政治科學論叢 / 第 80 期 / 民國 108 年 6 月 / 頁 37-62

Relabeling Countries with Non-Market Economies as Countries with Market-Distorted Economies:

The New EU Methodology in Anti-dumping Investigations at the Heart of a Storm*

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Abstract

The European Union adopted in December 2017 the new Anti-dumping Regulation which aims at protecting its producers against unfair trade practices, especially dumped imports from China. The European Commission's original proposal to revise its anti-dumping rules was put forward in November 2016, just before the 15th anniversary of China's accession to the WTO. The deadline meant that China demanded to be recognized as a having market-economy status, and to no longer treated as a non-market economy in anti-dumping investigations. According to the new regulation, the methodology removes the former distinction between market and non-market economies for calculating dumping margins. Instead, the European Commission will need to prove the existence of a significant market distortion between a product's sale price and its production cost. On that basis, it will be allowed to set prices for products by referring, for example, to the price of the good in a country with similar levels of economic development, or to relevant undistorted international costs and prices. Faced with its obligation to respect WTO rules, the European Commission's new anti-dumping rules are "country- neutral". However, this

* DOI:10.6166/TJPS.201906_(80).0003
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Received: 9 October 2018 / Accepted: 28 May 2019.

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new approach has sustained some major criticisms and constitutes one of the most contentious issues in EU-China bilateral trade relations. This research paper will attempt to address the debate on the interpretation of the key provision in China's Accession Protocol, followed by an analysis of what alternative means and methods for calculating anti-dumping duties would be applied in cases involving China after 11 December 2016.

Keywords: China's Accession Protocol to the World Trade Organization (WTO), Non-market Economy (NME), Analogue Country Methodology, Shifting in Burden of Proof, Significant Market Distortions

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I. Introduction

The European Union adopted in December 2017 the new Anti-dumping Regulation (AD Regulation)[1] which aims at protecting its producers against unfair trade practices. The European Commission's original proposal to revise its anti-dumping rules was put forward in November 2016, just before the 15th anniversary of China's accession to the WTO. The deadline meant that China had demanded to be recognized as a country with Market Economy Status (MES), and no longer be treated as a Non-Market Economy (NME) in anti-dumping investigations.

Under the old rules, the European Commission calculated a Chinese product's normal value by using the surrogate country approach (instead of domestic prices), which usually led to imposing higher anti-dumping (AD) duties on Chinese goods. Chinese companies were at a disadvantage due to the fact that the EU did not accord MES to China and AD duties were thus more likely to be imposed. In fact, China has been a major target of AD investigations conducted by the EU in recent years. As of January 2018, the EU has adopted more than 50 AD measures against Chinese products which were sold on the EU market at a lower price than on the home market. The AD actions against Chinese products concerned mainly key export goods such as inter alia solar panels, polysilicon, wine, mobile telecommunication networks, and steel (European Commission, 2018).

According to the new regulation, the methodology used removes the former distinction between market and non-market economies for calculating dumping margins. Instead, the European Commission will need to prove the existence of a significant market distortion between a product's sale price and its production cost. On that basis, it will be allowed to set a price for the product by referring to, for example, the price of the good in a country with similar levels of economic development, or to relevant undistorted international costs and prices. Faced with its obligation to respect WTO rules, the European Commission's new

[1] 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 subsidized imports from countries not members of the European Union, Official Journal of European Union, 19 December 2017, L338/1.

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AD rules are "country-neutral". The European Commission has also drafted specific reports on countries or sectors describing distortions. Those reports will be used by EU firms to file complaints and to support their cases.

However, this new approach has sustained some major criticisms and constitutes one of the most contentious issues in EU-China bilateral trade relations. It has been argued that since some of the underlying concerns that had given rise to the creation of the particular NME provision in China's Accession Protocol to the World Trade Organization (WTO) may persist following 11 December 2016, the WTO members-including EU-may resort to other alternative methods available in situations where domestic Chinese prices or costs are distorted through state intervention. The question then arises whether the proposed changes would be truly in line with WTO rules. This research paper will attempt to address the debate on the interpretation of the key provision in China's Accession Protocol, followed by an analysis of what alternative means and methods for calculating anti-dumping duties would be applied in cases involving China after 11 December 2016. This article seeks to answer the following question: to what extent will the significant market distortions be permissible in anti-dumping investigations against China?

