IMPLICATIONS OF THE EU'S POSITION ON TRADE DISTORTION FOR EU-CHINA TRADE RELATIONS: FROM SELECTIVE ADAPTATION TO COORDINATED COMPLIANCE

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ABSTRACT

This paper revisits the "significant distortion" standard created in the European Union's (hereinafter "EU") anti-dumping trade regulation, which leads to the application of third-country prices in the calculation of dumping margins. The authors argue that: (1) According to the detailed analysis in this article, it remains in question as to whether the "significant distortion" standard adopted by the EU is consistent with the EU's World Trade Organization (hereinafter "WTO") treaty obligation under Paragraph 15 of the China's WTO Accession Protocol. (2) In the big picture and from a normative and strategic perspective, this paper argues that the paradigm of selective adaptation provides a more comprehensive understanding of both the EU's new trade policies and China's socialist market economy. (3) As a policy suggestion, it is proposed that, instead of using anti-dumping investigations to address the

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problems of China's state centred economy, coordinated compliance of international trade and human rights, with a focus on the labour rights in China, may be a desirable policy approach for the EU to take towards China in hope of a better treaty performance by China in both trade and human rights. This policy approach of coordinated compliance does not involve anti-dumping as a policy tool, but it is used by developing a comprehensive set of labour and environmental standards for Chinese and other non-EU producers to follow and comply with. Labour and environmental standards can be used to determine whether the fair trade is achieved in China's exports to the EU. To ensure labour and environmental standards are met will also significantly increase the production cost and exporting price of Chinese and other foreign products. This policy approach will also have a strong political implication for the future of EU-China trade relations.

KEYWORDS: *antidumping, non-market economy, significant distortion, selective adaptation, coordinated compliance, EU, China, WTO*

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I. INTRODUCTION: CHINA'S SOCIALIST MARKET ECONOMY AND SELECTIVE ADAPTATION OF WESTERN LIBERAL NORMS: A CONCEPTUAL AND CONTEXTUAL ANALYSIS

Twenty years ago, China's accession to the World Trade Organization (hereinafter "WTO") in December 2001 signalled a milestone in the country's economic development and reform. Twenty years later, China's WTO membership has enabled the country to become a trade superpower and has greatly changed the global economic landscape. On December 2, 2021, while many scholars and practitioners in China were celebrating the 20th anniversary of the country's accession to the WTO, the Fourth Chamber of the European Court of Justice (hereinafter "ECJ") rendered a judgment on the appeal of an anti-dumping case *European Commission and GMB Glasmanufaktur Brandenburg GmbH v. Xinyi PV Products (Anhui) Holdings Ltd*, which concerns the interpretation of Article 2(7)(b) and (c) of the EC Regulation No. 1225/2009 (hereinafter "EC Basic Regulation") on the "Undertaking operating under market economy conditions" status, specifically the concept of "significant distortions carried over from the former non-market economy (hereinafter "NME") system," within the meaning of the third indent of Article 2(7)(c)—Tax incentives. This judgment by the ECJ reveals the implications and linkages of the EU's anti-dumping law and policy and China's economic model, featured with the latter's "socialist market economy."

In July 2021, it was argued in an article published in *the Economist* magazine at the occasion of the 100th anniversary of the founding of China's ruling Communist Party (hereinafter "CCP") that a most important reason for the CCP's longevity is its "ideological agility."[1] Whereas the People's Republic of China's (hereinafter "PRC") political normative discourse during the Mao era from 1949 to 1978 was preoccupied in terms of national sovereignty and planned economy based on the communist ideology, the post-Mao era party ideology enshrines the primacy of economic development and political stability and, thus, marks a significant shift towards economic pragmatism. The CCP's ideological agility in the post-Mao era can be traced back to 1978 when Deng Xiaoping shifted China's policy focus to "reform and openness" that began in late 1978, which refers to the changing of the existing political and economic system by learning from the West and participating in the international system. After the beginning of the economic reform in 1978, the Maoist orthodoxy began to be repudiated and since then the economic reform has been based on Chinese and international experience, including practices of different countries,

[1] *Still Going Strong*, ECONOMIST, June 26, 2021, at 11.

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whether socialist or capitalist, or European or Anglo-American.[2] This ideological agility as featured within Deng's "socialist market economy" preserved "the essence of China's traditions while also utilizing foreign knowledge."[3]

China's socialist market economy involves a dynamic of selective adaptation where the Western term of "market economy" is locally contextualized in China and the normative discourse of the CCP leads to different perceptions of the norms and values underpinning theory of capitalism and market economy. This concerns the content and the effect of market economy as perceived by the Party-state. Whether Western liberal norms of market economy conflict with the PRC's official normative discourse determines how they are selectively adapted into the local context. Moreover, China's compliance with the WTO, including the compatibility of its socialist market economy with the WTO, involves and depends on the dynamics of selective adaptation in the context of local norms, including the Party ideology and normative discourse that underlie the PRC's system of socialist market economy.[4] As such, the selective adaptation of international norms in China has been described as "a coping strategy to balance local needs against the requirement for compliance with external rules."[5]

On the other hand, for the PRC's leadership, the country's WTO membership during the last twenty years has not only opened more markets to Chinese products but has also served China's internal reform agenda by providing extra international leverage for the government to force through difficult reforms of its domestic economic system.[6] The WTO is founded on Western liberal traditions and the principles of transparency, rule of law, and non-discrimination, and the Protocol of China's WTO Accession reaffirms the country's commitment to comply with WTO rules through further reforms towards a Western standard market economy.[7] China's strategy of reforming the domestic economy and legal system since its accession to the WTO was reaffirmed by the PRC government in its white paper "China and the World Trade Organization," which asserts that China has been:

> Consistently reforming to develop the socialist market economy. China has accelerated efforts to improve the socialist market

[2] Jianfu Chen, *The Transformation of Chinese Law — From Formal to Substantial*, 37(2) H.K. L.J. 689, 689 (2007).
[3] PITMAN B. POTTER, CHINA'S LEGAL SYSTEM 31 (2013).
[4] *Id. See generally* PITMAN B. POTTER, ASSESSING TREATY PERFORMANCE IN CHINA: TRADE AND HUMAN RIGHTS (2014).
[5] GLOBALIZATION AND LOCAL ADAPTATION IN INTERNATIONAL TRADE LAW 285 (Pitman B. Potter & Ljiljana Biuković eds., 2011).
[6] Donald C. Clarke, *China's Legal System and the WTO: Prospects for Compliance*, 2(1) WASH. UNIV. GLOB. STUD. L. REV. 97, 97 (2003).
[7] *Id.* at 97-98.

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> economy system and strengthen the market system. This has involved reorganizing the relationship between the government and the market, letting the market play the decisive role in resource allocation and the government play its role better.[8]

However, the United State (hereinafter "US") government did not share this view. In September 29, 2021, the United States and the European Union held an inaugural meeting of the US-EU Trade and Technology Council and established "Common Principles to Update the Rules for the 21st Century Economy," the very first of which is the "global trade challenges and addressing non-market trade distortive practices,"[9] with a focus on "trade policy cooperation towards Non-Market Economies" that is commonly seen as targeting the PRC.[10] This coincides with the position of the US government during the Trump Administration, as shown in the communication titled "China's Trade-Disruptive Economic Model" submitted by the delegation from the US to the WTO in July 2018.[11] In it, the US described China's economic model as trade-disruptive and as having a non-market nature, especially regarding issues such as state-owned enterprises (hereinafter "SOEs"), law as an instrument of the state, industrial policy and forced technology transfer.[12] According to the US government, China's "socialist market economy" was not a market-oriented economy but rather an economy controlled both directly and indirectly by the government.[13] This is also reflected in multilateral trade agreements. For example, Article 32.10 of the *Agreement between the United States of America, the United Mexican States, and Canada* (USMCA), titled "Non-Market Country FTA (Free Trade Agreement)," provides that "entry by a Party into a free trade agreement with a non-market country will allow the other Parties to terminate this Agreement on six months' notice and replace this Agreement with an agreement as between them."[14] Overall, as Ian Bremmer describes in his book "The End of the Free Market: Who Wins the

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[8] *Full Text*: *China and the World Trade Organization*, ENGLISH.GOV.CN (June 28, 2018, 3:51 PM), http://english.www.gov.cn/archive/white_paper/2018/06/28/content_281476201898696.htm.
[9] *FACT SHEET: U.S.-EU Establish Common Principles to Update the Rules for the 21st Century Economy at Inaugural Trade and Technology Council Meeting*, THE WHITE HOUSE (Sept. 29, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/09/29/ fact-sheet-u-s-eu-estab %20lish-common-principles-to-update-the-rules-for-the-21st-century-economy -at-inaugural-trade-and-technology-council-meeting/.
[10] *U.S.-EU Trade and Technology Council Inaugural Joint Statement*, U.S. DEP'T OF COM. (Sept. 29, 2021), https://www.commerce.gov/news/press-releases/2021/09/us-eu-trade-and-technology-counc il-inaugural-joint-statement.
[11] General Council, *China's Trade-Disruptive Economic Model: Communication from the United States*, WTO Doc. WT/GC/W/745 (July 11, 2018).
[12] *Id.*
[13] *Id.* ¶ 1.5.
[14] Agreement Between the United States of America, the United Mexican States, and Canada, Can.-Mex.-U.S., art. 32.10, Nov. 30, 2018-Dec. 10, 2019 (entered into force July 1, 2020).

