

Navigating State Interventions: The Pivotal Role of PTAs in Modern Trade Conflicts

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Abstract

In international trade, State interventions often challenge the efficacy of traditional anti-dumping and countervailing measures under the World Trade Organization (WTO) framework. This article examines the limitations of the Anti-Dumping Agreement and the Agreement on Subsidies and Countervailing Measures (SCM Agreement) in addressing State interventions, such as export taxes, export bans on raw materials, and non-commercial activities by State-owned enterprises. These interventions pose significant legal and economic challenges in global trade. The article advocates for the potential of preferential trade agreements (PTAs) as practical tools to address these challenges, surpassing traditional legal pathways under the Anti-Dumping Agreement. An analysis of recent WTO disputes demonstrates how PTAs provide targeted disciplines against State interventions that cause market distortions and unfair trade practices. PTAs offer a more rational and equitable approach to managing trade conflicts, avoiding conventional trade remedies' economic irrationalities and protectionist tendencies. The article proposes a strategic shift towards PTAs to fill gaps left by traditional WTO agreements. It highlights the need for a dynamic, adaptable legal framework in international trade that responds to sophisticated State interventions in the global economy.

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I. INTRODUCTION

A series of WTO disputes illustrate the limitations of the Anti-Dumping Agreement¹ in addressing State interventions that distort prices and injure the domestic industries of other WTO Members. These State interventions have included export taxes and export bans on raw input materials, price-fixing by governments of raw input materials at rates below cost-recovery, and non-commercial sales by State-owned enterprises. The significance of the limitations of the Anti-Dumping Agreement concerning these kinds of State interventions lies in the incomplete coverage of the Agreement on Subsidies and Countervailing Measures (SCM Agreement). As legal avenues to address these types of State interventions under the Anti-Dumping Agreement shrink through WTO dispute settlement, clear gaps are beginning to emerge between the Anti-Dumping Agreement and SCM Agreement regarding these types of State interventions.

This article evaluates the potential for preferential trade agreements (PTAs) to fill these gaps. It shows that PTAs can address State interventions like export taxes, export bans, State-control of prices, and non-commercial conduct by State-owned enterprises, in more effective and transparent ways than applying anti-dumping and countervailing measures. Section II provides an overview of the types of State interventions incapable of being counteracted under the Anti-Dumping Agreement in WTO dispute settlement. Section III then explains why these types of State interventions fall outside the scope of the SCM Agreement. Section IV describes why the Anti-Dumping Agreement has proven incapable of addressing these State interventions, thus creating gaps where they are effectively unregulated, despite having the potential to distort prices and injure other WTO Members' domestic industries. Section V shows how PTAs could fill these gaps between the Anti-Dumping Agreement and the SCM Agreement. The section will show how targeted disciplines that address the underlying types of State interventions at issue in these WTO disputes could prove to be a more effective and desirable solution than continuing to strive to use anti-dumping and countervailing measures as remedial tools.

¹ Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Jan. 1, 1995, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 3. Dumping, in the context of international trade, refers to the practice where a company exports a product at a price lower than the price it normally charges in its home market or below its cost of production. This practice may be considered “unfair” or detrimental for several reasons, including because industries competing in the market where the dumping occurs may suffer significant harm due to dumping, with reduced market share, lower profits, and potentially, the loss of jobs and company closures. In response to these challenges, the WTO Agreements include provisions for anti-dumping measures. These measures allow countries to impose duties on dumped goods to protect domestic industries and cure the “unfairness.”

II. STATE INTERVENTIONS AND THE ANTI-DUMPING AGREEMENT IN RECENT WTO DISPUTES

In a series of WTO disputes, States have grappled with how to use the Anti-Dumping Agreement to counteract the harmful effects of certain State interventions that reduce the price of imports. The WTO Antidumping Agreements allow WTO Members to impose Antidumping duties subject to certain substantive and procedural requirements. In each of these cases, a WTO Member imposed antidumping duties under their domestic laws to address State interventions, and the imposition of the antidumping duties was challenged at WTO proceedings.

The State interventions at issue in *EU–Biodiesel (Argentina)* and *EU–Biodiesel (Indonesia)* comprised export taxes imposed by Argentina and Indonesia on the primary raw materials used to produce biodiesel.² Although biodiesel was also subject to an export tax, its export was taxed at a significantly lower rate.³ The cumulative effect of these measures was to depress the cost of the raw materials used to produce biodiesel in Argentina and Indonesia compared to international prices for the raw materials, thus affording a cost advantage to biodiesel producers in Indonesia and Argentina. Since the export tax on biodiesel itself was lower than that on the raw materials, the cost advantage afforded by the depressed raw material prices persisted when biodiesel was exported into international markets.⁴

The State intervention in *Ukraine–Ammonium Nitrate* involved the Russian government setting the domestic price of the primary raw material to produce ammonium nitrate, namely gas.⁵ The domestic gas supplier in Russia was Gazprom, an entity majority-owned by the Russian government, and the Russian government set the price of gas sold by Gazprom domestically at levels below cost recovery.⁶ Meanwhile, Gazprom maintained profitability by exporting gas at a

² Panel Report, *European Union—Anti-Dumping Measures on Biodiesel from Argentina*, ¶ 7.181, WTO Doc. WT/DS473/16 (adopted Oct. 6, 2016); Panel Report, *European Union—Anti-Dumping Measures on Biodiesel from Indonesia*, ¶¶ 7.13–14, WTO Doc. WT/DS480/R (adopted Feb. 28, 2018).

³ *See id.*

⁴ Panel Report, *EU–Biodiesel (Argentina)*, *supra* note 2, at ¶ 7.184; Panel Report, *EU–Biodiesel (Indonesia)*, *supra* note 2, ¶ 7.14. Since the export taxes on the raw input materials were set by reference to the prevailing international prices for those materials, they were necessarily lower than the prices available to foreign competitors. The magnitude of the resulting distortion reflected the difference between the (higher) export tax on the raw input materials and the (lower) export tax on the final product, taking into account the percentage of the raw input material's contribution to the cost of production of the final product.

⁵ Panel Report, *Ukraine—Anti-Dumping Measures on Ammonium Nitrate*, ¶ 7.73, WTO Doc. WT/DS493/AB/R (adopted Sept. 30, 2019).

⁶ *Id.* The Ukrainian authorities' determination also made reference to Working Party Report on Russia's Accession (*id.*, n.162), but in the WTO proceedings, Ukraine made only limited use of its

price significantly higher than the level set for domestic prices by the Russian government.⁷ Ammonium nitrate produced in Russia benefited from a cost advantage over ammonium nitrate produced elsewhere due to the Russian government's intervention in the domestic gas price.

The State intervention at issue in *Australia—A4 Copy Paper*⁸ comprised the support for developing timber plantations⁹ and Indonesia's export ban on logs.¹⁰ This intervention was said to depress the price of the product at issue artificially, namely A4 copy paper, by stimulating an oversupply of timber as a primary raw material. This reduced the cost of timber as an input in the production of pulp and, in turn, of A4 copy paper.¹¹

Thus, various State interventions have been the subject of attempted redress under the Anti-Dumping Agreement. These include export taxes on raw input materials, export bans on raw input materials, below-cost sales of input materials by state-owned enterprises, price controls on inputs, and State action to develop and support the production of raw input materials.¹² In each of these cases, WTO Panels found the Member who had imposed the anti-dumping measure to have violated the Anti-Dumping Agreement.

contents (*see id.*, n.162). The Working Party Report included relevant factual material regarding Gazprom and Russia's gas market. *See* Panel Report, *Report of Working Party on the Accession of the Russian Federation*, ¶¶ 76, 90–93, 125 WTO Doc. WT/ACC/RUS/70 (adopted Nov. 17, 2011).

