount to "significant state interference" as provided in law.[45] On appeal, the Court of Justice of the EU (hereinafter "CJEU") espoused the panel's finding and added that[46]:

> In the context of a non-market economy country, the fact that a company established in that country is de facto controlled by state shareholders raises serious doubts as to whether the company's management is sufficiently independent of the state to be able to take decisions regarding prices, costs and input autonomously an in response to market signals.

The CJEU's reasoning seems to imply that state ownership leads to a finding of *significant* state interference only if it, *first*, results in de facto, other than de jure, control and, *second*, affects the independency and commerciality of an SOE.

As with MET, the IT test is concerned with the commercial nature of a business but places a greater emphasis on ownership. Notably, the requirement on majority private shareholding, which emphasizes that the proportion of state officials on the board and in key management positions should be a minority, could already disqualify many SOEs.[47] On this basis, state-controlled companies (where the state's shareholdings are at or above 50%) would be deemed prima facie interfered with by the state.[48] In addition, government ownership may also be interpreted as indicating that an exporter lacks commercialism, which would in turn fail an IT claim. In some instances, because the company could not clarify its relationship with its state-owned shareholders, the Union institutions considered that the first criterion, which requires export prices and quantities, and conditions and terms of sale are freely determined, was not met and subsequently repudiated the application.[49] Although the IT test and the MET test overlap in criteria, the EU later refocused the former on state interference in export activities.[50] Hence, notwithstanding its stringent stance regarding state-ownership, the IT test has a rather narrow emphasis on state impact on the export activities at stake.

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[44] *See generally* Case T-498/04, Zhejiang Xinan Chem. Indus. Grp. Co. v. Council, 2009 E.C.R. II-1969 (June 17, 2009).
[45] *Id.* ¶¶ 96-102.
[46] Case C-337/09 P - Council v. Zhejiang Xinan Chem. Indus. Grp. Co., ECLI:EU:C:2012:471, ¶ 86 (July 19, 2012).
[47] VAN BAEL & BELLIS, *supra* note 36, at 192, and the cases cited therein.
[48] *Id.* at 193, and the cases cited therein.
[49] Council Regulation (EC) 1987/2005, recital 17, 2001 O.J. (L 320) 1.
[50] VAN BAEL & BELLIS, *supra* note 36, at 193.

臺灣大學學術期刊資料庫

Apart from state influence on exporters' commercial decision-making, investigating authorities frequently consider government-caused cost distortions. In this respect, investigations would typically delve into the elements of production costs and financial situation of businesses, bankruptcy and property laws, and currency conversions. Although these elements are not geared for SOEs, they assist in rooting out the potential state-granted or -related competitive advantages, particularly preferential financing. For example, the third criterion of the MET test, which concerns production costs and the financial situation of businesses, frequently creates obstacles for large corporations that have undergone an ownership transformation or received assets or liquidation from the government.[51] To satisfy this particular criterion, an SOE must prove that state-owned shares are sold freely and at a market price. In addition, the Union institutions would rigorously review direct costs from the acquisition of the land use right[52] and necessary assets.[53] Besides, subsidization was often an intrusive factor in acquiring MET. However, the Union institutions might not reject MET claims on this basis insofar as the subsidies are insignificant and adjustments can correct the effect.[54]

As noted, the operation of the MET and IT tests is predicated on a given NME status. Thus, the primary purpose of these tests is to provide a mechanism for importing countries to examine the commerciality, independence, and government influence of companies originating from NMEs.

C. Market-Focused Analysis: The Significant Distortions Test

In response to the expiration of China's NME status in 2016, the EU has revamped its trade defense toolkits. The "special market economy status", together with the MET and IT tests, was repealed and superseded by a new methodology, mandating the use of the surrogate method in determining dumping and normal value against imports from economies identified as featuring "significant distortions".[55]

In order to establish that a market is significantly distorted, the Commission put forward a list of five proxies that by and large resemble the MET criteria. Despite their ostensible similarities, the significant distortions methodology differs fundamentally from the MET test in terms of focus. As

[51] *Id.* at 182.
[52] As regards land use right, the Commission would look into the price of land use right—whether it is centrally determined by the authorities and whether it is granted below a normal rate or even for free. *Id.* at 183.
[53] *Id.* at 184.
[54] *Id.* at 176; Commission Regulation (EC) 1551/2006, 2006 O.J. (L 287) 3.
[55] Regulation (EU) 2017/2321 of the European Parliament and of the Council, art. 2 (6a), 2016 O.J. (L 176) 55.

臺灣大學學術期刊資料庫

noted, the MET and IT tests concern government influence on the operation of businesses and specific activities. The new methodology is distinctive: it aims to ascertain whether a market as such is distorted. All the indices and analysis included therein serve this purpose. Accordingly, under the auspices of the significant distortions test, the evaluation of government-SOE interactions is relegated to a general assumption.

This trend could be gleaned from the Commission's assessment of state control. The first element of the significant distortions test dictates that "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"; the second interrogates "state presence in firms allowing the State to interfere with respect to prices or costs".[56] From 2019 onwards, the Commission applied the new methodology in several anti-dumping investigations against products from China and attended to *inter alia* these two criteria.[57]

On the face of it, the former criterion concentrates on state control, de facto and de jure alike, while the latter zones in on the distortion of commerciality. In the course of investigations, the former indeed directed the Commission's gaze to the public ownership of companies. For instance, in the first antidumping investigation applying the significant distortions test, which targets steel road wheels from China (hereinafter "SRW investigation"), the Commission has established state control based on the conditions of the upstream main raw material market—in this case, the steel sector—in which SOEs are omnipresent.[58] In terms of the second element, the analysis however largely departs from its purported focus on commerciality. Instead, the Commission assessed other forms of state presence in firms other than ownership control. In the SRW investigation, as regards this criterion, the Commission offered a laconic reading of state control over SOEs, as quoted in full below[59]:

> The State (and in many aspects also the CCP) not only actively formulates and oversees the implementation of general economic policies by individual SOEs, but it also claims its rights to participate in operational decision-making in SOEs. This is typically done through rotation of cadres between government authorities and SOEs, through presence of party members on SOEs executive bodies and of party cells in companies, as well as through shaping the corporate structure of the SOE sector.

