

Normal Value in Anti-Dumping Proceedings against China Post-2016: Are Some Animals Less Equal Than Others?

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The person who came up with the idea to call this process ‘the granting of China’s market economy status’ might either have been a clever public relations strategist, or a terrible one, but missed the point by miles...¹

This article attempts to show that from 12 December 2016, WTO Members can no longer use the analogue country or similar methodologies as the basis for normal value calculations in anti-dumping proceedings targeting China and should rather use Chinese domestic prices or costs. However, contrary to what some would like decision-makers to believe, this does not mean that the EU or other WTO Members will have no defence against genuine Chinese dumping practices. Other provisions in either the ADA or the SCM Agreement offer sufficient guarantees against that. Furthermore, our assessment of the manner in which the Commission has conducted MES reviews casts doubt on the quality of the evidentiary base used, on the apparent willingness to give some trading partners the benefit of the doubt but not to others, and on the utility of the review process as a lever to encourage reforms in transition economies, such as China.

I INTRODUCTION

Much has been written about whether or not China should be granted market economy status [MES] for the purpose of application of anti-dumping [AD] regimes from 12

December 2016 onwards on the basis of its 2001 Protocol of Accession to the WTO [Accession Protocol].²

However, this discussion is a false one, as Fjellner rightly points out in the quotation above. The WTO agreements notably the WTO Anti-Dumping Agreement

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¹ Christofer Fjellner, ‘3.5 Million Lost Jobs’ is Red Herring in China’s Market Economy Status Bid (2015), <http://www.euractiv.com/sections/trade-society/35-million-lost-jobs-red-herring-chinas-market-economy-status-bid-320013>, consulted on 20 Dec. 2015.

² See, for example, Barbara Barone, *One Year to Go: The Debate over China’s Market Economy Status (MES) Heats Up*, Directorate-General for External Policies, Policy Department, European Parliament, 1–24 (December 2015); Business Europe, *China’s Market Economy Status*, position paper (December 2015); Joris Cornelis, *China’s Quest for Market Economy Status and Its Impact on the Use of Trade Remedies by the European Communities and the United States*, 2(2) Global Trade & Customs J., 105–115 (2007); Christofer Fjellner, *3.5 Million Lost Jobs’ is Red Herring in China’s Market Economy Status Bid* (2015), <http://www.euractiv.com/sections/trade-society/35-million-lost-jobs-red-herring-chinas-market-economy-status-bid-320013>, consulted on 20 Dec. 2015; European Parliamentary Research Service, *Granting Market Economy Status to China: An Analysis of WTO Law and of Selected WTO Members Policy* (November 2015); FTA, *To ME or Not to ME: China’s Status After 11 December 2016*, position paper (November 2015); Henry Gao, *If You Don’t Believe in the 2012 Myth, Do you Believe in the 2016 Myth?*, Intl. Econ. L. & Policy Blog (2011), <http://worldtradelaw.typepad.com/ielpblog/2011/11/if-you-dont-believe-in-the-2012-myth-do-you-believe-in-the-2016-myth.html>, consulted on 20 Dec. 2015; Brian Gatta, *Between ‘Automatic Market Economy Status’ and ‘Status Quo’: A Commentary on ‘Interpreting Paragraph 15 of China’s Protocol of Accession*, 9(4) Global Trade & Customs J., 165–172 (2014); Folkert Graafsma & Elena Kumashova, *In re China’s Protocol of Accession and the Anti-Dumping Agreement: Temporary Derogation or Permanent Modification?*, 9(4) Global Trade & Customs J., 154–159 (2014); Stephen Green, *China’s Quest for Market Economy Status*, The Royal Institute of International Affairs, Asia Programme, Chatham House Briefing Note (2004), <https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/Asia/bnmay04.pdf>, consulted on 20 Dec. 2015; Madariaga Report, *Is China Already a Market Economy? What Implications for the EU’s Trade Defence Policy?*, Madariaga College of Europe Foundation (2012), <http://www.madariaga.org/images/madariagareports/2012-jun-22%20-%20china%20market%20economy%20status.pdf>, consulted on 20 Dec. 2015; Jorge Miranda, *Interpreting Paragraph 15 of China’s Protocol of Accession*, 9(3) Global Trade & Customs J., 94–103 (2014); Matthew R. Nicely, *Time to Eliminate Outdated Non-Market Economy Methodologies*, 9(4) Global Trade & Customs J., 160–164 (2014); Bernard O’Connor, *Much Ado About ‘Nothing’: 2016, China and Market Economy Status*, 10(5) Global Trade & Customs J., 176–180 (2015); Bernard O’Connor, *Market-economy Status for China is Not Automatic*, VOX website, the Centre for Economic Policy Research (2011), <http://www.voxeu.org/article/china-market-economy>, consulted on 20 Dec. 2015; Bernard O’Connor, *The Myth of China and Market Economy Status in 2016*, <http://worldtradelaw.typepad.com/files/oconnorresponse.pdf>, consulted on 20 Dec. 2015; Bernard O’Connor, *China and Market Economy Status III, International Economic Law and Policy Blog* (2012), <http://worldtradelaw.typepad.com/ielpblog/2012/05/china-and-market-economy-status-iii.html>, consulted on 20 Dec. 2015; Theodore Posner, *A Comment on Interpreting Paragraph 15 of China’s Protocol of Accession by Jorge Miranda*, 9(4) Global Trade & Customs J., 146–153 (2014); Weijia Rao, *China’s Market Economy Status under WTO Antidumping Law After 2016*, 5(2) Tsinghua China L. Rev. (2013), http://www.tsinghuachinalawreview.org/articles/PDF/TCLR_0502_RAO.pdf, consulted on 20 Dec. 2015; Mathieu Rémond, *The EU’s Refusal to Grant China ‘Market Economy Status’ (MES)*, 5(3) Asia Eur. J., 345–356 (2007); Marie-José Rinaldi-Larribe, William Lightfoot & Zhongxiu Zhao, *Does China Deserve the Market Economy Status?*, 2(2) J. Chinese Econ. & For. Trade Stud., 110–120 (2009); Paul Rosenthal & Jeffrey Beckington, *The People’s Republic of China: A Market Economy*

[ADA] and the GATT 1994 do not define the concepts of market economy [ME] and non-market economy [NME] nor do they regulate the ME or NME classification of WTO Members. Rather, these terms are entrenched in the national laws of some WTO Members and since China's Accession Protocol does not set the threshold for ME or NME status of China, the expiry of section 15(a)(ii) of China's Accession Protocol does not imply that all WTO Members would have to recognize China as a ME.

Rather, the key question is what can be expected from the expiry of section 15(a)(ii) of China's Accession Protocol. In this context it is clear that WTO Members cannot resort to the Accession Protocol after 11 December 2016 to derogate from the application of the rules in Article 2 of the ADA for normal value establishment for Chinese producers. That being said, it is a matter of debate whether WTO Members can use the second supplementary provision to Article VI:1 GATT 1994 [second *Ad Note* to Article VI:1 GATT 1994] to derogate from the standard obligation to establish normal value on the basis of domestic prices or costs, e.g., to use the analogue country methodology.³ Our view is that the second *Ad Note* to Article VI:1 GATT 1994 cannot be used as far as China is concerned.

Furthermore, while it seems clear that WTO Members may not resort to the use of a special/analogue country methodology post-11 December 2016, they could possibly use certain techniques when calculating normal value such as making adjustments to the prices of certain inputs that they consider do not reflect market prices. The European Union [EU] in particular has been very creative in this respect. The WTO consistency of this approach is debatable and is currently being challenged by Argentina,

Indonesia and Russia. Additionally, the anti-subsidy instrument could possibly also or alternatively be used.

2 LEGAL ANALYSIS

There is nothing in the WTO agreements explicitly defining the meaning of the terms ME and NME or regulating the ME/NME classification of WTO Members.⁴ In practice, the concepts of ME and NME exist and are of primary importance most notably in the context of AD cases. NME would not appear to be an economic concept.⁵

In the context of the multilateral framework, the NME concept can be traced back to the negotiations of the International Trade Organization's [ITO] Charter after World War II. As the Soviet Union – which was virtually the only country with a state foreign trade monopoly at the time – was to be a party to this Charter, the draft Charter had a section on 'Expansion of Trade by Complete State Monopolies of Import Trade', essentially providing that a state trading country needed to import products at a minimum value to be agreed upon. As the negotiations of the ITO Charter stalled and the Soviet Union did not become a party to the GATT, the provision was not included in the GATT 1947.