⁷ Panel Report, *Ukraine—Ammonium Nitrate*, *supra* note 5, at ¶ 7.73.

⁸ Panel Report, *Australia—Anti-Dumping Measures on A4 Copy Paper*, WTO Doc. WT/DS529/R (adopted Jan. 27, 2020).

⁹ Anti-Dumping Commission (Australian Government), *Report No. 341 Alleged Dumping of A4 Copy Paper from the Federative Republic of Brazil, the People's Republic of China, the Republic of Indonesia, and the Kingdom of Thailand and Alleged Subsidisation of A4 Copy Paper Exported from the People's Republic of China and the Republic of Indonesia: Final Report*, 146, 168, 170.

This support included reversing the ban on natural forest timber for pulp manufacturing, providing seven million hectares of natural forest concessions to assist the pulp and paper sector, and issuing permits to allow the use of timber waste for pulp. The Indonesian government also made investments including constructing seven new pulp mills with capacity of nearly five million tons and nearly two million hectares of new timber plantations at an overall cost of 14 billion dollars by 2017.

¹⁰ *Id.* at 146.

¹¹ *Id.* at 167–68, 173–74.

¹² In addition to the cases discussed in this section, similar state interventions were at issue in Panel Report, *European Union—Cost Adjustment Methodologies and Certain Anti-Dumping Measures on Imports from Russia*, WTO Doc. WT/DS494/R (adopted July 24, 2020) and are currently being litigated in Panel Report, *Australia—Anti-Dumping and Countervailing Duty Measures on Certain Products from China*, WTO Doc. WT/DS603/R (adopted Mar. 26, 2024).

III. THE LIMITS OF THE SCM AGREEMENT IN ADDRESSING STATE INTERVENTIONS

The SCM Agreement has three fundamental limitations as interpreted by the Appellate Body,¹³ which tends to exclude the State interventions described in section II from its purview. First, the State intervention must fall within the particular conduct listed in subparagraphs (i) to (iii) in Article 1.1(a)(1) of the SCM Agreement, which provides:¹⁴

- (i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);
- (ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits);
- (iii) a government provides goods or services other than general infrastructure, or purchases goods;

The plain text of these subparagraphs does not cover State interventions that depress the price of raw input materials, such as through export bans and export taxes, except where the State itself (“government” or “public body”) is the provider of the raw input materials.¹⁵ Even then, however, the provider of the raw input material must be the “government” or a “public body” to qualify under subparagraphs (i) to (iii) of Article 1.1(a)(1).

This elicits the second fundamental limitation in the SCM Agreement. According to the controversial¹⁶ interpretation of the Appellate Body, an enterprise does not qualify as a “public body” merely because it is majority-owned

¹³ Understanding on Rules and Procedures Governing the Settlement of Disputes art. 1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU]. The WTO Appellate Body, was established in 1995 in DSU art. 17. It is a standing body of seven persons that reviews appeals from reports issued by WTO panels in disputes brought by WTO Members (Art. 17.1). The Appellate Body can uphold, modify, or reverse a panel’s legal findings and conclusions (Art 17.13). Its reports are adopted by the Dispute Settlement Body (DSB) unless there is a consensus among all members not to do so (Art. 17.14). However, since November 30, 2020, the Appellate Body has been unable to review new appeals due to vacancies that have left it without the quorum needed for functioning.

¹⁴ SCM Agreement, art 1.1(a)(1) (footnote omitted).

¹⁵ See, e.g., Panel Report, *United States—Measures Treating Export Restraints as Subsidies*, WTO Doc. WT/DS194/R (adopted Aug. 23, 2001), ¶¶ 8.26, 8.31, 8.34, 8.53; Panel Report, *United States—Countervailing Measures on Supercalendered Paper from Canada*, WTO Doc. WT/S505/R (adopted Mar. 5, 2020), ¶¶ 7.37–39; Appellate Body Report, *United States—Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMs) from Korea*, ¶¶ 114–16, WTO Doc. WT/DS296/R (adopted July 20, 2005). See also Meredith Crowley & Jennifer Hillman, *Slamming the Door on Trade Policy Discretion? The WTO Appellate Body’s Ruling on Market Distortions and Production Costs in EU—Biodiesel (Argentina)*, 17 WORLD TRADE REV. 195, 209 (2018).

¹⁶ See, e.g., Michael Cartland et al., *Is Something Going Wrong in the WTO Dispute Settlement?*, 46 J. WORLD TRADE 979, 1001–12 (2012).

by the State.¹⁷ Instead, State-owned enterprises must also be shown to possess, exercise, or be vested with governmental authority to qualify as “public bodies.”¹⁸ Thus, if a State-owned enterprise is not set up to perform a governmental function, its conduct will not be captured by the SCM Agreement, regardless of whether it sells raw input materials to domestic producers at below-market rates.

The significance of the Appellate Body’s interpretation of “public body” lies in the evidentiary challenges it presents in proving that a State-owned enterprise has actually been vested with governmental authority. In particular, without legislative or other publicly-available documentary evidence, obtaining evidence that a given State-owned enterprise has been vested with governmental authority can be challenging.¹⁹ The authorities that conduct subsidy investigations lack subpoena powers in the jurisdictions of the other WTO Members whose alleged subsidies they investigate.²⁰ Even if the authorities find sufficient evidence that a government is exercising “meaningful control” over a State-owned enterprise, the enterprise will only qualify as a “public body” if the authorities can prove that it is also performing a governmental function.²¹

A third key limitation in the SCM Agreement pertains to its coverage of private enterprises whose conduct is influenced by State interventions. In particular, Article 1.1(a)(iv) covers instances where:

(iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments;

Thus, if a government “entrusts or directs” private enterprises to provide upstream raw material inputs to downstream domestic producers, such conduct is covered by the SCM Agreement. Importantly, however, “entrust” has been interpreted to occur where a government gives responsibility to a private enterprise, and “direction” has been interpreted to refer to situations where the

¹⁷ Appellate Body Report, *United States—Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, ¶ 4.10, WTO Doc. WT/DS436/R (adopted Dec. 19, 2014). See also Appellate Body Report, *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, ¶ 318, WTO Doc. WT/DS379/R (adopted Mar. 25, 2011).

¹⁸ Appellate Body Report, *US—Anti-Dumping and Countervailing Duties (China)*, *supra* note 17, at ¶ 317.

¹⁹ As the panel stated in *EC—Countervailing Measures on DRAM Chips (Korea)* in the analogous context of Article 1.1(a)(iv): “[i]n the absence of a clear and explicit government order, the evidence to be relied on will inevitably be circumstantial” (Panel Report, *European Communities—Countervailing Measures on Dynamic Random Access Memory Chips from Korea*, ¶ 7.105, WTO Doc. WT/DS299/R (adopted Aug. 3, 2005)). See Jochem de Kok, *The Future of EU Trade Defence Investigations against Imports from China*, 19 J. INT’L ECON. L. 515, 541–43 (2016).

²⁰ Panel Report, *EC—DRAM Chips (Korea)*, *supra* note 19, at ¶ 7.61, 7.80.