II. Section 15 of China's Accession Protocol at the Centre of a Fierce Controversy

Section 15 of China's Accession Protocol has allowed WTO members to treat China as a NME for the purposes of AD investigations and to use a non-standard methodology for calculating dumping margins for imports from China, i.e., not using Chinese prices and costs in calculating the normal value. In December 2016, section 15(a)(ii) expired. However, the expiry of this particular subparagraph leaves much room for diverging interpretations and as a result the criteria for MES conferral at that time had not been truly set up. One thing for sure is that China's Accession Protocol no longer provides a legal basis for determining the normal value of Chinese imports by using an NME methodology. It seems that the European Commission itself believes this to be so, given that a list of states considered as NMEs-including China - has been removed. Although there is no explicit discrimination against China in the new AD Regulation, the introduction of a number of new criteria, together with the specific reports on countries or sectors describing market distortions, can prolong the use of alternative prices for calculating the normal value in AD investigations.

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A. Origin of the Debate

The origin of the fervent debate over the conferral of MES to China finds its root in Section 15 of China's Accession Protocol entitled "Price Comparability in Determining Subsidies and Dumping", which provides that:

> "Article VI of the GATT 1994, the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement") and the SCM Agreement shall apply in proceedings involving imports of Chinese origin into a WTO Member consistent with the following:
>
> (a) In determining price comparability under Article VI of the GATT 1994 and the Anti-Dumping Agreement, the importing WTO Member shall use either Chinese prices or costs for the industry under investigation or a methodology that is not based on a strict comparison with domestic prices or costs in China based on the following rules:
>
> (i) If the producers under investigation can clearly show that market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product, the importing WTO Member shall use Chinese prices or costs for the industry under investigation in determining price comparability;
>
> (ii) The importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product.
>
> (…)
>
> (d) Once China has established, under the national law of the importing WTO Member, that it is a market economy, the provisions of subparagraph (a) shall be terminated provided that the importing Member's national law contains market economy criteria as of the date of accession. In any event, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession. In addition, should China establish, pursuant to the national law of the importing WTO Member, that market economy conditions prevail in a particular industry or sector, the non-market economy provisions of subparagraph (a) shall no longer apply to that industry or sector."

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This section includes a chapeau and four paragraphs, with two subparagraphs under the first paragraph. The chapeau clearly notes that Article VI of GATT 1994, the AD Agreement and the SCM Agreement shall govern the investigations against Chinese imports. Nonetheless, the investigations should be conducted in line with the rules set out in the following paragraphs. In terms of the determination of the normal value and price comparison methodologies, the first paragraph is undoubtedly the key provision. Paragraph (a) of Section 15 comprises two subparagraphs, subparagraph (a)(i) and (ii), providing two kinds of price comparison methodologies that are contingent upon whether the Chinese producers in question satisfy their burden of proof. On one hand, a standard methodology shall be used, as noted in subparagraph (a)(i), if the Chinese producers "can clearly show that market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product." On the other hand, a non-standard methodology may be used, as noted in subparagraph (a)(ii), if they cannot. This particular provision contains the conditions for applying alternative methodologies to calculate the normal value, and its expiration on 11 December 2016 has induced intensive discussions.

In relation to paragraph (a), paragraph (d) of Section 15 of China's Accession Protocol comprises of three sentences. The first and the third sentences of paragraph (d) provide the possibility for the Chinese government to take the initiative in proving economy-wide or industry-wide market economy conditions fulfilled in accordance with the national law of the importing WTO Member. By contrast, the second sentence of paragraph (d) is an "expiration clause" stating that in any event, the provisions of subparagraph (a)(ii) of Section 15 of China's Accession Protocol shall expire 15 years after the date of accession. Taking the plain meaning of the words, paragraph (d) makes a distinction between the termination of paragraph (a) as a whole, the expiry of subparagraph (a)(ii), and the non-application of the NME provisions of paragraph (a) (De Kok, 2016: 519). The second sentence thus gives rise to lively discussions and different interpretations regarding the issue of whether the expiration clause shall lead to an automatic graduation of China from NME status after 11 December 2016.

