The Unhappy Marriage of Customs and Anti-Dumping Legislation: Tensions Relating to Product Description and Origin

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In most countries, the rules concerning anti-dumping and customs reside in different laws. However, since the enforcement of anti-dumping measures is the responsibility of customs authorities, there is necessarily interaction between both areas of law. It is important to get this interaction right. For instance, changes in customs legislation could (inadvertently) increase the number of products covered by anti-dumping measures, arguably violating the rules of the World Trade Organization (WTO). This article examines two key points of tension between customs and anti-dumping laws, which have previously not been given much attention, taking the European Union (EU) as an example. First, the article sets out the problem of two competing interests concerning product description: that of a description that is accurate for purposes of coverage under an anti-dumping regulation, on the one hand, and that of a description that is efficient for purposes of ensuring simple and automatic duty collection by the customs authorities, on the other. It then explains the EU’s practical solution to this problem (TARIC codes), but advises caution regarding that practice. Second, it sets out how the EU uses rules of origin to impose anti-dumping duties on products that otherwise might not be covered, and cautions against that practice as well. Finally, the article discusses how to avoid breaching WTO law and how to ensure certainty and transparency for companies.

1 INTRODUCTION

1.1 THE IMPORTANCE OF ANTI-DUMPING DUTIES

In 2016, the European Union (EU) imported products worth a total of EUR 1.7 trillion.¹ The same year, a total of over EUR 465 million was collected by EU
customs authorities through trade defence measures, primarily anti-dumping duties.\textsuperscript{2} The impact of anti-dumping duties can be seen not only in the amount of duties collected, but also in the value of imports diverted. On average, over a three-year period, anti-dumping duties divert almost 50\% of the imports they cover.\textsuperscript{3} In other words, ensuring that anti-dumping duties are correctly implemented and collected is important to the entire EU (and world) economy, making the interrelationship between anti-dumping and customs legislation central.

1.2 TENSIONS OVER PRODUCT DESCRIPTION AND ORIGIN

Anti-dumping legislation determines whether and at what level anti-dumping duties are imposed on specific products originating in specific countries; customs legislation governs the enforcement of these duties, \textit{ergo}, the collection. This creates a sometimes ‘unhappy marriage’ between customs legislation on the one hand and anti-dumping legislation on the other. This unhappy marriage is particularly evident in the dual use of two concepts: (1) the description of the product covered and (2) the determination of its origin.\textsuperscript{4} These two concepts are used both for customs duties and anti-dumping duties – the product description and origin together attract a duty – but with diverging content and purpose. In customs law, product description (or better classification) is used to facilitate fast and automatic duty collection, whereas in anti-dumping law, product description is used to specify a kind of products subject to anti-dumping duties. As for rules of origin, customs authorities typically verify origin to check for the application of lower duties (a preferential tariff application), whereas anti-dumping rule-makers use origin to identify possible dumping and assess higher anti-dumping duties. These tensions over product description and origin lead to confusion and uncertainty for companies. In the worst case, they can result in violation of World Trade Organization (WTO) law.

1.3 THESE TENSIONS IN THE EU CONTEXT

In the EU, both customs and anti-dumping duties are collected at the same time and by the same authorities, the customs authorities of the Member States. However, the rules determining the duties are different, and rule-making on anti-dumping and customs legislation is divided. And the EU’s practice for handling these tensions lacks transparency and legal certainty.

\textsuperscript{2} Data obtained from the European Commission upon request.

\textsuperscript{3} Swedish National Board of Trade, \textit{Do EU Producers and the EU Economy Really Benefit from Anti-Dumping Policy?} 5 (2013).

\textsuperscript{4} The authors are planning to address the other areas of interaction between anti-dumping and customs law (valuation, customs licenses and refund) in separate articles.
As in other customs territories, when a product, e.g. a pair of shoes, arrives at the EU border, it goes through customs clearance. EU customs law obliges the Member State customs authority to collect the different duties that apply to that specific pair of shoes, and to verify compliance with other rules, for example those relating to safety and chemical substances. In terms of duties, traditional customs duties are collected first. These are set according to product codes (functioning as a description or classification). However, to a large extent, the EU has concluded free trade agreements (FTAs) with other countries to facilitate trade, resulting in, inter alia, lower customs tariffs between the trade partners. FTA tariff rates are allowed by the WTO as an exception to the rule that the lowest tariff applied to one country be extended to all (‘most favoured nation’, or ‘MFN’).

Besides the customs duty, some products from some countries are subject to anti-dumping duties, which are likewise collected at the border by the customs authority. Such duties are imposed to outweigh dumping of products that causes injury to domestic producers.

The EU has exclusive competence for both commercial policy, which includes anti-dumping measures, and the customs union, which entails customs legislation. Historically, EU anti-dumping legislation and customs legislation have rarely referred to each other. Rule-making is divided: customs legislation is controlled primarily by the Directorate General for Taxation and Customs Union (DG TAXUD), whereas anti-dumping legislation is controlled by the Directorate General for Trade (DG TRADE). On top of that, Member States have a role in the adoption of further rules for administration and enforcement of EU customs legislation. While DG TAXUD and DG TRADE are both part of the European Commission (Commission), they are run independently and have separate and distinct goals. Therefore, even though the end result of their rule-making is the collection of a duty at the border, the rules vary and can be difficult to reconcile in practice.

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5 Countervailing duties can also be imposed on certain imported products to outweigh a subsidy given by the exporting country. Measures targeting subsidies are regulated by the WTO Agreement on Subsidies and Countervailing Measures and, at EU level, by Regulation (EU) 2016/1037 of the European Parliament and of the Council of 8 June 2016 on protection against subsidized imports from countries not members of the European Union, OJ L 176, 30 June 2016, at 55. Even though the focus of this article is on anti-dumping duties, some of its reasoning may apply to countervailing duties as well.


