NOTES ON RELATED PARTIES AND TRANSFER PRICING IN ANTI-DUMPING INVESTIGATIONS

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ABSTRACT :

This study examines the provisions of the WTO Anti-Dumping Agreement concerning related party transactions and contrasts them with internationally accepted transfer pricing principles, particularly those outlined in the OECD Transfer Pricing Guidelines as applied to income taxation. The study aims to highlight the differing approaches and applications of these two systems when addressing the shared challenge of related party transactions. By analyzing these distinctions, the study provides insights into the complexities and implications of applying anti-dumping and transfer pricing frameworks in international trade and taxation contexts.

Keywords: anti-dumping, parties and transfer pricing, Anti-Dumping Investigations, Anti-Dumping Agreement.

1. Introduction

It has been well documented that multinational enterprises may transfer profits from overseas subsidiaries to parent companies or between affiliates[1]. The fact that the prices (or profit margins) of related party transactions (RPTs) may not necessarily be reliable poses challenges for several regulatory disciplines, including the two systems that are the subject of this article, Anti-Dumping (AD) and taxation. The perspective may be quite different. In an income tax audit, the tax authority is trying to establish whether the net profit declared by the enterprise is too low compared to the situation where it would have been dealing with independent parties. Conversely, in an anti-dumping investigation, the trade remedy authority is attempting to establish whether prices in the import market are too low as compared to the domestic market of the exporter.

In this article the different applications and approaches are contrasted between Anti-Dumping (AD) and transfer pricing (TP) for income tax with respect to the impact of related party transactions.

2. The calculation of dumping and related parties

Dumping is a legal term that applies to a product as a result of a deceptively straightforward mathematical comparison. Simplifying, when the export price of a product to an importing country is lower than the normal value like products in its domestic market, it is possible that product is being dumped at the importing country.[2] The underlying rationale is obvious. When a product is being sold in an import market at a price (the export price) lower than the seller can receive in their own country (the normal value), this may indicate there is something wrong with this trade. It is noteworthy that establishing a product is being dumped does not suffice for a country to take action. Dumping in and of itself does not allow a WTO Member to take action against the product by means of extra import duties under the Anti-Dumping Agreement (ADA)[3]. It is furthermore required that the importing country's authority establishes that its domestic industry for like products is being injured as a result.[4]

One of the key points to establish in a dumping investigation is whether the normal value (domestic market) is higher than the export price (export market). The reality is a lot more complex than a simple comparing of two numbers. Both numbers may be affected by transactions between related party transactions (RTPs) which casts at least some doubt on their accuracy. Accordingly, both international (the ADA) and national anti-dumping rules[5] provide in (similar but not identical) rules governing the calculations to determine both sides of the comparison, for 'export price' and for 'normal value'. In both cases, provisions are made for correcting the possible effect of RTPs. In addition, beyond the determination of dumping, the ADA refers to the possible impact of related parties on the determination of injury.

3. Who are 'related parties' from an anti-dumping perspective?

The ADA does not provide a general definition of 'related parties'. A provision in footnote 11 to Article 4.1. seems to offer a general definition but it only deals with determining injury. As the ADA is not the equivalent of a regulation that applies in and of itself to importers, but rather an agreement which restricts the circumstances under which Members are permitted to impose anti-dumping duty in accordance with GATT Article VI, the Members can define this notion themselves as long as they remain compliant with the other rules laid out in the ADA (such as the obligation to conduct a 'fair comparison').[6]

Nevertheless, as provided in art. 31 (3) (c) Vienna Convention on the Law of Treaties[7], it is logical to take into account a definition of 'related parties' in other WTO agreements, and the WTO Customs Valuation Agreement[8] might, at first glance, seem more relevant than others. The CVA provides a definition with a fair degree of detail:

For the purposes of this Agreement, persons shall be deemed to be related only if:

(a) they are officers or directors of one another's businesses;

(b) they are legally recognized partners in business;

(c) they are employer and employee;

(d) any person directly or indirectly owns, controls or holds 5 per cent or more of the outstanding voting stock or shares of both of them;

(e) one of them directly or indirectly controls the other;

(f) both of them are directly or indirectly controlled by a third person;

(g) together they directly or indirectly control a third person; or

(h) they are members of the same family.