[56] *Id.*
[57] *See also* Commission Implementing Regulation (EU) 2021/582, ¶ 118, 2021 O.J. (L 124) 40; Commission Implementing Regulation (EU) 2021/1811, ¶¶ 41, 47, 2021 O.J. (L 366) 17; Commission Implementing Regulation (EU) 2021/1812, ¶¶ 57, 82-83, 87, 2021 O.J. (L 366) 62.
[58] Commission Implementing Regulation (EU) 2020/353, ¶ 73, 2020 O.J. (L 65) 9.
[59] *Id.* ¶ 74.

臺灣大學學術期刊資料庫

In subsequent anti-dumping determinations following the SRW investigation, the EU has consistently applied the new methodology, indicating a growing tendency of the Commission to neglect particularities of each SOE. While this trend can partly be attributed to the Commission propensity for the tightening of review, at its heart lies the modus operandi of the significant distortions test. As the primary aim of the new methodology is to identify market distortions, it by nature focuses on how government, through various means, impacts the market. To facilitate, if not effectuate, such analysis, the test operates on the default premise that SOEs are synonymous with the state. As a result, even though the significant distortions test is likewise rebuttable, it is arduous, if not impossible, for SOEs to challenge this conclusive presumption of state interference. A market-centric analysis of this kind leaves no room for anti-dumping investigations to properly appreciate the intricate influences of states over SOEs and their transactions.

IV. THE PMS TEST: LEGAL FRAMEWORK FOR MARKET-FOCUSED ANALYSIS

At its root, the design of the significant distortions test is a result of the EU's shifted recourse to the PMS test, as inscribed in Article 2.2 of the anti-dumping agreement.[60] This provision categorically stipulates three types of circumstances under which the rejection of domestic prices and the use of surrogate bases is permissible: (1) there are no domestic sales of like products in the OCT in the exporting country; or (2) a PMS exists in the domestic market so that a proper comparison is not permitted; or (3) there is a "low volume of sales in the country of exportation" that thwarts proper comparison.[61] The first limb gives rise to the OCT test, the second to the PMS test.

The EU's market-focused significant distortions analysis is tailored in compliance with the PMS test. As mentioned, in order to rely on the PMS test, countries must first prove the presence of PMS in the exporting country before proceeding to use surrogate bases. However, government interference in market functioning is ubiquitous, and it is unreasonable to subject the whole gamut of plausible influential factors to the rubric of PMS. It is unclear what type, form, or scale of intervention may lead to a finding of PMS as

[60] Edwin Vermulst et al., *Normal Value in Anti-Dumping Proceedings Against China Post-2016: Are Some Animals Less Equal than Others?*, 11(5) GLOB. TRADE & CUSTOMS J. 212, 220 (2016); *see generally* Ming Du, *From "Non-Market Economy" to "Significant Market Distortions": Rethinking the EU Anti-Dumping Regulation and China's State Interventionism*, 41 Y.B. EUR. L. 314 (2022).

[61] The third circumstance concerns the technical issue of whether there are sufficient sales in the domestic market.

臺灣大學學術期刊資料庫

defined by WTO anti-dumping law. This requires the drawing of a proper line; failing to do so risks arbitrary and abusive application of the PMS test, undermining the rule of law. Despite a number of cases involving the PMS test, the WTO adjudicatory bodies do not conclusively address this question, and may be unwilling to for fear of judging on sensitive political matters, leaving the scope of PMS and its standards undetermined.

Despite the potential of sidestepping this fundamental normative inquiry, as demonstrated by the panel in *Australia — A4 Paper*, there remain other practical barriers that hinder the use of PMS as a means of validating the surrogate method. In *Australia — A4 Paper*, the panel held that, even if the PMS is established, a "proper comparison" looking into "the relative effect of the [PMS] on domestic and export prices" is required, according to the qualification for the PMS test in Article 2.2 of the Anti-Dumping Agreement.[62] If the market distortion affects both domestic and export prices evenhandedly, domestic prices should not be excluded.[63] The onus of fulfilling the proper comparison is on importing states. Consequently, when considering SOEs, a critical question arises regarding whether the competitive advantage or lack of commerciality of SOEs necessarily affects price comparison. The answer depends on the contours of the "propriety" of comparison and member states' margins of discretion, which are pending in several cases in front of the WTO's halted judiciary.[64] Furthermore, even if domestic prices are disregarded, a finding of PMS may not automatically justify the use of surrogate costs in calculating CNV. In the *EU — Biodiesel* case, the Appellate Body (hereinafter "AB") stated that identifying distortions associated with government intervention does not immediately warrant the rejection of costs recorded in producers' books and records.[65]

Ultimately, due to the lack of clarity regarding the criteria and the requirement for a "proper comparison," the applicability and effectiveness of the PMS test in regulating government-related distortions are imbued with uncertainty and disharmony within the WTO context.