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War between States and Corporations," China is the primary driver in the rise of state capitalism and a challenge to the free market economies of the developed world.[15]

These contrasting views indicate different perceptions and interpretations of the meaning of the term "market economy" developed by Adam Smith centuries ago. In his remarkable and thought-provoking book *Adam Smith in Beijing*, historical sociologist Giovanni Arrighi argues that contemporary China is a "non-capitalist market economy", a term similar to the Chinese official term of a "socialist market economy." As Arrighi suggests, China's non-capitalist market economy, which includes both private and state-owned enterprises, is a reinterpretation of Adam Smith's vision of a large market economy managed by a strong state with the ability to control private and state monopolies in favour of a free market that is competitive but subordinate to the state's responsibility to ensure that the accumulated social wealth is widely dispersed to improve living standards of the general population, and in contrast to the Western or European capitalist model of neoliberalism in which the state is subordinate to the interests of capitalists, and which features the endless expansion of the capitalist system, as exemplified by economic globalisation. Arrighi observes that the market economy has no single trajectory and need not be capitalist, and that China's non-capitalist market economy conforms to the "Smithian new Asia age model" conceptualised by Arrighi.[16]

Based on Adam Smith's theory of comparative advantage at its core, free trade as a major principle of the current international trade law regime, as represented by the WTO, has greatly facilitated the development of global trade liberalization. In the meantime, to protect their own economic interests and domestic industries, many nations adopted new attitudes towards a more unilateral position in both theory and practice based upon Alexander Hamilton's infant industry theory. Unilateralism as a process of selective adaptation may encompass practices such as imposing limits on imports and protecting domestic industries by means of anti-dumping provisions, imposing countervailing or anti-subsidy duties, establishing trade barriers through anti-dumping investigation, and imposing anti-dumping duties on imported products.[17] This is also reflected in the remarks by European Commission President Jean-Claude Juncker on the EU's Regulations on protection against dumped and subsidized imports: "we will do whatever it takes to defend European producers and workers when others distort the

[15] *See generally* IAN BREMMER, THE END OF THE FREE MARKET: WHO WINS THE WAR BETWEEN STATES AND CORPORATIONS? (1st ed. 2010).
[16] *See generally* GIOVANNI ARRIGHI, ADAM SMITH IN BEIJING: LINEAGES OF THE TWENTY-FIRST CENTURY (2009).
[17] Marc J. Melitz, *When and How Should Infant Industries Be Protected?*, 66 J. INT'L ECON. 177, 177 (2005).

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market or don't play by the rules."[18]

In the big picture, both the EU's interpretation of WTO rules (to be discussed below in Part Ⅱ) and China's socialist market economy suggest the paradigm of selective adaptation. Many states choose not to fully comply with WTO and other international laws because of their need to balance international treaty obligations with domestic policy priorities.[19] They achieve this balancing act by selectively interpreting and applying the provisions of international treaties.[20] The selective adaptation of international norms has the aim of treating local social acceptance of international norms as a badge of legitimacy.[21] A satisfactory degree of compliance with international rule cannot be expected if it fails to blend with local interest and legal culture.[22] Selective adaptation provides us with a unique perspective to understand the interplay between the WTO rule regime and the treaty performance of its contracting parties, including PRC's socialist market economy and EU's anti-dumping regulations. It suggests the importance of a normative consensus in that "the sharing of international practice rules does not necessarily indicate consensus on the normative order underlying those rules."[23]

In summary, both Pitman Potter's concept of "selective adaptation" and Giovanni Arrighi's "Smithian new Asia age model" suggest that: (1) the market economy, as Giovanni Arrighi argues, has no single trajectory and need not be capitalist, and that China's non-capitalist market economy, which includes both private and state-owned enterprises, conforms to the "Smithian new Asia age model." (2) Whereas China's socialist market economy is seen as a selective adaptation of Adam Smith's theory of market economy, the EU's interpretation and implementation of the Section 15 of China's WTO accession protocol, as represented in the Article 2 of EU Basic Regulation, also suggests a paradigm of selective adaptation of WTO rules.

By reference to a case study of a newly rendered judgment by the ECJ, Part II of our article provides a detailed analysis and examination of the "significant distortion" standard in EU's anti-dumping laws and practices, as this EU standard is used to determine the normal value of imported products in anti-dumping investigations. Part III of this article attempts to provide an

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[18] *EU Trade Defence: Stronger and More Effective Rules Enter into Force*, EUR. COMM'N (June 7, 2018), https://trade.ec.europa.eu/doclib/press/index.cfm?id=1859&mc_cid=195b8a8b0b&mc_eid=%2015028e403f.

[19] RESEARCH HANDBOOK ON THE POLITICS OF INTERNATIONAL LAW 169-70 (Wayne Sandholtz & Christopher A. Whytock eds., 2017).

[20] Beth A. Simmons, *Compliance with International Agreements*, 1(1) ANN. REV. POL. SCI. 75, 80 (1998).

[21] Pitman B. Potter, *Legal Reform in China: Institutions, Culture, and Selective Adaptation*, 29(2) L. & SOC. INQUIRY 465, 478 (2004).

[22] Simmons, *supra* note 20, at 84.

[23] Ljiljana Biuković, *Compliance with International Treaties: Selective Adaptation Analysis*, 44 CANADIAN Y.B. INT'L L. 451, 451-53 (2007).

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overview of the WTO jurisprudence on anti-dumping and features a discussion on the compatibility of the EU's significant distortion standard with WTO laws after the expiration of the NME status provisions in the Accession Protocol of these countries, by reference to the case laws of the WTO dispute settlement Body (hereinafter "DSB"). It is argued that the EU's anti-dumping Regulation contradicts both the Protocol and the WTO Anti-Dumping Agreement (hereinafter "ADA"), particularly Articles 2.2 and 9.2.

In conclusion, this article will attempt to suggest that, first, the paradigm of selective adaptation provide a more comprehensive understanding of both the EU's anti-dumping trade policies and China's socialist market economy. Based on these detailed analyses, this article argues that, as it remains highly controversial as to the compatibility of the EU's significant distortion standard with the WTO's treaty requirements, the EU should consider other policy alternatives instead of using anti-dumping investigations to address the problems of the low production costs of Chinese products. The concept of coordinated compliance of international trade and human rights as developed by Pitman Potter, with a focus on the labour rights in China, may be a desirable policy approach for the EU to take towards China in hope of a better treaty performance by China in both trade and human rights, which will also have strong implications for the future of EU-China trade relations. This policy approach of coordinated compliance does not involve anti-dumping as a policy tool, but it is used by developing a comprehensive set of labour, environmental, and other corporate social responsibility (hereinafter "CSR") standards for foreign producers to follow and comply with.

II. THE EU'S ANTI-DUMPING POLICIES ON CHINESE PRODUCTS: FROM THE "NON-MARKET ECONOMY STATUS" TO THE "SIGNIFICANT DISTORTION" STANDARD

Twenty years ago, when China joined the WTO in December 2001, its market economy status had not yet been commonly recognised by WTO members, which treated the PRC as an NME, especially in cases of anti-dumping investigations designed to protect WTO members against imported goods priced below fair market value. The Accession Protocols and the Working Party Reports of China, along with other transitional economies such as Viet Nam and Tajikistan, contain specific rules on the application of Article VI of the General Agreement on Tariffs and Trade (hereinafter "GATT") 1994 and the ADA by other WTO Members in their anti-dumping investigations concerning imports from these NMEs, because at the time of their WTO accession, these transitional economies were still in the "process of transition towards a full market economy." These specific rules on the application of Article VI of the GATT 1994 and the ADA provide that the

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importing Member's decision on whether to use domestic prices or costs or a methodology that is not based on a strict comparison with domestic prices or costs shall be based on special rules.[24] According to Section 15(a)(ii) of the Accession Protocol of the People's Republic of China (hereinafter "Protocol"), WTO members can use a pricing methodology that "is not based on a strict comparison with domestic prices or costs in China."[25] In the meantime, Section 15(d) also provides that "in any event, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession," meaning that Section 15(a)(ii) was set to expire in December 2016.[26] In other words, in any event, the disadvantageous treatment given to China and Chinese products as an NME, as prescribed in Section 15 of the WTO's Accession Protocol of the PRC shall duly end in December 2016. However, under the EU anti-dumping regulations of 2016 (hereinafter "EU Basic Regulation"), China, Vietnam, Kazakhstan, and other countries that are deemed as non-market economies are treated differently from market economy countries in the determination of the normal value of their exported products in anti-dumping investigations.[27] Whereas the normal value of products imported from market economy countries is based on the prices paid or payable in the ordinary course of trade in the exporting country,[28] the normal value of products from China and other NME countries "shall be determined on the basis of the price or constructed value in a market economy third country, or the price from such a third country to other countries."[29] Pursuant to this provision, the calculation of the normal value of Chinese products is made with reference to the cost of production for the same products in developed market economy countries such as Germany and Japan rather than the actual cost of production. This renders the export price of Chinese products markedly lower than the market prices in the reference countries.

Debates on China's NME status persist beyond the expiration of the NME status provisions in the Protocol. The EU's position is that the expiration of Section 15(a)(ii) does not automatically grant China market economy status. Indeed, the Directorate-General for Trade of the European Commission has publicly emphasized many times that although the surrogate country methodology is no longer used in anti-dumping

[24] PHILIPPE DE BAERE ET AL., THE WTO ANTI-DUMPING AGREEMENT: A DETAILED COMMENTARY 36 (2021).
[25] World Trade Organization, Accession of the People's Republic of China, Decision of 10 November 2001, art. 15(a)(ii), WTO Doc. WT/L/432 (2001).
[26] *Id.* art. 15(d).
[27] 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, 2016 O.J. (L 176) 1, 21 [hereinafter Basic Regulation].
[28] *Id*. at 24 (art. 2.1).
[29] *Id*. at 26 (art. 2.7 (a)-(b)).

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investigations against products imported from China, this does not mean that the EU recognizes China as having market economy status.[30] China insists that whether or not its market economy status is recognized, calculation of the normal value of Chinese products should be based solely on domestic prices or costs and that the surrogate country methodology stipulated in Section 15(a)(ii) cannot apply to Chinese products.