Persons who are associated in business with one another in that one is the sole agent, sole distributor or sole concessionaire, however described, of the other shall be deemed to be related for the purposes of this Agreement if they fall within the criteria of paragraph 4.[9]

Indeed, the EU Basic Regulation has adopted a reference to the customs valuation rules to determine who are related parties for anti-dumping purposes[10]. Besides the same reference as in the ADA to related parties for the purposes of determining 'domestic industry' and for circumvention[11], the Basic Regulation refers for 'normal value' to a definition of 'related persons' for the purposes of EU Customs law, particularly in relation to customs valuation.[12] The EU Customs Code essentially reproduces the definition set out in the CVA except for one added paragraph:

For the purposes of paragraph 1(e),(f) and (g) one person is deemed to control another when the former is legally or operationally in a position to exercise direction over the latter.

Vietnam has chosen a different approach with respect to defining 'related parties'. It has adopted the more succinct definition which is also found in the ADA with respect to related parties and injury, and applies this definition also for the purposes of determining dumping.[13]

The definition used for customs valuation (and anti-dumping) purposes by the CVA and the EU Customs Code of 'related parties' is markedly more detailed than 'associated enterprises' commonly used in income tax treaties for TP purposes, which reads as follows:

[Enterprises are associated enterprises where]

a) an enterprise of a Contracting State participates directly or indirectly in the management, control or capital of an enterprise of the other Contracting State, or

b) the same persons participate directly or indirectly in the management, control or capital of an enterprise of a Contracting State and an enterprise of the other

Contracting State [...][14]

Both definitions have a substantial common foundation in the possibility of being related in several alternative ways, notably in terms of capital, management or control. These aspects are mentioned in both the income tax and the customs value notion. It has been observed that the definition of associated enterprises 'leaves a number of major issues open for debate'[15].

There are also remarkable differences between the definition of related parties in the two systems. The reference to 'they are legally recognized partners in business' is puzzling. It is unclear whether the term partner refers to a partnership in the sense of, for example, the UK Partnership Act of 1890 which is defines a partnership as 'the relationship between persons carrying on a business in common with a view to profit'[16]. There are several definitions in the Cambridge Dictionary referring to various degrees of involvement. A partner can mean 'an owner' or 'another person or organization joining in a business activity'. Partnering with someone may simply mean businesses working together.

It is noteworthy that this term was interpreted by the European Court of Justice to mean that the buyer and the seller may not be deemed to be legally recognised partners or to be related on account of a direct or indirect relationship of de jure control in a situation in which no document exists which makes it possible to establish such a relationship[17].

4. Determining the export price in the case of related party transactions

With respect to the 'export price', Art. 2.3. ADA provides:

Where it appears to the authorities concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer

This allows the authorities (of the import market) to disregard an RPT-price for purposes of determining the export price. Instead of the usual customs value at import, such as the transaction value, this may be replaced by a constructed export price[18].

It is not always the case that RPT sales are at a lower price than at arm's length. Art. 2.3. ADA would apply to a situation where, for example, the

RPT price between producer and its related importer is higher than the normal value in the domestic market, but the related importer is prepared to assume a loss when selling to the export market, or it is being compensated by the producer for selling at a loss. For example, the related importer may be able to sell at lower prices because it receives rebates or incentives from the producer. In such situations, art. 2.3. ADA allows the authority to 'construct' the export price from the sales price of the products by the related importer or trader to the first independent buyer. This may become complicated if the products are raw materials or ingredients which are used in production by the related importer. Art. 2.3. provides in that case that the authority may construct the price on 'a reasonable basis'. In case the authority must construct the export price from the sale to the first independent buyer, art. 2.4. ADA provides that the authority 'should' make allowances for 'costs, including duties and taxes, incurred between importation and resale'. However, from an AD perspective the relevant provision has been interpreted by the Panel in US-Stainless steel plate in coils from Korea[19] to mean that the authority is not obliged to make the allowances, but if allowances are made, they must be limited to those listed in art. 2.4 ADA.