V. AN ALTERNATIVE COURSE: THE OCT TEST AND STATE-RELATED BUSINESS

In this section, the article presents the utilisation of the OCT test as a viable framework underpinning the entity-based assessment. The OCT test

[62] *Australia — A4 Copy Paper* Panel Report, *supra* note 9, ¶ 7.75.
[63] *Id.*; *see also* Appellate Body Report, *Ukraine — Anti-Dumping Measures on Ammonium Nitrate*, ¶ 6.87, WTO Doc. WT/DS493/AB/R (adopted Sep. 30, 2019); *EU — Cost Adjustment Methodologies II (Russia)* Panel Report, *supra* note 14, ¶ 7.106.
[64] *See* Du, *supra* note 60, at 326.
[65] Appellate Body Report, *European Union — Anti-Dumping Measures on Biodiesel from Argentina*, ¶¶ 6.37-.41, WTO Doc. WT/DS473/AB/R (adopted Oct. 26, 2016) [hereinafter *EU — Biodiesel (Argentina)* Appellate Body Report].

臺灣大學學術期刊資料庫

is incorporated as a legitimate basis for the utilisation of surrogate prices, similar to the PMS test. Its evaluation method, akin to the MET and IT tests, assesses the impact of government distortion on a specific company or transaction, rather than on the overall market. Subsection IV.A presents a primary exposition of the OCT test as stipulated in the WTO's anti-dumping law. On this basis, Subsection IV.B delves into the prospective utilisation of the OCT test in addressing the predatory pricing tactics, undue competitive advantages, and absence of commerciality exhibited by SOEs. Lastly, Subsection IV.C justifies the applicability of the OCT test in addressing government interference in business in light of the contextual and teleological interpretation of the WTO Anti-dumping Agreement.

A. The OCT Test in the WTO Anti-Dumping Law

The definition of OCT is unclear, but its applicability in supporting the employment of surrogate prices has been affirmed in WTO jurisprudence. As stipulated in Article 2.2 of the Anti-Dumping Agreement and clarified through case law, investigating authorities are required to exclude all sales not falling within the scope of the OCT from the calculation of the value, in order to ensure that the normal value truly represents the "normal" price of the similar product.[66]

In *US — Hot-Rolled Steel*, the AB entertained the issue of definition but refrained from providing a conclusive interpretation. Simultaneously, the Panel stated that it was satisfied with the broad definition put forward by the US in accordance with its decree.[67] Yet, this statement does not indicate the Panel's endorsement of the US' definition of OCT. Instead, it is based on AB's deference to state autonomy: the AB considered that the determination of OCT should differ depending on the varying types of transactions and thus acknowledged the necessary margins of discretion bestowed upon antidumping authorities in making individual determinations.[68] Hence, the Panel's ruling only conveys that the concept of OCT is heuristic and open-textured, leaving the verdict regarding the "normality" of transactions to member states.[69]

While the definition of OCT is by and large left open, scholarly discussions and prior jurisprudence provide useful guidance on the criteria for its determination. First and foremost, the OCT test is concerned with the operation of a specific company and transaction rather than with that of

[66] Appellate Body Report, *United States — Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, ¶ 139, WTO Doc. WT/DS184/AB/R (adopted Aug. 23, 2001) [hereinafter *US — Hot-Rolled Steel* Appellate Body Report].
[67] *Id.*
[68] *Id.* ¶ 140.
[69] *Id.*

臺灣大學學術期刊資料庫

market conditions. Notably, Article 2.2.1 specifies a situation when deviation from OCT arises, that is, "the sales of the like product in the domestic market, or export sales to a third country, at prices below per unit (fixed and variable) costs of production plus selling, general and administrative (hereinafter "SG&A") costs may be considered as not having been made in the OCT."[70] Furthermore, as has been highlighted in scholarly writings, at the heart of the OCT test lies the requirement of commerciality. Particularly, the French text of the OCT implies that "normales" qualifies commercial transactions that have no exceptional characteristics and reflect the usual commercial practice.[71] Whether a seller's objective is to maximize revenue when setting prices is crucial to determine whether sales reflect the usual commercial practice.[72] Therefore, for a sale to be considered "normal", it should include terms and conditions that align with common commercial patterns and prioritize commerciality as its core feature.[73] Yet, a standalone sale that is not "for profit" does not categorically preclude its commerciality insofar as it is in congruence with commercial logic. This reading finds great resonance with WTO cases and the ethos of the OCT test, which will be unfolded in Subsection V.C. Henceforth, *arguendo*, we will begin exploring the potential of the OCT test for SOE regulation on this basis.

B. The OCT Test in Identifying State-Related Unfair Trading

1. The OCT Test and Non-Commercial Predatory Pricing — As discussed in Section I, an archetypal manifestation of SOEs' unfair trading is harmful predatory pricing. Price undercutting or other predatory pricing strategies are typically administered through sales below cost. In line with Article 2.2.1 of the Antidumping Agreement, the OCT test permits investigating authorities to examine and refute below-cost domestic prices. The incentives for below-cost sales, whether they are public, societal, or security-related, shall have no impact on the applicability of this clause. Thus, even if an SOE is saddled with public pursuits and *ipso facto* engages in predatory pricing with no recoupment intent, as long as the deal at stake is below cost, it is already in contradistinction to the ultimate goal of profitability, which defines the normality of a commercial transaction. On

[70] Panel Report, *European Communities — Anti-Dumping Measure on Farmed Salmon from Norway*, ¶¶ 7.230-.237, WTO Doc. WT/DS337/R, (adopted Jan. 15, 2008) [hereinafter *EC — Salmon (Norway)* Panel Report].
[71] Stéphanie Noël, *Why the European Union Must Dump So-Called 'Non-Market Economy' Methodologies and Adjustments in Its Anti-Dumping Investigations*, 11(7-8) GLOB. TRADE & CUSTOMS J. 296, 303 (2016).
[72] Stéphanie Noël & Weihuan Zhou, *Replacing the Non-Market Economy Methodology: Is the European Union's Alternative Approach Justified Under the World Trade Organization Anti-Dumping Agreement?*, 11(11-12) GLOB. TRADE & CUSTOMS J. 559, 565 (2016).
[73] *Id.* at 563-64.