Due to the lack of conclusion on China's NME status, the EU avoids using the term "market economy status" in EU Regulation 2017/2321, instead creating a new "significantly distorted market" standard to trigger a method of product valuation that is similar to the old surrogate country methodology in anti-dumping investigations. Regulation 2017/2321 lists six elements and three aspects of distortions to identify significant distortion. Article 6(a) to (b) defines "significant distortions" and provides criteria for assessing their existence as follows:

Significant distortions are those distortions which occur when reported prices or costs, including the costs of raw materials and energy, are not the result of free market forces because they are affected by substantial government intervention. In assessing the existence of significant distortions regard shall be had, *inter alia*, to the potential impact of one or more of the following elements:

1. The market in question being served to a significant extent by enterprises which operate under the ownership, control or policy supervision or guidance of the authorities of the exporting country.
2. State presence in firms allowing the state to interfere with respect to prices or costs.
3. Public policies or measures discriminating in favour of domestic suppliers or otherwise influencing free market forces.
4. The lack, discriminatory application or inadequate enforcement of bankruptcy, corporate or property laws.
5. Wage costs being distorted.
6. Access to finance granted by institutions which implement public policy objectives or otherwise not acting independently of the state.[31]

By adopting the abovementioned criteria to identify the presence of market distortion, the Commission of the European Communities

[30] Xiaohong Jiang (蒋小红), *Zhongguo "Fei Shichang Jingji Daiyu" zhihou Qingxiao de Jisuan Fangfa—Jiexi Oumeng Maoyi Jiuji Lifa de Zuixin Fazhan* (*中国"非市场经济待遇"之后倾销的计算方法—解析欧盟贸易救济立法的最新发展*) [*The Calculation Methodology of Dumping After China's "Non-Market Economy Treatment"—Analysis on the New Development of EU's Trade Remedy Legislation*], 4 GUOJIFA YANJIU (国际法研究) [CHINESE REV. INT'L L.] 98, 98 (2017).

[31] Regulation (EU) 2017/2321 of the European Parliament and of the Council of 12 December 2017 Amending Regulation (EU) 2016/1036 on Protection Against Dumped Imports from Countries Not Members of the European Union and Regulation (EU) 2016/1037 on Protection Against Subsidised Imports from Countries Not Members of the European Union, art. 1(1)(b), 2017 O.J. (L 338) 1, 3-4 [hereinafter Regulation (EU) 2017/2321].

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(hereinafter "EU Commission") requires a country to prove the absence of significant distortion by showing that the country does not impose improper influence on the allocation of economic resources or directly affect the enterprises' strategic policy decisions; exerts no influence through the use of state-fixed prices or discrimination in the tax, trade, or currency regimes; lacks both state-induced distortion and a non-market trading and compensation system in the privatization of enterprises; complies with international labour, financial, and environmental standards in exports; abides by international accounting standards; and carries out foreign exchange conversions at market rate.[32] It is important to note that similar standards are applied by the EU in determining China's market economy status. According to the *Commission Staff Working Document on Progress by the People's Republic of China towards Graduation to Market Economy Status in Trade Defence Investigations* of 2008,[33] five criteria are used to evaluate a country's market economy status:

1. The degree of government influence over the allocation of resources and decisions of enterprises, for example through the use of state-fixed prices or discrimination in the tax, trade or currency regime.
2. Absence of state-induced distortions in the operation of enterprises linked to privatization and absence of use of non-market trading or compensation system.
3. Existence and implementation of a transparent and non-discriminatory company law which ensures adequate corporate governance, the application of international accounting standards, protection of shareholders' rights, and public availability of accurate company information.
4. Existence and implementation of a coherent, effective, and transparent set of laws that ensure the respect of property rights and the operation of a functioning bankruptcy regime.
5. Existence of a genuine financial sector that operates independently from the state and which in law and practice is subject to sufficient guarantee provisions and adequate supervision.[34]

A comparison of the two sets of criteria—the set for ascertaining significant distortion in EU's 2017 regulation and that for evaluating a

[32] *Proposal for a Regulation of the European Parliament and of the Council Amending Regulation(EU)2016/1036 on Protection Against Dumped Imports from Countries Not Members of the European Union and Regulation(EU)2016/1037 on Protection Against Subsidized Imports from Countries Not Members of the European Union*, at 27-28, COM (2016) 0721 (June 27, 2017) [*Proposal for Regulation(EU)2016/1036*]. *See also EU and China Reach Agreement in Principle on Investment*, EUR. COMM'N (Dec. 30, 2020), https://trade.ec.europa.eu/doclib/press/index.cfm?id=2233.

[33] *Commission Staff Working Document on Progress by the People's Republic of China Towards Graduation to Market Economy Status in Trade Defense Investigations*, at 7-24, SEC (2008) 2503 final (Sept. 19, 2008).

[34] *Id.*

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country's market economy status—shows a common emphasis on government influence over the pricing in the operation of enterprises, the identification of non-market trading, and noncompliance with international labour and accounting standards and with international financial rules. Although it has not expressly stated that the regulation is meant to target China, the EU's conclusion based on these criteria and China's particular economic mode is that its market is significantly distorted.

The *Commission Staff Working Document on Significant Distortions in The Economy of the People's Republic of China for the Purpose of Trade Defence Investigations* of 2017 (hereinafter "*Working Document*") details the EU Commission's analysis of the significant distortions in China's market, focusing on three aspects. First, it examines the core features that give the Chinese economy its current structure, including the concept of a socialist market economy as embodied in the PRC Constitution and other laws, the role of the CCP in relation to the economy, the extensive system of plans issued and pursued by various levels of government under the leadership of the CCP, the extensive state-owned sector with numerous state-owned enterprises, including various supervision and control mechanisms, the financial market, the procurement market, and the system of investment screening. In the *Working Document*, the EU Commission points out that the Chinese government continues to exert a decisive influence on the allocation of resources and on their prices. The *Working Document* covers the various factors of production, examining in detail the provision of land, energy, capital, material inputs, and labour in China. The analysis shows that the allocation and pricing of the various factors of production is heavily influenced by the state. Finally, the *Working Document* examines a number of sectors, including steel, aluminium, chemicals, and ceramics, which were selected based on their prominence in the EU's anti-dumping investigations since the conclusion of the Uruguay Round.[35]

A. A Case Study on the Interpretation of the Article 2(7) of the EC Basic Regulation: European Commission & GMB Glasmanufaktur Brandenburg GmbH v. Xinyi PV Products (Anhui) Holdings Ltd

On December 2, 2021, a most recent judgment by the ECJ on the appeal of an anti-dumping case *European Commission and GMB Glasmanufaktur Brandenburg GmbH v. Xinyi PV Products (Anhui) Holdings Ltd* provides a very comprehensive interpretation on the meaning of "significant distortion" and the specific legal texts in the EC Basic Regulation in relation to all the

[35] *Commission Staff Working Document on Significant Distortions in the Economy of the People's Republic of China for the Purposes of Trade Defence Investigations*, at 3, SWD (2017) 483 final/2 (Dec. 20, 2017).

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criteria for examining "significant distortion." This case concerns the very core issue of the interpretation of Articles 2(7)(b) and (c) of the EC Basic Regulation on the "Undertaking operating under market economy conditions' status, specifically the concept of 'significant distortions carried over from the former NME system', within the meaning of the third indent of Article 2(7)(c) concerning tax incentives."

Article 2(1) to (6) of the EC Basic Regulation sets out the rules applicable to the determination of normal value. Article 2(7) of that regulation introduces special detailed rules for the calculation of normal value for imports from NME countries.[36] Article 2(7) of that regulation provides:[37]

> (a) In the case of imports from non-market economy countries [including Albania, Armenia, Azerbaijan, Belarus, Georgia, North Korea, Kyrgyzstan, Moldova, Mongolia, Tajikistan, Turkmenistan and Uzbekistan], normal value shall be determined on the basis of the price or constructed value in a market economy third country, or the price from such a third country to other countries, including the Community, or where those are not possible, on any other reasonable basis, including the price actually paid or payable in the Community for the like product, duly adjusted if necessary to include a reasonable profit margin. . . .
>
> (b) In anti-dumping investigations concerning imports from the People's Republic of China, Vietnam and Kazakhstan and any non-market-economy country which is a member of the WTO at the date of the initiation of the investigation, normal value shall be determined in accordance with paragraphs 1 to 6, if it is shown, on the basis of properly substantiated claims by one or more producers subject to the investigation and in accordance with the criteria and procedures set out in subparagraph (c), that market economy conditions prevail for this producer or producers in respect of the manufacture and sale of the like product concerned. When this is not the case, the rules set out under subparagraph (a) shall apply.
>
> (c) A claim under subparagraph (b) must . . . contain sufficient evidence that the producer operates under market economy conditions, that is if:
>
> [1.] decisions of firms regarding prices, costs and inputs, including for instance raw materials, cost of technology and labour, output, sales and investment, are made in response to market

[36] Case C-21/14 P, Comm'n v. Rusal Armenal Zao, ECLI:EU:C:2015:494, ¶ 47 (July 16, 2015) [hereinafter Case C-21/14 P].
[37] Basic Regulation, *supra* note 27, 26 (art. 2(7)).

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signals reflecting supply and demand, and without significant State interference in this regard, and costs of major inputs substantially reflect market values,

[2.] firms have one clear set of basic accounting records which are independently audited in line with international accounting standards and are applied for all purposes,

[3.] the production costs and financial situation of firms are not subject to significant distortions carried over from the former non-market economy system, in particular in relation to depreciation of assets, other write-offs, barter trade and payment via compensation of debts,

[4.] the firms concerned are subject to bankruptcy and property laws which guarantee legal certainty and stability for the operation of firms, and

[5.] exchange rate conversions are carried out at the market rate.