Determining the price of goods that are resold by a related enterprise of the seller to an independent enterprise from the price of the latter sale is a familiar technique in TP, known as the Resale (minus) method. But, the issue of allowances as raised in art. 2.4. ADA is a major difference in approach between AD and TP. From a TP perspective, there is no restriction to the type of adjustments that are made as long as the outcome will reflect what independent parties would agree under the circumstances. There is no restriction in TP that only costs incurred between import and resale can qualify to be considered for an adjustment. From an AD perspective, only prescribed adjustments (allowances) may be used by the authority, notably costs that are incurred between importation and resale (including duties and taxes) and profits.

Another major difference is that for AD purposes, some authorities will disregard the profit element realized by the related party importer, something which is simply not possible under the TP approach.[20]

5. Determining the normal value in the case of related party transactions

The normal value in the domestic market is used as a benchmark to determine if a product is being dumped in the export market. The higher the normal value, the more likely there is indeed dumping when the normal value is compared with the export price. The normal value in the sense of art. 2.1. ADA can be defined as a comparable price in the ordinary course of trade for the like product when destined for consumption in the domestic market of the exporting country. The crucial notion here is 'in the ordinary course of trade' as, since it is not defined in the ADA, it is common for authorities to take the position that RPTs within the domestic market are not within its scope.[21]

The suggestion that all or nearly all RPT should be rejected as a basis to calculate the normal value was critically assessed by the Panel and, on appeal, by the Appellate Body of the WTO in relation to the so-called 99.5% test applied by the US authorities.[22] That practice consisted of comparing the sales prices, i.e. by producers to related and unrelated parties. If the RPT prices are per weighted average below 99.5% (i.e. 0.5% lower) than the weighted average prices charged to unrelated parties, the RTP transactions are not taken into account for calculating the normal value. However, the US authority would only take into account instances where the RTP price is below the unrelated price, and not the other way around. In other words, the calculation is skewed in favour of eliminating lower prices. The more lower prices are rejected from calculating the normal value, the more likely the normal value will be higher, and thus the dumping margin will be higher. In United States - Hot Rolled Steel from Japan the panel decided that such a test is not permitted because of its one-sided nature[23]. The Appellate Body agreed with this outcome, noting that sales below or above the arm's length price both equally affect the normal value.[24]

Many authorities will rather than disregard domestic sales to related parties entirely replace their pricing with a reconstructed price based on the resale price to independent parties[25]. The method is largely the same as on the export price side, but it is remarkable that the rules that apply to the normal value side are not exactly the same as for determining the export price, as there is no equivalent of art. 2.3. for normal value. Nevertheless, as the Appellate Body decided in US-Hot Rolled Steel from Japan, if an authority uses downstream sales, they must deduct the same price components.[26]

In case a constructed normal value is used, the authority can choose to determine the normal value it based on the 'costs of production in the country of origin plus a reasonable amount for administrative, selling and general costs (SGA) and for profits[27]. For AD purposes, the authority is permitted to only take into account the manufacturing costs, the SGA and profits. What is more, the authority has considerable leeway to calculate and allocate costs. Although they should as a rule be based on the records of the producers, there will often be disagreements with authorities on the calculations. It is in the producers' interest to include as few and as low costs as possible in the manufacturing cost, so that the difference with the (likely low) export price is as small as possible.

The ADA provides in this regard that:

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 [...][28]

In Appellate Body in EU-Biodiesel from Argentina decided that the adverb "reasonably" in the second condition of the first sentence of Article 2.2.1.1 modifies the verb "reflect", rather than the word "costs"[29]. For SGA and profits, the ADA provides that the authority must use the data of the producer or exporter for the like product in case there are viable domestic sales in the ordinary course of trade for at least one exported "Product Control Number"[30]. Lacking those viable domestic sales, alternatively the authority can use the actual costs of the producer for the same general category of products, weighted average of costs by other producers or 'any other reasonable method'.[31]

Although constructing the normal value from the cost of production in AD and the cost-plus method in TP are based on the same idea that one can reverse engineer a non-RPT price from the cost basis, there are a number of significant differences, both in terms of substance and in terms of process.