²¹ Appellate Body Report, *US—Hot Rolled Carbon Steel (India)*, *supra* note 17, at ¶¶ 4.36–.37, 4.42, 4.52. See also Panel Report, *US—Hot Rolled Carbon Steel (India)*, *supra* note 17, at ¶¶ 7.73, 7.80, 7.89 & n.261.

government exercises its authority over a private enterprise.²² In both instances, the link between the government and the private enterprise's conduct is *direct*.²³ When a private enterprise's conduct is a mere side-effect resulting from a government measure, this does not come within the meaning of "entrustment" or "direction" as interpreted in WTO jurisprudence.²⁴ Thus, an export ban or export tax imposed by a government may intentionally depress the domestic price of raw input material, but the resulting sales of the raw input material by private enterprises to domestic producers at artificially low prices do not amount to an "entrustment" or "direction" for the purposes of Article 1.1(a)(1)(iv).²⁵ State interventions that do not involve the tacit exercise of *control* over private enterprises, but which instead influence their conduct in less direct ways, would not be captured by Article 1.1(a)(1)(iv).

Finally, note that Article 1.1(a)(2) of the SCM Agreement covers a further type of State intervention involving "any form of income or price support in the sense of Article XVI of GATT 1994."²⁶ This pertains to support "which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into, its territory."²⁷ The scope of conduct covered by this subparagraph has been interpreted somewhat narrowly to include "direct government intervention in the market with the design to fix the price of a good at a particular level, for example, through purchase of surplus production when price is set above equilibrium."²⁸ Based on this interpretation, State interventions such as in *Ukraine—Ammonium Nitrate* that fix the prices of *raw input materials*—as opposed to the end-product itself—would not be captured by Article 1.1(a)(2) of the SCM Agreement.

Thus, despite the SCM Agreement being directed at State interventions that produce price distortions that injure foreign producers, the limitations in its scope "reflects the Members' agreement that only certain types of government action

²² Appellate Body Report, *United States—Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMs) from Korea*, ¶¶ 110–11, WTO Doc. WT/DS296/AB/R (adopted July 20, 2005).

²³ *Id.* at ¶ 112.

²⁴ Panel Report, *China—Countervailing and Anti-Dumping Duties on Grain Oriented Flat-rolled Electrical Steel (GOES) from the United States*, ¶ 7.91, WTO Doc. WT/DS414/R (adopted Nov. 16, 2012).

²⁵ Panel Report, *United States—Measures Treating Export Restraints as Subsidies*, ¶¶ 8.75–76, WTO Doc. WT/DS194/R (adopted Aug. 23, 2001).

²⁶ SCM Agreement, *supra* note 14, at art. 1.1(a)(2).

²⁷ General Agreement on Tariffs & Trade 1994, art. 16(3), Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 190 [hereinafter GATT 1994].

²⁸ Panel Report, *China—GOES (United States)*, *supra* note 24, at ¶ 7.85.

are subject to the SCM Agreement, and also that not all government actions that may affect the market come within the ambit of the SCM Agreement.”²⁹

IV. THE LIMITS OF THE ANTI-DUMPING AGREEMENT IN ADDRESSING STATE INTERVENTIONS

The Anti-Dumping Agreement’s focus on private actors’ pricing behavior³⁰ is typically contrasted with the focus of the SCM Agreement by price-distorting interventions by States.³¹

However, nothing in the Anti-Dumping Agreement—nor the SCM Agreement and WTO Agreement more broadly—precludes the use of anti-dumping measures to counteract State interventions that affect the prices of private entities in a way that causes dumping.³² Indeed, several contextual elements of the Anti-Dumping Agreement and the GATT 1994 foreshadow the possibility of State interventions being the object of anti-dumping measures. For instance, Article VI.5 of the GATT 1994 recognizes that a State’s provision of export subsidies to a private entity can reduce that entity’s export price vis-à-vis its domestic price, creating a circumstance where either anti-dumping or countervailing duties could be used to address the same resulting situation of dumping or export subsidization.³³ Likewise, the practical effect of Article 2.7 of the Anti-Dumping Agreement is to permit the use of anti-dumping measures to counteract distortions resulting from State interventions that impact export prices where those exports originate from “a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State.”³⁴ As another example, paragraph 2 of the *Ad Note* to Article VI.2 and VI.3 of the GATT 1994 states that “[m]ultiple currency practices can in

²⁹ Panel Report, *United States—Final Countervailing Duty Determination with respect to certain Softwood Lumber from Canada*, ¶ 7.29, WTO Doc. WT/DS257/R (adopted Dec. 20, 2005). See also Panel Report, *United States—Measures Treating Export Restraints as Subsidies*, ¶ 8.63, WTO Doc. WT/DS194/R (adopted Aug. 23, 2001).

³⁰ Panel Report, *United States—Anti-Dumping Measures on Certain Shrimp from Viet Nam*, ¶ 7.372, WTO Doc. WT/DS429/R (adopted Apr. 22, 2015). Appellate Body Report, *United States—Measures Relating to Zeroing and Sunset Reviews*, ¶¶ 111, 156, WTO Doc. WT/DS322/R (adopted Jan. 23, 2007).

³¹ See Appellate Body Report, *US—DRAMMS (Korea)*, *supra* note 22, at ¶ 112.

³² See, e.g., Appellate Body Report, *US—Anti-Dumping and Countervailing Duties (China)*, *supra* note 17, at ¶ 568. See also Appellate Body Report, *European Communities—Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, ¶ 376, WTO Doc. WT/DS397/R (adopted July 28, 2011).

Article 2.1 of the Anti-Dumping Agreement describes dumping as follows: “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.”

³³ Appellate Body Report, *US—Anti-Dumping and Countervailing Duties (China)*, *supra* note 17, at ¶ 568.

³⁴ See Panel Report, *EU—Biodiesel (Argentina)*, *supra* note 2, at ¶ 7.241.

certain circumstances constitute a subsidy to exports which may be met by countervailing duties under paragraph 3 or can constitute a form of dumping.”³⁵ Again, this paragraph presupposes that State interventions (in this instance, “multiple currency practices”) can give rise to either dumping or subsidization, and can be counteracted under either the Anti-Dumping Agreement or the SCM Agreement.

These contextual elements show that there is nothing inherent in the Anti-Dumping Agreement that precludes the use of anti-dumping measures to counteract State interventions where those interventions contribute to a situation of dumping by private entities. Equally, however, these contextual elements pertain to specific scenarios and particular types of State interventions.³⁶ In the absence of clauses governing how other scenarios involving different types of State interventions could be addressed through anti-dumping measures, the cases in section II illustrate the difficulties encountered by respondents striving to find legal avenues to justify such measures in WTO disputes. In short, respondents have explored three potential legal avenues to justify their use of anti-dumping measures to counteract State interventions. These potential avenues are grounded, respectively, in the references to “*reasonably* reflect” and “shall *normally*” in Article 2.2.1.1 of the Anti-Dumping Agreement, and to “particular *market* situation” in Article 2.2. Respondents in WTO disputes have (unsuccessfully) sought to use these textual references to justify rejecting the investigated exporters’ actual costs and prices when determining whether they are dumping, and instead replacing these with costs and prices unaffected by the State intervention at issue.

In the two *EU–Biodiesel* disputes, Indonesia and Argentina challenged the EU authorities’ reliance on the “*reasonably* reflect” limb of Article 2.2.1.1 of the Anti-Dumping Agreement to replace the raw material input costs actually incurred by producers—which had been distorted through export taxes on those raw materials—with undistorted benchmarks for those costs.³⁷ The strength of the respective cases made by Indonesia and Argentina lay in the plain text of this limb of Article 2.2.1.1, which pertains to the reasonableness of how costs are reflected in *producers’ records*, and not to whether the *costs themselves* are reasonable (or e.g. unreasonable through distortions).³⁸ As long as the producers’ records reasonably depicted the costs that those producers actually incurred in purchasing the inputs, there was no basis to reject those costs under the “*reasonably* reflect” limb of Article 2.2.1.1 on the basis that they were distorted through State interventions.³⁹

³⁵ GATT 1994, *supra* note 27, second Ad Note to arts. VI:2 & VI:3.