臺灣大學學術期刊資料庫

this score, in *Australia — A4 Paper*, the panel went as far as to note that, "[h]igh production costs during a period could result in all domestic sales being below cost and therefore outside the ordinary course of trade making the "no sales in the ordinary course of trade" provision applicable despite the fact that export sales may also be affected".[74] Therefore, under the OCT test, investigating authorities could effectively insulate normal value construction from low prices resulting from SOEs' public, non-commercial policy goals (e.g., stabilizing price growth or implementing an entry-level price structure).

2.The OCT Test and Competitive Advantages — When there is no predatory pricing, for example, when SOEs' sales are not below recorded costs but actual input costs themselves are artificially low by virtue of state intervention, a thornier question arises. Under the OCT test, only anomalous transactions should be discarded. The question at hand therefore is whether the links between a low price and its facilitating government-caused distorted costs could cause it to be regarded as deviating from normal business practises.

For there to be a deviant, there must be a normal baseline situation for the assessment to begin with. In this regard, a contentious issue is whether the baseline "normal" situation alludes to the market conditions of the country of origin or a fabricated ideal competitive market. If the former circumstance prevails, recorded costs, despite being distorted, should not be rejected on the basis of OCT because they appear normal in accordance with local standards.

Regarding this question, the local standards argument has eventually found favour with jurisprudence. The AB in *US — Hot-Rolled Steel* emphasized that whether a transaction is normal should be judged in line with the usual commercial practice in the exporter's home market, hence the application of local standards. [75] In addition, the assessment of the reasonableness of SG&A costs and for profit should be circumscribed by Article 2.2.2 of the Anti-Dumping Agreement,[76] which mandates the use of actual data that reflects actual cost incurred. Thus, in principle, even if the input costs are distorted by government interference, the OCT test does not allow the investigating authority to discard pertinent sales.

However, in the case of SOEs, a distinction must be drawn between two scenarios: *first*, the input costs of an SOE are directly fixed or set unfairly low by the government in favour of SOEs; *second*, SOEs' low input prices derive from prevailing market conditions. In the former scenario, as the market distortion concerned is specific to SOEs, it could hardly be considered normal, even in the milieu of domestic market for SOEs. In this

[74] *Australia — A4 Copy Paper* Panel Report, *supra* note 9, ¶ 7.39.
[75] *US — Hot-Rolled Steel* Appellate Body Report, *supra* note 66, ¶ 140.
[76] *EU — Biodiesel (Argentina)* Appellate Body Report, *supra* note 65, ¶ 6.39.

臺灣大學學術期刊資料庫

case, it is reasonable to establish an OCT. As acknowledged by the AB in *US — Hot-Rolled Steel*, prices fixed in a manner incompatible with normal commercial practice or according to criteria which are not those of the marketplace are not in the OCT and unsuitable to use as the basis for the normal value.[77] In the latter situation, as the positive impacts of market distortion accrue to all participants in the home market, it is uncertain whether an objection to the domestic sales could be justified.[78]

With some ingenuity this latter scenario may, however, be contemplated under the aegis of Article 2.2.1 in relation to below-cost sales.[79] In determining sales below cost under this article, a valid question is whether the "cost" mentioned therein refers to actual costs, even if they are distorted, or market value costs, constructed on surrogate bases.[80] An answer to this question resides with Article 2.2.1.1, which governs the ascertainment of "costs, not only the calculation of costs for the purpose of constructing normal value but also for determining whether sales are below costs for the OCT".[81] Through a string of cases, the WTO Panels reiterated that the recorded input prices cannot be rejected if they are "State-regulated" or "far below market prices paid in unregulated markets" on the ground that they do not "reasonably reflect" the cost incurred by producers (second condition of Article 2.2.1.1).[82] Yet, what is unclear is the functionality of the term "normally" in the same article.[83] As clarified in *Australia — A4 Copy Paper*, the term "normally" in Article 2.2.1.1 accords investigating authorities a margin of discretion to derogate and use surrogate costs from other anti-dumping law obligations.[84] In this regard, PMS is neither a sufficient nor a

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[77] *US — Hot-Rolled Steel* Appellate Body Report, *supra* note 66, ¶¶ 140-41.

[78] *See* Weihuan Zhou, *Appellate Body Report on EU−Biodiesel: The Future of China's State Capitalism Under the WTO Anti-Dumping Agreement*, 17(4) WORLD TRADE REV. 609, 628 (2018). But see the analysis in Subsection IV.C regarding comparator proper.

[79] See, for instance, Indonesia's argument in Panel Report, *Korea — Anti-Dumping Duties on Imports of Certain Paper from Indonesia*, ¶ 4.18, WTO Doc. WT/DS312/R (adopted Nov. 28, 2005).

[80] Panel Report, *European Union — Anti-Dumping Measures on Biodiesel from Argentina*, ¶ 7.236, WTO Doc. WT/DS473/R (adopted Oct. 26, 2016) [hereinafter *EU — Biodiesel (Argentina)* Panel Report].