7 Treaty of the Functioning of the EU, Art. 31(1)(e) and (f).

This article, citing practical examples, aims at highlighting the tensions within the EU legal framework for customs and anti-dumping, as well as at spurring a discussion on these otherwise rarely deliberated issues. While the examples are drawn from the EU context, tensions between customs and anti-dumping legislation exist in many other countries.

The article is structured as follows. Section 2 discusses how the product description in anti-dumping investigations relates to product codes for implementation by customs authorities. Section 3 discusses how the rules of origin in the customs legislation are sometimes altered to facilitate the imposition of anti-dumping duties. Section 4 sets out recommendations on how to ensure WTO compliance, transparency and legal certainty.

2 PRODUCT DESCRIPTION

2.1 TENSION BETWEEN PRODUCT DESCRIPTION AND CLASSIFICATION BY PRODUCT CODES

When a package containing a pair of shoes arrives at the EU border, the customs officer verifies the customs tariff, collects the customs duty, and enforces other possible trade restrictions, e.g. anti-dumping duties.

Collection of customs duties is simplified by tariffs being set according to product codes, which classify products into categories. All WTO Members have linked their tariffs at WTO level based on the six-digit World Customs Organization’s Harmonized System nomenclature (‘HS codes’). Most WTO Members then subdivide the HS codes for their internal purposes. The EU uses eight-digit codes referred to as the Combined Nomenclature (‘CN codes’). The aim is to have a suitable code for classifying every product that turns up at the EU border.

In that way, the customs officer can verify that the shoes conform to the product code indicated in the customs declaration and collect the customs duty set for that code.

By contrast, anti-dumping duties are imposed on the basis of products whose prices are dumped and cause injury to domestic industries. Even though the description of the dumped product is based on basic physical, chemical, or technical characteristics, or all three, as well as use, it is influenced by the findings on dumping and injury, and initially proposed by a domestic industry in its complaint. The

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9 Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union, OJ L 176, 30 June 2016, at 21, (‘EU Basic Anti-dumping Regulation’), Arts 5(2)(b) and 14(2), second paragraph, provide for a description of the dumped product. See also Wolfgang Mueller et al., EC and WTO Anti-Dumping Law, a Handbook para. 1.27 (2d ed., Oxford 2009). The domestic producers may adapt the product description in the complaint depending on the details of the products they produce and the inputs that are used.
Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (GATT) of 1994 (‘WTO Anti-Dumping Agreement’) prohibits duties from being imposed on products for which there is no proven dumping and injury.\(^\text{10}\) At the same time, the product descriptions of EU regulations imposing anti-dumping duties refer to CN codes (which often have a different coverage) in order to simplify collection of the duties.\(^\text{11}\)

There is an inherent tension between the interest in adhering to the legal principle, established at both WTO and EU levels, that anti-dumping duties can only be imposed on products for which there is proven injurious dumping, and the interest of efficient collection of the anti-dumping duties by customs authorities. As outlined below, product descriptions in anti-dumping regulation that do not match the CN codes are common.\(^\text{12}\)

One could go to two extremes to resolve this tension. At one end, a regulation imposing anti-dumping measures could only refer to CN codes for describing the product. That would make it clear which products are covered and arguably simplify implementation by customs authorities. The customs officer would just rely on the same classification for anti-dumping duties as for the customs duty. However, as it would not be possible to subdivide the CN code, the duties imposed would not as efficiently target the dumped products. At the same time, a large product scope could dilute data to the extent that it becomes difficult for the domestic industry to prove dumping and injury, and even make imposition of duties illegal under the WTO Anti-Dumping Agreement.

At the other end, anti-dumping regulations could refrain from referring to CN codes altogether. That would arguably give full effect to the legal principle that anti-dumping duties can only be imposed on products for which there is proven injurious dumping. The product description used at the EU border could be so targeted and specific that only the truly dumped products are covered. However, not referring to any codes would make collection of anti-dumping duties difficult for customs authorities. First, it would require manual customs clearance. Second, discrepancies in collection would arise between EU Member States and even within Member

\(^{10}\) Primarily Arts 1–3, in addition to the General Agreement on Tariffs and Trade of 1947 (‘GATT’), Art. VI. See Panel Report of 8 June 2007, Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala, WT/DS331/R, para. 7.343: ‘It is clear that there must be identity between the product subject to the anti-dumping duty and the product in respect of which a determination of dumping is made.’ See also Panel Report of 3 Apr. 2006, US – Softwood Lumber V (Art. 21.5 – Canada), WT/DS264/R/W, para. 5.26.

\(^{11}\) See e.g. Council Regulation (EEC) No 2474/93 of 8 Sept. 1993 imposing a definitive anti-dumping duty on imports into the Community of bicycles originating in the People’s Republic of China and collecting definitively the provisional anti-dumping duty. OJ I, 228, 9 Sept. 1993, at 1, Art. 1. Logically, there is no obligation under WTO law to refer to product codes for anti-dumping measures. See Judith Czako et al., A Handbook on Anti-Dumping Investigation 310, (Cambridge 2003), fn. 103.

\(^{12}\) The case of footwear, which is further discussed in s. 2.3., is such an example.
States, creating uncertainty for companies. In our shoes example, a customs officer would likely try to match the shoes and anti-dumping duties by classifying them by product codes anyway.

### 2.2 The EU’s Practical Solution: TARIC Codes

The EU uses a practical solution somewhere in between these extremes. It has created additional subheadings to the product codes for purposes of imposing anti-dumping duties, so-called Integrated Tariff of the European Communities (‘TARIC codes’).

If the product covered by the anti-dumping regulation does not correspond directly to a CN code, a TARIC subheading will be created. Depending on what is most practical in the individual case, the TARIC subheading will either describe in detail the product covered or the product excluded. In either case, a residual TARIC subheading will be created for all other products falling within the CN code. The reference in the operative part of the regulation imposing anti-dumping duties is normally in the language of ‘product […] (excluding […] current falling within CN code ex […] (TARIC code […]’). If the product concerned is fully equated with the CN code, which happens only rarely, no TARIC subheading will be created.13

While the product description for anti-dumping purposes is handled by DG TRADE, TARIC codes are assigned by DG TAXUD, separate from the process leading to the imposition of anti-dumping duties.