During the GATT Review Session of 1954–1955, the issue of centrally planned economies was revived in the discussions about amending the GATT provisions on AD. It was then argued that production costs and selling prices of products in centrally planned economies were all set by the State and thus did not reflect the market's demand and supply forces. This led to the introduction of the second

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or a Non-market Economy in Anti-Dumping Proceedings Starting on December 12, 2016?, 9(7/8) *Global Trade & Customs J.*, 352–355 (2014); Laurent Ruessmann & Jochen Beck, *2016 and the Application of an NME Methodology to Chinese Producers in Anti-Dumping Investigations*, 9(10) *Global Trade & Customs J.*, 457–463 (2014); Terence Stewart et al., *The Special Case of China: Why the Use of a Special Methodology Remains Applicable to China after 2016*, 9(6) *Global Trade & Customs J.*, 272–279 (2014); Terence Stewart et al., *Any Change to China's Non-Market Economy Status Must be Based on the Criteria Specified under U.S. Antidumping Law*, U.S.–China Economic and Security Review Commission (2005), http://origin.www.uscc.gov/sites/default/files/Research/05_08_18_trade_group_law_position_paper.pdf, consulted on 20 Dec. 2015; Andrew Stoler, *Market Economy Status for China: Implications for Antidumping Protection in Australia*, speech at Australia-China Council of South Australia (2004), <http://www.iit.adelaide.edu.au/research/conferences/docs/ACBCSA2809042.pdf>, consulted on 20 Dec. 2015; Vera Thorstensen et al., *WTO-Market and Non-Market Economies: the Hybrid Case of China* (2013), <http://ccgi.fgv.br/sites/ccgi.fgv.br/files/u5/LATAM%20-%20WTO%20and%20NMEs.pdf>, consulted on 20 Dec. 2015; Christian Tietje & Karsten Nowrot, *Myth or Reality? China's Market Economy Status under WTO Anti-Dumping Law after 2016*, Policy Papers on Transnational Economic Law, No. 34, Transnational Economic Law Research Center, 1–12 (2011), <http://telc.jura.uni-halle.de/sites/default/files/telc/PolicyPaper34.pdf>, consulted on 20 Dec. 2015; Lisa Toohey & Jonathan Crowe, *The Illusory Reference of the Transitional State and Non-Market Economy Status*, 2(2) *Chinese J. Comp. L.* 314–336 (2014); William Watson, *Will Nonmarket Economy Methodology Go Quietly into the Night? – U.S. Antidumping Policy toward China after 2016*, CATO Institute, No. 76, 1–17 (2014); <http://object.cato.org/sites/cato.org/files/pubs/pdf/pa763.pdf>, consulted on 20 Dec. 2015; Yanning Yu, *Rethinking China's Market Economy Status in Trade Remedy Disputes After 2016: Concerns and Challenges*, 8(1) *Asian J. WTO & Intl. Health L. & Policy*, 77 (2013).

³ Use of the analogue country methodology invariably leads to findings of high dumping margins, see Edwin Vermulst, *EU Anti-Dumping Law and Practice* 298–306 (2nd ed., 2010). Compare *FTA, To ME or Not to ME: China's Status After 11 December 2016*, position paper, at 3 (November 2015) which calculates an average duty level for China of 45% in the case of the EU.

⁴ Compare Barbara Barone, *One Year to Go: The Debate over China's Market Economy Status (MES) Heats Up*, Directorate-General for External Policies, Policy Department, European Parliament, 1–24, at 5 (December 2015). As an aside, it is noted that NME is defined in the UNCTAD Glossary of Customs Terms and in the US Department of State, Glossary of Trade in similar terms:

A national economy in which the government seeks to determine economic activity largely through a mechanism of central planning, as in the former Soviet Union, in contrast to a market economy, which depends heavily upon market forces to allocate productive resources. In a nonmarket economy, production targets, prices, costs, investment allocations, raw materials, labor, international trade, and most other economic aggregates are manipulated within a national economic plan drawn up by a central planning authority. Hence, the public sector makes the major decisions affecting demand and supply within the national economy.

⁵ Compare Christian Tietje & Karsten Nowrot, *Myth or Reality? China's Market Economy Status under WTO Anti-Dumping Law after 2016*, Policy Papers on Transnational Economic Law, No. 34, Transnational Economic Law Research Center, 1–12, at 3 (2011), <http://telc.jura.uni-halle.de/sites/default/files/telc/PolicyPaper34.pdf>, consulted on 20 Dec. 2015; Adam McCarty & Carl Kalapesi, *The Economics of the 'Non-Market Economy' Issue: Vietnam Catfish Case Study*. (Mekong Economics Ltd, 2003).

*Ad Note to Article VI:1 GATT that was carried forward in GATT 1994:*⁶

It is recognized that, in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability for the purposes of paragraph 1, and in such cases importing contracting parties may find it necessary to take into account the possibility that *a strict comparison with domestic prices in such a country may not always be appropriate*. [Emphasis added].

This provision provides WTO Members with the possibility to deviate from the requirement in Article 2.1 ADA to calculate normal value in AD investigations on the basis of domestic prices or costs in the case of centrally planned economies for example by using surrogate or analogue market economy country producers' prices or costs. It may be noted that the only GATT member at the time with a centrally planned economy was Czechoslovakia.⁷

The analogue country methodology was further codified in the GATT framework in 1967 through the incorporation of a provision in the Working Party Report concerning the accession of Poland to the GATT, on the 'surrogate country' methodology in AD proceedings against Polish exports.⁸ This was further carried forward in the accession documents of Romania and Hungary to the GATT.

Following from this, some WTO members began to make a distinction in their national AD legislations between the dumping margin calculation methods involving imports from MEs and those from countries classified as NMEs by them. The Working Party Report on China's accession to the WTO illustrates this point:

Paragraph 151 of the Working Party Report

The representative of China expressed concern with regard to past measures taken by certain WTO Members which had

treated China as a non-market economy and imposed anti-dumping duties on Chinese companies without identifying or publishing the criteria used, without giving Chinese companies sufficient opportunity to present evidence and defend their interests in a fair manner, and without explaining the rationale underlying their determinations, including with respect to the method of price comparison in the determinations. [Emphasis added]

Some WTO Members such as the EU,⁹ Japan and India¹⁰ have established specific criteria for considering countries as MEs which apply to China as well although in the case of the EU, the criteria do not seem to be included in the national law or legal system.¹¹

To assess the relevance of the ME status for China before and after 2016, it is necessary to recall first the relevant parts of section 15 of China's Accession Protocol and to understand what is implied in these provisions. Before proceeding to analyse the various provisions below, it is important to bear in mind that contrary to the conclusion drawn by certain experts¹² the inclusion of paragraphs (a) and (d) of section 15 was NOT a recognition on the part of China that it was a NME at the time of accession to the WTO¹³ and is also not reflected as such in the Accession Protocol. Paragraphs 150 and 151 of the Working Party Report merely indicate that certain WTO Members considered China as a NME.

Section 15 of China's Accession Protocol states as follows:

Price Comparability in Determining Subsidies and Dumping

- (a) *In determining price comparability* under Article VI of the GATT 1994 and the Anti-Dumping Agreement, the importing WTO Member shall use either Chinese prices or costs for the industry under investigation or a methodology that is not based on a strict comparison with domestic prices or costs in China based on the following rules:

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⁶ And by cross-reference Art. 2.7 of the ADA.

⁷ William Watson, *Will Nonmarket Economy Methodology Go Quietly into the Night? – U.S. Antidumping Policy toward China after 2016*, CATO Institute, No. 76, 1–17, at 4 (2014).

⁸ https://www.wto.org/gatt_docs/English/SULPDF/90800042.pdf.

⁹ The EU for instance has five cumulative criteria for assessing whether a country qualifies for MES (similar to the Market Economy Treatment criteria in Art. 2(7)(c) of the EU Basic AD Regulation). These criteria were allegedly applied for countries such as Ukraine and Russia to obtain ME status under EU law and are currently equally applicable to China. These criteria are discussed at greater length in s. 4 of this paper.

¹⁰ Customs Tariff (Identification, Assessment and Collection of Antidumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995, Annexure I, Principles governing the determination of normal value, export price and margin of dumping, para. 8, <http://commerce.nic.in/traderemedies/compendium/comp2.pdf>.

¹¹ European Parliamentary Research Service, *Granting Market Economy Status to China: An Analysis of WTO Law and of Selected WTO Members Policy*, at 13 (November 2015).

¹² See, for example, Bernard O'Connor, *Much Ado About 'Nothing': 2016, China and Market Economy Status*, 10(5) *Global Trade & Customs J.*, 176–180, at 3 (2015).

¹³ Appellate Body ['AB'] Report, *EC – Fasteners*, para. 86:

China submits that China's Accession Protocol merely authorizes certain WTO Members to apply a temporary and limited derogation from certain rules of the Anti-Dumping Agreement concerning the determination of normal value, but in no case contains any general acknowledgement that China is an NME.