Article 2(7) of the EC Basic Regulation introduces detailed rules for the calculation of the normal value of imports from NME countries. According to Article 2(7)(a) of the EC Basic Regulation, which derogates the rules set out in Article 2(1) to (6) of the regulation, in the case of imports from NME countries, normal value must be determined on the basis of the price or constructed value in a market-economy third country (the "analogue country method"). The aim of this provision is to prevent the consideration of prices and costs in NME countries, as these are not the normal result of market forces. Article 2(7)(b) further provides that in anti-dumping investigations of Chinese imports, normal value is to be determined in accordance with Article 2(1) to (6), rather than by the analogue country method, if it is shown, on the basis of properly substantiated claims by one or more producers subject to the investigation, and in accordance with the criteria and procedures set out in Article 2(7)(c), that market economy conditions prevail for that producer or those producers in terms of the product concerned. This wording is intended to enable Chinese producers subject to market-economy conditions to receive market-economy treatment (hereinafter "MET")—that is, to be treated as producers in market-economy countries are treated. The burden of proof lies with the producer wishing to claim MET under Article 2(7)(b) of the EC Basic Regulation. The first subparagraph of Article 2(7)(c) requires such a producer's claim to contain sufficient evidence that the producer operates under market-economy conditions. There is no burden on EU institutions to prove that the producer does not satisfy the conditions for the granting of MET. Rather, EU institutions' role is to assess whether the evidence supplied by the producer concerned meets the requirements of the first subparagraph of Article 2(7)(c) of the EC Basic Regulation to grant it MET, and the EU judicature examines whether such assessment is vitiated

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by a manifest error.[38]

In the present case, the court has stated that Xinyi PV's request for MET was rejected on the sole ground that the company had not established that it satisfied the third criterion for the grant of MET of Article 2(7)(c) of the EC Basic Regulation, namely that its production costs and financial situation are not subject to significant distortions carried over from the former NME system, in particular in relation to the depreciation of assets, other write-offs, barter trade and payment via compensation of debts. It is apparent from the wording of this provision that it imposes two cumulative conditions, the first being the existence of a significant distortion in production costs and in the financial situation of the firm in question and the second being that the distortion proves to have been carried over from the former NME system.

The ECJ held that it was necessary to interpret this criterion for the grant of MET, specifically the condition relating to the existence of a significant distortion of production costs and the financial situation of the undertaking in question, in light of case law.[39]

First, the literal interpretation of the condition indicates that the producer concerned must present sufficient evidence to establish that "[its] production costs and financial situation . . . are not subject to significant distortions." The use of the conjunction "and" unequivocally implies that the producer bears the burden to establish first, that there is no significant distortion of its production costs, and second, that there is no significant distortion of its financial situation. The condition is therefore based on two cumulative and distinct subconditions, both of which must be satisfied to grant MET, namely the absence of significant distortions carried over from the former NME system of the producer's production costs and the absence of significant distortions of the producer's financial situation. The use of the term "in particular" highlights the purely indicative nature of the subsequent list; it does not establish any express link between the parameters that it sets out and the factors taken into account when calculating normal value under Article 2(1) to (6) of the EC Basic Regulation. The wording of the third element listed in Article 2(7)(c) of the EU Basic Regulation does not provide any link between the assessment of the existence of a significant distortion of the financial situation of the producer concerned and either its production costs or the relevant factors to determine normal value in accordance with Article 2(1) to (6). Rather, the wording suggests that the third criterion for the grant of MET involves the producer's financial situation in the broad sense and does not necessarily relate closely to either production costs or prices.

[38] Case C-249/10 P, Brosmann Footwear (HK) Ltd v. Council, ECLI:EU:C:2012:53, ¶ 32 (Feb. 2, 2012).
[39] Case C-709/17 P, Comm'n v. Kolachi Raj Indus. (Priv.) Ltd, ECLI:EU:C:2019:717, ¶ 82 (Sept. 12, 2019).

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Second, Article 2(7) of the EC Basic Regulation establishes a specific regime that derogates the general rules for calculating normal value that are provided in Article 2(1) to (6). This specific regime applies to imports from NME countries. It is based in principle on the analogue country method laid out in Article 2(7)(a), which continues to apply by default pursuant to Article 2(7)(b) and (c), and it applies to anti-dumping investigations concerning imports from China. Only when a Chinese producer shows to the requisite legal standard that it satisfies all five of the conditions of Article 2(7)(c) will the analogue country method not be applied to said producer and will the Commission instead be required to calculate the normal value of the goods using the method provided in Article 2(1) to (6) for imports from market-economy countries. Thus, in an anti-dumping investigation concerning imports from China, the application of the general rules of Article 2(1) to (6) of the EC Basic Regulation requires that all of the conditions of Article 2(7)(b) and (c) be satisfied. The first criterion for the grant of MET, set out in the first listed element of Article 2(7)(c), expressly refers to decisions of the producer concerning prices, costs and inputs. However, the third criterion for the grant of MET at issue in the present cases does not. In any event, the court in Council v. Zhejiang Xinan Chemical Industrial Group did not establish a direct link between the conditions for granting MET laid down in Article 2(7)(c) and the provisions of Article 2(1) to (6).[40]

The court stated that the granting of MET under Article 2(7)(b) depends on the properly substantiated demonstration by the producer in accordance with the criteria and procedures of Article 2(7)(c) that "market economy conditions prevail for that producer in respect of the manufacture and sale of the like product concerned." However, it does not necessarily follow that all five criteria set out in Article 2(7)(c) of the EC Basic Regulation relate to the manufacture and sale of the like product concerned, as the third element of that provision requires the Commission to assess whether measures concerning the financial situation of the undertaking actually give rise to a significant distortion affecting the production or sale of the like product.

Indeed, nothing in Article 2(7)(c) suggests that each of the five criteria set out in that provision must be assessed explicitly by reference to factors directly affecting the manufacture and sale of the like product concerned. By definition, the criteria are not directly related to such manufacture and sale, and it may be presumed that they may be reflected in the costs or prices of the producer concerned.

Similarly, the criterion regarding "significant distortion" must be understood to refer to all measures—even general measures such as preferential tax regimes—resulting in a significant distortion of the financial situation of that producer. This is particularly compelling, as such measures

[40] Case C-337/09 P, Council v. Zhejiang Xinan Chem. Indus. Grp. Co., ECLI:EU:C:2012:471, ¶ 79 (July 19, 2012).

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likely distort producers' costs and prices without affecting their ability to adduce evidence to the contrary.

To reiterate, according to the relevant case law, the producer wishing to request MET in accordance with Article 2(7)(b) of the EC Basic Regulation bears the burden of proving that the criteria set out in Article 2(7)(c) are satisfied. The Commission need not prove that the producer has not satisfied the conditions for such treatment; rather, it must assess whether the producer's evidence is sufficient to show that the criteria are fulfilled and thus warrant MET.[41]

The judgment by the ECJ as discussed above reveals that, although the significant distortion standard seems to be an objective standard applied equally to all WTO member states, practically, it is argued that this standard may function in a discriminatory fashion against some states.[42] In fact, the standard was adapted from the EU's original standard for identifying market economy conditions. Both standards were designed for determining government intervention in the market and placed emphasis on government influence on the price of products via intervention in the market and enterprises as the basis for ascertaining the existence of market distortion. In practice, the application of the significant distortion standard will not give China the same treatment as other WTO member states in anti-dumping investigations following the expiry of Section 15 of the Protocol.

III. AN OVERVIEW OF THE WTO'S JURISPRUDENCE ON ANTI-DUMPING AND THE COMPATIBILITY OF THE EU'S POSITION WITH WTO LAWS: THE WTO PROTOCOL ON CHINA'S ACCESSION AND THE ADA

"Dumping" in economic terms refers to the sale of goods by an exporting producer at a price lower in the importing country than in the domestic market of the exporting country, which is considered an unfair trade practice.[43] The WTO regulates anti-dumping investigations and lays out the conditions required to impose anti-dumping measures in Article VI of the GATT 1994 and in the complementary Agreement on Implementation of Article VI of GATT (hereinafter "ADA"). Article VI of the GATT 1994 and the ADA form an "inseparable package of rights and disciplines" (WTO 2008).[44] The ADA states that "injurious dumping" occurs when a producer sells its goods in an export market at prices below their "normal value",

[41] Case C-21/14 P, *supra* note 36, ¶¶ 15-16.
[42] Jiang, *supra* note 30, at 104-05.
[43] DE BAERE ET AL., *supra* note 24, at 9.
[44] Appellate Body Report, *United States — Measures Relating to Shrimp from Thailand*, *United States — Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties*, ¶ 233, WTO Doc. WT/DS343/AB/R, WT/DS345/AB/R (adopted Aug. 1, 2008).

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which may be determined by the price of similar goods in the exporter's domestic market, as this practice can harm the domestic industry of the importing country.[45] Therefore, material harm of the domestic industry caused by dumped imports is required for anti-dumping measures to be imposed. However, whether dumping is harmful per se is a matter of some dispute.[46] Importing countries impose anti-dumping measures as temporary safeguards to address the harmful effects of dumping on their domestic industries.[47] Although this may be a necessary practice, it has been widely argued that "anti-dumping duties have increasingly taken on the role of general safeguards in the WTO system."[48] For instance, as recognized as an NME, the PRC has consequently become a major target of anti-dumping investigations, ranking first among WTO countries in terms of the number of anti-dumping investigations ever since its accession to the WTO.[49] In 2016 alone, ninety-one anti-dumping investigations were initiated against China.[50]

A. Section 15 of the Accession Protocol of China

As mentioned above, according to Section 15 of the Accession Protocol of the PRC, whereas such a disadvantageous treatment given to China and Chinese products may have been justified before December 2016 under the EU anti-dumping regulations of 2016, in any event, such treatment shall duly end in December 2016. Thus, Section 15 of the PRC's Accession Protocol does not replace the standard determination of a product's "normal value" as set out in Article VI of the GATT 1994 and the ADA; rather, it serves as a temporary derogation of that process of valuation.[51]