[81] *EC — Salmon (Norway)* Panel Report, *supra* note 70, ¶¶ 7.252, 7.482; Panel Report, *China — Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan*, ¶ 7.50, WTO Doc. WT/DS454/R (adopted Oct. 28, 2015) [hereinafter *China — HP-SSST (Japan)* Panel Report].

[82] *See* 2020 O.J. (L 65) 9, ¶ 73.

[83] The Panel in *EU — Cost Adjustment Methodologies II (Russia)* bypassed the question by finding the EU's argument on this basis *ex post facto* rationalization. *See EU — Cost Adjustment Methodologies II (Russia)* Panel Report, *supra* note 14, ¶¶ 7.97-.107. However, it confirmed the possibility to reject recorded input prices if they are well-established as "abnormal".

[84] *Australia — A4 Copy Paper* Panel Report, *supra* note 9, ¶ 7.162. *See also* Appellate Body Report, *United States — Measures Affecting the Production and Sale of Clove Cigarettes*, ¶ 273, WTO Doc. WT/DS406/AB/R (adopted Apr. 24, 2012); Panel Report, *China — Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*, ¶ 7.161, WTO Doc. WT/DS427/R (adopted Sep. 25, 2013); *EU — Biodiesel (Argentina)* Panel Report, *supra* note 80, ¶ 7.227; Appellate Body Report, *European Communities — Definitive Anti-Dumping Measures on*

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necessary precondition for establishing the trustworthiness of recorded costs.[85] Therefore, at least based on a textual reading, Article 2.2.1.1 leaves the door open to reject distorted costs and use surrogate costs in ascertaining whether an SOE's transaction is below cost and not in OCT. However, as Subsection IV.C will specify, this interpretation might be at odds with the object and purpose of the OCT test.

3.The OCT Test and Commerciality — The next question is whether state ownership, control, or influence, as indicators of varying layers of government interference in trading companies, could deflect their transactions from the OCT. The answer depends initially on whether below-cost sales, as specified in Article 2.2.1, are the sole basis for establishing the OCT test.

In this regard, WTO jurisprudence almost demonstrates schizophrenia.[86] In several WTO cases, the adjudicating bodies held that Article 2.2.1 of the WTO Anti-Dumping Agreement "sets forth the *only* circumstances under which sales of the like product in the exporting country can be disregarded".[87] However, in *US — Hot-Rolled Steel*, the AB found that it could envisage many reasons for which transactions might not be in the OCT, such as common ownership or a liquidation sale.[88] It also clarified that the test laid down in Article 2.2.1 is not the only way in which it can be determined that low-priced sales are not in the OCT. Essentially, the provision does not intend to exhaust all the possibilities for determining whether sales are in the OCT.[89] In *US — Hot-Rolled Steel*, the AB found that home market transactions made to affiliates are aimed at shifting resources from the seller to the buyer and, conversely, are abnormal.[90] Such transactions are viewed not in the OCT because, as the AB explained, they result in an allocation of resources between the seller and the buyer that is different from what it would normally be in the marketplace.[91] In this circumstance, sales above cost but below the usual market price might not

Certain Iron or Steel Fasteners from China, ¶ 317, WTO Doc. WT/DS397/AB/R (adopted July 28, 2011) [hereinafter *EC — Fasteners (China)* Appellate Body Report].

[85] *Australia — A4 Copy Paper* Panel Report, *supra* note 9, ¶ 7.162.

[86] Note that while Appellate Body and Panel decisions are said to create legitimate expectations, the WTO dispute settlement process does not strictly follow *stare decisis*.

[87] Appellate Body Report, *United States — Final Anti-Dumping Measures on Stainless Steel from Mexico*, ¶ 103, WTO Doc. WT/DS344/AB/R (adopted May 20, 2008); Appellate Body Report, *United States — Continued Existence and Application of Zeroing Methodology*, n.636, WTO Doc. WT/DS350/AB/R (adopted Feb. 19, 2009); Appellate Body Report, *United States — Final Dumping Determination on Softwood Lumber from Canada*, ¶ 100, WTO Doc. WT/DS264/AB/R (adopted Aug. 31, 2004); *EC — Salmon (Norway)* Panel Report, *supra* note 70, ¶ 7.231. More recently confirmed in WTO, see *China — HP-SSST (Japan)* Panel Report, *supra* note 81, ¶ 7.49.

[88] *US — Hot-Rolled Steel* Appellate Body Report, *supra note* 66, ¶ 141, n.106.

[89] *Id.* ¶ 147.

[90] *Id.* ¶ 108.

[91] *Id.* ¶ 141.

臺灣大學學術期刊資料庫

be in the OCT, subject to *ad hoc* scrutiny by the investigating authorities.[92] In the same vein, in *EU — Biodiesel*, the EU rejected domestic prices by citing skewed sales of biodiesel in Argentina. This finding was not contested in the case. Likewise, in *China — HP-SSST (EU)*, the panel held that China had acted inconsistently with Article 2.2, which requires the use of "actual data pertaining to production and sales in the ordinary course of trade of the like product", in the belief that the Chinese investigating authority failed to exclude from the submitted documents certain data tainted due to "the inclusion of the two free sample transactions".[93] None of the cited cases concerns below-cost pricing, indicating that the WTO panels do not exclude the probability that the concept of OCT connotes and accommodates more than below-cost pricing.