³⁶ Panel Report, *EU–Biodiesel (Argentina)*, *supra* note 2, at ¶ 7.241.

³⁷ *Id.* at ¶ 7.227; Panel Report, *EU–Biodiesel (Indonesia)*, *supra* note 2, at ¶¶ 7.21–23.

³⁸ Appellate Body Report, *European Union—Anti-Dumping Measures on Biodiesel in Argentina*, ¶¶ 6.39, 6.56, WTO Doc. WT/DS473/AB/R (adopted Oct. 26, 2016).

³⁹ Panel Report, *EU–Biodiesel (Argentina)*, *supra* note 2, at ¶¶ 6.39, 6.56, 7.247–248.

Accordingly, the panels and Appellate Body found the EU authorities' attempt to justify counteracting the State interventions at issue is inconsistent with Article 2.2.1.1.⁴⁰

For the same reasons, in *Ukraine—Ammonium Nitrate*, Ukraine failed to justify replacing the State-controlled domestic gas input costs with undistorted market prices for gas via the “reasonably reflect” limb of Article 2.2.1.1.⁴¹ However, Ukraine also pursued an alternative legal avenue to justify counteracting the State-controlled gas input costs. In particular, whilst Article 2.2.1.1, as interpreted by panels and the Appellate Body, requires the actual costs incurred by producers to be used regardless of whether those costs were distorted through State interventions, the text of Article 2.2.1.1 caveats this requirement with the term “normally.”⁴² Ukraine thus invoked this caveat by arguing that the producers' actual costs need only “normally” be used, whereas the circumstance of their gas input costs being fixed by the State at below cost-recovery rates justified the Ukrainian authorities' deviation from what this rule would “normally” require.⁴³ Again, Ukraine was unsuccessful. The panel did not entirely foreclose this legal avenue as a permissible means of counteracting State interventions.⁴⁴ However, it precluded Ukraine from invoking the “normally” limb because the producers' gas input costs did not reflect the *complete* costs of gas in Russia, despite the price of gas being fixed by the State, and despite the fixed price being at below cost-

⁴⁰ *Id.* at ¶ 7.248; Panel Report, *EU—Biodiesel (Indonesia)*, *supra* note 2, at ¶ 7.27; Appellate Body Report, *EU—Biodiesel (Argentina)*, *supra* note 38, at ¶ 6.56.

⁴¹ Panel Report, *Ukraine—Ammonium Nitrate*, *supra* note 5, ¶¶ 7.89, 7.91.

⁴² See Crowley & Hillman, *supra* note 15, at 208. The text of Article 2.2.1.1 of the Anti-Dumping Agreement provides in relevant part:

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. (underlining added)

The panel in *China—Broiler Products* stated “the use of the term ‘normally’ . . . indicates that the rule . . . admits of derogation under certain circumstances” (Panel Report, *China—Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*, ¶ 7.161, WTO Doc. WT/DS427/R (adopted Aug. 2, 2013)). The term “normally” functions as a standalone derogation from Article 2.2.1.1 whose scope and meaning is not exhausted by the two explicit conditions in Article 2.2.1.1. To interpret “normally” otherwise would effectively amount to reading the term out of the text of Article 2.2.1.1, since it conditions the overarching term “shall.”

⁴³ Panel Report, *Ukraine—Ammonium Nitrate*, *supra* note 5, at ¶ 7.78. That said, Ukraine does not appear to have placed significant emphasis on this alternative ground during the proceedings (*see id.*, n.140).

⁴⁴ *See id.* at ¶ 7.68. Since the panel determined that Ukraine's reliance on the “normally” limb of Article 2.2.1.1 would amount to an *ex post facto* rationalization of the Ukrainian authorities' determination, it was not called upon to determine whether the “normally” limb provides a standalone basis for derogating from Article 2.2.1.1 (*see id.*, ¶ 7.80).

recovery rates.⁴⁵ The panel's approach thus seems to effectively neuter the applicability of the "normally" limb of Article 2.2.1.1 in instances of State interventions.⁴⁶

A third legal avenue for addressing State interventions in the Anti-Dumping Agreement was tested in *Australia–A4 Copy Paper*.⁴⁷ In particular, as a result of the State interventions described in Section II (i.e. export bans on logs and State support for timber plantations), the Australian authorities found there to be a "particular market situation" under Article 2.2 of the Anti-Dumping Agreement for A4 copy paper in Indonesia, thus justifying the replacement of the distorted input costs incurred by Indonesian producers with undistorted international reference prices. The term "particular market situation" is undefined in the Anti-Dumping Agreement, and had not previously been interpreted or applied in WTO jurisprudence.⁴⁸ The Panel determined that Indonesia did not successfully show that the Australian Anti-Dumping Commission (ADC) violated Article 2.2 of the Anti-Dumping Agreement in its determination of a 'particular market situation' in Indonesia's A4 copy paper market.⁴⁹ However, regardless of whether this term can encompass State interventions that impact the cost of producing a given product,⁵⁰ the text of Article 2.2 demonstrates that, to be enlivened, the "particular market situation" must affect domestic sales in such a way that those sales "do not permit a proper comparison" with export sales when determining whether dumping is occurring.⁵¹ Thus, if the State intervention affects the price of both

⁴⁵ See *id.* ¶ 7.80. The panel determined that the Ukrainian authorities' reasoning that the "records of the investigated Russian producers' [did] not completely reflect the costs associated with production and sale of the Products, in particular, the gas expenses" could not correspond to the "normally" limb of Article 2.2.1.1, but rather, corresponded only to the "reasonably reflect" limb of Article 2.2.1.1. The panel seems to have placed significant weight on the absence of the term "normally" in the corresponding provision of Ukraine's domestic anti-dumping law, and to that extent, the panel's reasoning is weak—WTO Members need not use terminologies and concepts that are identical to the WTO Agreement in their domestic laws.

⁴⁶ See also Panel Report, *EU–Biodiesel (Argentina)*, *supra* note 2, at ¶ 7.236 & n.391; Weihuan Zhou, *Appellate Body Report on EU–Biodiesel: The Future of China's State Capitalism under the WTO Anti-Dumping Agreement*, 17 WORLD TRADE REV. 609, 621, 623 (2018).

⁴⁷ Panel Report, *Australia–Anti-Dumping Measures on A4 Copy Paper*, *supra* note 8.

⁴⁸ This concept was, however, addressed but found irrelevant by a GATT Panel. See GATT Panel Report, *EC–Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil*, ¶ 478, ADP/137 (adopted July 4, 1995).

⁴⁹ Panel Report, *Australia–Anti-Dumping Measures on A4 Copy Paper*, *supra* note 8, at ¶ 7.57.

⁵⁰ See Weihuan Zhou & Andrew Percival, *Debunking the Myth of 'Particular Market Situation' in WTO Antidumping Law*, 19 J. INT'L ECON. L. 863, 867–69, 877 (2016).