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

2.1 First and Third Sentences of Section 15(d) Concerning ME Qualification and Its Limited Relevance

As can be observed, the first sentence of section 15(d) specifies that if China establishes under the national law of the importing WTO Member that it is a ME, the possibility given to investigating authorities in paragraph 15(a)(ii) – as it is the only provision permitting the establishment of normal value on the basis of a special methodology not based on Chinese domestic prices or costs notably the analogue country methodology – cannot be used any longer in AD investigations with respect to China. In the authors' view, the core element of this sentence that has been completely overlooked in all the writings on the subject is that there is a proviso in the first sentence of section 15(d). In other words, it is clearly

stated in this sentence that the relevance of this sentence and its operation is limited to the extent the national law of a WTO Member had MES criteria – as opposed to market economy treatment [MET] criteria which are applicable to individual producers – at the time of China's accession to the WTO.

At least two writers on the subject have claimed that, post 11 December 2016, as the first sentence of section 15(d) will remain unchanged, China will have to meet the ME conditions under the national laws of WTO Members in order for the special/analogue country methodology not to be applied and that this sentence would be rendered inutile if the expiry of section 15(a)(ii) results in the non-application of the special/analogue country methodology.¹⁴

However, in the authors' view, the scope of the first sentence of section 15(d) is much more limited than is being claimed by some considering that they are overlooking the proviso. First, the need to qualify as a ME cannot be read into the first sentence of section 15(d) and imposed upon China with regard to countries that did not have MES criteria in their national laws at the time of China's accession. In this sense the proviso was meant to ensure legal certainty for China and to avoid that China is arbitrarily and randomly classified as a NME by countries which had no MES criteria at the time of China's accession. This assessment is fortified by the Chinese representative's statement in paragraph 151 of the Working Party Report that 'certain WTO Members...had treated China as a non-market economy and imposed anti-dumping duties on Chinese companies without identifying or publishing the criteria used.' Moreover, imposing the obligation on China to qualify for MES under the national laws of even those WTO Members which did not have MES criteria at the time of China's accession amounts to unilaterally and illegally expanding the scope of China's commitments.

Second, it cannot be overlooked that right after the first sentence of paragraph (d), the second sentence starts with the words, 'in any event' and goes on to state that subparagraph a(ii) giving the right to use a special/analogue country methodology for normal value calculation shall expire fifteen years after the date of China's accession to the WTO. The words 'in any event' would have been unnecessary if the interpretation of certain experts that special methodologies can continue to be applied against Chinese producers unless China qualifies for MES under the national laws of WTO Members,¹⁵ was the intent of the first sentence of section 15(d) or of section 15(a)(i). However, these words do exist in the Protocol and were supposedly added to ensure that

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¹⁴ Bernard O'Connor, *Much Ado About 'Nothing': 2016, China and Market Economy Status*, 10(5) *Global Trade & Customs J.*, 176–180 at 5 (2015); Laurent Ruessmann & Jochen Beck, *2016 and the Application of an NME Methodology to Chinese Producers in Anti-Dumping Investigations*, 9(10) *Global Trade & Customs J.*, 457–463 at 460–461 (2014).

¹⁵ Laurent Ruessmann & Jochen Beck, *2016 and the Application of an NME Methodology to Chinese Producers in Anti-Dumping Investigations*, 9(10) *Global Trade & Customs J.*, 457–463 at 459–460 (2014); Terence Stewart et al., *The Special Case of China: Why the Use of a Special Methodology Remains Applicable to China after 2016*, 9(6) *Global Trade & Customs Journal*, 272–279 at 276 (2014).

China is not indefinitely subjected to the special/analogue country methodology which deviates from the normal value calculation rule in Article 2 ADA. It is relevant to note that the accession documents of Vietnam¹⁶ and most recently Tajikistan that acceded to the WTO in 2013¹⁷ have the same provisions as in sections 15(a) and (d) of China's Accession Protocol. Thus, it would be disingenuous to consider that not only China but equally Vietnam and Tajikistan intentionally accepted that individual WTO Members could perennially brand them as NMEs or discriminate against them in AD investigations and subject their producers to high dumping margins using the special/analogue country methodology.

Third, based on the structure of paragraphs (a), (c) and (d) of section 15 it is evident that the focus of these provisions was not on country-wide MES and the first sentence of paragraph (d) is the only place where reference is made to country-wide MES. This also indicates that the qualification as a ME under WTO Members' national laws was meant to have a limited scope within the framework of section 15.

The above interpretation also applies as regards the third sentence of section 15(d) which states that if China establishes pursuant to the national laws of the importing WTO Members that market economy conditions prevail in a particular industry or sector, *the provisions of subparagraph (a) shall no longer apply to that industry or sector*. This flows logically from the fact that this sentence presupposes the existence of MES criteria at the time of China's accession and is thus linked to the first sentence of section 15(d) such that if China as a whole could not qualify as a ME, then specific sectors could nevertheless qualify. In such case as well, if specific industries or sectors qualify for the MES criteria prior to 11 December 2016, the domestic prices or costs have to be considered for companies from those sectors for normal value establishment.

2.2 Second Sentence of Section 15(d) Concerning the Fifteen-Year Time Limit and Its Effect

On 11 December 2016, section 15(a)(ii) will expire. This has led to heated debate across the globe and a problem

that is still unresolved – what is the exact effect of the expiry of section 15(a)(ii) on normal value establishment for Chinese producers? In the authors' opinion, the language of the second sentence of section 15(d) and the overall structure of section 15 clearly contemplate that from 11 December 2016 onwards, in any event, '*...a methodology that is not based on a strict comparison with domestic prices or costs...*' of Chinese producers can no longer be used by any WTO Member.

Putting aside political and economic arguments, if one were to look at the question only from a legal perspective, it seems counterintuitive to claim that the expiry of section 15(a)(ii) would entail no change in the obligations of WTO Members towards China as far as normal value establishment in AD investigations is concerned and that they could still brand China as a NME and/or use analogue country/special methodologies. The authors certainly disagree with this assessment on several grounds.

First, the argument that since section 15(a) chapeau and subparagraph (a)(i) will not be terminated on 11 December 2016, the continued use of the special/analogue country methodology is permitted,¹⁸ seems to be legally untenable. This is because the Chapeau of section 15(a) states that for price comparability, '*...the importing WTO Member shall use either Chinese prices or costs for the industry under investigation or a methodology that is not based on a strict comparison with domestic prices or costs in China based on the following rules.*' This is just an outline for the rules to be applied and not a rule in itself. Indeed, this is indicated by the use of the words 'based on the following rules' which then leads to two subparagraphs, one of which lays down the rule for the use of Chinese producers' prices or costs and the other of which outlines the situation wherein a special/analogue country methodology 'may' be used.

Additionally, section 15(a)(i) states that:

if market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product, the importing WTO Member shall use Chinese prices or costs for the industry under investigation in determining price comparability.

So on its own this provision has no value in imposing additional rules or creating exceptions because this paragraph cannot be read *a contrario*. This is not only because *a contrario* reading of provisions is generally not accepted in WTO disputes,¹⁹ but, more importantly,

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¹⁶ Paragraph 255 of the Working Party Report on the accession of Vietnam to the WTO.

¹⁷ Section 16 of the Protocol of Accession of Tajikistan to the WTO.

¹⁸ See, for example, Bernard O'Connor, *The Myth of China and Market Economy Status in 2016*, at 3 (undated); Laurent Ruessmann & Jochen Beck, *2016 and the Application of an NME Methodology to Chinese Producers in Anti-Dumping Investigations*, 9(10) *Global Trade & Customs J.*, 457–463 at 462 (2014).

¹⁹ See, for example, WTO Panel Report, *Korea – Commercial Vessels*.

because section 15(a)(ii) lays out the *a contrario* situation, i.e., that:

{t}he importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product.

In any event those who are arguing that based on the rules of treaty interpretation, section 15(a)(i) permits the continuation of the non-use of Chinese producers' prices/costs are disregarding the distinction between the general rules for normal value establishment in Article 2 ADA and an exception, i.e., section 15(a)(ii), that is set to expire, and are furthermore creating a new exception by reading into the text of section 15(a)(i) an expired exception. The proponents of this line of reasoning are starting their interpretation on the wrong foot, i.e., from the Chinese Accession Protocol, whereas the starting point should be the ADA. Put in simpler terms, Article 2 ADA lays down the rules for normal value establishment to be applied by and with respect to exporting producers from all WTO Members without referring to or distinguishing between MEs and NMEs. As will be described in part 3 below, at least the second *Ad* note to Article VI:I GATT 1994 cannot be the basis for the derogation from Article 2 ADA with respect to China. Thus, section 15(a)(ii) of the Chinese Accession Protocol is the sole legally recognized exception permitting WTO Members to derogate from the rules in Article 2 ADA and to apply the special/analogue country methodology. With the expiry of this provision there is no legal basis to use the special/analogue country methodology. Arguing that unless China qualifies as a ME under the national law of the concerned WTO Member – by placing reliance on the non-expiry of section 15(a)(i) of the Accession Protocol special/analogue country methodology for normal value calculation can be used – is tantamount to creating a new exception, i.e., the need to be qualified as a ME by China, for which there is no legal basis in the text in any event. Moreover, as mentioned before, ME or NME status of China is not regulated by WTO law nor is the NME status of China recognized in any WTO Agreement. Additionally, there is no mechanism in the ADA or the Chinese Accession Protocol indicating that the expiry of section 15(a)(ii), section 15(a)(i) would provide the exception and could be alleviated as the basis to derogate from the general normal value calculation rules.