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[45] DE BAERE ET AL., *supra* note 24, at 10.
[46] *See generally* Bruce A. Blonigen & Thomas J. Prusa, *Dumping and Antidumping Duties* (Nat'l Bureau Econ. Rsch., Working Paper No. 21573, 2015).
[47] PETROS C. MAVROIDIS ET AL., THE LAW AND ECONOMICS OF CONTINGENT PROTECTION IN THE WTO 288-90 (2008). *See generally* Alan O. Sykes, *Protectionism as a "Safeguard": A Positive Analysis of the GATT "Escape Clause" with Normative Speculations*, 58 UNIV. CHI. L. REV. 255 (1991).
[48] DE BAERE ET AL., *supra* note 24, at 11. *See generally* J. Michael Finger et al., *Antidumping as Safeguard Policy* (World Bank Dev. Rsch. Grp.,Working Paper No. 2730, 2001).
[49] *2017nian Shangwu Gongzuo Nianzong Zongshu zhi Shisi: Jiji Kaizhan Maoyi Jiuji Gongzuo, Qieshi Weihu Maoyi Zhixu he Chanye Anquan* (2017年商务工作年终综述之十: 积极开展贸易救济工作，切实维护贸易秩序和产业安全) [*Year-End Overview XIV for Commerce Work in 2017: Active Work on Trade Remedy and Maintain Trade Order and Industry Security*], ZHONGHUA RENMIN GONGHEGUO SHANGWUBU (中华人民共和国商务部) [MINISTRY OF COM. CHINA] (Jan. 19, 2018, 3:58 PM), http://www.mofcom.gov.cn/article/ae/ai/201801/201801027%2001381.shtml.
[50] *2016nian Maoyi Moca Anjian Tongji* (*2016年贸易摩擦案件统计*) [*Case Review and Data on Trade Friction in 2016*], ZHONGHUA RENMIN GONGHEGUO SHANGWUBU (中华人民共和国商务部) [MINISTRY OF COM. CHINA] (Mar. 17, 2017, 3:45 PM), http://gpj.mofcom.gov.cn/article/zt_mymcyd/su%20bjectdd/201703/20170302536150.shtml.
[51] DE BAERE ET AL., *supra* note 24, at 38.

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Section 15(d) of WTO's Protocol on China's Accession provides that "in any event, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession." Following December 2016, an importing WTO member can no longer apply the surrogate country methodology to calculate the normal value of products from China.[52] Article 31 of the Vienna Convention on the Law of Treaties provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[53] In accordance with the ordinary meaning of the term "in any event", regardless of China's market economy status as evaluated by the WTO or any members thereof, Section 15(a)(ii), upon its expiry, should no longer be adopted as the legal basis for the application of surrogate country methodology. Otherwise, the term dictating the expiration of the stated provisions may lose its meaning.

This view is confirmed by the Appellate Body of the WTO,[54] which held that:

> [Section] 15(d) of China's Accession Protocol establishes that the provisions of [Section] 15(a) expire 15 years after the date of China's accession (that is, 11 December 2016) . . . . In other words, [Section] 15(a) contains special rules for the determination of normal value in antidumping investigations involving China. [Section] 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.[55]

This important issue remains controversial and has been widely discussed in relation to the structure of paragraph 15(a) and the wording of paragraph 15(d), and De Baere, Du Parc and Van Damme have provided a detailed discussion and examination of this issue.

On the one hand, Miranda has argued that the only consequence of this expiration was a change in the burden of proof for showing whether China can be treated as an NME;[56] in other words, "the expiry of subparagraph 15(a)(ii) would only eliminate the presumption that China and the individual

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[52] Jiang, *supra* note 30, at 102.
[53] Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331.
[54] Appellate Body Report, *European Communities — Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, ¶ 289, WTO Doc. WT/DS397/AB/R (adopted July 28, 2011).
[55] *Id.*
[56] Jorge Miranda, *Interpreting Paragraph 15 of China's Protocol of Accession,* 9(3) GLOB. TRADE & CUSTOMS J. 94, 103 (2014); Jorge Miranda, *More on Why Granting China Market Economy Status After December 2016 Is Contingent upon Whether China Has in Fact Transitioned into a Market Economy*, 11(5) GLOB. TRADE & CUSTOMS J. 244, 247 (2016).

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industries or sectors remain under the NME regime."[57] However, what is worthy of noting is that, as discussed above, according to the judgment of the ECJ on the case of *European Commission and GMB Glasmanufaktur Brandenburg GmbH v. Xinyi PV Products (Anhui) Holdings Ltd*, the court even rejected this view that there is a shift in the burden of proof for showing whether China can be treated as an NME after the expiry of subparagraph 15(a)(ii).

In this regard, there are two main arguments against this theory.

First, Section 15(a) of the PRC's Accession Protocol contains a general provision on the alternative methodologies that an importing WTO member may use in valuating imports from China. It does not suggest that such methodologies could apply independently of the two subsequent subsections, particularly when one of those subsections has expired. In fact, with the expiry of subsection 15(a)(ii), there is no longer a possibility of using "a methodology that is not based on a strict comparison with domestic prices or costs in China", as the condition on which this possibility was based has ceased to exist. Furthermore, it has no practical consequence if subsection 15(a)(ii) has expired but the entire Section 15(a) has not.[58]

Second, Miranda's interpretation of Section 15 seems to be inconsistent with the wording of the bilateral agreement between the United States and China, from which Section 15 is directly transposed, as well as paragraph 151 of the Working Party Report on China's accession. The negotiating history of China's Accession Protocol reveals the evolution of the text of Section 15, particularly the fact that the division of paragraph (a) into subparagraphs (i) and (ii) was only introduced at a later stage of the negotiations.

EU Regulation 2017/2321 does not have a provision recognizing China's market economy status upon the expiration of Section 15 of the Protocol. In essence, by legislating a similar methodology with different wording, the 2017 regulation acts as renewal of the provisions of subparagraph (a)(ii) of Section 15 of the Protocol, allowing the continuation of the expired surrogate country methodology and consequent differential treatment in anti-dumping investigations. This allows the WTO to avoid the question of whether the standard calculation method used for other WTO member states should now apply to China in determining dumping, given China's satisfaction of its WTO commitments. In other words, the EU has in essence not met its implied obligation, upon the expiration of the Section 15 of the Protocol, to grant China the same treatment that given other WTO member countries when determining the normal value of products imported from those countries by using domestic prices or costs of those products.

Therefore, on 12 December 2016, China initiated a proceeding against

[57] DE BAERE ET AL., *supra* note 24, ¶ 94.
[58] DE BAERE ET AL., *supra* note 24, at 40.

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the European Union to the WTO Dispute Settlement Body with respect to the European Union's legislated price comparison methodologies.[59] China argued that "Article 2(1) to 2(7) of the EU Basic Regulation, which pertain to the pricing of imported products, are inconsistent with WTO rules, including Article 2.1 and 2.2 of the ADA and Article VI:1 of the GATT 1994." Specifically, in a request for consultations submitted to the EU, China alleged the following:

> Articles 2(1) to 2(7) of the Basic Regulation provide for differential treatment of Chinese imports, as compared to imports from other WTO Members. Specifically, in contrast to the treatment afforded imports from other WTO Members, Chinese imports are denied the advantage of the rules set forth in Articles 2(1) to 2(6) regarding the determination of normal value, and instead face the less favourable rules set forth in Article 2(7), unless Chinese producers satisfy a requirement in Article 2(7)(b) to demonstrate that "market economy" conditions prevail. As a result, the European Union denies Chinese imports an advantage that is enjoyed by imports from other WTO Members, contrary to Article I:1 of the GATT 1994. This differential treatment ceased to be justifiable when paragraph 15(a)(ii) of China's Accession Protocol expired on 11 December 2016.[60]

In response, the EU argued that "Article 2(7)(a)-(b) of the EU Basic Anti-Dumping Regulation does not mandate the investigating authority to dis-apply paragraphs 1 to 6 of Article 2 in all cases concerning China," as Article 2(7)(a) includes the qualifying words "or, where those are not possible, on any other reasonable basis." This wording, the EU argued, does not exclude the application of paragraphs 1 to 6 of Article 2 to China. However, the EU did not respond to the allegation that the regulation subjected China and other non-market economies to a different standard of treatment. China's argument pointed out that although the normal value of products from market economy countries is based on the prices paid or payable in the ordinary course of trade, the normal value of products from non-market economies can only be calculated in the same way when the producer can prove "market economy conditions prevail for this producer" with the criteria and procedures set out in Article 2(7)(c). However, the EU further argued that under Section 15 of the Protocol, it is self-evident that any existing anti-dumping proceedings prior to 11 December 2016 but concluded afterwards are unaffected by the termination of Section

[59] Request for Consultations by China, *European Union — Measures Related to Price Comparison Methodologies*, WTO Doc. WT/DS516/1, G/L/1170, G/ADP/D116/1 (Dec. 15, 2016).
[60] *Id.* ¶ 6.

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15(a)(ii).[61] According to De Baere, Du Parc and Van Damme (2021), the EU's interpretation of Section 15:

> [S]ignificantly expands the concept of the normal value and the flexibilities provided by Article VI of the GATT 1994 with respect to the comparison between the normal value and the export price. Accepting that interpretation would essentially mean that every time an importing Member considers that domestic prices or costs are not 'market-determined', whether in China or in any other WTO Member, that importing Member could reject those domestic prices and costs in favour of a 'market-determined' alternative of its choice. It is questionable whether that interpretation is supported by the text of the GATT 1994, the Anti-Dumping Agreement and the very logic of the WTO anti-dumping system.[62]

Before the final decision of the panel appointed by the DSB was made, on 20 December 2017, the EU passed a new anti-dumping regulation (EU Regulation 2017/2321).[63] The results of the application of the two regulations—the EU Basic Regulation and the EU Regulation 2017/2321—are the same: certain countries, including China, are treated differently in EU anti-dumping investigations. Although the 2017 regulation does not use the term "non-market economy country" and deletes the term "surrogate country methodology" used in the EU Basic Regulation, it introduces the concept of "significant distortions." Pursuant to EU Regulation 2017/2321, if the market of a country has significant distortions, the normal value of products shall not be calculated by the domestic prices or costs of the exporting country but shall instead be "constructed exclusively" on prices or costs "reflecting undistorted prices or benchmarks" in "an appropriate representative country" or "undistorted international prices or benchmarks."[64] EU Regulation 2017/2321 has given rise to heated debate since its promulgation. Although it does not expressly stipulate that the "significant distortion" rules apply to China, it is reasonable to assume so. As such, China has strongly rejected the 2017 regulation, arguing that it is inconsistent with WTO rules. The PRC's Ministry of Commerce responded to the regulation, stating that no such notion of "significant distortion" appears in WTO laws. With the adoption of the market distortion version of

[61] First Written Submission by the European Union, *European Union — Measures Related to Price Comparison Methodologies*, ¶ 16, WT/DS516 (Nov. 14, 2017), https://trade.ec.europa.eu/doclib/docs/2017/november/tradoc_156401.pdf.
[62] DE BAERE ET AL., *supra* note 24, at 42-43.
[63] Regulation (EU) 2017/2321, *supra* note 31.
[64] *Proposal for Regulation(EU)2016/1036*, *supra* note 32, at 9.