With respect to the substance of the calculation, both from a perspective of AD and TP there are costs that should not be taken into account when reconstructing the price of products from a cost basis, but the nature of the limitation differs. From the perspective of AD, the production costs will be based on the accounting records of the producer, provided these are in line with Generally Accepted Accounting Principles and reasonably reflect the costs for production and sale. The attention of the authority will generally be to verify if the production costs were not understated. For example, an authority may make adjustments for appropriate amortization and allowances for capital expenditures and other development costs. The apprehension is that a producer/exporter may not have reflected all appropriate depreciation and capex, which results in a lower normal value and thus a lower dumping margin. From the perspective of TP, the focus is mostly on the functional analysis, and whether the costs that are included in the basis for the cost-plus calculation are in accordance with the functions performed by each entity in the group of the taxpayer[32]. The AD approach includes the 'costs of production in the country of origin', which does not necessarily mean that information from outside the country is not taken into account.[33]

The rules for the addition for profit in the AD approach, or mark-up in TP, may also differ significantly, depending on the circumstances. From a TP perspective, the functional analysis of the activity of the supplier is a crucial element. The focus on the function performed is not explicit in AD. Furthermore, the examination of the SGA and the added profit in an AD determination of the normal value does not necessarily exclude RPT, as the rules on SGA and profit in the ADA for constructing the normal value do not include a limitation to the ordinary course of business[34]. As interpreted by the Appellate Body, the lack of such an explicit reference means that no such exclusion of RPT sales can be made from the calculation of the weighted average referred in art. 2.2.2. (ii)[35]. Including profit margins from RPTs to determine an arm's length profit margin is in sharp contrast to the emphasis on external comparables in TP, also in terms of determining a profit margin for the cost-plus method[36].

6. Related parties and the determination of injury

For a country to impose anti-dumping duty in accordance with the ADA, it must not only establish dumping but also injury to its domestic industry caused by the dumping of the product. The concept of RPTs is relevant as well in this context. Art. 4.2. ADA states that for defining which enterprises are part of the domestic industry, producers that are related to the exporters or importers of the product under investigation, those may be excluded. At this point in the ADA a definition appears of 'producers related to the exporters or importers':

For the purpose of this paragraph, producers shall be deemed to be related to exporters or importers only if (a) one of them directly or indirectly controls the other; or (b) both of them are directly or indirectly controlled by a third person; or (c) together they directly or indirectly control a third person, provided that there are grounds for believing or suspecting that the effect of the relationship is such as to cause the producer concerned to behave differently from non-related producers. For the purpose of this paragraph, one shall be deemed to control another when the former is legally or operationally in a position to exercise restraint or direction over the latter[37].

As Vermulst noted, the authority has a wide discretion whether to include related party producers into its determination[38].

7. Concluding remarks

While AD and TP share a similar challenge in RPTs, both disciplines have very different aims. The aim of an AD investigation is to determine whether a product is being dumped and thereby causing injury to the domestic manufacturing of the same or like products, and if so, to quantify the dumping margin which will be translated into AD duty at the import stage. RPTs are relevant to this exercise mainly because their prices may often be excluded to determine whether a product is being dumped, in which case the authority may use a constructed price starting from non-RPT transaction, making various adjustments. The aim of a TP audit by tax authorities is to verify if the taxable income of corporate taxpayers has been affected by the prices of their RPTs.

Accordingly, the purpose of the ADA is to harmonize and restrain the authorities of the Members from imposing AD duty out of protectionism rather than injury caused by genuine dumping. Some elements of AD were therefore meant to strictly limit the authority such as the list of allowances in art. 2.4. ADA or adjustments in art. 2.2.1.1. ADA, while exclusions of comparable factors are rare in a TP context. However, the ADA leaves significant leeway to the authority in a number of areas, including in terms of narrowing down the allegedly dumped product by means of a subdivision of characteristics (PCN as referred above), allocating and calculating costs of production, SGA and profits.