Finally, from a legal and practical point of view it would be useless and incoherent to put in a deadline for the expiry of section 15(a)(ii) or to have even included the second sentence of section 15(d) in the Accession Protocol if the exception provided in section 15(a)(ii) could nevertheless be applied based on some interpretation (not the textual reading) of section 15(a)(i).

Second, while several experts claim that since the second sentence of section 15(d) refers to the expiry of subparagraph (a)(ii) only, as opposed to paragraph (a), NME methodologies could be applied post-11 December 2016,²⁰ the textual and contextual difference between the three sentences of paragraph (d) has been overlooked by them:

- (i) The first and third sentences of section 15(d) impose the burden on China to qualify as a ME as a whole or with respect to industries/sectors under the national laws of WTO Members which had MES criteria at the time of China's accession, for the non-application of the special/analogue country methodology. In contrast, the second sentence was a commitment on the part of the WTO Members that in any event, the special/analogue country methodology would not be applied after 11 December 2016 against China. Thus, in that sense, indeed the result of the first and second sentences was intended to be the same.²¹
- (ii) Furthermore, it seems logical that the first and third sentences of section 15(d) refer to the inapplicability of paragraph (a) as a whole and not merely subparagraph (a)(ii) because, as mentioned previously, WTO agreements do not deal with the ME status of a country and do not regulate the criteria for MES implying that each WTO Member can apply different thresholds for MES qualification. Hence, if the drafters would have referred to simply the expiry of paragraph (a)(ii) in the first and third sentences of section 15(d), it would have amounted to giving legal recognition to the concept of ME and acknowledgement on the part of China that it could be considered as a NME by WTO Members who had MES criteria and those who did not. However, this was not the position of China then and is not now. Furthermore, in such a situation the first and second sentences of section 15(d) read together would imply that if China got MES under the national law of a specific WTO Member before 11 December 2016, the special/analogue country methodology would not be

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²⁰ Jorge Miranda, *Interpreting Paragraph 15 of China's Protocol of Accession*, 9(3) *Global Trade & Customs J.*, 94–103 at 99 (2014); Theodore Posner, *A Comment on Interpreting Paragraph 15 of China's Protocol of Accession by Jorge Miranda*, 9(4) *Global Trade & Customs J.*, 146–153 at 148 (2014); Terence Stewart et al., *The Special Case of China: Why the Use of a Special Methodology Remains Applicable to China after 2016*, 9(6) *Global Trade & Customs J.*, 272–279 at 277 (2014).

²¹ Compare Terence Stewart et al., *The Special Case of China: Why the Use of a Special Methodology Remains Applicable to China after 2016*, 9(6) *Global Trade & Customs J.*, 272–279 at 277 (2014).

used and in any event, the special/analogue country methodology cannot be used from 12 December 2016 implying that from that date, regardless of the national legal criteria, China would be a ME by default.

- (iii) Following from point (ii) above, it seems appropriate that the second sentence of section (d) refers to the expiry of section 15(a)(ii) because it deals with the non-use of a methodology as opposed to the classification or qualification of China as a ME which are the broader issues dealt with in the first and third sentences of section 15(d). Moreover, section 15(a)(ii) is the only enabling clause in section 15(a) permitting the use of a special/analogue country methodology regardless of the legal or practical classification of China as NME under the laws of the WTO Members. Indeed, this seems to be the reason that section 15(c) required WTO Members to notify the special methodologies used for normal value calculation and not the MES criteria.
- (iv) Moreover, it also seems evident that the mention of the words 'in any event' in the second sentence of section 15(d) precludes different results from the three sentences of section 15(d) and bridges the gap. In other words, read as a whole, the second sentence of section 15(d) seems to state that in any event, whether or not WTO Members had MES criteria in their laws at the time of China's accession to the WTO and notwithstanding that China may not have qualified for MES under the laws of those WTO Members that had ME criteria or other Members, the permission to not use Chinese producers' prices or costs does not exist after 11 December 2016.

Third, certain writers on the subject have been dismissive and minimized the AB's ruling in *EC – Fasteners (China)* which establishes that on 11 December 2016, section 15(a)(ii) will expire and special rules for normal value determination cannot be applied to Chinese producers thereafter, since according to them it was dicta. However, the fact remains that the AB provided a legal interpretation on the issue and very precisely delineated the scope of section 15(d):

Paragraph 15(d) of China's Accession Protocol establishes that the provisions of paragraph 15(a) expire

15 years after the date of China's accession (that is, 11 December 2016). It also provides that other WTO Members shall grant before that date the early termination of paragraph 15(a) with respect to China's entire economy or specific sectors or industries if China demonstrates under the law of the importing WTO Member 'that it is a market economy' or that 'market economy conditions prevail in a particular industry or sector'. Since paragraph 15(d) provides for rules on the termination of paragraph 15(a), its scope of application cannot be wider than that of paragraph 15(a). Both paragraphs concern exclusively the determination of normal value. *In other words, paragraph 15(a) contains special rules for the determination of normal value in anti-dumping investigations involving China. Paragraph 15(d) in turn establishes that these special rules will expire in 2016 and sets out certain conditions that may lead to the early termination of these special rules before 2016.*²² [Emphasis added]

Interestingly, while a huge debate is raging in the EU and the European Commission [Commission], under pressure of the EU domestic industries, is conducting an impact assessment²³ and public consultations²⁴ on China's ME status, it has been totally overlooked that the EU itself argued in *EC – Fasteners (China)* that section 15 of China's Accession Protocol 'entitles' it to treat China as a NME until 2016.²⁵

Additionally, in the EU court Case T-512/09 *Rusal Armenal V Council and Commission*, the Council of the EU also argued that China and Vietnam had negotiated a deadline beyond which WTO Members are required to treat them as market economies.²⁶ In the same case, in the judgment issued in November 2013, the EU's General Court also interpreted section 15(d) as containing a cut-off date after which the special methodologies for normal value calculation would be repealed:

In that regard, the Court notes that point 15 of Part I of the Protocol on the accession to the WTO of the People's Republic of China expressly provides for the possibility that other WTO members may not apply Article 2 of the Anti-Dumping Agreement where the producer(s) concerned fail to show that they operate under market economy conditions as regards the manufacture, production and sale of the like product. The same is true of point 3 of Part I of the Protocol on the Accession to the WTO of the Socialist Republic of Vietnam, which, by

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²² AB report, *EC – Fasteners (China)*, para. 290.

²³ http://europa.eu/rapid/press-release_MEMO-16-61_en.htm.

²⁴ <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1455>.

²⁵ AB Report, *EC – Fasteners (China)*, paras 25, 361.

²⁶ Case T-512/09 *Rusal Armenal V Council and Commission*, para. 30:

the Council states that there are also other members of the WTO which do not treat Armenia as a market economy and that, unlike in the cases of the People's Republic of China and the Socialist Republic of Vietnam, the Republic of Armenia did not negotiate a deadline beyond which the other WTO members were required to treat it as a market economy.

reference to paragraphs 527 and 255 of the Working Party Report on the Accession of that country to the WTO, lays down an identical exception. It must be emphasised that, contrary to the Council's and the Commission's contentions, the exceptions in question were not requested by those two candidate countries for accession in exchange for setting a cut-off date after which they would be repealed. As is apparent from paragraph 150 of the Report of the Working Party on the Accession to the WTO of the People's Republic of China and from paragraph 254 of the Report of the Working Party on the Accession of the Socialist Republic of Vietnam, it was the WTO members which raised the issue of price comparability in the candidate countries and obtained the abovementioned commitments from them together with a cut-off date after which the commitments would expire.²⁷

To conclude, according to the authors, from 12 December 2016 onwards, section 15 of China's Accession Protocol cannot be relied upon to use a special/analogue country methodology as regards Chinese imports in AD investigations. This does not imply that China would automatically be considered a ME by all WTO Members because as mentioned before, ME status is subject to the national qualification criteria of the WTO Members and is not the focus of China's Accession Protocol or the ADA. However, even if some WTO members continue to classify China as an NME under their national laws, it would just be a symbolic issue without any particular significance for AD cases as long as they stop using the analogue country methodology against Chinese imports.