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the old surrogate country methodology concept, "China may face enduring unfair and unequal treatment in EU's anti-dumping investigations."[65] This issue will remain unresolved given that on 14 June 2019, as the Panel decided to suspend its work pursuant to Article 12.12 of the DSU at the request of China, and the authority for the establishment of the Panel lapsed on 14 June 2020.

Furthermore, on May 5, 2021, the European Commission proposed a new draft regulation on Foreign Subsidies Distorting the Internal Market.[66] This proposal adopts a broad definition of trade distortion where a foreign subsidy is liable to improve the competitive position of the undertaking concerned in the EU's internal market and where, in doing so, it actually or potentially negatively affects competition on the internal market. This most recent position of the EU invites discussion and re-provokes a long standing debate between China and the EU on China's market economy status and EU's trade standards on "significant distortion".

B. "Particular Market Situation" in Article 2 of the Anti-Dumping Agreement

Article 2.2 of the WTO ADA specifies only two situations in which the normal value of a country's products may be determined through the use of cost adjustment methodologies such as adopting a constructed normal value of products or using third-country sales as a basis for valuation. The first situation occurs where no sales of the product in question exist in the ordinary course of trade in the domestic market of the exporting country. The second situation occurs where a particular market situation negates the possibility of a proper comparison of the export price with domestic sales,[67] although neither Article 2.2 nor other provisions of the ADA provide guidance on identifying such a market situation. Nonetheless, there are strict limitations on the application of the surrogate country methodology. In the *EC — Cotton Yarn* case,[68] a panel formed by the GATT noted that the

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[65] Yan-yun Zhou (周艳云), Maoyizhan Beijing xia Oumeng "Shichang Niuqu" de Xintidaiguo Fangfa de WTO Heguixing Luxi—Yi DS516 An Wei Shijiao (*贸易战背景下欧盟"市场扭曲"的新替代国方法的 WTO 合规性缕析—以 DS516 案为视角*) [*On the Compliance of "the Special Surrogate Country Methodology" of the European Union Based on "Market Distortion": From the Perspective of DS516 Case*], 37(5) HEBEI FAXUE (河北法学) [HEBEI L. SCI.] 64, 66 (2019).

[66] *Formal Comments of the EDPS on the Proposal for a Regulation of the European Parliament and of the Council on Foreign Subsidies Distorting the Internet Market*, EUR. DATA PROT. SUPERVISOR (June 29, 2021), https://edps.europa.eu/system/files/2021-06/2021-0501_d1435_formal_comments_foreign_subsidies_en.pdf.

[67] Appellate Body Report, *European Communities — Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China (Recourse to Article 21.5 of the DSU by China)*, ¶ 5.205 ,WTO Doc. WT/DS397/AB/RW (adopted Feb. 12, 2016).

[68] Panel Report, *EC — Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil*, WTO Doc. ADP/137 (July 4, 1995).

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wording of Article 2.2 makes it clear that the test to determine whether cost adjustment methodologies may be applied is not whether or not a "particular market situation" exists *per se*;[69] rather, a particular market situation is only relevant insofar as it renders domestic sales unfit to permit a proper comparison between domestic and export prices.[70] In other words, the price in a surrogate country may only be adopted to calculate the normal value of a product when there is evidence proving that the domestic price in the exporting country could not support a fair comparison of the prices and that the price of the surrogate country could better effect a fair comparison than the domestic price of the product.

Although the ADA does not specify which circumstance may fall within the category of a "particular market situation", it does not grant WTO member states the power to set the standard for determining this in their domestic laws. Nevertheless, by amending its domestic Anti-Dumping Regulations, the EU sets the criteria for determining the particular market situation based on market distortion. These criteria have not been recognized by all WTO member states; therefore, the legitimacy and justification of its application in the global market is questionable. The EU Basic Regulation provides that as long as market distortion exists in the exporting country due to substantial government intervention, the surrogate price will necessarily replace the domestic sale price or cost of the subject product in the exporting country.[71] The EU's new antidumping regulation does not cite necessity for fair comparison of prices as the reason for its adoption of the new surrogate country methodology, which is against the ADA provision narrowly limiting the application of surrogate country methodology. Indeed, government intervention does not necessarily lead to influence over price comparability, meaning that fair comparison is possible in such situations without the absolute need for the surrogate country methodology. Such a view is supported by the WTO Appellate Body. In the case of *United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, the Appellate Body held that government intervention in the domestic market affects the price of the product in the domestic market and in the export market in the same way and to the same extent. As any lowering of prices attributable to government intervention is reflected on both sides of the dumping margin calculation, the overall dumping margin is not affected by such government intervention.[72]

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[69] *Id.* at ¶ 478.
[70] *Id.*
[71] Regulation (EU) 2017/2321, *supra* note 31.
[72] Appellate Body Report, *United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, ¶ 568, WTO Doc. WT/DS379/AB/R (adopted Mar. 25, 2011) [hereinafter US AD & CD].

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C. Construction of "Normal Value" Under Article 2.2 of the Anti-Dumping Agreement

Although the WTO ADA does not prohibit anti-dumping investigating authorities from taking the cost of production or sale price of like products in the domestic market of a third surrogate country into account in determining the normal value of such product as the result of a particular situation in the domestic market of the exporting country, it places strict limitations on this methodology. In the case of *European Union — Anti-Dumping Measures on Biodiesel from Argentina*, the Appellate Body held that the anti-dumping investigating authority must ensure that the external data regarding the cost of production or sale price of like product in a third surrogate party is substantially equal to the corresponding data in the ordinary course of trade in the country of origin. The investigating authority must process the external data of the surrogate country to ensure that the normal value of the product of the country of origin could be calculated based on such processed data.[73] Furthermore, in accordance with Article 2.2 of the WTO ADA, only in exceptional cases should the surrogate country methodology be adopted to determine the dumping margin in anti-dumping investigations, and priority must be given to the cost and price of the product in the country of the origin.

However, in creating the regulation regarding the application of surrogate country methodology based on market distortion, the EU did not include any provision limiting the adoption of data from a surrogate country. According to the EU Commission's interpretation of the regulation, costs in the country of origin are normally calculated on the basis of records kept by the exporter and producer under investigation. Where there are significant distortions in the exporting country with the consequence that costs reflected in these records are artificially low, international prices or those of other representative markets may be adopted.[74] In summary, the EU's regulation applying the surrogate country methodology based on market distortion is not in compliance with Article 2.2 of the WTO ADA.

Furthermore, the regulation's precondition for adopting the data of a third country does not comply with the provisions under WTO laws. According to Article 2.2 of the WTO ADA, the anti-dumping investigating authority of the importing country must, before adopting any data of a third country, make sure that there are no proper data available from the exporting country of the product. As per paragraphs (i) and (ii) of Article 2.2.2, in the case that the normal value of the product in question cannot be determined by actual data pertaining to production and sales in the ordinary course of

[73] Appellate Body Report, *European Union — Anti-Dumping Measures on Biodiesel from Argentina*, ¶ 6.70, WTO Doc. WT/DS473/AB/R (adopted Oct. 26, 2016) [hereinafter Biodiesel from Argentina].
[74] Regulation (EU) 2017/2321, *supra* note 31.

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trade of like products in the exporting country by the exporter or producer under investigation, the anti-dumping investigating authority must instead use the actual domestic prices of the same general category of products. Where the normal value of the product in question cannot be determined by adopting these actual amounts, the anti-dumping investigating authority may take the weighted average of the actual amounts incurred and realized by other exporters or producers in the production and sale of the like product in the domestic market of the exporting country. Only when these methods fail may the data of a surrogate country be adopted. Furthermore, Paragraph (iii) of Article 2.2.2 sets a limitation on the determined profit, requiring that the anti-dumping investigating authority ensure that the amount of profit established by determining the normal value of the product using any reasonable methods including the surrogate country methodology does not exceed the profit normally realized by other exporters or producers of products of the same general category in the domestic market of the exporting country.[75]

In the *EU — Biodiesel* case, the Appellate Body emphasized that the profit margin selected in an anti-dumping investigation must be the result of a reasoned analysis that is rationally directed at approximating what the producers' profit margin for a like product would have been if the like product had been sold in the ordinary course of trade in the domestic market of the exporting country.[76] In the *EU — Footwear (China)* case, the EU Commission alleged that the necessary data for calculating the cap on profit set out in Article 2.2.2(iii) were not available, and therefore the EU Commission was entitled to ignore this requirement. The Panel rejected this argument, finding that the Commission apparently never even considered whether it might be reasonable to use the data of these companies to calculate the cap, and that the EU Commission did not determine "the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin." The Panel ultimately found that "the Commission could not, and did not, ensure that the amount for profit it established . . . did not exceed this level."[77]

As is evident in the above analysis, the EU's 2017 regulation providing for the adoption of the surrogate country methodology for calculating the normal price of the exported product of a country as long as the market of such country is determined to be "distorted" does not comply with the provisions of the WTO ADA with respect to the precondition for the

[75] *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*, WTO, https://www.wto.org/english/docs_e/legal_e/19-adp_01_e.htm (last visited Feb. 13, 2021) (art 2.2.2(iii)).
[76] Biodiesel from Argentina, *supra* note 73, ¶¶ 6.24-.39.
[77] Panel Report, *European Union — Anti-Dumping Measures on Certain Footwear from China*, ¶ 7.300, WTO Doc. WT/DS405/R (adopted Feb. 22, 2012).