Aside from the TARIC subheading, additional four-digit TARIC codes are created when anti-dumping duties are imposed. These additional TARIC codes designate companies with individual anti-dumping rates, as well as a residual code for all other companies (Figure 1).

**Figure 1**

<table>
<thead>
<tr>
<th>Structure of the TARIC codes and of the additional codes</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 2 3 4 5 6 7 8</td>
</tr>
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13 Instead, importers will refer to the CN code with additional zeros for the remaining two digits.
2.3 **EXAMPLES TO DEMONSTRATE THE EU’S PRACTICAL SOLUTION**

When a regulation imposes anti-dumping duties on all products covered by the relevant CN code, as in the case of the original regulation imposing anti-dumping duties on bicycles, the product is defined exactly as the CN code and no new TARIC codes are created:

A definitive anti-dumping duty is hereby imposed on imports of bicycles and other cycles (including delivery tricycles), not motorized falling within CN code 8712 00, originating in the People’s Republic of China.\(^\text{14}\)

When the description of the dumped product does not fully match the relevant CN code, because it excludes certain kinds of products that would otherwise fall within the CN code, the regulation imposing the anti-dumping duties describes the excluded products and, separately, TARIC codes are created. The original regulation imposing anti-dumping duties on footwear is a good example of how complicated the product description and reference to product codes can be in such cases:

A definitive anti-dumping duty is hereby imposed on imports of footwear with uppers of leather or composition leather, excluding sports footwear, footwear involving special technology, slippers and other indoor footwear and footwear with a protective toecap, originating in the People’s Republic of China and Vietnam and falling within CN codes: 6403 20 00, ex 6403 30 00, [and 32 other CN codes] (TARIC codes 6403 30 00 39 [and 35 other TARIC codes]).\(^\text{15}\) (emphasis added)

TARIC codes were created for the footwear excluded from the anti-dumping regulation, and residual TARIC codes were created for the footwear covered by the regulation.

If the product description in an anti-dumping regulation turns out to be over- or under-inclusive, it can be changed pursuant to a review after the measures entered into force. An exporter can thus request an interim review, arguing that certain products covered by the CN code (or created TARIC code) should be excluded. As an example, a specific sewing thread was excluded from anti-dumping duties on high-tenacity polyester yarn pursuant to an interim review, even though both the

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\(^{14}\) Council Regulation (EEC) No 2474/93 of 8 Sept. 1993 imposing a definitive anti-dumping duty on imports into the Community of bicycles originating in the People’s Republic of China and collecting definitively the provisional anti-dumping duty, OJ L 228, 9 Sept. 1993, at 1, Art. 1. The description in the CN code equally reads ‘bicycles and other cycles (including delivery tricycles), not motorised’. Some exporters had argued that various categories of bicycles should be considered separate products on the grounds that the specific applications and the use of the bicycles in the various categories are perceived by the market as being different, but the Council concluded that the similarities outweighed any differences.

thread and the yarn fall under the same CN code. The regulation imposing anti-dumping duties was amended and a specific TARIC code was created for the excluded sewing thread to facilitate implementation of the exclusion by customs authorities:

TARIC code 5402 20 00 05 – “Z”-twisted multiple (folded) or cabled yarn, intended for the production of sewing threads, ready for dyeing and for receiving a finishing treatment, loosely wound on a plastic perforated tube”

In the case of anti-dumping duties on bicycles mentioned above, after an expiry review, unicycles were excluded from the product description of bicycles in the anti-dumping regulation. Subsequent to the exclusion, a specific TARIC code was created for unicycles: ‘8712 00 70 10’.

2.4 A WORD OF CAUTION REGARDING THE EU’S PRACTICAL SOLUTION

The practical solution used by the EU appears to combine the two interests: (1) adhering to the legal principle of describing the product based on injurious dumping and not customs codes, and (2) ensuring efficient implementation by creating specific TARIC codes. However, there are (at least) three reasons to exercise caution regarding this practical solution.

First, if a product is not clearly excluded in the product codes, customs authorities will collect anti-dumping duties on it. In practical terms, when a product arrives at the border, customs authorities rely only on the TARIC code to determine if the product is covered by anti-dumping duties, and do not consider the actual product description in the anti-dumping regulation. Legally, it is difficult for them to do anything else. This creates a de facto presumption in favour of the product codes. A discrepancy between the product description and the TARIC code will thus lead to incorrect collection of anti-dumping duties. That was the case for anti-dumping duties imposed on

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18 E.g. the Swedish customs authority explains on its website that the customs code and the origin are needed to determine whether an anti-dumping duty is due. Website of Swedish customs authority: http://www.tullverket.se/sv/foretag/importeravaror/raknauttullochavgifter/antidumpningstullochutjamningstillfrl4.78aa922815794d801e22.html (accessed 14 July 2017).
dynamic random access memories (DRAMs), and the discrepancy was later corrected with an adjusted product description.\(^\text{19}\)

There is therefore a risk of duties being imposed on products for which there is no proven injurious dumping— in breach of the WTO Anti-Dumping Agreement.\(^\text{20}\)

DG TRADE and DG TAXUD should be mindful of this and ensure that product descriptions and TARIC codes be limited by what anti-dumping investigations have proven. For example, a precautionary approach would be to create TARIC codes for the products covered by an anti-dumping regulation and have a residual TARIC code for all other products, instead of the other way around. Exporting producers should be equally aware of this during the anti-dumping investigation, because there is little an importer can do when facing customs authorities \textit{ex post}. Appealing a customs decision on the ground that a product should be excluded from anti-dumping duties is normally a lengthy and costly endeavour. It would normally include that the issue be referred to the Court of Justice of the EU for a preliminary ruling on the product description. Requesting an interim review regarding the product description is equally cumbersome.