3 THE SEARCH FOR ALTERNATIVES

While the above discussion demonstrates that WTO Members cannot resort to the Accession Protocol after 11 December 2016, it remains open whether they can rely on the second *Ad Note* to Article VI:1 GATT 1994 to effectively use a methodology that is not based on a strict comparison with domestic prices or costs in China, i.e., the analogue country methodology. Some experts consider that the second *Ad Note* to Article VI:1 GATT 1994 gives WTO Members the basis to use a special/analogue country methodology post-11 December 2016.²⁸ However, it would appear to us that WTO Members cannot rely on

this provision in the case of China for the following reasons.

First, it needs to be recalled that section 15 was included in China's Accession Protocol precisely because China was an economy in transition and did not fit within the contours of countries intended to be covered by the second *Ad Note* to Article VI:1 GATT 1994, i.e., State trading countries. Paragraph 150 of the working Party Report supports this point:

{s}everal members of the Working Party noted that China was continuing the process of transition towards a full market economy. Those members noted that under those circumstances, in the case of imports of Chinese origin into a WTO Member, special difficulties could exist in determining cost and price comparability in the context of anti-dumping investigations and countervailing duty investigations. In fact, way back in 1998, i.e. prior to China's accession to the WTO, the EU had recognized that China is an economy in transition when it introduced the MET criteria in the basic AD Regulation.²⁹

Moreover, in a relatively recent EU Court case, the General Court also noted that if the existing WTO rules notably the *Ad Note* to Article VI:1 already permitted deviating from the normal value calculation rules in Article 2 ADA, 'the exceptions created – in the form of 'commitments' from the accession country – under the Protocols of accession of the People's Republic of China and the Socialist Republic of Vietnam would serve no purpose.'³⁰

Second, the AB in *EC – Fasteners* explicitly noted that the second *Ad Note* to Article VI:1 is applicable to very specific types of countries which meet two conditions, namely where (i) the state has a complete or substantially complete monopoly over trade; and (ii) all domestic prices are fixed by the state:³¹

{t}he second Ad Note to Article VI:1 refers to a 'country which has a complete or substantially complete monopoly of its trade' and 'where all domestic prices are fixed by the State'. This appears to describe a certain type of NME, where the State monopolizes trade and sets all domestic prices. The second Ad Note to Article VI:1 would thus not on its face be applicable to lesser forms of NMEs that do not fulfil both conditions, that is, the complete or substantially complete monopoly of trade and the fixing of all prices by the State.³²

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²⁷ *Ibid.* at para. 47.

²⁸ Terence Stewart et al., *The Special Case of China: Why the Use of a Special Methodology Remains Applicable to China after 2016*, 9(6) *Global Trade & Customs J.*, 272–279, at 277 (2014).

²⁹ OJ [1998] L128/18.

³⁰ Case T-512/09 *Rusal Armenal V Council and Commission*, para. 47.

³¹ See also Case C-21/14, *European Commission v Rusal Armenal*, para. 51, where the Court of Justice of the EU also interpreted second *Ad Note* to Art. VI:1 on these lines.

³² AB report, *EC-Fasteners (China)*, footnote 460.

Therefore, if any WTO Member would want to base normal value for Chinese producers on analogue country prices or costs, it would have to explicitly prove that the Chinese economy meets these two criteria. While establishing the existence of these criteria is clearly a difficult task in general, the AB ruling above clearly indicates that the second *Ad Note* to Article VI:1 GATT 1994 would not apply as far as China is concerned. This implies that if this provision were to be used in AD investigations concerning Chinese imports to use the analogue country methodology, China could file a WTO dispute in which it could be comfortable of its success.

Third, according to paragraphs 15(a) and 15(d) of China's Accession Protocol, it is incumbent upon Chinese producers/China to satisfy the criteria for ME qualification. In contrast, the burden of proof would be on the WTO Members to establish the criteria in the second *Ad Note* to Article VI:1. Major WTO Members imposing AD duties on Chinese products notably the US and the EU would have significant difficulties in establishing the existence of these criteria considering the shift in their policy of initiating anti-subsidy cases against China as subsidies would not make any sense in a fully state-controlled economy, as contemplated by the second *Ad Note*, because the state would be subsidizing itself.³³ Indeed, this was the very logic applied previously by the US and the EU to not initiate anti-subsidy proceedings against China and other countries that they considered NMEs.

Fourth, it may be noted that when applying the disciplines of Article 2 ADA for the normal value establishment, investigating authorities might decide to resort to adjusting the Chinese prices of certain inputs/raw materials on the basis of international/representative market prices if they find that the Chinese prices of such inputs are 'artificially low' or subject to dual pricing.³⁴

It is recalled that Article 2.2 ADA provides that:

{w}hen 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...such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with...the cost of

production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits. [Emphasis added].

This implies that in the case of 'a particular market situation' the normal value may be constructed. In this context Article 2.2.2.1 ADA further provides that:

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.

Two points need to be noted here. While the particular market situation is not defined in Article 2.2 ADA, it would need to pertain to sales of the like product. This would seem to preclude its invocation in situations where the particular market situation concerns upstream products.

Additionally, as Article 2.2.2.1 does not provide any guidance to authorities in case the records of the exporters/producers do not 'reasonably reflect the costs associated with the production and sale of the product under consideration', some WTO Members consider that they have discretion to interpret and apply these provisions in domestic AD investigations.

Thus, for example, the EU and India³⁵ have in cases concerning countries recognized by them as MEs used the 'particular market situation' exception to disregard domestic sales prices and construct the normal value. Furthermore, in constructing the normal value they have considered that the prices of the inputs/raw materials were not properly reflected in the accounting records of the producers and accordingly applied adjustments on the basis of information from other representative markets.

For instance, in 2002 the Russian Federation was considered a ME by the EU. Simultaneously, the EU amended Article 2(3) of its basic AD Regulation – which is the equivalent of Article 2.2 ADA – to define a particular market situation as follows:

A particular market situation for the product concerned within the meaning of the first subparagraph may be deemed to exist,

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³³ Compare William Watson, *Will Nonmarket Economy Methodology Go Quietly into the Night? – U.S. Antidumping Policy toward China after 2016*, CATO Institute, No. 76, 1–17, at 9 (2014).

³⁴ Dual pricing is a policy practice by which governments set domestic prices of raw material inputs, such as energy at a level below export or world market prices or even below production costs, irrespective of whether or not the final exported good itself is exported at dumped prices.

³⁵ Indian AD measures on *Polypropylene from inter alia Saudi Arabia* (2009), http://commerce.nic.in/writereaddata/traderemedies/adfin_Polypropylene_Oman_SaudiArabia_Singapore.pdf.

*inter alia, when prices are artificially low, when there is significant barter trade, or when there are non-commercial processing arrangements.*³⁶

Furthermore, in Article 2(5) of its basic AD Regulation, which corresponds to Article 2.2.2.1 ADA, the EU added the following provision allowing adjustments to raw material prices based on representative third market prices if it finds that the *costs associated with the production and sale of the product under consideration* are not reasonably reflected in a producer/exporter's records:

If costs associated with the production and sale of the product under investigation are not reasonably reflected in the records of the party concerned, they shall be adjusted or established on the basis of the costs of other producers or exporters in the same country or, where such information is not available or cannot be used, on any other reasonable basis, including *information from other representative markets*. [Emphasis added].

The EU has on the basis of the above provision in Article 2(5) of its basic AD Regulation in many post-2002 AD investigations concerning Russia adjusted the prices of inputs such as gas when constructing the normal value for the product subject to the investigation on the ground that the prices of those inputs were not reasonably reflected.³⁷ While in most of those cases the producers did not have representative domestic sales in the ordinary course of trade so that normal value had to be constructed in any event, in one particular case the EU used the 'particular market situation' justification to disregard the domestic sales and construct the normal value.³⁸

A similar approach has been taken in cases involving other countries where the EU found dual pricing issues³⁹ and, more recently, where the EU found that countries

imposed export taxes on certain raw materials (soya bean and crude palm oil) used in the manufacture of the product concerned (biodiesel).⁴⁰ The WTO consistency of this approach is however debatable and has been challenged in the WTO by Argentina, Indonesia and Russia.⁴¹

As regards export taxes, the EU very recently has also attacked these through its anti-subsidy instrument. In *Ductile cast iron pipes and tubes*,⁴² the EU considered that the imposition of an export tax on iron ore by the Indian government amounted to direction or entrustment to Indian iron ore producers, whether publicly or privately owned, to provide iron ore at less than adequate remuneration to Indian downstream industries.

While the WTO consistency of this approach is questionable considering that there is a WTO Panel report⁴³ rejecting this indirect method of countervailing possible effects of an export tax, it nevertheless shows that post-11 December 201, China's economy does not have to be treated as undistorted in anti-subsidy investigations conducted after that date. Not only does paragraph 15(b) of China's Accession Protocol⁴⁴ not expire in 2016, but the out-of-country benchmarking practice for benefit calculation approved in *U.S.-Anti-Dumping and Countervailing Duties (China)* for China was based on Article 14 of the SCM Agreement, and China's NME status was not relevant for any of the legal analyses done by either the WTO or the USDOC.