⁵¹ The text of Article 2.2 of the Anti-Dumping Agreement provides, in relevant part:

When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic

domestic and export sales equally, it is difficult to see how that intervention could be said to preclude a “proper comparison” between them.⁵² Although the State interventions described in Section II differentiate between domestic and export prices of *input* costs, they do not distinguish between the domestic and export prices of the final product allegedly dumped. Suppose State interventions give rise to distortions that have an equal impact on the export and domestic prices of the allegedly dumped product. In that case, it seems unlikely that the “particular market situation” limb of Article 2.2 could provide a legal pathway for addressing those State interventions. Indeed, the Panel found Australia’s measure inconsistent with Article 2.2, first sentence, because the Commission failed to determine that domestic sales did “not allow a proper comparison” with export sales.⁵³

Beyond these legal avenues—“reasonably reflect” and “normally” in Article 2.2.1.1, and “particular market situation” in Article 2.2—it is not obvious what other aspects of the Anti-Dumping Agreement could be used to address State interventions that distort prices. Another possibility could involve invoking the obligation to make a “fair comparison” under Article 2.4.⁵⁴ This would be premised on the argument that distortions arising from State interventions need to be addressed to compare the domestic and export prices under Article 2.4 to be “fair.” Such an argument has yet to be tested in WTO jurisprudence and is essentially a matter of perspective.⁵⁵ From the exporting country’s perspective, a distortion introduced by a State intervention that affects the export and domestic

market of the exporting country, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits (footnote omitted; underlining added).

⁵² See de Kok, *supra* note 19, at 531–32.

⁵³ Panel Report, *Australia—Anti-Dumping Measures on A4 Copy Paper*, *supra* note 8, at ¶ 7.91.

⁵⁴ The text of Article 2.2 of the Anti-Dumping Agreement provides, in relevant part:

A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability.

⁵⁵ See also Crowley & Hilman, *supra* note 15, at 204. In response to this broader issue of perspective, Crowley and Hillman frame the question as: “First, what is dumping? In other words, are exporters dumping if they set prices to maximize profits given a locally available input price? Or, if an input price is favourably distorted by a government policy, does this automatically imply dumping by a profit-maximizing firm?”

prices equally does not give rise to an imbalance between those prices,⁵⁶ and hence does not engage the fairness of comparison between those prices. From the importing country's perspective, distorted export prices relate to export sales into competitive markets that are free from the State intervention at issue, resulting in unfair competitive conditions, thus warranting an adjustment when making the comparison under Article 2.4.⁵⁷ Both perspectives have merit. However, since the comparison at the heart of dumping ultimately involves the domestic price and the export price of the investigated producers,⁵⁸ it seems unlikely that considerations involving the interaction between the investigated producers' export price and other prices in other markets could be imported into the notion of "fairness" in Article 2.4.⁵⁹

⁵⁶ The third sentence of Article 2.4 has been interpreted to the effect that adjustments made to the export or domestic prices to facilitate a "fair comparison" must relate to an "identifiable component" of the price of relevant transactions and whether that "identifiable component" is linked exclusively either to domestic sales or to relevant export sales that are compared, or to both sides of the comparison but in different amounts (Panel Report, *European Union—Anti-Dumping Measures on Imports of Certain Fatty Alcohols from Indonesia*, ¶ 7.58, WTO Doc. WT/DS442/R (adopted Dec. 16, 2016). See also Panel Report, *EU—Biodiesel (Argentina)*, *supra* note 2, at ¶¶ 7.301–302; Appellate Body Report, *United States—Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing)*, ¶ 156, WTO Doc. WT/DS294/R (adopted June 11, 2009); Panel Report, *United States—Final Dumping Determination on Softwood Lumber from Canada*, ¶ 7.176, WTO Doc. WT/DS264/R (adopted Aug. 31, 2004). Therefore, distortions that affect both export and domestic prices equally would not, on their face, appear to warrant an adjustment under Article 2.4. See also Vassilis Akritidis & Florentine Snej, *The Shake-Up of the EU Institutions' Dumping Calculation Methodology and the Compatibility of a Market-Oriented Concept of Normal Value with WTO Law*, 13 GLOB. TRADE & CUSTOMS J. 129, 136 (2018).

⁵⁷ Such an argument would be premised on the concept of "fair" being a "general and abstract standard" (Appellate Body Report, *US—Zeroing (EC)*, *supra* note 56, at ¶ 146) that connotes "impartiality, even-handedness, or lack of bias" (Appellate Body Report, *US—Softwood Lumber (Canada)*, *supra* note 56, at ¶ 138). The difficulty of that approach lies in that the Appellate Body's interpretation that the meaning of "fair" is informed by the principles and requirements set out in the subsequent sentences of Article 2.4, hence invoking the problems mentioned in footnote 49. Nonetheless, the Appellate Body has found that the obligation to make a "fair comparison" is an "independent obligation" that is not defined *exhaustively* by the subsequent sentences of Article 2.4, thus creating at least some scope to make this argument (Appellate Body Report, *US—Zeroing (EC)*, *supra* note 56, at ¶ 146).

⁵⁸ The text of Article 2.1 of the Anti-Dumping Agreement defines the concept of dumping as follows:

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.

⁵⁹ Even though "fairness" in Article 2.4 may encompass considerations beyond those specifically listed in Article 2.4, panels and the Appellate Body have suggested that they must nonetheless concern the underlying concept of "dumping" in the Anti-Dumping Agreement. In this regard, the panel stated in *US—Zeroing (EC)* that:

The WTO disputes described above and the uncertainty around existing rules in the Anti-Dumping Agreement have led to some calls for “the need for reforming the WTO anti-dumping disciplines dealing with [non-market economy]-like situations,” such as introducing clearer legal authority to use market-based costs and prices to ascertain dumping.⁶⁰ Similarly, some WTO Members have proposed changes to interpretations of the SCM Agreement to ameliorate some of the difficulties arising from the approach of the Appellate Body, such as in relation to “public body.”⁶¹ However, the gulf between different Members’ positions and interests in WTO rules on trade remedies makes finding consensus on new rules exceedingly unlikely in the current environment.

The closure of some legal avenues for addressing State interventions under the Anti-Dumping Agreement through WTO dispute settlement, and the uncertainty of others, warrants the consideration of alternative and more effective ways of addressing the underlying concerns. The consideration of alternatives is particularly prescient given ongoing disputes and uncertainty about whether China may continue to be permissibly treated as a non-market economy for the purposes of anti-dumping measures.⁶² Jurisdictions such as Australia that already recognize China as a market economy have sought to use the aforementioned legal avenues in the Anti-Dumping Agreement regarding State interventions affecting the prices of Chinese exports.⁶³ However, these avenues are shrinking.⁶⁴

“To determine whether an approach is unfair there must be a discernible standard of appropriateness or rightness within the four corners of the AD Agreement which would provide a basis for reliably judging that there has been an unfair departure from that standard.”

Panel Report, *United States—Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing)*, ¶ 7.260, WTO Doc. WT/DS294/R (adopted May 9, 2009); Appellate Body Report, *US—Zeroing (EC)*, *supra* note 56, at ¶¶ 139, 146 (affirming the panel in this regard).

⁶⁰ Sherzod Shadikhodjaev, *Input Cost Adjustments and WTO Anti-Dumping Law: A Closer Look at the EU Practice*, 18 *WORLD TRADE REV.* 81, 102–06 (2019).

⁶¹ See, e.g., Press Release, Office of the United States Trade Representative, Statement of the Trilateral Meeting of the Trade Ministers of Japan, the United States and the European Union (Jan. 14, 2020), <https://perma.cc/XM6K-6GEU>.

⁶² There is no definitive WTO ruling on whether applying NME methodology for anti-dumping measures against China is permissible post-December 11, 2016, following the suspension of the WTO panel proceedings in the *EU—Price Comparison Methodologies* at China’s request on May 7, 2019. See de Kok, *supra* note 19, at 528, 541–42.; Ye Li, *Normal Value in Anti-Dumping Proceedings: Is Surrogate Value No Longer Applied Exceptionally?*, 13 *GLOB. TRADE & CUSTOMS J.* 435, 438–39, 441 (2018); James Searles, *The European Union’s Options for China Dumping Methodology After 11 December 2016*, 11 *GLOB. TRADE & CUSTOMS J.* 430, 437–39 (2016).