The problem can be exemplified by the case of screws used as ‘feet’ for furniture. Such screws had been declared under the CN code for ‘base metal articles for furniture’, but the Commission later adopted a regulation classifying them as ‘screws’ under another CN code.\(^\text{21}\) The CN code for screws was covered by anti-dumping duties.\(^\text{22}\) Given the de facto presumption in favour of the product code, the duties are collected unless the importer successfully challenges the customs decision imposing the duties or an interim review is successfully brought to exclude the specific screws from the anti-dumping regulation.

Second, the creation of TARIC codes is ad hoc and done by DG TAXUD according to what it finds practically most suitable for the individual anti-dumping regulation (without knowing much, if anything, about the product scope discussion that may have taken place in the anti-dumping investigation). The practice is not codified in any legal document. The EU


\[^{20}\text{Primarily Arts 1–3, in addition to the General Agreement on Tariffs and Trade of 1947 (‘GATT’), Art. VI.}\]


\[^{22}\text{Commission Implementing Regulation (EU) 2015/519 of 26 Mar. 2015 imposing a definitive anti-dumping duty on imports of certain iron or steel fasteners originating in the People’s Republic of China, as extended to imports of certain iron or steel fasteners consigned from Malaysia, whether declared as originating in Malaysia or not, following an expiry review pursuant to Art. 11(2) of Regulation (EC) No 1225/2009, OJ L 82, 27 Mar. 2015, at 78.}\]
Basic Anti-Dumping Regulation\textsuperscript{23} does not refer to product codes at all, and the regulation establishing the system of CN codes merely provides that TARIC codes may be created for anti-dumping duties.\textsuperscript{24} Thus, there is little transparency to ensure that this practice is used in a fair and objective manner. In addition, there is currently no legal or regulatory mechanism to provide input or challenge it as such since it is not part of the regulations imposing the anti-dumping duties.

Third, on a more general level, this practice is questionable from the perspective of good governance. Instead of taking all decisions necessary to impose anti-dumping duties within the procedures prescribed for it, i.e. the anti-dumping investigations and the regulations imposing the anti-dumping measures, the Commission operates outside the formal procedures through its practical solutions. That way, it can use the product codes of the customs legislation to impose anti-dumping duties to the extent it deems justified – without the proper checks and balances.

3 ORIGIN OF PRODUCTS

3.1 ‘Rules’ for Rules of Origin

Returning to the example of shoes arriving at the EU border, the customs officer must also verify the declaration of the shoes’ origin, so that the correct customs duty can be collected (e.g. there might be a preferential tariff applicable) and so that other trade restrictions can be enforced, e.g. anti-dumping duties. Given the complex production chains in today’s global economy, it is easy to see that determining the origin of products can be complicated. Below is an outline of the legal framework for determining origin, i.e. the rules of origin, first on the international level and then on the EU level. This will ground the discussion on how rules of origin are used for imposing anti-dumping duties on products that otherwise might not be covered.

3.1[a] The International Framework (WTO)

There are few binding international rules for determining origin. The GATT 1994 does not contain such rules, and the 1999 Revised Kyoto Convention on the Simplification and Harmonization of Customs Procedures mainly provides guidance

\textsuperscript{23} Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union, OJ L 176, 30 June 2016, at 21, (‘EU Basic Anti-dumping Regulation’).

on the methods and procedures for determining and verifying origin. However, the WTO Agreement on Rules of Origin of 1995 (‘RoO Agreement’) provides some binding rules on how rules of origin can be applied, and is the focus of this section.

Strictly speaking, the origin of products only has to be determined when some kind of discrimination based on the country of origin is intended. While the WTO’s overarching principle is non-discrimination, the WTO allows its Members to impose certain discriminatory trade measures, e.g. preferential tariff rates between trade partners or anti-dumping duties. For such measures, the RoO Agreement distinguishes two separate kinds of rules of origin: preferential and non-preferential. According to Article 1, preferential rules of origin are those ‘related to contractual or autonomous trade regimes leading to the granting of tariff preferences going beyond the application of paragraph 1 of Article I of GATT 1994 [i.e. MFN]’. These rules are generally set out in the specific FTA. For all other measures requiring discrimination based on origin, non-preferential rules of origin must be applied. Anti-dumping duties are explicitly mentioned in Article 1(2) of the RoO Agreement as requiring non-preferential rules of origin. The focus for this article is therefore on non-preferential rules of origin, for which Article 2 of the RoO Agreement provides binding rules. The RoO Agreement also sets out a work program for future harmonization of the non-preferential rules of origin, which so far has not yielded much. The aim of the harmonization work program is that all WTO Members agree on applying the same non-preferential rules of origin for all purposes.

The binding rules in Article 2 of the RoO Agreement require non-preferential rules of origin to, inter alia:

1. be clear;
2. notwithstanding the measure or instrument of commercial policy to which they are linked, not be used as instruments to pursue trade objectives directly or indirectly;
3. not themselves create restrictive, distorting, or disruptive effects on international trade;
4. not discriminate between WTO Members; and

26 For autonomous trade regimes, like the EU’s Generalized Scheme of Preferences (‘GSP’), the preferential rules of origin are generally set out in the domestic law of the WTO Member granting the lower tariff.
28 Those rules are applicable from the entry into force of the RoO Agreement on 1 Jan. 1995.
29 The RoO Agreement also has other provisions that are not relevant for the purposes of this article.
30 See the RoO Agreement, Art. 3(a).
be administered in a consistent, uniform, impartial and reasonable manner.

To date, there has only been one WTO dispute in which a panel report has been circulated regarding rules of origin. In US – Textiles Rules of Origin, the panel held that the RoO Agreement sets out what the WTO Members cannot do, but that it ‘does not prevent Members from determining the criteria which confer origin, changing those criteria over time, or applying different criteria to different goods’.\(^3\) In other words, as long as WTO Members comply with the principles set out in Articles 1 and 2 of the RoO Agreement, and until the harmonization work program is completed, WTO Members may have their own non-preferential rules of origin for trade measures discriminating based on origin.