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application of the surrogate country methodology and the limitations in such application. This is an expanded application of the surrogate country methodology unilaterally established by the EU and is therefore against the provisions of the WTO ADA.

D. The Current Standpoint of the WTO: The Situation Following the A4 Copy Paper *Case*

On 1 September 2017, Indonesia requested consultations with Australia concerning measures relating to the imposition of an anti-dumping order on A4 copy paper and the investigation and determination leading thereto. The claims in this case concern the interpretation of "a particular market situation" in the second clause of Article 2.2 of the ADA, the construction of the "normal value" of the exporters and the use of a substitute price in calculating dumping margins. The panel formed by the DSB completed a final report and circulated it to members on 4 December 2019, and it was adopted by the DSB on 27 January 2020. This case represents the DSB's most updated position regarding the interpretation and application of Article 2.2 of the ADA, and it is therefore influential on the formation of the trade policies of the world's largest economies, including the EU, the US and China, as well as on their fulfilment of their international obligations under the WTO. Thus, although the dispute in the *A4 Copy Paper* case was between Indonesia and Australia, it is no surprise that China, the EU, the US and four other countries requested to join the consultations as third parties and submitted arguments.

E. The Definition of "a Particular Market Situation"

One of Indonesia's claims in this dispute concerned the second clause of Article 2.2 of the ADA, which provides for the discarding of domestic sales as the basis for normal value when "because of a particular market situation, . . . such sales do not permit a proper comparison." Australia found a "particular market situation" to exist in Indonesia's A4 copy paper market because alleged government-induced distortions affected Indonesia's pulp and paper industries, and the price of Indonesia's A4 copy paper was lower than regional benchmarks.[78] Indonesia contested Australia's determination of a particular market situation because in its view, the proper interpretation of that expression necessarily excludes (i) situations in which the input costs of the product are allegedly distorted; (ii) situations that affect both the domestic market sales and export sales of the product; and (iii) situations

[78] Panel Report, *Australia — Anti-Dumping Measures on A4 Copy Paper*, add., annex B-2, WTO Doc. WT/DS529/R/Add.1 (adopted Jan. 27, 2020) [hereinafter Australia AD Addendum].

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arising from government action.[79] The Panel found that none of these situations were necessarily excluded from constituting a "particular market situation" and therefore concluded that Indonesia did not demonstrate that Australia had acted inconsistently with Article 2.2 of the ADA when the Anti-Dumping Commission found that a particular market situation existed in the Indonesian domestic market for A4 copy paper.[80]

Regarding the requirement to examine whether the domestic sales affected by the particular market situation "permit a proper comparison", Indonesia argued that even if the particular market situation existed in Indonesia's A4 copy paper market, Australia should have considered whether the domestic sales permitted a proper comparison by examining whether an individual exporter's domestic prices can properly be compared with its export prices.[81] The Panel found that "the phrases 'particular market situation' and 'permit a proper comparison' function together to establish a condition for disregarding domestic market sales as the basis for normal value"[82] and that when a market situation affects domestic market sales prices solely as a result of a decreased cost for an input used identically to produce merchandise for the domestic and export markets, the investigating authority must assess the effect of the particular market situation on the domestic price in relation to the effect on the export price. The panel concluded that Australia had acted inconsistently with the first sentence of Article 2.2 of the ADA because the Anti-Dumping Commission did not conduct the required analysis and had disregarded domestic sales of A4 copy paper without properly determining that such sales did not permit a proper comparison.[83]

F. The Construction of "Normal Value"

Another claim advanced by Indonesia in this dispute was that in constructing the normal value of the exporters, Australia's Anti-Dumping Commission disregarded their properly recorded cost information in violation of Article 2.2.1.1 of the ADA. Indonesia argued that Article 2.2.1.1 requires an investigating authority to use an exporter's actual costs unless they fail to meet one of the two express conditions set out in this provision.[84] Australia countered that the term "normally" in Article 2.2.1.1 provides a separate ground to disregard an exporter's records when the circumstances are not "normal and ordinary" and that the circumstances regarding

[79] *Id.* annex B-3.
[80] Panel Report, *Australia — Anti-Dumping Measures on A4 Copy Paper*, ¶ 7.2.3.6, WTO Doc. WT/DS529/R (adopted Jan. 27, 2020) [hereinafter Australia AD].
[81] Australia AD Addendum, *supra* note 78, annex B-1.
[82] Australia AD, *supra* note 80, ¶ 7.27.
[83] *Id.* ¶¶ 7.2.4-.2.5.
[84] Australia AD Addendum, *supra* note 78, annex B-1.

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Indonesian exporters' pulp records were not "normal and ordinary" because they reflected the particular market situation.[85] The Panel found that when the two conditions in the first sentence of Article 2.2.1.1 are satisfied, recorded costs may be rejected in some circumstances on the basis of the term "normally". For the purposes of resolving this dispute, the Panel found it unnecessary to define what those circumstances could be. However, the Panel found that Australia was not permitted to reject the recorded pulp costs on the basis of the term "normally" in this investigation because it had not established that the prerequisite first and second express conditions in the first sentence of Article 2.2.1.1 of the ADA were satisfied. Thus, the Panel found that Australia had acted inconsistently with the first sentence of Article 2.2.1.1 of the ADA.[86]

G. The Use of a Substitute Price in Calculating Dumping Margins

In addition to the two claims discussed above, the panel upheld Indonesia's claim that Australia's calculation of the cost of production of A4 copy paper in Indonesia, which used a substitute for the rejected pulp costs of Indonesian producers, was inconsistent with Article 2.2 of the ADA.[87] As noted above, the Panel found that there was no basis for using substitute costs because the recorded costs had been rejected inconsistently with Article 2.2.1.1. The Panel also found that a reasoned and adequate explanation was lacking for the use of substitute costs that included a profit component for one of the Indonesian integrated producers that produced its own pulp inputs. In relation to other producers that purchased pulp inputs, the panel found that Indonesia had not demonstrated that Australia had acted inconsistently with Article 2.2 of the ADA when using substitute costs that included a profit component. The Panel found that a reasoned and adequate explanation was lacking as to why, with regard to the integrated producer's cost of producing pulp internally, the investigating authority did not use substitute woodchip costs in conjunction with the other recorded costs of producing pulp internally, which were not affected by the particular market situation, instead of using substituted pulp costs.[88]

H. Third Parties' Arguments

As the *A4 Copy Paper* case concerns the application of the ADA, China, the EU, Japan, Korea, the US, Russia and Thailand requested to join the consultations as third parties and submitted arguments. All of these

[85] *Id.* annex B-2.
[86] Australia AD, *supra* note 80, ¶ 7.3.
[87] *Id.* ¶ 7.4.
[88] *Id.* ¶ 7.169.

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arguments are attached as appendixes to the panel's report.

Not surprisingly, these countries hold different positions on the proper interpretation of the ADA, specifically the proper interpretation and application of Article 2.2 in anti-dumping cases. They either stand with the plaintiff Indonesia or the respondent Australia, notwithstanding the slight inconsistencies in the arguments on certain issues. China, Russia and Thailand insist on narrowly interpreting the term "the particular market situation", which should be based on a case-by-case analysis.

China explains its standpoint on the substantial issues of the case. In interpreting the term "particular market situation" that "does not permit a proper comparison", China emphasises that the legal criteria for determining "normal commercial practice" for "ordinary course of trade" should not be adopted.[89] To disregard the domestic price of a like product in determining the normal value, a market situation should be so "particular" that it impacts "the domestic price of like product in a way that affects its (proper) comparison with the export price." The features of the market that might be special or distinguishable are not sufficient reason for disregarding the domestic price of a like product. For the same reason, government intervention should not be a sufficient condition for disregarding the domestic price, as such intervention may affect both the domestic and export markets and does not affect the proper comparison of the domestic and export prices for determining dumping and the dumping margin. Regarding the construction of normal value, China cites the Appellate Body's decision in *EU — Biodiesel (Argentina)* [90] to demonstrate that the use of the information outside the country of origin shall be strictly limited. Although data from a third country are used, the data must be "apt to or capable of yielding a cost of production in the country of origin."[91]

Russia and Thailand also agree with a narrow interpretation of the term "particular market situation". Russia submits that the investigating authority shall not "take into account government influence on the domestic market for the product under consideration, in particular such as imposing price floors or ceilings," and that if a particular market situation exists that prevents a proper comparison of the domestic and export sale prices, an alternative method to construct the normal value "shall be based on the cost of production in the country of origin."[92]

Thailand holds that a particular market situation requires a case-specific analysis and that this term shall not be interpreted to "capture any government actions that may have an effect on the formation of domestic sales price." Moreover, the term "should not cover government influence in

[89] Australia AD Addendum, *supra* note 78, annex C-1.
[90] Australia AD, *supra* note 80, ¶ 7.158.
[91] Australia AD Addendum, *supra* note 78, annex C-1.
[92] *Id.* annex C-5.

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the form of subsidies within the context of the Agreement on Subsidies and Countervailing Measures."[93]

In contrast, Korea agrees with the narrow interpretation of the term "particular market situation" and opposes the wilful adoption of a third country price to replace the records maintained by the exporter or producer when calculating the normal value of production.[94] However, it views the Chinese NME as an exceptional case that "must be viewed as distinct from the circumstances described in Article 2.2" because of China's Accession Protocol. It argues that there are "particular influence and intervention of the governments" in the Chinese NME, as China is an NME country that opposes the consideration of the findings in *US — Anti-Dumping and Countervailing Duties (China)*,[95] which relates to NME producers in cases involving market economy producers.