⁶³ See Zhou & Percival, *supra* note 50, at 870–72, 886–87. See also Matthew R. Nicely & Brian Gatta, *U.S. Trade Preferences Extension Act (TPEA) of 2015 Could Lead to Increased Use of “Particular Market Situation” in Calculating Normal Value in Anti-Dumping Cases*, 11 *GLOB. TRADE & CUSTOMS J.* 238, 240–42 (2016); Edwin Vermulst et al., *Normal Value in Anti-Dumping Proceedings against China Post-2016: Are Some Animals Less Equal Than Others?*, 11 *GLOB. TRADE & CUSTOMS J.* 212, 219–21 (2016).

⁶⁴ See also Crowley & Hillman, *supra* note 15, at 206; de Kok, *supra* note 19, at 539; Zhou, *supra* note 46, at 627–28.

V. PREFERENTIAL TRADE AGREEMENTS AND FILLING THE GAPS IN THE ANTI-DUMPING AGREEMENT AND SCM AGREEMENT

Preferential trade agreements (PTAs)⁶⁵ could provide an alternative vehicle for addressing the types of State interventions described in Section II that have given rise to WTO disputes in recent years. Rather than trying to pigeonhole State interventions within nebulous concepts in the Anti-Dumping Agreement like “reasonably reflect,” “normally,” “particular market situation,” and “fair,” PTAs could include disciplines that more directly and transparently address these interventions. Indeed, addressing these through substantive obligations in PTAs rather than through anti-dumping measures would ameliorate the economic irrationalities associated with anti-dumping measures, such as protecting domestic industries at the expense of increased consumer prices, and potentially hindering legitimate foreign competition to the detriment of the consumer and the development of the domestic industry.⁶⁶ This section provides an overview of the kinds of substantive obligations that PTAs could include to address State interventions as an alternative to the use of anti-dumping measures.

A. Export taxes.

In the two *EU–Biodiesel* cases, export taxes applied by Indonesia and Argentina on the raw input materials were found to depress the price of those inputs in those markets artificially.⁶⁷ They afforded producers in those markets access to lower-priced raw input materials compared to their foreign competitors in, for example, the European Union (E.U.).

⁶⁵ Preferential Trade Agreements are treaties between two or more countries that agree to offer each other more favorable trade terms compared to those offered to other countries. They aim to reduce or eliminate tariffs, quotas, and other trade barriers between the participating countries. These agreements cover trade in goods and services and can address various other trade-related issues, such as intellectual property rights, investment, and competition policy. PTAs are intended to enhance trade and economic growth among member countries by facilitating increased access to markets and promoting closer economic integration. PTAs must be notified to the WTO and are formally subject to various requirements to ensure they complement the global trading system governed by WTO rules. See Andrew Mitchell & Nicolas Lockhart, *Ensuring Compliance Between a Bilateral PTA and the WTO*, in NEGOTIATING A PREFERENTIAL TRADING AGREEMENT ISSUES, CONSTRAINTS AND PRACTICAL OPTIONS 235 (Sisira Jayasuriya et al. eds., 2009).

⁶⁶ Tania Voon, *Eliminating Trade Remedies from the WTO: Lessons from Regional Trade Agreements*, 59 INT'L & COMPAR. L. Q. 625, 631 (2010).

⁶⁷ Panel Report, *EU–Biodiesel (Argentina)*, *supra* note 2, at ¶¶ 7.181, 7.184; Panel Report, *EU–Biodiesel (Indonesia)*, *supra* note 2, at ¶¶ 7.13–14.

Article XI of the GATT 1994 generally prohibits export restrictions but excludes “duties, taxes or other charges” from its scope.⁶⁸ PTAs could fill the gap left by Article XI in this regard. For instance, the recently negotiated *United States–Mexico–Canada Agreement* (USMCA) provides:⁶⁹

No Party shall adopt or maintain any duty, tax, or other charge on the export of any good to the territory of another Party, unless the duty, tax, or charge is also applied to the good if destined for domestic consumption.

This kind of provision would directly and effectively address the State intervention that was at issue in the two *EU–Biodiesel* cases⁷⁰ and which has also been raised as part of the broader “market economy” discussions concerning whether China’s domestic prices are suitable for use in anti-dumping investigations.⁷¹ Notably, under Article 11.3 of China’s Accession Protocol to the WTO, China is subject to a specific obligation, beyond general WTO requirements, to refrain from imposing export taxes. This was further clarified in the Appellate Body decisions in *China–Raw Materials* and *China–Rare Earths*, where the Appellate Body emphasized that China cannot invoke GATT Article XX as a defense for implementing export taxes, even if justified by legitimate objectives.

B. Export bans and other restrictions.

One of the State interventions at issue in the *Australia–A4 Copy Paper* dispute concerns an export ban on logs. As mentioned above, Article XI of the GATT 1994 generally prohibits export restrictions, which should, in principle, address this kind of State intervention. Nonetheless, some recent PTAs have provided the valuable clarification that:⁷²

2. The Parties understand that GATT 1994 rights and obligations incorporated by paragraph 1 prohibit, in any circumstances in which any other form of restriction is prohibited, a Party from adopting or maintaining:

⁶⁸ GATT 1994, *supra* note 27, at art. XI.1, which provides:

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

⁶⁹ The North American Free Trade Agreement, Can.-Mex.-U.S., art. 2.15, Dec. 8, 1993 [hereinafter NAFTA].

⁷⁰ Panel Report, *EU–Biodiesel (Argentina)*, *supra* note 2, at ¶¶ 7.181, 7.184; Panel Report, *EU–Biodiesel (Indonesia)*, *supra* note 2, at ¶¶ 7.13–.14.

⁷¹ See, e.g., U.S. DEPT. OF COMMERCE, CHINA’S STATUS AS A NON-MARKET ECONOMY (2017) 134, 139.

⁷² See, e.g., Comprehensive & Progressive Agreement on Trans-Pacific Partnership (CPTPP) art. 2.10.2, Mar. 8, 2018, 3346 U.N.T.S.

- (a) export and import price requirements, except as permitted in enforcement of countervailing and antidumping duty orders and undertakings;
- (b) import licensing conditioned on the fulfilment of a performance requirement; or
- (c) voluntary export restraints inconsistent with Article VI of GATT 1994, as implemented under Article 18 of the SCM Agreement and Article 8.1 of the AD Agreement.

Subparagraph (a) prohibits measures with an effect equivalent to an export tax that require export prices of raw material inputs to be higher than international reference prices, thus creating an incentive to retain the input for trade in the domestic market, which could, in turn create an artificial surplus and the suppression of domestic prices. Likewise, subparagraph (c) prohibits voluntary export restraints applied outside of the context of an affirmative determination that a product is being dumped or subsidized. These kinds of clarifications could prove helpful in instances where the State intervention is less straightforward than, say, an export ban on logs, as in the *Australia–A4 Copy Paper* dispute.

C. Performance requirements.

A further set of disciplines that could more effectively target State interventions through PTAs comprise prohibitions on performance requirements. The *Australia–A4 Copy Paper* dispute illustrates the kind of factual matrix where such disciplines could come into play.