According to Article 5 of the RoO Agreement, WTO Members have to notify their rules to the WTO Secretariat. It follows that, if WTO Members decide not to make use of any of the allowed trade restrictive measures that discriminate based on origin, e.g. anti-dumping measures, they do not have to notify non-preferential rules of origin. The statistics on notifications show that in 2016, fifty-six WTO Members had notified the WTO Secretariat that they do not apply any non-preferential rules of origin and thirty-five Members had not submitted any notification.\(^3\) Only forty-seven WTO Members (i.e. 34\% of all WTO Members, counting the EU and its Member States as one) had notified their non-preferential rules of origin by providing references to their domestic legislation, case law, etc.\(^3\) The European Communities (‘EC’, now EU) notified that it applies non-preferential rules of origin in 1995.\(^4\)

### 3.1[b] EU Framework

The basic EU non-preferential rules of origin are set out in Article 60 of the Union Customs Code.\(^3\) Article 59 confirms that non-preferential rules of origin...
origin should be used for ‘measures, other than tariff measures, established by Union provisions governing specific fields relating to trade in goods; and other Union measures relating to the origin of goods’, i.e. anti-dumping duties. As rules of origin are part of customs legislation, they are managed by DG TAXUD.

Articles 31–36 of the Delegated Act to the Union Customs Code provide some further details to the non-preferential rules of origin. In addition, Annex 22–01 of the Delegated Act provides specific non-preferential rules of origin for a few HS headings (four-digit level), primarily for textiles, and for some specific products (sometimes on CN code level). According to the Commission, ‘[t]hese rules have been decided upon over the years to clear up particular cases where there has been a need for additional clarity.’ Apart from the rules in Annex 22–01, the specific non-preferential rules of origin applied by the EU are the rules set out in the negotiating position of the EU in the WTO harmonization work program. These rules of origin, commonly referred to as ‘list rules’, are not codified but rather considered non-binding interpretations of the basic rules of Union Customs Code. They exist for all four-digit level HS headings for which there are no binding rules in Annex 22–01 of the Delegated Act, and are published on the Commission’s website.

The practical example of shoes illustrates the complexity of the legal framework for rules of origin. For customs clearance and statistical purposes, when a shipment of shoes arrives at the EU border, the importer must declare the non-preferential origin of the shoes. In addition, if the importer intends to use preferential tariff rates under an FTA or an autonomous trade regime, a declaration of the preferential origin must


also be provided.\textsuperscript{40} In other words, the situation may arise where shoes are considered to originate from one country for the purpose of imposing anti-dumping duties, under the non-preferential rules of origin, and considered to originate from another country for the purpose of assessing customs duties, under specific preferential rules of origin.\textsuperscript{41}

### 3.2 Rules of Origin for Anti-Dumping Measures

The legal framework for rules of origin results in tension in relation to anti-dumping measures. Three particular tensions in the EU will be discussed below: (1) rules of origin are altered to impose anti-dumping duties more easily; (2) Article 14(3) of the EU Basic Anti-Dumping Regulation seemingly allows ad hoc deviations from the rules of origin in the customs legislation; and (3) the non-binding nature of most EU non-preferential rules of origin creates uncertainty regarding anti-dumping measures.

#### 3.2[a] Rules of Origin Altered to Impose Anti-Dumping Duties

To survey the extent to which the EU alters rules of origin to facilitate the imposition of anti-dumping duties, the authors have reviewed all EU anti-dumping investigations to date and compared them to product-specific alterations of the non-preferential rules of origin in the binding customs legislation for the corresponding products. Generally, there is little reasoning provided to explain altering rules of origin, which makes it difficult to extract the true motivation for altering rules that apply generally and for all purposes. The motivation could have been related to anti-dumping measures or to something else. The authors have not therefore in this article evaluated each of the individual cases, but merely mapped where a non-preferential rule of origin has changed and/or become binding for a product covered by an anti-dumping investigation or measure, i.e. correlation. This has previously not been surveyed, but the results show that the individual cases merit closer examination into whether causation can be established. The authors therefore encourage further research into this.

\textsuperscript{40} In fact, the EU has preferential arrangements that divert from MFN rates with most other countries. See Raj Bhala, \textit{International Trade Law, Interdisciplinary Theory and Practice} 701 (Lexis Nexis 2008).

In about twenty-five instances indicated in the table below, the authors found some kind of change to the rule of origin for products targeted by anti-dumping measures (Table 1).