Moreover, in anti-dumping practice, the evidence that the state controls transactions would bear heavily on the determination of the OCT. For instance, in the EU's previous anti-dumping investigation, sales to SOEs were excluded from the normal value determination because they were not made in the OCT.[94] So were transactions made at prices fixed by governmental authorities.[95] These practices have so far never been tested at the WTO. However, as a baseline it is clear from the *US — Hot-Rolled Steel* case that sales between two or several SOEs belonging to the same exporting nation could be subject to rigorous scrutiny due to the potential affiliation or relations as sharing a common owner, namely, the state.[96] Beyond this situation, in the past, despite a few WTO cases involving the MET and IT tests, the reasonableness of their criteria has never been a point of contention, nor has the question of whether or not state ownership or control is sufficient in establishing government interference. A close encounter regarding state influence occurred in *EU — Fastener* regarding the IT test, when the AB noted that the Anti-dumping Agreement "addresses pricing behaviour by exporters' such that "if the State instructs or materially influences the behaviour of several exporters in respect of prices and output, they could be effectively regarded as one exporter for purposes of the [Anti-Dumping] Agreement . . . ."[97] In light of this judgment, state interference can lead to an objection to sales only if it distorts commerciality or, by extension, normality of a transaction.

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[92] *Id.*
[93] Panel Report, *China — Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union*, ¶ 7.66, WTO Doc. WT/DS460/R (adopted Oct. 28, 2015).
[94] Commission Implementing Regulation (EU) 2016/90, recitals 22-23, 2016 O.J. (L 19) 22.
[95] *See generally* Commission Regulation (EEC) 2818/91, 1991 O.J. (L 271) 17. But see Commission Decision (83/360/EEC), 1983 O.J. (L 196) 22, where the minimum price fixed by the Australian authorities was used as normal value.
[96] *US — Hot-Rolled Steel* Appellate Body Report, *supra* note 66, ¶ 108.
[97] *EC — Fasteners (China)* Appellate Body Report, *supra* note 84, ¶ 376.

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To surmise the argument, the OCT test determines if a transaction accurately reflects the product's fair domestic market value under normal competitive and commercial conditions. It therefore allows for the dismissal of sales that are subject to significant influence to the effect that it erodes the normality of transactions and commerciality of enterprises. Yet, due to the scarcity of case law, this tentative inference has thus far been established on the grounds of the ambiguity of WTO rules and judicial deference. The next subsection seeks to vindicate this approach in line with the ordinary meaning of OCT and the object and purpose of WTO antidumping rules. The fundamental question to be answered in the next subsection is this: Can state interference be regarded an intrusion on ordinary pattern of trade as provided in the WTO Anti-Dumping Agreement?

C. The Alternative Path: Merits and Limits

To answer the question, we first turn to the original and intended meaning of the OCT. The concept of the ordinary course of trade, business, or commerce is not exclusive to trade law. Historically, the proposal to incorporate the concept of the "ordinary course of commerce" into anti-dumping rules was initiated by Canada and Australia for the alleged purpose of clarifying the scope of alternative basis.[98] At that time, Canada's proposal did not meet much contestation, and the term swiftly and almost imperceptibly found its way into the provisions of the GATT anti-dumping rules.[99] The OCT test, then termed as the "ordinary course of commerce," statutorily manifests in Article 17 of the New York Draft and was later incorporated into Article VI:1 of the GATT concerning the determination of dumping. The respective clause allowed for the reconstruction of the normal value when there was no domestic sale price falling within the OCT.[100] Although the meaning and contours of OCT have never been clarified in the deliberations, in the subsequent exchanges of opinions among states the term often alludes to *commercial* transactions. During the Tokyo Round negotiations, controversy emerged regarding whether sales at a loss should always be deemed as departing from the OCT.[101] The crux of this wrangle was precisely that sales at a loss could be a normal commercial strategy

[98] *See* U.N. ESCOR, Suggestions by Canadian Delegation, Drafting Committee of the Preparatory Committee of the International Conference on Trade and Employment, U.N. Doc. E/PC/T/C.6/W.20 (Jan. 27, 1947); U.N. ESCOR, Verbatim Report of the Second Meeting of Committee II, Preparatory Committee of the International Conference on Trade and Employment, at 25, U.N. Doc. E/PC/T/C.II/PV/2 (Oct. 23, 1946).

[99] There were only a few instances where the term was raised in the *travaux préparatoires* of the GATT.

[100] *See* The Report of the Group of Experts on "Anti-Dumping and Countervailing Duties", ¶ 10, GATT Doc. L/978, 8S/145, 148 (May 13, 1959).

[101] See in detail in TERENCE P. STEWART, THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986-1992) 1440-44 (1993).

臺灣大學學術期刊資料庫

aimed at future recoupment. Despite the differing interpretations of what should be considered normal, which is an issue regarding the content of this standard, a close examination of the dispute reveals that states appear to have reached a consensus on the approach to its ascertainment: OCT should be determined in accordance with the normal pattern of *commercial* sales.[102] Further, if the doctrine of contemporaneity offers any insights here, it is at least worth noting that most of the draftsmen of the GATT and participants in the Tokyo Round debate hailed from industrial countries,[103] where state trading monopolies or government intervention in trading were viewed as indefensibly abnormal.[104]

Indeed, the situation and perception have evolved over time: state trading monopolies have declined while SOEs grow increasingly commercial. However, in light of the subsequent state practice, state intervention continues to be regarded as an intrusive factor of the abnormity of transactions. In *Australia — A4 Copy Paper*, the Australian anti-dumping investigating authority rejected the recorded costs on the grounds that the records did not reasonably reflect *competitive market costs*. Australia, which purported to premise its argument on the PMS test, adduced the following findings:[105]

> (a) the domestic price of A4 copy paper was affected by government intervention that distorted costs and prices; and/or (b) the "particular market situation" meant that the domestic price of A4 copy paper was fixed in a manner incompatible with normal commercial practice; and/or (c) the "particular market situation" meant that the domestic price of A4 copy paper was fixed according to criteria which were not those of the marketplace.