B. Various Interpretations of Section 15

Interpreting the provisions of Section 15(d) in conjunction with Section 15(a) has triggered widely divergent opinions among legal experts. For a long

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time, it was assumed that China would be granted MES and standard antidumping treatment on 11 December 2016 following the expiration of Section 15(a)(ii) of China's Accession Protocol. However, some commentators argue that China's MES is not automatic. According to their analysis, China needs to establish that market economy conditions prevail in accordance with the criteria under the domestic law of the importing WTO Member after 11 December 2016. Given the complex nature of the subject and the diverging legal interpretations of the consequences on China's status, this section does not intend to determine which of the various interpretations should be accepted, but only to provide an overview of different legal opinions regarding Sections 15(a) and 15(d) of China's Accession Protocol.

Most of the legal experts, who are interpreting the meaning and consequences of Section 15, refer in their arguments to general rules and supplementary means of treaty interpretation set out in the Vienna Convention on the Law of Treaties, namely Articles 31 and 32. Some lawyers also rely on the relevant trade agreements under the WTO, and invoke WTO Panels and Appellate Body reports which could provide further guidance on interpretation practices in their various decisions. Yet, it is incredible that Sections 15(a) and 15(d) of China's Accession Protocol can lead to such different and even conflicting consequences based on identical or similar means and methods of treaty interpretations. Following these interpretations, there is no single response to the question of what methodologies will be applicable by virtue of the expiry of Section 15(a)(ii). In this respect, the prominence of the political and economic arguments over the legal reasoning is omnipresent.

In the lively and ongoing discussions among legal experts, one can sharpen the distinction between two primary groups with two opposing positions, each consisting of secondary groups which put forward slightly different arguments from the mainstream of reasoning. The first group takes the position in favor of China that upon the expiry of Section 15(a)(ii), this provision no longer provides a legal basis for determining the normal value of Chinese imports on the basis of an NME methodology. According to the proponents of this group, Section 15(a)(ii) is the sole basis in China's Accession Protocol for the right to use non-Chinese prices and costs. After its expiration, no legal basis will remain in Section 15 for deviating from the use of ordinary methodology in anti-dumping investigations, i.e., using the domestic prices and costs of Chinese exporters. Some commentators support this interpretation by providing the *Report of the Working Party on the Accession of China*, particularly

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paragraphs 150 and 151, as supplementary material (Li, 2016: 229-237). The WTO members-including the EU-will be obliged to grant China *de facto* MES (Graafsma & Kumashova, 2014: 154-159; De Kok, 2016: 525-528; Noel, 2016: 296-305; Kleimann, 2016: 1-5; Vermulst et al., 2016: 212-219; Yu & Guan, 2017: 16-24; Suse, 2017: 1; Zhou, 2017: 345-364). Some legal experts propose that the investigating authorities would be able to disregard the ordinary methodology only if conditions in the second *AD Note* to Article VI:1 of the GATT 1994 are met,[2] which equals to the *de facto* awarding MES to China. In addition, some experts have invoked the decision in the *EC-Fasteners* dispute in which the Appellate Body interpreted Section 15(a)(ii) for the first time in 2010 (WTO, 2011).[3] It supported the argument that the rules allowing for alternative calculations would expire by the end of the year in 2016, and were therefore temporary. Others have cited the findings of the Panel and of the Appellate Body in *EU-Biodiesel* to lend support to the view that it is no longer permitted to use prices prevalent in representative third countries as a benchmark to construct the normal value of the producer or exporter under investigation.[4]

Some argue that this provision indicates that China will automatically receive MES by 11 December 2016, while others strongly disagree, contending that the remaining text of Section 15 makes it clear that China must meet specific criteria before MES can be granted. The opposing view is that since the expired part is limited to Section 15(a)(ii), the surviving parts of Section 15 continue to apply in a way that permits countries to continue using alternative

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2 The second *AD Note* to Article VI:1 refers to a "country which has a complete or substantially complete monopoly of its trade" and "where all domestic prices are fixed by the State". This appears to describe a certain type of NME, where the State monopolizes trade and sets all domestic prices. Without explicitly mentioning the term "non-market economy", the *AD Note* only points out a specific category of this system.

3 The implications of the expiry of Section 15(a)(ii) were not under the scrutiny of this ruling, as a result it led to this interpretation being disputed by some experts. However, the arguments used by the Appellate Body in this decision imply that a potential ruling on the application of the analogue country methodology could be in favor of China. See Dekeyser et al. (2016: 6-7).