**Table 1**

<table>
<thead>
<tr>
<th>Product of Anti-Dumping Investigation</th>
<th>HS Code for (New) Rule of Origin</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bed linen</td>
<td>ex 6302 (A), (B), (C), (D), (E), (F)</td>
</tr>
<tr>
<td>Binder or bale twine (polypropylene)</td>
<td>5607</td>
</tr>
<tr>
<td>Cellulose acetate (filament yarns)</td>
<td>5403</td>
</tr>
<tr>
<td>Ceramic tableware and kitchenware</td>
<td>6911</td>
</tr>
<tr>
<td>Cotton fabrics (unbleached)</td>
<td>5208</td>
</tr>
<tr>
<td>DRAMs</td>
<td>ex 8473.30 (A) and ex 8473.50 (B)</td>
</tr>
<tr>
<td>DRAMs</td>
<td>ex 8542.32 (A)</td>
</tr>
<tr>
<td>Footwear (with textile uppers)</td>
<td>6404</td>
</tr>
<tr>
<td>Footwear (with uppers of leather or plastics)</td>
<td>6402</td>
</tr>
<tr>
<td>Footwear (with uppers of leather or plastics)</td>
<td>6403</td>
</tr>
<tr>
<td>Footwear with protective toecaps</td>
<td>6405</td>
</tr>
<tr>
<td>Laser optical reading systems</td>
<td>ex 8527</td>
</tr>
<tr>
<td>Magnetic disks (3.5 microdiscs)</td>
<td>ex 8523.20 90</td>
</tr>
<tr>
<td>Cotton fabrics (unbleached)</td>
<td>5209</td>
</tr>
<tr>
<td>Polyester filament apparel fabrics (finished)</td>
<td>5407</td>
</tr>
<tr>
<td>Polyester filament tow</td>
<td>5501</td>
</tr>
<tr>
<td>Polyester high tenacity filament yarn; polyester textured filament yarn (PTY); polyester yarn (PTY/POY)</td>
<td>5402</td>
</tr>
<tr>
<td>Polyester staple fibres</td>
<td>5503</td>
</tr>
<tr>
<td>Sacks and bags (polypropylene or polyethylene)</td>
<td>ex 6305 (A), (B), (C), (D), (E), (F)</td>
</tr>
<tr>
<td>Solar panels</td>
<td>ex 8501 (A)</td>
</tr>
<tr>
<td>Solar panels</td>
<td>ex 8541 (A)</td>
</tr>
<tr>
<td>Synthetic fibre ropes</td>
<td>5607</td>
</tr>
<tr>
<td>Television camera system; televisions (colour); camera systems</td>
<td>ex 8528 (A)</td>
</tr>
<tr>
<td>Television camera systems (parts)</td>
<td>ex 8542 (B)</td>
</tr>
</tbody>
</table>
As before, since these are changes in the HS, these new or altered rules apply for every purpose that requires non-preferential rules of origin, and thus not only for anti-dumping duties. Similar to the TARIC codes introduced to implement the product description of anti-dumping regulations, new product-specific rules of origin are often inserted in the form of exceptions to the non-binding list rules that would otherwise apply.

As an example, in the case of television camera systems, a product-specific rule of origin was introduced by the new heading ‘ex 85.28 (A) – Television receivers, (excluding videotuners, television projection equipment and video monitors), whether or not combined, in the same housing, with radio-broadcast receivers or sound recording or reproducing apparatus, but not with videorecording or reproducing apparatus’:

Manufacture where the increase in value acquired as a result of assembly operations and, if applicable the incorporation of parts originating in the country of assembly represents at least 45% of the ex-works price of the products. When the 45% rule is not met, the apparatus shall be treated as originating in the country of origin of parts whose ex-works price represents more than 35% of the ex-works price of the apparatus. When the 35% rule is met in two countries, the apparatus shall be treated as originating in the country of origin of parts representing the greater percentage value.

Another example is the case of DRAMs, where a product-specific rule of origin was introduced under the two headings ‘ex 8473.30 (A)’ and ‘ex 8473.32 (A)’, with the same description (‘Electronic integrated circuits known as DRAMs’):

Manufacture where the increase in value acquired as a result of working and processing, and, if applicable, the incorporation of parts originating in the country of manufacture, represents at least 45% of the ex-works price of the products. When the 45% rule is not met, the DRAMs originate in the country in which the major portion in value of the materials used originated.

Some of the product-specific rules of origin, arguably created for the purpose of anti-dumping measures, have received significant attention and criticism. In the case of photocopiers produced by the Japanese company Ricoh in their US plant, the Commission adopted a tailor-made ‘negative rule’ of origin. A ‘negative’ rule of origin determines what element (such as a production step) does not confer origin on a particular product. This was heavily criticized by the US and others, and eventually led to the prohibition of negative rules of origin in Article 2(f) of the RoO Agreement. A more recent example is that of solar panels, where the Commission created a new rule of origin allegedly

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because the production chain was so complicated that anti-dumping duties would have been otherwise difficult to impose. \(^{44}\) The impact of new rules of origin for solar panels is vast since the subsequent anti-dumping measures affected an import value of EUR 21 billion.\(^{45}\)

The practice of altering rules of origin to facilitate the imposition of anti-dumping duties is worth evaluating on the basis of the RoO Agreement. The practice might be contrary to Article 2(b), which requires that, notwithstanding the measure to which they are linked, the rules must not be used as instruments to pursue trade objectives directly or indirectly. The question is to what extent can a rule of origin that is created or altered for all purposes, with the aim of facilitating the imposition of an anti-dumping duty, be considered an instrument to pursue a trade objective directly or indirectly. From a textual point of view, it is hard to see how that would not be the case.

The Panel in US – Textiles Rules of Origin, which concerned rules of origin in relation to import quotas, held that protecting the domestic industry against import competition is, in principle, such a ‘trade objective’ prohibited by Article 2(b) of the RoO Agreement.\(^{46}\) Like an import quota, anti-dumping measures would clearly be a measure to protect the domestic industry from import competition, and, thus, ‘the rule of origin should not add to the protection already afforded by the [anti-dumping measure]’.\(^{47}\) Once established that the rule of origin results in more products being covered by an anti-dumping measure, one would need to establish that this was the objective behind the rule, primarily by examining ‘the design, architecture and revealing structure’.\(^{48}\)

Even though a party making a claim always needs to make a prima facie case, it can definitely not be excluded that a trade partner of the EU could manage to do so.\(^{49}\) It is logical and legitimate to use customs legislation to ensure the integrity and effectiveness of the administration of anti-dumping duties, along with other

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\(^{45}\) Swedish National Board of Trade, Preventing Global Value Chains in Renewable Energy; The Use of Non-Preferential Rules of Origin as an Indirect Trade Policy Instrument in the EU 10 (2015:8).


\(^{47}\) Ibid., para. 6.84.


measures. However, that should normally not require a change of the customs legislation, and if it does, the change should normally not result in an overall increase in the amount of anti-dumping duties collected. If that is the result, the alteration of the customs legislation is most likely not (just) a matter of ensuring the integrity and effectiveness of the administration of the measure, but (also) a matter of trade policy and would arguably be prohibited under Article 2(b).