As already mentioned, there was an export ban on logs in that case, but interestingly, there was no export ban on the intermediary product derived from logs to produce A4 copy paper, namely pulp.⁷³ While the domestic price of pulp in Indonesia was artificially depressed vis-à-vis international prices through the export ban on logs, it seems that domestic pulp producers did not seek to fully realize the potential price windfall by exporting pulp.⁷⁴ Instead, the artificially depressed pulp prices were found to flow through to the production of A4 copy paper, thus artificially depressing its cost of production and its final price. The Australian authorities do not appear to have examined closely why some pulp

⁷³ Anti-Dumping Commission (Australian Government), *Final Report*, *supra* note 9, at 170–72.

⁷⁴ See Anti-Dumping Commission (Australian Government), *Alleged Dumping of A4 Copy Paper Exported from the Federative Republic of Brazil, the People's Republic Of China, the Republic Of Indonesia and the Kingdom Of Thailand and Alleged Subsidisation of A4 Copy Paper Exported from the People's Republic Of China and The Republic Of Indonesia Statement Of Essential Facts*, 122 (2016). Despite the price differential with international prices, and despite the very low internal rates of return for Indonesian pulp (see Anti-Dumping Commission (Australian Government), *Final Report*, *supra* note 9, at 167) only some pulp was exported.

producers in Indonesia failed to export pulp.⁷⁵ Nonetheless, the broader facts indicate that most Indonesian pulp producers' timber came from plantations owned or controlled by the Indonesian government.⁷⁶ Further, the Indonesian government specifically targeted the pulp and paper industries as priority areas for development.⁷⁷ This included providing additional forest concessions to the pulp industry, the reversal of a ban on natural forest timber for pulp manufacturing, and 14 billion dollars in investment by the Ministry of Forestry to expand plantation forests used by the pulp industry and in the construction of seven new pulp mills.⁷⁸ By making more timber available, pulp mills could expand their capacity utilization, and by making more pulp mills available, pulp producers could expand their capacity. This facilitated the expansion of paper production and exports.⁷⁹ Several pulp producers were, in turn, related to or integrated with paper producers.⁸⁰

In this kind of factual matrix, a straightforward prohibition on export bans, as reflected in Article XI of GATT 1994, does not fully address the nature of the State intervention and its impact on the behavior of private entities. Aside from the export ban on logs as the upstream raw material, some downstream and complementary factors led to the price of the final product, A4 copy paper, being distorted. These included related-party or other vertically-integrated relationships between pulp producers and paper producers and governmental measures which (a) led to artificially depressed timber prices, (b) expanded access to timber used for pulp production, and (c) the enhanced capacity and capacity utilization of pulp mills. If it were the case that these governmental measures were linked to the use of pulp in paper production in Indonesia, this could engage disciplines on

⁷⁵ One explanation may be due to affiliations between pulp and paper producers: Anti-Dumping Commission (Australian Government), *Final Report*, *supra* note 9, at 173. The authorities found that pulp was not exported despite: “[t]he very low internal rates of return for Indonesian pulpwood producers are consistent with oversupply caused by GOI support for the development of timber plantations and its prohibition on the export of timber logs” (*id.* at 167).

⁷⁶ Anti-Dumping Commission (Australian Government), *Statement of Essential Facts*, *supra* note 74, at 121.

⁷⁷ *Id.* at 123.

⁷⁸ *Id.* at 124.

⁷⁹ *Id.* at 122.

⁸⁰ Anti-Dumping Commission (Australian Government), *Final Report*, *supra* note 9, at 173.

performance requirements.⁸¹ For example, the PTA that was recently concluded between Australia and Indonesia provides:⁸²

Neither Party shall, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory, impose or enforce any requirement:

- (a) to export a given level or percentage of goods or services;
- (b) to achieve a given level or percentage of domestic content;
- (c) to purchase, use or accord a preference to goods produced in its territory or to purchase goods from persons in its territory; . . .

Subparagraphs (b) and (c) are replicated in a further provision that prohibits the States parties from “condition[ing] the receipt or continued receipt of an advantage” on those matters.⁸³

If, as a condition of receiving the advantage of the aforementioned governmental measures on timber and pulp, private pulp producers⁸⁴ were required to pass through some or all of the benefit to domestic paper producers, each of the disciplines on performance requirements extracted above could be engaged. For instance, such a scenario would involve refraining from exporting pulp (either fully, or some amount), despite its artificially-depressed price being more competitive than that of foreign producers, which would, in turn involve setting a tacit “level or percentage” of pulp to be exported (or, indeed not exported) in the sense of subparagraph (a).⁸⁵ Likewise, from the perspective of the paper producers, this factual matrix involves use of Indonesian pulp in order to obtain the benefit of the artificially-depressed prices resulting from governmental measures, which in turn involves “achiev[ing] a given level or percentage of domestic content” in the sense of subparagraph (b). Moreover, in the sense of subparagraph (c), paper producers would be purchasing pulp produced in Indonesia as a result of governmental measures that artificially depress pulp prices.

As this fact scenario demonstrates, disciplines on performance requirements in PTAs can address complex ways State interventions affect markets and the behavior of private entities. Again, they could present a more effective and

⁸¹ The Australian authorities’ determination did not include a finding that Indonesia’s support for the plantation and forestry sector was conditioned upon the use of pulp in downstream paper production, and I do not suggest this to be the case. I note that part of Indonesia’s policy regarding timber, pulp, and raw materials in the forestry sector was found to be directed at “high added value” outcomes. *Id.* at 169.

⁸² Indonesia-Australia Comprehensive Economic Partnership Agreement, Austl.-Indon., art. 14.6.1., Mar. 4, 2019.

⁸³ *Id.* at art. 14.6.2.

⁸⁴ “Private enterprises” of any nationality are covered within the definition of “investment” for this provision: *Id.* at art. 14.1 and 14.2.1(c).

⁸⁵ *Pope & Talbot v. Canada*, Interim Award, ¶¶ 74–76 (U.N. Comm’n on Int’l Trade Law Arbitral Trib. June 26, 2000).

transparent means of addressing the kinds of State interventions that have raised concerns in the context of anti-dumping investigations.

D. State-owned enterprises.

The role of Gazprom in the factual matrix of *Ukraine—Ammonium Nitrate* illustrates the potential role of State-owned enterprises (SOEs) in effectuating State interventions in markets. To recall, Gazprom was majority-owned by the Russian government and was the conduit through which domestic gas inputs were sold at below cost-recovery rates to domestic fertilizer (i.e. ammonium nitrate) producers.⁸⁶ Gazprom maintained profitability by exporting gas for a significantly higher price.⁸⁷ It is also noteworthy that Gazprom maintained substantial investments in the Russian fertilizer industry.⁸⁸

More recently, in the debate over China's status as a market or non-market economy, the United States has described State-owned enterprises as one of the primary vehicles through which the Chinese government intervenes in the market to distort prices and afford unfair advantages to producers in certain sectors.⁸⁹

As explained earlier, the Appellate Body's interpretation of "public body" imposes an evidentiary burden that can be impractical to satisfy, thus eroding the effectiveness of the SCM Agreement in addressing non-commercial conduct by State-owned enterprises. Likewise, regarding the effectiveness of the Anti-Dumping Agreement, Ukraine failed before the WTO panel in its attempt to replace the artificially low Gazprom gas prices with external market-determined prices when ascertaining whether there was dumping of ammonium nitrate.⁹⁰ PTAs offer an opportunity to side-step the Appellate Body's "public body" interpretation and to establish disciplines on the conduct of State-owned enterprises that constrain their use as a vehicle for distortive State interventions. For instance, the *Comprehensive & Progressive Agreement on Trans-Pacific Partnership* (CPTPP) introduced a definition for State-owned enterprises that is broader than the Appellate Body's interpretation of "public body":⁹¹

⁸⁶ Panel Report, *Ukraine—Ammonium Nitrate*, *supra* note 5, at ¶ 7.73.