The EU, the US and Japan support Australia. In Japan's view, the investigating authority has the right to choose a third country price other than the adjusted price or costs in the domestic market of the exporting countries to estimate the normal value, whether the exporting country is a market economy country or not. It further argues that the term "particular market situation" only applies to market economy countries.[96]

The US interprets the term "particular market situation" very broadly and gives the investigating authority full power to decide whether a particular market situation exists in a specific case. An investigating authority may find that a particular market situation exists when the evidence on the record demonstrates that "a specific condition or set of circumstances renders the comparable price, in the ordinary course of trade, for the like product, unfit as a proper comparison."[97] It further adds that state interference is a factor that can make the domestic price unsuitable for use as the basis for normal value, as the affected domestic sales do not permit a proper comparison with the export price.[98]

The EU introduces the term "distortion" when interpreting the term "particular market situation". According to the EU, a particular market situation is one in which the normal operation of the market forces of supply and demand has been distorted.[99] Such distortion may affect both the domestic and export prices or costs.[100]

The EU also views the "particular market situation" concept and other concepts such as "ordinary course of trade" and "NME" referred to in some

[93] *Id.* annex C-6.
[94] *Id.* annex C-4.
[95] US AD & CD, *supra* note 72.
[96] Australia AD Addendum, *supra* note 78, annex C-3.
[97] *Id.* annex C-7.
[98] *Id.* annex C-7 (¶¶ 3, 5, 12).
[99] *Id.* annex C-2.
[100] *Id.* at 68.

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accession protocols as having "no necessary bright line distinction"[101] because they can operate together to support a particular conclusion. Although the EU does not specify which accession protocols it refers to, it obviously includes China's Accession Protocol. The EU does not equate "particular market situation" with "NME", but acknowledges that both terms may lead to the same conclusion: the export price cannot reflect the normal price of production, and a third-party export price may be chosen to calculate the normal price.

In the EU's view, government intervention may create a particular market situation. When calculating the normal value, an investigating authority is free to choose a third country's export price. It further argues that consistent interpretation by the municipal laws and investigating authorities of all WTO members is not required.[102]

In summary, the *A4 Copy Paper* case is of considerable importance for anti-dumping disputes within WTO regimes. The panel of this case gave its first interpretation of the term "particular market situation". However, it did not offer clear guidance or criteria for identifying a particular market situation. Weighing the arguments of the claimant and the respondent, as well as all of the third parties' submissions, the panel rejected the claimant's allegation that a particular market situation shall exclude situations of distorted input costs or situations that affect both domestic market and export sales or situations arising from government action. However, the panel accepted the claimant's argument that in constructing the normal value of the exporters, the investigating authorities shall strictly follow Article 2.2 of the ADA, especially Article 2.2.1.1. Even if a particular market situation is proven, when using a substitute cost from a third country, a reasoned and adequate explanation shall be provided by the investigating authorities as to why the cost of products from the origin country cannot be used to calculate dumping. There is no formal precedent in WTO law, and to ensure consistency, it is reasonable to expect that a panel will follow prior Appellate Body reports on the same issue. The influence of this case needs to be carefully examined. The panel ultimately supported the claimant, Indonesia, which may benefit the third parties with similar positions, such as China and Russia. The panel did not give clear guidance on the interpretation of the term "particular market situation", leaving room for a broad interpretation that includes various government behaviours in the context of a state-controlled economy or an NME. As the EU emphasises in this case, "there is no requirement on the consistent interpretation by the municipal laws and investigating authorities of all WTO members," and the EU therefore has the right to enforce laws with a broad definition of "particular market situation". On May 5, 2021, the European Commission proposed a new draft regulation

[101] *Id.* at 70.
[102] *Id.* at 67.

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on Foreign Subsidies Distorting the Internal Market. This proposal adopts a broad definition of "distortion": "A distortion on the internal market shall be deemed to exist where a foreign subsidy is liable to improve the competitive position of the undertaking concerned in the internal market and where, in doing so, it actually or potentially negatively affects competition on the internal market."[103]

IV. CONCLUSION: COORDINATED COMPLIANCE AS PROPOSED APPROACHES FOR THE EU'S TRADE POLICY TOWARDS CHINA

Every WTO member has its own unique economic system. It might be more desirable to address differences in economic policies and economic models by respecting differences, seeking common ground and coexisting with competition, as "[a] fair world trade regime would recognize the value of diversity in economic models. It should seek a *modus vivendi* among these models, rather than tighter rules."[104]

With the expiry of Paragraph 15 of the Accession Protocol, China is entitled to a standard calculation of the dumping margin based on domestic prices rather than the prices of a surrogate country. However, the EU's new draft regulation of 2021, together with its other similar regulations of 2016 and 2017, give the EU flexibility in assessing significant distortion in a market and the power to continuously refer to third-country prices in anti-dumping investigations. This is not a country-neutral approach but an extension of unjustified, unequal treatment of China and Chinese products. In the short term, this treatment will inevitably harm the Chinese economy, as it creates trade barriers against Chinese products. Moreover, in the long term, it may have negative impacts on the EU's trade, as the EU's development is closely tied to China's.

The EU is China's largest trading partner. As the EU has acknowledged, China's continuous development may benefit the EU; therefore, it is important that they maintain a mutually beneficial relationship. Although the two parties may disagree on the application of the significant distortion standard, the door for further negotiation remains open. Furthermore, China reserves the option to reach bilateral trade agreements with individual EU member countries.

Going forward, all WTO members in the multilateral global trading system will have the opportunity to offer input regarding the regulation of

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[103] *Formal Comments of the EDPS on the Proposal for a Regulation of the European Parliament and of the Council on Foreign Subsidies Distorting the Internet Market*, *supra* note 66; *Proposal for a Regulation of the European Parliament and of the Council on Foreign Subsidies Distorting the Internal Market*, art. 3, COM (2021) 223 final (May 5, 2021).

[104] Dani Rodrik, *The WTO Has Become Dysfunctional: Trade Rules Must Acknowledge the Benefits of Divergent Economic Models Such as China's*, FIN. TIMES (Aug. 5, 2018), https://www.ft.com/co%20ntent/c2beedfe-964d-11e8-95f8-8640db9060a7.

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these controversial anti-dumping measures. The issues raised by the terms "NME", "particular market situation", and "significant distortions" will be further clarified and settled by WTO laws when a consensus is reached by all WTO members. This suggests the importance of seeking normative consensus between China and the EU in defining, interpreting, and debating the meaning of these terms as mentioned above in their local contexts.

After the expiry of Section 15 of China's WTO accession protocol, it is questionable and controversial to keep using the NME methodologies in anti-dumping investigations. China's economic model cannot justify the using of NME methodologies by other WTO members after the expiry of Section 15. As we know, as WTO's appellate body becomes dysfunctional, the controversies over the interpretation of Section 15 will remain unsolved. From the author's point of view, the anti-dumping investigation should target private commercial decisions only as opposed to state activities. As it remains highly controversial as to the compatibility of the EU's significant distortion standard with the WTO's treaty requirements, the EU should consider other policy alternatives instead of using anti-dumping investigations to address the problems of the low production costs of Chinese products. The concept of coordinated compliance of international trade and human rights as developed by Pitman Potter, with a focus on issues of labour, environmental, and climate change, may be a desirable policy approach for the EU to take towards China in hope of a better treaty performance by China in both trade and human rights, which will also have strong implications for the future of EU-China trade relations.[105] This policy approach of coordinated compliance does not involve anti-dumping as a policy tool, but it is used by developing a comprehensive set of labour, environmental, and other CSR standards for Chinese and other foreign producers to follow and comply with. This may be another approach for the EU to take instead of debating and interpreting the controversial meaning of "non-market economy", "particular market situation", and "significant distortions", etc., In this regard, the authors suggest the EU use international labour and environmental standards as an approach to engage PRC in the bilateral trade relations. Labour and environmental standards can be used to determine whether the fair trade is achieved in China's exports to the EU. To ensure labour and environmental standards are met will also significantly increase the production cost and exporting price of Chinese products. As a matter of fact, this coincides with the EU's expectation on China to comply with

[105] *See generally* Pitman B. Potter, *Coordinating Human Rights and Trade Policy in China: The Case of Environmental Protection*, *in* LOCAL ENGAGEMENT WITH INTERNATIONAL ECONOMIC LAW AND HUMAN RIGHTS ch. 10 (Potter B. Potter & Ljiljana Biukovic eds., 2017); Pitman B. Potter, *Labour Relations and Trade Policy in China: Opportunities for Coordinated Compliance*, *in* GREY ZONES OF INTERNATIONAL ECONOMIC LAW AND GLOBAL GOVERNANCE ch. 8 (Daniel Drache & Lesley A. Jacobs eds., 2018).

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international labour, financial, and environmental standards in exports; abides by international accounting standards; and carries out foreign exchange conversions at market rate.[106]

China's treaty performance on human rights has centred on the extent to which the Party and the state have struck a balance between individual rights and more collective interests, such as economic development, public safety, social stability, and political order.[107] The WTO is commonly seen as built on the norms of liberalism, marked by Western liberal traditions and the principles of transparency, rule of law, and non-discrimination. The WTO's multilateral agreements have had political implications, especially in terms of human rights, and China's WTO membership and treaty commitments facilitated China's compliance with the international human rights regime. However, instead of fully embracing a transparent government system based on the Western rule of law, the party state carefully filtered and accepted only the parts of the WTO laws that suited its economic and political agenda. The Party-state's pledge of human rights protection is subject to the higher priority of economic development, political stability and social control. From a legal instrumentalist perspective, the Chinese government considers the international system only when it suits the Party-state. However, since economic development is a major driving force in China's participation in the international system, as was well-illustrated by China's accession to the WTO and its integration into the international economic law system, we anticipate that coordinated compliance of international trade and human rights, through the implementation of international labour and environmental standards, may be a feasible approach for the EU to engage China in its bilateral trade relations, rather than debating the meaning of controversial terms such as "NME", "particular market situation", and "significant distortions".

[106] *Proposal for Regulation(EU)2016/1036*, *supra* note 32. *See also EU and China Reach Agreement in Principle on Investment*, *supra* note 32.

[107] POTTER, *supra* note 3. *See generally* Chao Wang, *Coordinated Compliance and Private Approach of International Engagement in China's Human Rights*, *in* INTERNATIONAL ENGAGEMENT IN CHINA'S HUMAN RIGHTS ch. 6 (Titus Chen & Dingding Chen eds., 2015).

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