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[102] *See also* Negotiating Group on MTN Agreements and Arrangements, *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (Anti-Dumping Code): Aspects of the Agreement Proposed for Negotiation*, GATT Doc. MTN.GNG/NG8/W/7/Rev.1 (Dec. 4, 1987); Negotiating Group on MTN Agreements and Arrangements, *Amendments to the Anti-Dumping Code Communication from the Delegation of Hong Kong*, GATT Doc. MTN.GNG/NG8/W/51/Add.1 (Dec. 22, 1989); Negotiating Group on MTN Agreements and Arrangements, *Proposed Elements for a Framework for Negotiations Principles and Objectives for Anti-Dumping Rules Communication from the Delegation of Singapore*, GATT Doc. MTN.GNG/NG8/W/55 (Oct. 13, 1989); Negotiating Group on MTN Agreements and Arrangements, *Communication from the European Communities to GATT Uruguay Round - Anti-Dumping Code*, GATT Doc. MTN.GNG/NG8/W/63 (Dec. 20, 1989); Negotiating Group on MTN Agreements and Arrangements, *Submission of Japan on the Amendments to the Anti-Dumping Code*, GATT Doc. MTN.GNG/NG8/W/48 (Jan. 29, 1990); Negotiating Group on MTN Agreements and Arrangements, *Drafting Proposals of the Nordic Countries Regarding Amendments of the Anti-Dumping Code*, GATT Doc. MTN.GNG/NG8/W/76 (Apr. 11, 1990).

[103] Including European Community, Australia, Canada, the United States, and Japan.

[104] On this score, see also the observation of Jackson in JOHN H. JACKSON, WORLD TRADE AND THE LAW OF THE GATT 417 (1969).

[105] *Australia — A4 Copy Paper* Panel Report, *supra* note 9, ¶ 7.86.

臺灣大學學術期刊資料庫

The essence of the aforementioned statement was that state intervention gives rise to peculiar commercial practices and should be dismissed *ipso facto*. The panel, in its response to this submission, rejected the claim but analogized Australia's reasoning to the analysis of the OCT.[106] It could be inferred from the panel's reinterpretation that a transaction affected by government intervention to the effect that distorts costs and prices could be considered deviating from OCT. In some cases, OCT has been used in the event of government-induced market distortion and went unchallenged. As noted above, in *EU — Biodiesel*, Argentina did not question the EU's OCT determination on this basis. All of these instances demonstrate an enduring consensus that government intervention may be reasonably regarded as a factor undermining the normalcy of commercial sales. Hence, it is justifiable to apply the OCT test to sales of SOEs under appropriate circumstances. By the same token, it would not be too much of a stretch to suggest that the same inference applies to transactions that have been distorted by other forms of government intervention other than shareholding.

Nevertheless, it must be amplified, as the panel in the *US — Hot-Rolled Steel* case noted, for transactions to be disregarded, they must appear "aberrant" even in the context of the exporting country. The attainment of this threshold may not be as formidable as it initially appears. Since modern states rarely exercise absolute and all-encompassing control over the market, it is reasonable to identify the residual occurrences of state intervention as "abnormal". An intriguing question here rather concerns the determination of the comparator: Is state interference with a particular SOE normal if the majority of companies in the same industry segment are privately owned? If other sectors are liberalised, can state control over a specific segment of industrial sector (such as telecommunications) be considered abnormal? There are no definitive answers to these questions, and the WTO tribunals do not seem willing to render one. As stated, importing countries retain considerable authority in interpreting the OCT, as authorized by the WTO panels.

Indeed, as state intervention in sales varies considerably, it is against common sense that its presence can always exclude pertinent sales from OCT, regardless of the type or magnitude of intervention. Furthermore, the ambiguity inherent in the OCT test can lead to inconsistent and potentially biased applications of the test by different investigating authorities. Thus, the questions of whether a precise demarcation is required and, if so, what the proxies should be, merit further discussion. On this score, the standard of "commerciality" remains highly relevant. As a commerciality requirement is not inscribed in the OCT test, it is more adequate to view it as a prime analytical tool than a constitutive element. In line with this standard, several

[106] *See also US — Hot-Rolled Steel* Appellate Body Report, *supra* note 66, ¶ 139.

臺灣大學學術期刊資料庫

indices for assessing the normality and commerciality of transactions should be attended to, such as market signals, profit-maximization behaviour, and the presence of state influence. In any event, even though the term as stipulated in the treaty is open-textured, the general principle of good faith remains relevant to its application and interpretation.

Another obstacle for the application of the OCT test rests with the symbiotic PMS test. As both the OCT test and the PMS test situate under the chapeau of Article 2.2, serving the same objective of ensuring comparability of the normal value, one may argue on a contextual basis that the juxtaposition of OCT and PMS entails that these two concepts must be interpreted as mutually exclusive in order not to render the former superfluous. One could therefore on this account contend that government intervention should be exclusively dealt with under the PMS, and this precludes the use of the OCT test in the respective context. This interpretation may seem logical ostensibly. Nonetheless, considering the negotiation history of the two assessments, it does not hold ground. First of all, the qualifying term of "particular" in the PMS test does not bluntly refer to government-induced distortion; the initial intent of incorporating this notion into the Antidumping Agreement is unclear.[107] Hence, it is difficult to argue that the PMS test should be applied exclusively in circumstances of government-induced distortion. It is even hard to claim resolutely that the Antidumping Agreement explicitly addresses market distortion in any provisions other than the second interpretative note to Article VI:I.[108] Furthermore, the presence of the OCT term in the agreement predates the incorporation of the debated PMS doctrine.[109] On this basis, the PMS test is said to be a "residual category".[110] Therefore, the only conclusion that could be inferred from the text of the Antidumping Agreement is that importing countries can rely on both standards in repudiating domestic prices as normal value, and the application of each standard entails differing requirements. The reliance on the PMS standard is predicated on the distorted "comparability" between export price and normal value,[111] while the employment of OCT requires the commerciality and normality of a transaction to be skewed, as explained above.