3.2[b] Article 14(3) of the EU Basic Anti-Dumping Regulation

Reviewing the interplay between customs and anti-dumping legislation in the EU, another rarely discussed but fundamentally important tension appears which is the explicit reference to customs legislation in Article 14(3) of the EU Basic Anti-Dumping Regulation. The WTO Anti-Dumping Agreement does not mention such possibility. The wording of Article 14(3) seems to allow the design of specific rules of origin for the purpose of anti-dumping measures alone: ‘Special provisions, in particular with regard to the common definition of the concept of origin, as contained in [the Union Customs Code], may be adopted pursuant to this Regulation.’ The provision differs from the practice previously described in which the EU changes a rule of origin in the customs legislation for all purposes. By contrast, Article 14(3) seems to suggest that a regulation imposing anti-dumping duties, or another piece of legislation, can adopt a rule of origin for specific anti-dumping measures.

This provision was introduced in the 1994 EU Basic Anti-Dumping Regulation\(^50\) without any explanation in the proposal.\(^51\) At the same time as it entered into force on 1 January 1995, the regulations imposing anti-dumping duties changed wording in the operative part. Instead of stating ‘[t]he provisions in force concerning customs duties shall apply’,\(^52\) regulations adopted after the entry into force of Article 14(3) state ‘[u]nless otherwise specified, the provisions in force concerning customs duties shall apply’.\(^53\) Interestingly, to date, the EU has not relied on Article 14(3) to deviate from the rules of origin in the


customs legislation. Nonetheless, the provision as such is worth evaluating from a WTO perspective.

First, Article 14(3) might be inconsistent with Article 2(b) of the RoO Agreement because a rule of origin adopted under it could be considered an instrument for pursuing trade objectives in the same way as described above. Indeed, if an origin rule is adopted solely for (certain) anti-dumping duties, that should make it even easier to prove that the rule pursues trade objectives.

Second, adopting a rule solely for one anti-dumping measure risks contravening Article 2(d), which prohibits rules of origin from discriminating between WTO Members when it comes to a certain good, since anti-dumping measures by design target imports from specific countries. While imposing anti-dumping duties on products from another WTO Member is a permissible discrimination under WTO law, use of rules of origin for increasing that discrimination is not. Likewise, rules created ad hoc for an individual case might be contrary to Article 2(e), which requires that the rules be administered in a consistent, uniform, impartial and reasonable manner.

Besides potentially being inconsistent with WTO law, Article 14(3) of the EU Basic Anti-Dumping Regulation is also questionable from an EU perspective. The provision allows deviation from customs legislation, presumably in the form of individual anti-dumping regulations or other Commission implementing regulations. However, nowhere does the Union Customs Code provide for such deviations. On the contrary, Article 59 of the Union Customs Code confirms that the non-preferential rules of origin in Article 60 should be used for ‘measures, other than tariff measures, established by Union provisions governing specific fields relating to trade in goods; and other Union measures relating to the origin of goods’, i.e. anti-dumping duties. It is therefore questionable whether the EU Basic Anti-dumping Regulation can allow deviations from the Union Customs Code and, if so, whether it can be considered specific in relation to that code. Both acts were adopted through the ordinary legislative procedure and are equal in the hierarchy of EU norms.

54 There are examples where Art. 14(3) has been cited in regulations imposing anti-dumping duties to deviate from other parts of customs legislation, e.g. for requiring additional certificates and hindering reimbursement of duties. See e.g. Commission Implementing Regulation (EU) 2016/223 of 17 Feb. 2016 establishing a procedure for assessing certain market economy treatment and individual treatment claims made by exporting producers from China and Vietnam, and implementing the judgment of the Court of Justice in joined cases C-659/13 and C-34/14, OJ L 41, 18 Feb. 2016, at 3, recital 18. See also Mueller et al., supra n. 9, paras 14.82–14.84.
3.2[c] Non-Binding Nature of Most EU Non-Preferential Rules of Origin

Finally, even if no new product-specific rules of origin were created for imposing anti-dumping duties, the fact that most EU rules of origin take the form of list rules, which are non-binding interpretations of the basic rules of Union Customs Code, might be problematic for imposing anti-dumping duties.  

Unless the non-binding rules are applied as if binding by customs authorities, it is likely that there are differences in implementation between and within the Member States. Indeed, from consulting Member State customs authorities, it appears as if the list rules are rather used as guidance from which deviations are regularly made. Inconsistent application might also be more likely because the list rules were not created as legislation but rather as a starting point for negotiations in the WTO harmonization work program (a wish list). Therefore, the rules have not undergone any legislative procedure to guarantee their quality and applicability by customs. In addition, the flexibility of the non-binding nature of the rules allows their use as an instrument to levy anti-dumping duties where origin is not entirely clear.

The non-binding nature of the list rules might therefore lead to an application that is contrary to Article 2(e) of the RoO Agreement, which requires that the rules be administered in a consistent, uniform, impartial and reasonable manner.

3.3 A WORD OF CAUTION REGARDING RULES OF ORIGIN FOR ANTI-DUMPING MEASURES

The EU’s practices and rules regarding rules of origin and anti-dumping might have rather wide implications for international trade.

First, as outlined above, depending on the specific circumstances, they might violate WTO law, and the EU might find itself in a WTO dispute over the RoO Agreement at some point. It might also lead EU trade partners to employ similar practices and rules. Such increased politicization of the non-preferential rules of origin might in turn make negotiations within the WTO harmonization work program more difficult.  