⁸⁷ Panel Report, *Accession of the Russian Federation*, *supra* note 6, at ¶¶ 76, 90–93, 125.

⁸⁸ Ukraine, however, does not appear to have alleged in the WTO proceedings that the domestic gas prices were affected by related-party trading (possibly because the prices were in any event fixed by the government): Panel Report, *Ukraine—Ammonium Nitrate*, *supra* note 5, at ¶ 7.90. This is despite the Ukrainian authorities' references to the Working Party Report in their determination, which in turn recorded Gazprom's investments in the fertilizer sector: Panel Report, *Accession of the Russian Federation*, *supra* note 6, at ¶¶ 76, 90–93, 125.

⁸⁹ U.S. DEPT. OF COMMERCE, CHINA'S STATUS, *supra* note 71, at 52–94.

⁹⁰ Panel Report, *Ukraine—Ammonium Nitrate*, *supra* note 5, at ¶¶ 7.89, 7.91.

⁹¹ CPTPP, *supra* note 72, at art. 17.1. *See also* Agreement between the European Union and Japan for an Economic Partnership (EPA), E.U.-Japan, art. 13.1(h), July 17, 2018, 3404 U.N.T.S. 56661.

state-owned enterprise means an enterprise that is principally engaged in commercial activities in which a Party:

- (a) directly owns more than 50 per cent of the share capital;
- (b) controls, through ownership interests, the exercise of more than 50 per cent of the voting rights; or
- (c) holds the power to appoint a majority of members of the board of directors or any other equivalent management body.

Based on that definition of State-owned enterprises, the CPTPP requires State-owned enterprises to act “in accordance with commercial considerations in its purchase or sale of a good or service,”⁹² with “commercial considerations” defined as “price, quality, availability, marketability, transportation, and other terms and conditions of purchase or sale, or other factors that would normally be taken into account in the commercial decisions of a privately owned enterprise in the relevant business or industry.”⁹³ Sales or purchases of raw input material by State-owned enterprises at prices influenced by governmental priorities or policy considerations would be precluded under this kind of discipline. Likewise, Article 17.4.1(c) of the CPTPP provides that State-owned enterprises must:⁹⁴

- (c) in its sale of a good or service:
 - (i) accords to an enterprise of another Party treatment no less favorable than it accords to enterprises of the Party, of any other Party or of any non-Party; and
 - (ii) accords to an enterprise that is a covered investment in the Party’s territory treatment no less favorable than it accords to enterprises in the relevant market in the Party’s territory that are investments of investors of the Party, of any other Party or of any non-Party.

Based on this provision, a State-owned enterprise would be precluded from differentiating between domestic producers and foreign producers in its pricing. Accordingly, foreign producers would, in principle have access to goods and services sold by State-owned enterprises at the same prices as domestic producers, thereby foreclosing the potential for State-owned enterprises to be used as a vehicle for conferring domestic producers with a competitive advantage. Similar

⁹² CPTPP, *supra* note 72, at art. 17.4.1(a). The exception to this is where SOEs are required to fulfil, in a manner that is not inconsistent with the non-discrimination protection of Article 17.4.1(c)(ii), any terms of a public service mandate, which is defined as “a government mandate pursuant to which a state-owned enterprise makes available a service, directly or indirectly, to the general public in its territory.”

⁹³ *Id.* at art. 17.1.

⁹⁴ *Id.* at art. 17.4.1(c) (footnote omitted).

disciplines can be found in the USMCA⁹⁵ and recent PTAs concluded by the E.U.⁹⁶

Finally, China's Accession Protocol to the WTO includes obligations that may address issues related to State interventions and SOEs. Scholarly work highlights these broad obligations, specifically Article 11.3.⁹⁷ These obligations could be interpreted to encompass a wide range of state actions, including those related to SOEs, and it will be interesting to monitor how they coexist and interact with the evolving norms in PTAs regarding the regulation of SOEs and market distortions.

VI. CONCLUSION

PTAs offer a practical, transparent, and direct method for addressing State interventions that fall beyond the reaches of the Anti-Dumping Agreement and SCM Agreement but whose price distortions nonetheless injure the domestic industries of other WTO Members. Moreover, addressing these through substantive obligations in PTAs rather than through anti-dumping and countervailing measures would ameliorate the economic irrationalities sometimes associated with those measures, such as protecting domestic industries at the expense of increased consumer prices, and potentially hindering legitimate foreign competition to the detriment of the consumer and the development of the domestic industry.

Some have proposed multilateral amendments to the Anti-Dumping Agreement to accommodate the kinds of State interventions discussed in this article.⁹⁸ Not only do these seem highly unlikely to succeed in the current political economy of the WTO, but perhaps more importantly, they would be neither more effective nor more transparent in targeting the specific interventions that have given rise to concerns.

⁹⁵ The CPTPP and USMCA, while sharing common objectives in disciplining state-owned enterprises (SOEs), diverge in their definitions and scope of control. The CPTPP's definition, as previously mentioned, focuses on direct ownership and control. In contrast, the USMCA expands this definition to encompass direct and indirect ownership. It includes an understanding of control where a Party "holds the power to control the enterprise through any other ownership interest, including indirect or minority ownership." This broader interpretation under the USMCA potentially captures a more comprehensive range of enterprises under the SOE umbrella, addressing subtler forms of state influence that may not be apparent through majority ownership alone.

⁹⁶ USMCA, *supra* note 69, at art. 22.4.1; EPA, *supra* note 91, at art. 13.5.

⁹⁷ See, e.g., Weihuan Zhou et al., *Building a Market Economy Through WTO-Inspired Reform of State-Owned Enterprises in China*, 68 INT'L & COMPAR. L. Q. 977 (2019); André Sapir & Petros C. Mavroidis, *China and the World Trade Organization: Towards a Better Fit* (Bruegel, Working Paper Issue 6, 2019).

⁹⁸ Shadikhodjaev, *supra* note 60, at 102–06.

The main drawback of PTAs is that they only apply to willing subsets of WTO Members. However, it would be wrong to therefore dismiss their potential. WTO Members who, at times, engage in these kinds of State interventions can also have an interest in arresting similar interventions by other WTO Members. For instance, at the same time that the E.U. was defending its attempt to counteract the effects of Indonesia's and Argentina's export taxes in the *EU–Biodiesel* cases, it was also complaining about Australia's use of the same legal tool to counteract the effects of Italy's support for its tomato growers.⁹⁹ Similarly, while Australia maintained anti-dumping measures against Russia due to the impact of Russia's intervention in domestic gas prices,¹⁰⁰ it simultaneously moved to implement a mechanism to intervene to reduce its domestic gas prices.¹⁰¹

Given the current global trade dynamics, the role of PTAs has become even more critical. These agreements, with their direct and transparent disciplines on State interventions, offer a viable alternative to anti-dumping and countervailing measures.

⁹⁹ Feger & La Doria, European Commission, Written Submission, The Commission, Anti-dumping Investigation by the Australian Government on Imports of Prepared or Preserved Tomatoes Exported from Italy 9 (2016).

¹⁰⁰ Anti-Dumping Commission (Australian Government), Report No. 312 Continuation Inquiry Concerning Certain Ammonium Nitrate Exported from the Russian Federation, either Directly or via Estonia, 29–35 (2016).

¹⁰¹ AUSTRALIAN GOVT. DEPT. OF INDUSTRY, SCIENCE & RESOURCES, DOMESTIC GAS SUPPLY (2024) <https://perma.cc/MZH6-6Q3J>.