The necessity of buffer mechanisms in WTO law has been well addressed in scholarship.[112] One may disagree about its legitimacy and proper form, but its existence is predetermined by the inherent tension of the liberal international economic order. Such a mechanism is warranted not

[107] Weihuan Zhou & Andrew Percival, *Debunking the Myth of "Particular Market Situation" in WTO Antidumping Law*, 19(4) J. INT'L ECON. L. 863, 867-68 (2016).
[108] This provision addresses complete and absolute monopoly.
[109] Zhou & Percival, *supra* note 107, at 872.
[110] *Id.* at 868.
[111] *Id.* at 874.
[112] *See generally* Shaffer, *supra* note 2; Bown, *supra* note 6.

臺灣大學學術期刊資料庫

only for the sake of market economies but also for maintaining the stability of international economic order by way of preventing the escalation of regime conflicts. As a buffer mechanism, the OCT test is non-discriminatory as it only considers whether a transaction (or its operators) is anomalous against the country's prevalent domestic conditions. Compared to the PMS concept, which artificially labels a country as "less equal" or "particular",[113] this local standard approach refrains from making a definitive value judgement regarding a country's choice of governance model and thus finds better resonance with the embedded liberalist ethos of the WTO system. It diverts attention from the essentially futile and destructive debate about whether any economy is more distorted than others to the actual effect of government intervention on commerce in the real world. Such an approach parallels what some academics have termed the crucial distinction between "market distortion" and "background institutional conditions".[114] As Lang rightfully put it, "particular governmental action is a 'market distortion' when it affects market behaviours, prices, or outcomes in a way which makes them different from what they would have been if they were 'market determined'."[115] Government intervention in the market that falls short of this threshold merely represents antecedent institutional conditions, which cannot be relied on to justify corrective actions.

Nevertheless, while the OCT test offers an alternative framework for addressing state-induced distortions, it is not without its own deficiencies. As the term OCT is open-textured, it is susceptible to inconsistent interpretation. Investigating authorities may also face considerable hurdles in obtaining detailed information regarding the operations and transactions of SOEs, particularly given the opacity and reluctance that frequently accompany such inquiries. Nonetheless, there are legal techniques and strategies that can be employed to surmount these challenges, including shifting the burden of proof and leveraging international cooperation and information-sharing agreements. Technically, the OCT test should not be more difficult to prove than the PMS test if the latter is applied as required by the Antidumping Agreement to assess comparability. Moreover, it is advisable that the investigating authorities establish in advance a set of criteria and guidance for the determination of OCT. Likewise, the engagement of third-party auditors or independent experts in assessing the commerciality and normality of SOE transactions can also serve to bolster both the objectivity and credibility of such investigations. Equally critical is the establishment of robust mechanisms for dialogue and cooperation

[113] *See generally* Vermulst et al., *supra* note 60.
[114] *See* Andrew Lang, *Heterodox Markets and 'Market Distortions' in the Global Trading System*, 22(4) J. INT'L ECON. L. 677, 693 (2019).
[115] *Id.* at 694.

臺灣大學學術期刊資料庫

between importing and exporting nations to ensure that the OCT test is applied with fairness and transparency.

In the end, it is imperative to recognize that any buffer mechanism is only effective when the underlying conflicts do not amount to an irresistible force for regime change. In the long term, more sustainable solutions must be pursued.

VI. CONCLUSION

Anti-dumping measures have proven to be an effective instrument for mitigating the negative externalities caused by government interference in the operations of SOEs and other types of commerce. Such externalities arise when the state manipulates production input costs to provide business with competitive advantages or when it exercises control or influence over enterprises, eroding and impinging on their commerciality. However, the efficacy of these measures depends on the existence of a mechanism that permits the characterization and evaluation of such interference. In the past, the NME methodology was utilized for this purpose, but its legal standing is currently uncertain. Furthermore, the persistent reliance on the NME methodology and PMS test is arguably leading to overgeneralization and its legitimacy crisis. Consequently, parallel, if not alternative, paths are required to resolve SOE issues.

The OCT test is a potential framework. This framework could enable the evaluation of whether the prices offered by SOEs reflect market realities or have been distorted by government intervention. The OCT test has the potential to be a legal basis that is more versatile and adaptable than the PMS method, and hence overcome the peril of overgeneralization.

The test offers importing countries a means to reject the skewed sales without identifying their home country market as distorted *ex ante*, showing simultaneous deference to the autonomy of antidumping investigations and regime difference. Moreover, because the OCT test evaluates the specific transaction and entity, it enables customized fact-based analysis when dealing with foreign exporters and thus enhances procedural fairness.

However, it is also crucial to observe that anti-dumping measures are not a panacea for resolving all international trade issues involving SOEs, due to their intrinsic regulatory rationale, operational paradigm, and limited contours. For one thing, trade defense measures address the adverse effects instead of the nuisance as such. Moreover, as much as the application of antidumping measures has the effect of counteracting government-caused distortions, they are not initially formulated for this end. Hence, the competence, legitimacy, and adequacy of antidumping measures in addressing government-induced distortions are likely to loom as a subject of recurring debates.

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