4 STATED RATIONALE FOR NME STATUS IN THE EU

In the 33rd Annual Report to the Council and European Parliament by the Commission on its AD, anti-subsidy,

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³⁶ See also ITA anti-dumping annual on the US AD law provisions, Ch. 8 s. B:

Once a market is determined as viable, the sales must be examined to determine if they may be used for NV calculations. In doing this analysis, certain exceptions to basing NV on prices in an EC or third-country market (foreign markets) must be considered. These involve situations where like products are not sold in either usual commercial quantities or in the ordinary course of trade...In addition, the Act provides for 'particular market situations' wherein a foreign market fails to permit a proper comparison with U.S. price. Although the Act does not identify these 'particular market situations,' several are set forth in the SAA...Examples of 'particular market situations' include: (1) where a single sale in a foreign market constitutes five percent of sales to the United States; (2) where there are such extensive government controls over pricing in a foreign market that prices in that market cannot be considered competitively set; and (3) where there are differing patterns of demand in the United States and a foreign market. Note that if any of the preceding circumstances eliminate all EC market sales from consideration, then third-country sales could be considered for NV if there is a viable third-country market.

³⁷ See, for example, *Solutions of urea and ammonium nitrate originating in, inter alia, Russia*, OJ [2008] L75/14 (interim review).

³⁸ *Potassium chloride originating in, inter alia Russia*, OJ [2005] L302/14 (interim review).

³⁹ *Solutions of urea and ammonium nitrate originating in, inter alia, Algeria*, OJ [2006] L365/26 (expiry review).

⁴⁰ *Biodiesel originating in Argentina and Indonesia*, [2013] OJ L315/2 (definitive).

⁴¹ DS473, EU –Anti-dumping measures on biodiesel from Argentina; DS474, EU – Cost adjustment measures and certain anti-dumping measures on imports from Russia; DS480, EU – Anti-dumping measures on biodiesel from Indonesia' Ds49, European Union – Cost Adjustment Methodologies and Certain Anti-Dumping Measures on Imports from Russia – (Second complaint).

⁴² *Ductile cast iron tubes and pipes from India*, [2016] OJ L___/___ (definitive).

⁴³ Panel Report, *US – Export Restraints*.

⁴⁴ Paragraph 15(b) states as follows:

In proceedings under...the SCM Agreement...if there are special difficulties in that application, the importing WTO Member may then use methodologies for identifying and measuring the subsidy benefit which take into account the possibility that prevailing terms and conditions in China may not always be available as appropriate benchmarks. [Emphasis added].

and safeguard actions, the point is made that the manner in which certain key steps in anti-dumping investigations are conducted need not be the same across the EU's trading partners:

*{i}n an anti-dumping investigation, Commission services usually compare the export price of a product with its 'normal value,' which is the price payable in the domestic market of the exporting country or a constructed normal value...However, this methodology can only be used if costs and prices in the exporting nation are reliable and the result of supply and demand, i.e. not subject to significant distortions.*⁴⁵

In the context of AD investigations, then, the concept of MES was introduced to identify situations when the 'usual' methodology can be applied. In official documents on MES, the Commission has stated repeatedly that any MES designation is solely motivated by the goal of properly enforcing its AD legislation. In its 2008 review of China's 'progress' towards MES the Commission noted:

*{t}he assessment of Market Economy Status (MES) is not a judgement of the general functioning of the Chinese economy or a political judgement on whether a market economy per se exists in China. It focuses on a number of specific technical areas related to the influence of state intervention on prices and costs in China. These influences, where they exist, are obviously relevant to trade defence investigations, because they determine the extent to which the costs of exports from China reflect the unfair influence of state intervention.*⁴⁶

Foreign governments may request MES status. The Commission will then establish '*...whether the conditions in the country concerned have evolved to the extent that prices and costs can be used for the purpose of trade defence investigations*.'⁴⁷ The suggestion, it would seem, given the numerous injunctions to reform from the Commission in documents concerning MES, is that once the process of economic transition or development is sufficiently advanced then a trading partner would meet these conditions.

Another impression given is that, like many of the Commission's accounts of its AD enforcement, the assessment of MES is seen as a technical exercise, unsullied by tactical or strategic diplomatic considerations. The

assessment of the Commission's treatment of MES requests, in particular as they relate to China, will thus be assessed on evidential grounds in section 5.

Proceeding in this technocratic manner, the Commission has enunciated five criteria that must all be met before MES status is granted. In its last published review of China's eligibility for MES, the five criteria were stated thus:

1. *a low degree of government influence over the allocation of resources and decisions of enterprises, whether directly or indirectly (e.g. public bodies), for example through the use of state-fixed prices, or discrimination in the tax, trade or currency regimes.*
2. *an absence of state-induced distortions in the operation of enterprises linked to privatisation and the use of non-market trade or compensation system.*
3. *the existence and implementation of a transparent and non-discriminatory company law which ensures adequate corporate governance (application of international accounting standards, protection of shareholders, public availability of accurate company information).*
4. *the existence and implementation of a coherent, effective, and transparent set of laws which ensure the respect of property rights and the operation of a functioning bankruptcy regime.*
5. *the existence of a genuine financial sector which operates independently from the state and which in law and practice is subject to sufficient guarantee provisions and adequate supervision.*⁴⁸

The range of policies implicated by these criteria is substantial, including price regulation, privatization, corporate governance law, bankruptcy, and the regulation of national financial systems. This might give the impression that attaining MES status requires meeting a high standard – yet this is hard to square with the fact that only 15⁴⁹ EU trading partners have failed to attain MES.

In turn, this begs the question: what must a trading partner demonstrate to meet each of these criteria? With respect to the first requirement, the Commission argued:

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⁴⁵ 33rd Annual Report from the Commission to the Council and the European Parliament on the EU's Anti-Dumping, Anti-Subsidy and Safeguard activities (2014), Commission Staff Working Document at 39 (2015), http://trade.ec.europa.eu/doclib/docs/2015/august/tradoc_153702.pdf.

⁴⁶ Commission Staff Document on progress by the People's Republic of China towards graduation to Market Economy Status in Trade Defence Investigations at 4 (2008), http://trade.ec.europa.eu/doclib/docs/2009/june/tradoc_143599.pdf.

⁴⁷ *Ibid.*, at 5.

⁴⁸ *Ibid.*, at 6.

⁴⁹ College orientation debate on the treatment of China in anti-dumping investigations (2016), http://europa.eu/rapid/press-release_MEMO-16-61_en.htm.

{t}o meet this criterion, a state must demonstrate that it does not exercise undue influence over the allocation of economic resources in the economy or decisions of companies. This could take the form of price fixing, obligations to produce for export, restrictions imposed on exports of raw materials or subsidies for industrial inputs.⁵⁰

Making reference to Chinese restrictions on imports and exports, price-fixing, tax measures, industrial policies, and the subsidization of inputs, China was found not to have met this test. The Commission concluded its discussion on this point by arguing that '*i>n order to met (sic) this criterion it would be necessary for the Chinese authorities to demonstrate that the forms of intervention outlined above had been discontinued*'.⁵¹ The word 'discontinued' implies complete removal of the offending policy instruments and may not sit well with the view of MES as being granted once the development process has reached a certain point.

The Commission's discussion of Chinese industrial policy measures further reveals the tensions in how far it is prepared to go in demanding a laissez-faire approach. Having noted that the Chinese government has taken steps to encourage economic activities beneficial to development, the Commission notes that these may represent a 'legitimate approach.' The Commission, however, goes on to argue:

{t}he only question for the current assessment is whether such policies distort domestic competitive conditions in favour of domestic operators and thereby make domestic cost prices and costs unreliable.⁵²

This raises the possibility, then, that a policy being legitimate is trumped by a finding that it has introduced a distortion. It may not be easy to identify industrial policies that, by definition, favour certain activities over others in sectors where firms export or sell to firms that export, which do not also alter market outcomes.

In the Commission's view the Chinese economy met the second criterion in an earlier assessment of its MES conducted in 2004. The Commission noted in 2008 that it had no 'external information' that called into question its earlier assessment.

With respect to the third criterion, the Commission argued:

{i)n order to meet this criterion it is necessary for a state to demonstrate that within its economy companies are subject to a transparent and rigorous system of company law. This includes being subject to international accounting standards and international standards for shareholder protection and transparency. Transparent and reliable company records are absolutely central to trade defence investigations, as they are the chief means of determining a company's costs.⁵³

While noting a number of reforms by the Chinese government in this area, the Commission found that China had not met this criterion. The effective implementation and, where appropriate, enforcement of these reforms was stressed by the Commission.⁵⁴ Moreover, the Commission took the opportunity to make the case for greater foreign participation in the governance of Chinese enterprises.