While both disciplines employ similar concepts such as calculating a price from a cost basis, making adjustments for certain reasons such as levels of trade and physical characteristics of products or deriving a profit margin from comparable enterprises, their different purpose shapes the respective rules and outcomes. Although AD also takes into account profit margins for constructing both the export price and the normal value, the end result of the AD investigation unlike TP relates to price, not profit. Whereas the focus in a TP investigation is on comparing the RTP price with the arm's length price (or margin), in an AD investigation the focus is on comparing the export price with the normal value in the domestic market.

The outcomes of a TP compared to an AD investigation may be very different, even when only the determination of profit is taken into account. To determine a normal value for AD purposes, an authority may reject the profit margin of a producer or exporter if it is derived from RPTs (not in the ordinary course of business). The ADA allows in that case the authority to establish the profit element, among other methods, with reference to the weighted average of margins realized by other exporters or producers related to the production and sales of like products in the domestic market[39]. However, although adjustments for factors that affect price comparability are part and parcel of the ADA's 'fair comparison', allowance for profits accruing is only mentioned in connection with export price, not normal value[40]. From a TP perspective, reference to profit margins realized by third parties is likewise possible on a gross or on a net basis, such as for example under the transactional net margin method[41] but the TP rules on the subject have a great deal more depth and texture. TP rules distinguish different profit level indicators (costs, sales, assets, capital, etc.)[42] and require a rigorous analysis of the functions performed, the assets used and the risks assumed for any benchmarking based on third party data. There is no indication in the ADA that an authority is required to take these factors, which are crucial from a TP perspective, into account when applying the profit from other producers to determine the normal value in accordance with art. 2.2.2. (ii) ADA.

There has been some discussion whether the rules for customs valuation and TP could or should be better aligned with each other[43]. A similar debate does not seem to exist with respect to AD and TP. Nevertheless, Hiroshi Mukunoki and Hirofumi Okoshi analysed the connection between AD and TP from an economic perspective and concluded that:

A tighter enforcement of regulations on transfer pricing can trigger AD protection of the importing country, because a smaller dumping margin reduces the welfare cost of AD protection and encourages the importin country to implement AD protection. The AD protection serves as a tool to prevent the [Multinational Enterprise]'s tax avoidance, which complements tighter regulations on transfer pricing.[44]

Therefore, the legal divergence between AD and TP deserves more scholarly debate and study to fully explore the mutual interactions between both systems regarding the impact of RPTs ■

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[23]US-Hot-Rolled Steel Panel Report (n 22), para 7.112.

[24]US-Hot-Rolled Steel Appellate Body Report (n 22), paras 141-148.

[25]Vermulst (n 20) 25.

[26]US-Hot-Rolled Steel Appellate Body Report (n 22), para 166.

[27]ADA (n 1) art 2.2. Less frequently, the authority can determine the normal value from the export price to an appropriate third country.

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MỘT SỐ LƯU Ý VỀ CÁC BÊN LIÊN QUAN VÀ CHUYỂN GIÁ TRONG CÁC CUỘC ĐIỀU TRA CHỐNG BÁN PHÁ GIÁ

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TÓM TẮT:
Bài viết này bàn về các quy tắc của Hiệp định chống bán phá giá của WTO liên quan đến các giao dịch giữa các bên liên quan. Bài viết chỉ ra một số điểm tương phản với các nguyên tắc định giá chuyển nhượng được quốc tế chấp nhận, chẳng hạn như được phản ánh trong Hướng dẫn định giá chuyển nhượng của OECD, khi áp dụng cho thuế thu nhập. Qua đó, nêu bật một số nguyên tắc áp dụng khác nhau được thực hiện theo hai hệ thống này khi đối mặt với thách thức chung về các giao dịch giữa các bên liên quan.

Từ khóa: chống bán phá giá, các bên liên quan và chuyển giá, Điều tra chống bán phá giá, Hiệp định chống bán phá giá.