4 In this case, Argentina's complaint against the EU at the WTO, where the EU lost its case for AD measures on biodiesel in Argentina, could potentially have set a precedent for the inappropriate usage of the cost adjustment methodology against market economies. WTO DS459 on European Union and Certain Member States-Certain Measures on the Importation and Marketing of Biodiesel and Measures on Biodiesel Industry on 15 May 2013. WTO DS473 on European Union Anti-dumping Measures on Biodiesel from Argentina, 20 May 2016. See Suse (2017: 21-31).

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methodologies until China complies with their criteria (Stewart et al., 2014: 272-279; Posner, 2014: 146-153; Rosenthal & Beckington, 2014: 352-355; O'Connor, 2015a: 176-180; Miranda, 2016: 244-250; Sacerdoti, 2016: 1-16). The main argument advanced by the proponents is thus based on the principle of effective treaty interpretation, i.e., the expiry of Section 15(a)(ii) must not be interpreted in a way which renders the surviving parts of Section 15 inutile. The second group takes the position against awarding MES to China, stating that countries should be allowed to continue to use alternative methodologies until the conditions set in national laws are met and the remaining parts of Section 15 justify the continued use of alternative methodologies. According to their analysis, the NME methodology can be applied as the chapeau of paragraph (a), and subparagraph (a)(i) provides the basis for the continuous application of the NME Methodology (Posner, 2014: 149; Miranda, 2016: 244-250). The commentators contend that China should first establish that it is a market economy, "pursuant to the national law of the importing WTO member", before its domestic prices will be used in AD investigations (Plasschaert, 2016: 19-20). In other words, the analogue country methodology is still possible by virtue of Section 15(a) (O'Connor, N.d.; 2011; 2015b; Posner, 2014: 149).

In light of the foregoing, the debate over Section 15 of China's Accession Protocol is often reduced to an antithesis between those who support and those who oppose the MES automaticity for China. The interpretations of this particular clause have not appeared far less contentious after the expiry date. However, from one end of the spectrum to the other extreme, a less radical line of reasoning proposes that Section 15 no longer authorizes the regime which makes systematic use of the NME Methodology, although the WTO Members are not required to grant China a MES according to preconditions set in national laws of importing countries (De Kok, 2016: 525; Vermulst et al., 2016: 212; Graafsma & Kumashova, 2014: 154; Gatta, 2014: 165). Another line of thought observes that the expiry of Section 15(a)(ii) merely shifts the burden of proof from China to the investigating authorities in making an assessment of MES conditions. In case of the prevalence of NME conditions in China, the derogation is still possible and the continued use of the analogue country methodology may be maintained without breaching Section 15 of China's Accession Protocol (Miranda, 2014: 94-103).

Despite all its intricacies, the discussion on the meaning and consequences of Section 15 after the deadline shows that the old system cannot be maintained unchanged, in accordance with and giving full effect to Sections 15(a)(ii) and

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15(d). So far, it is impossible to find a way to force the WTO Members to use exclusively the WTO standard methodology to investigate AD cases involving Chinese exports, due to the surviving parts of Section 15(a), including the chapeau and subparagraph (a)(i), that an effective meaning should be attributed to those provisions. This in some way leads to the question that if the granting of MES to China is a political decision with technical backup, what kind of legal approach can the EU adopt?

C. The Legal Interpretation of the European Union

The WTO members have chosen different approaches, in terms of both procedure and substance, to transpose Section 15 of China's Accession Protocol into their respective domestic laws. The expiry of Section 15(a)(ii) thus requires the WTO members to contemplate amendments or to adjust their special AD regime. Accordingly, the EU has adopted the "shifting in burden of proof" approach and thereby has limited the legal effect of the expiry of Section 15(a)(ii) to the removal of the assumption of China as an NME. Under this new approach, instead of Chinese producers, the investigating authorities shall bear the burden of proving whether China satisfies the national ME conditions. The EU had the view that the expiry of this particular clause merely shifts the burden of proof from Chinese producers to investigating authorities, and that the remaining parts of Section 15 continue to exist and to be applied. It results in the use of a new methodology in the absence of the ME conditions at the level of an industry or sector, or of the Chinese economy as a whole, in individual AD investigations. In other words, the EU contended that unless the NME assumption is overturned, the investigating authorities may eventually apply appropriate third-country prices or costs in the absence of any evidence of ME conditions in China. Therefore, a methodology not based on a strict comparison with domestic prices and costs in the country of origin has been maintained, only not systematically.