Unlike the first criterion, which could be met by the withdrawal of Chinese state measures, as far as the third criterion is concerned, China is to be judged ultimately by the manner in which its enterprises react to the implementation and enforcement of these corporate governance reforms. Moreover, while the first criterion sends a signal in favour of a smaller, less intrusive state, the signal given by the Commission's discussion of the third criterion is that of a more expansive state in certain areas of policy. Note that China was not given the benefit of any doubt concerning the consequences of implementing these reforms.

When it assessed China on the fourth criterion, the Commission argued:

{t}o meet this criterion a state must demonstrate that within its economy an effective legal regime with respect to property rights, bankruptcy, and the protection of intellectual property. Ambiguities over private ownership are important in trade defence investigations, because they can effect access to credit by private companies, and non-payment of royalties for the use of intellectual property can obviously constitute an unfair cost distortion.⁵⁵

In addition to repeating the argument that it was too soon to be assured of the proper implementation of reforms to Chinese property rights, bankruptcy law, and competition law, the Commission took the opportunity to

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⁵⁰ Commission Staff Document on progress by the People's Republic of China towards graduation to Market Economy Status in Trade Defence Investigations at 7 (2008).

⁵¹ *Ibid.*, at 12.

⁵² *Ibid.*, at 9.

⁵³ *Ibid.*, at 12.

⁵⁴ For example, it was argued that '*{t}he adoption of a shareholding system is also an important step, but its final impact on corporate governance remains to be seen*' (Commission at 15 (2008)).

⁵⁵ *Ibid.*, at 15.

opine on various policy choices made in those reforms. For example, the Commission cast doubts on the wisdom of using the remaining resources of bankrupt state-owned enterprises to help sacked workers to adjust, preferring that such resources be paid to lenders.⁵⁶ The Commission also felt it necessary to comment on the availability of trained expertise to implement the new Bankruptcy Law. Any pretence of engaging in an arms-length evaluative process, as opposed to engaging in policy advocacy, would appear to have been lost.

China was found not to have met the fifth criterion as well. According to the Commission's review in 2008:

*{t}o meet this criterion a state must demonstrate that its financial sector operates free from state control and is governed by commercial standards in terms of cost of credit. These things are central to trade defence investigations, because access to credit at special rates constitutes an obvious and unfair competitive distortion in favour of a company.*⁵⁷

The Commission rejected Chinese arguments that no discrimination existed in the allocation of credit. As evidence to support its doubts, the Commission stated that, while state-owned enterprises were responsible for less than 30% of Chinese national income, 70% of lending by state-owned banks went to state-owned enterprises.⁵⁸ Chinese banks were faulted for not allocating capital according to international prudential standards and the cost of capital was said to be 'artificially lowered for many enterprises'.⁵⁹ The role that the Chinese central bank played in constraining commercial banks by 'fixing' interest rates was a particular concern, apparently because it creates an 'unfair distortion of true prices'.⁶⁰ In the light of the rethink of banking regulation and the state attempts in many jurisdictions to influence bank lending since the onset of the global financial crisis, these criticisms may have lost some force. In any event, it is noted that there are no upper limits applicable to commercial banks for RMB loan interest rates and the floor lending rate was abolished by the People's Bank of China in July 2013,⁶¹ as part of the continued reform of the Chinese banking sector.

Since the Commission's 2008 review of Chinese MES, if another review has been conducted it has not been made public. In August 2015 the Commission stated that no

consultations on MES with China had taken place after the 2008 review.⁶² While the reasons for Chinese disengagement are not known, their unwillingness to engage in the Commission's MES process may say much about China's assessment of its transparency and technocratic nature.

5 ASSESSING THE ASSESSORS OF NME STATUS

Further perspective on the process employed by the Commission with respect to MES reviews can be obtained by examining cases where one of the five criteria were met by transition economies. In a review in 2009, Armenia was found to have met two criteria (the first and fifth).⁶³ The next year Vietnam was found to satisfy one of the five criteria.⁶⁴ Neither review resulted in MES being awarded as other criteria remain to be satisfied.

Table 1 summarizes the arguments and evidence used by the Commission when making these positive findings in favour of Armenia and Vietnam. Despite identifying problematic customs charges and having concerns about recently announced crisis-era subsidies, the Commission was prepared to give Armenia the benefit of the doubt in so far as the degree of government influence over resource allocation is concerned. Likewise, the Commission was prepared to invest considerable faith in the WTO accession process and the implementation of the associated commitments that it was prepared to rule that deregulation in the Vietnamese economy was permanent. No such benefit of the doubt was accorded to China, even though it had completed its WTO accession process more than six years before the Commission's MES review in 2008.

The Commission's assessment of banking regulation and its enforcement appears to differ between the Chinese review in 2008 and the Armenian review in 2009. Despite China having enacted reforms, the Commission felt it was too early to judge whether China met the fifth criterion. In contrast, just eleven months after Armenian banks were to implement international financial reporting standards, and one month before other financial institutions were to comply with these standards, the Commission did not feel the need to defer judgment about effectiveness of

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⁵⁶ *Ibid.*, at 17.

⁵⁷ *Ibid.*, at 19.

⁵⁸ *Ibid.*, at 19.

⁵⁹ *Ibid.*, at 25.

⁶⁰ *Ibid.*, at 27.

⁶¹ <http://online.wsj.com/article/SB10001424127887324448104578615430573714510.html>, <http://www.thehindu.com/business/Economy/china-eases-control-on-lending-rates/article4932004.ece>.

⁶² *Assessment of Trade Defence Policy Decisions for 2014*, Directorate-General for External Policies, Policy Department, European Parliament at 6 (2015).

⁶³ Commission Staff Document on progress by Armenia towards graduation to market economy status in trade defence investigations (2009).

⁶⁴ Commission Staff Document on progress by the Socialist Republic of Vietnam's request for graduation to market economy status in trade defence investigations (2010).

implementation. Perhaps national circumstances were that different; otherwise it is difficult to rationalize on technocratic grounds the asymmetric treatment.

With respect to the evidence marshalled in the Armenian, Chinese, and Vietnamese cases, there is a marked difference. The Commission's assessments in the latter reviews made frequent reference to specific reforms, reports of third parties (typically, international organizations), and often cited facts to support their arguments. Having said that, the degree to which evidence is marshalled in the Commission's latter reports pales in comparison to that found in certain MES-related reports of the US Department of Commerce.⁶⁵

Further concerns can be raised about the Commission's assessments of MES once publicly available rankings of policy stance are considered. As noted in Table 1, from time to time the Commission has found it appropriate to cite evidence from the World Bank's extensive *Doing Business* database. While that database includes information on some policies that are unrelated to the five MES criteria, that is not the case for every metric.

In Table 2 information from the 2016 *Doing Business* ranking on several policy domains relevant – at least as the Commission has argued it – for AD investigations are reported for the six nations that have asked the EU to grant MES and which the EU, till date, has refused. Furthermore, the worst rankings of the thirty-one countries the World Bank classifies as 'OECD high income'⁶⁶ is presented as well. The EU grants MES to all of the members of the latter group (that are not its own Member States.) It will be interesting to see if, on rankings of policies of relevance for the implementation of AD investigations, China is ranked worse than the worst high income nation.

In terms of the aggregate 'ease of doing business' China's ranking does indeed fall short of the worst high income OECD nation. However, once the components of that ranking are considered – focusing on specific policy domains as the Commission does in its MES assessment – then China outperforms the worst high income OECD nations in all but one case. Moreover, in all but one case, the worst high income OECD nation is a Member State of the EU.⁶⁷ This implies that, on the World Bank's longstanding measures of the national business environment, China is ranked at about the same level as at least one Member State of the EU, where high standards are supposed to be in effect.

The one policy domain where China ranks worse than the high income OECD nations relates to trading across borders. Given the subject matter of this paper, then this could be a significant adverse finding. However, as the annex table shows, Chinese underperformance here relates to the time and cost of importing but not to exports (whose treatment is presumably of relevance in AD investigations of Chinese products shipped to the EU). Overall, while the World Bank's *Doing Business* database is not the only independent assessment of policy stance, it is certainly both high profile, frequently used (even by the Commission) and easy to access. After careful reflection, setting aside the findings of this particular database may be appropriate, but that only highlights the need for a comprehensive evidence-driven assessment.

In the light of these findings, any decision by the Chinese authorities to disengage from the Commission's MES process may not be that hard to rationalize. Concerns of asymmetric treatment and incomplete and selective use of evidence cannot be ruled out *a priori*. With Chinese disengagement, any notion that the MES process can be used as a lever to encourage further reform in that country can be set aside. This in turn begs the question what remaining, legitimate public policy purpose is being served by retaining discretion to treat Chinese firms accused of dumping more harshly than other foreign firms.

6 CONCLUSIONS

Our analysis has attempted to show that from 12 December 2016, WTO members can no longer use the analogue country or similar methodologies as the basis for normal value calculations in AD proceedings targeting China and rather should use Chinese domestic prices or costs.