Second, from the perspective of individual companies, these practices and rules create uncertainty. Companies rely on the EU’s list rules and make business decisions

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56 Swedish National Board of Trade, Preventing Global Value Chains in Renewable Energy: The Use of Non-Preferential Rules of Origin as an Indirect Trade Policy Instrument in the EU (2015:8), at 6. In relation to a lack of transparency, at the time of writing the Commission still has not updated its website on the list rules since the entry into force of the Union Customs Code and its Delegated Act in May 2016.

based on them.\textsuperscript{58} If rules of origin for certain products were to change suddenly and lead to anti-dumping duties, many companies would be taken by surprise.\textsuperscript{59} This would be the case particularly if the rule of origin were changed following an anti-dumping investigation, as is conceivable within the current practice. Companies that have not been (needed to be) involved in this anti-dumping proceeding would suddenly be confronted with altered non-preferential origin rules. They would not have had the chance to voice their opinion, nor can they request legal review under the current admissibility rules. In other words, for these companies, using customs law for anti-dumping purposes circumvents procedural guarantees granted to companies under anti-dumping legislation. In anti-dumping investigations, companies have the right to submit their comments and observations, request hearings, etc.

The same holds true for the \textit{ex post} procedural guarantees. Companies cannot challenge new rules of origin through direct action to the EU courts in Luxembourg.\textsuperscript{60} Unlike anti-dumping regulations, which target exporters directly, amendments to the Union Customs Code Delegated Act are formally considered to have general bearing and do not give standing to individual companies. This is the case even if the rule is practically speaking tailor-made for specific companies. Companies wishing to challenge a rule of origin must do so in national courts of the Member States by challenging the customs decision applying the rule, and argue that the question of validity of the origin rule be sent to the Court of Justice of the European Union for a preliminary ruling. Challenging the non-binding ‘list rules’, which would normally apply in case no new product-specific rule is created, might be even more difficult, as they are formally considered to be mere interpretations of the Union Customs Code and its Delegated Act.

Third, altering or creating non-preferential rules of origin might distort trade statistics in the sense that the new rules are not reflecting real trade flows. Trade statistics are based on non-preferential rules of origin.\textsuperscript{61} If such rules are altered, the statistics on where products originate are also altered without any change in the product’s production, components, or raw material. Similarly, inconsistent application of the non-binding list-rules might also hinder consistent and accurate trade statistics. Distorted trade statistics, in turn, could lead to flawed political decision-making, and even conceal the real data behind trade policy instruments, such as anti-dumping measures, from the general public.

\begin{footnotesize}
\textsuperscript{58} Cf. Vermulst & Waer, \textit{supra} n. 43, at 95 and 98.
\textsuperscript{59} In fact, depending on how the product-specific rules of origin are formulated, they might result in anti-dumping duties for EU companies that have outsourced parts of their production chain.
\textsuperscript{60} Cf. Vermulst & Waer, \textit{supra} n. 43, at 64.
\end{footnotesize}
Finally, as with the practice of creating TARIC codes, the practices and rules surrounding rules of origin and anti-dumping are questionable from the perspective of good governance. Instead of taking all decisions necessary to impose anti-dumping duties within the procedures prescribed for it, i.e. the anti-dumping investigations and the regulations imposing the anti-dumping measures, the Commission can conceal the full scope of the anti-dumping measure by creating product-specific rules of origin separately. By changing rules of origin in the customs legislation without properly explaining the anti-dumping background, and by having Article 14 (3) in the Basic Anti-Dumping Regulation to rely on, the Commission arguably takes on a role beyond what is visible to the Member States and other stakeholders.

4 RECOMMENDATIONS AND FINAL REMARKS

The practices regarding product description and origin outlined in this article show that customs legislation is used to facilitate the imposition and management of anti-dumping duties. It is logical and reasonable to make collection of anti-dumping duties by customs authorities as simple and effective as possible. However, when customs legislation has the effect of changing the amount of anti-dumping duties collected, it is arguably not just a matter of administration. It becomes a matter of trade policy. It is therefore important that the EU, and other WTO Members with similar practices, ensure that they strike a balance that is WTO consistent and provides legal certainty for companies.

First, the processes for the interaction between customs legislation and anti-dumping legislation should be formalized. For the EU specifically, the use of product codes and the practice of creating TARIC codes should be outlined in both the customs legislation and the anti-dumping legislation, and the details should be explained in guidance documents. In individual cases, the reasoning behind the created TARIC codes should be explained in the disclosure of the anti-dumping investigation and in the regulation imposing anti-dumping duties. Likewise, any considerations with regard to rules of origin relating to specific anti-dumping measures should be properly explained in the regulation adopting the new rule, i.e. amending the Union Customs Code Delegated Act, as well as in the disclosure of the anti-dumping investigation and the regulation imposing anti-dumping duties. By formalizing these practices, transparency would increase and the decisions would become subject to proper legal review.

Second, the practice of altering rules of origin for anti-dumping purposes should be reconsidered. Even with increased transparency, the practice can be considered use of rules of origin as instruments of trade policy. For the EU specifically, the reform of the EU Basic Anti-Dumping Regulation should be seen as a chance to remove or adapt Article 14(3). The provision as it stands gives a blank cheque to the
Commission to deviate from the customs legislation as it deems fit for the imposition of anti-dumping duties. Not only is this arguably inconsistent with WTO law (and maybe even EU law), it also creates unacceptable uncertainty and non-transparency for companies.

Third, the uncertainty caused by the non-binding list rules should be resolved. Making all non-preferential rules of origin binding at the level of HS headings (four-digit-level) would increase consistency among Member States and thus certainty for companies, and make the rules easier to challenge. However, simply making the EU list rules binding by adding them to the Delegated Act is not the right solution. Since the list rules were created for negotiations in the WTO harmonization work program, their quality is below what can be accepted for legislation. In addition, they were created a long time ago, without taking into account the increasingly complex production chains which require rules that factor in value added. Instead, the EU should create a new set of non-preferential rules of origin. This effort should coincide with an increased effort by the EU to promote and drive the WTO harmonization work program on non-preferential rules of origin. Ultimately, only harmonized rules of origin can prevent rules of origin from being used for trade policy in individual cases.

62 See e.g. Geraerts & Willems, supra n. 41, at 287–305.