Nor will WTO members be able to use the second *Ad* note to Article VI:1 of the GATT 1994.

However, contrary to what some scaremongers would like decision-makers to believe, this does not mean that the EU or other markets will have no defence against genuine Chinese dumping practices. Other provisions in either the ADA or the SCM Agreement offer sufficient guarantees against that.

What it does mean is that from 12 December 2016, WTO members can no longer use inherently flawed and discriminatory methods to calculate normal values in AD

Notes

⁶⁵ See, for example, US Department of Commerce (n.d.). The wide range of references found in the 156 footnotes in this official report on Vietnam, including numerous references to government acts, gives the impression that the document was thoroughly researched. US Department of Commerce, Antidumping Duty Investigation of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam – Determination of Market Economy Status, A-552-801.

⁶⁶ Australia, Austria, Belgium, Chile, Canada, the Czech Republic, Denmark, Estonia, Finland, France, Greece, Germany, Hungary, Iceland, Ireland, Israel, Italy, the Republic of Korea, Luxembourg, the Netherlands, New Zealand, Norway, Poland, Portugal, the Slovak Republic, Slovenia, Spain, Sweden, Switzerland, the United Kingdom, and the United States are members of this group.

⁶⁷ In the rankings where the worst high income OECD member was an EU Member State, the worst ranked nation was either Greece, Italy or Luxembourg.

proceedings involving China, leading to artificially high dumping margins.⁶⁸ From that day onwards they will therefore have to abide by the original seventh commandment of Animalism and not the revised one.⁶⁹

Furthermore, our assessment of the manner in which the Commission has conducted MES reviews casts doubt on the quality of the evidentiary base used, on the

apparent willingness to give some trading partners the benefit of doubt and not to others, and on the utility of the review process as a lever to encourage reforms in transition economies, such as China. The lapsing of the legal basis of MES as it relates to China may actually do the Commission a favour in drawing to a close another failed attempt to exercise leverage over the rising economic powers.

Table 1 Evidence and Assessment of the Commission When Accepting a Trading Partner Meets One of the Five Criteria for MES

<i>Economy/Year Document code</i>	<i>Criteria</i>	<i>Assessment</i>	<i>Evidence Referred to in the Commission's Assessment</i>
Armenia/2009 SEC(2009) 1681 final	1	<i>'With regard to the first criterion, it appears that the degree of state influence in the economy is not significant. The evidence available suggests that the Governments' role in the allocation of resources or setting of prices is no longer significant.'</i> (p. 4) <i>'The trade regime in Armenia is liberalised and while this is offset somewhat by the problems outlined in the customs sector it is not evident how these problems could have a distorting impact in the context of prices and costs in trade defence investigations. There is no evidence to show that subsidies are common in Armenia and any proposals to introduce subsidies as a means to address the economic crisis are an exceptional measure. In any event given that the aforementioned subsidies are only plans for the present, it would be severe to refuse this criterion on this basis.'</i> (p. 10)	<ul style="list-style-type: none"> – Reference made to reports and assessments by WTO, Asian Development Bank, World Bank, International Monetary Fund [IMF], and European Bank for Reconstruction and Development. – Specific reference to data on administrative fees charged by customs. – Specific reference to crisis-era government policy statements and national budget. – Specific reference to gas prices. – Specific reference to Armenia's rank in 2009 World Bank <i>Doing Business</i> report.
Armenia/2009 SEC(2009) 1681 final	5	<i>'Despite the fact that the Armenian financial sector is small, significant reforms have taken place with the banking sector fully privatised, the legislative framework in place and the Central Bank acting as regulator in the sector. The return to a floating exchange rate, as well as improved access to financing are positive factors in this context. On the basis of the above Armenia would appear to meet this criteria'</i> (p. 20). <i>'In addition the development of an independent, yet well-regulated financial sector is also an important element in creating the right environment for industry to develop.'</i> (p. 20)	<ul style="list-style-type: none"> – Specific reference to the number, type, and ownership of firms in the Armenian financial sector. – Specific reference to reform acts undertaken, adherence to international financial reporting standards, and regulatory role played by the Central Bank (which assumed these responsibilities in 2006). – Two references to relevant component rankings in the World Bank's <i>Doing Business</i> report for 2009. – Specific reference to reports and technical assistance by the World Bank and the IMF. – Reference to absence of intervention in foreign exchange market.
Vietnam/2010 SEC(2010) 122 final	1	<i>'Conclusive progress has been registered for this particular criterion. The private sector has shown outstanding performance and development. There is a clear plan leading to the convergence of the few remaining administered prices with market prices. The legal provisions permitting discriminations (sic) between private and public sector enterprises have been removed. Also, state interference in the decision-making processes of companies—both in the form of restrictions and conditions limiting the scope of their activities—has been completely eliminated.'</i>	<ul style="list-style-type: none"> – Specific reference to numerous reforms, including those to be implemented during 2010. – With respect to regulating electricity prices (a key input often referred to by the Commission) this report notes: <i>'(i)n this regard, Vietnam has underlined that the practise of controlling electricity prices is still applied in a number of industrialised countries.'</i> (p. 7) – Specific reference to IMF country reports (e.g., <i>'According to the IMF's current Country Report for Vietnam, administered prices are estimated to account for less than 10% of the Consumer Price Index Basket'</i> (p. 8)) and assessments by the Asian Development Bank.

Notes

⁶⁸ See FTA, *To ME or Not to ME: China's Status After 11 December 2016*, position paper (November 2015), footnote 3 *supra*.

⁶⁹ George Orwell, *Animal Farm* (Houghton Mifflin Harcourt 1990). As will be known, the original seventh commandment '[a]ll animals are equal' was later revised to '[a]ll animals are equal but some animals are more equal than others.'

Normal Value in Anti-Dumping Proceedings against China Post-2016

<i>Economy/Year Document code</i>	<i>Criteria</i>	<i>Assessment</i>	<i>Evidence Referred to in the Commission's Assessment</i>
		<p><i>'The Commission considers that the information received from external sources confirms that Vietnam has made decisive progress in removing State interference in the Vietnamese economy and creating an economic environment that does not distort market prices... This situation should be permanent as Vietnam has to comply with the commitments agreed by its accession to the WTO. On the basis of the elements outlined above, the Commission concludes that Vietnam has successfully completed the endeavour of fulfilling the conditions with respect to criterion 1.'</i> (p. 9).</p>	<ul style="list-style-type: none"> – Reference to certain WTO accession obligations. – Reference to technical assistance programmes of donors. – Specific reference to the share of output generated by the private sector, number of enterprises, and changes therein in recent years.

Table 2 Comparing Applicants for MES with High Income OECD Nations using the Doing Business Rankings

<i>Non-Market Economy Seeking MES from the European Union</i>	<i>Doing Business Category and Ranking in 2016 (1=Best)</i>						
	<i>Ease of Doing Business (Overall Ranking)</i>	<i>Registering Property</i>	<i>Getting Credit</i>	<i>Paying Taxes</i>	<i>Trading across Borders</i>	<i>Enforcing Contracts</i>	<i>Resolving Insolvency</i>
Armenia	35	14	42	41	29	28	71
Belarus	44	7	109	63	25	29	69
China	84	43	79	132	96	7	55
Kazakhstan	41	19	70	18	122	9	47
Mongolia	56	44	59	91	74	80	89
Vietnam	90	58	28	168	99	74	123
<i>Comparators:</i>							
Worse ranked OECD high income country	61	144	167	137	89	132	80
Is worst ranked OECD high income country a EU Member State?	Yes	Yes	Yes	Yes	No	Yes	Yes
Is China ranked worse than Worst OECD high income country?	Yes	No	No	No	Yes	No	No

Data source: www.doingbusiness.org, accessed on 5 February 2016.

Annex Table Comparison of China with High Income OECD Nations on Components of the 'Trading across Borders' Component of the 2016 Doing Business Ranking

<i>Component</i>	<i>2016 Doing Business Data</i>		
	<i>China</i>	<i>Worst OECD High Income Country</i>	<i>Is China Worse Than Worst OECD High Income Country?</i>
Trading Across Borders (overall rank)	96	89	Yes
Time to export: Border compliance (hours)	26	62	No
Cost to export: Border compliance (USD)	522	749	No

<i>Component</i>	<i>2016 Doing Business Data</i>		
	<i>China</i>	<i>Worst OECD High Income Country</i>	<i>Is China Worse Than Worst OECD High Income Country?</i>
Time to export: Documentary compliance (hours)	21	62	No
Cost to export: Documentary compliance (USD)	85	264	No
Time to import: Border compliance (hours)	92	64	Yes
Cost to import: Border compliance (USD)	777	655	Yes
Time to import: Documentary compliance (hours)	66	44	Yes
Cost to import: Documentary compliance (USD)	171	163	Yes

Data source: www.doingbusiness.org, accessed on 5 February 2016.