For its part, the EU has updated the legal framework of the AD regime. Although it has removed China from the list of NME countries, it continues to use a similar methodology by introducing the burden-of-proof condition. This new approach has been adopted since the EU was internally divided on the steps to take following the expiry of Section 15(a)(ii). Initially, it appeared that the European Commission would take the position that China should be treated

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as a market economy as of 11 December 2016 (De Gucht, 2013).[5] However, the European Commission has changed its position due to increasing legal and political debates, as well as public protest from EU businesses, steel workers and trade union leaders. The European Parliament was inclined toward continued treatment of China as a NME and passed a resolution on "China Market Economy Status" with broad inter-party support against granting China MES (European Parliament, 2016; Kleimann, 2016:1). On 3 October 2017, the European Parliament and the European Council reached an agreement on the new approach which permits the use of a new methodology in antidumping investigations on Chinese imports, while ensuring that the EU industry does not bear the additional burden of proof. Given the fact that opinions vary among EU policy makers on the ambiguous implications of Section 15, a decision on whether to grant China MES and which alternative mean would be used is considered to be a political one (Dekeyser et al., 2016: 2). Finally, an intermediate solution was found.

III. Using the Benchmark of Significant Market Distortions in Place of a Non-Market Economy: Challenges Ahead

The new AD Regulation is a response to the expiry of Section 15(a)(ii) of China's Accession Protocol. At the core of the amendments lies the use of prices derived from a constructed value as the basis for a normal value in the event that there are "significant (market) distortions" in the exporting country under investigation. This approach will replace the analogue country methodology applied to NME under the old Regulation. In the context of the analogue country approach, the domestic prices are replaced by prices and costs from an appropriate third country. This new approach should be in favor of a case-by-case analysis and lead to the cessation of the distinction between ME and NME countries. However, it is questionable whether the new methodology will bring the AD Regulation into compliance with WTO law, or if it only aims to preserve, to the greatest extent possible, the current effectiveness of AD measures against imports from China.

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5 The European Commission's legal service has reportedly circulated a non-public opinion expressing the opinion that "it would be unwise not to grant market-economy treatment to China". See Dalton (2015).

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A. Scaling a Cliff?

In December of 2017, it was publicly announced that the amendments will have several new elements added to the Basic AD Regulation. The new elements consist of the removal of the list of NME countries, a new methodology for establishing normal value in case of "significant distortions" in the market of the exporting country, and the adoption of the "shifting in burden of proof" approach. On the face of it, the new EU methodology provides for a "country-neutral" approach, since the distinction between ME and NME countries for the choice of the calculation methodology has been eliminated and replaced by a differentiation between WTO members and non-WTO members. In practice, however, China will remain the main target of the new AD regime. The EU sets a new benchmark-significant market distortions-for the exporters throughout the world, in place of NME status. Accordingly, China has strongly criticized that the new methodology would amount to prolonging the analogue country methodology under a new label.

Through the addition of a new paragraph 6a to Article 2 of the Basic AD Regulation, the EU now ceases to apply the analogue country methodology to those WTO members previously classified as NMEs, while this methodology would continue to apply to non-WTO members. Instead, the EU introduced a new methodology for determining normal value in case of "significant market distortions" in the exporting country, which renders the use of domestic prices and costs in that country inappropriate. The standard approach, which uses domestic prices and costs in the exporting country under investigations, basically will apply to all WTO members. Nevertheless, in case of significant distortions, the Commission would be allowed to construct values based on "costs of production and sale reflecting undistorted international prices, costs, or benchmarks, or corresponding costs of production and sale in an appropriate representative country with a similar level of economic development as the exporting country" under the new Article 2.6(a). In other words, the Commission would exceptionally construct normal value on the basis of out-of-country costs of production and sale for purposes of correcting a price distortion in the country of origin where significant state-induced market distortions are deemed to exist.

In the context of the analogue country approach, the domestic prices in the exporting country under investigation are disregarded, and replaced by prices and costs from a third ("analogue" or "surrogate") country with a market

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economy. By contrast, in the case of the constructed value method, the domestic prices are calculated on the basis of the cost of production in the country of origin, plus selling, general, and administrative expenses, and profits (Article 2.2, WTO Anti-dumping Agreement). In general, using the constructed value method to estimate the normal value rather than using the price in the exporting country or in third countries allows for greater discretion.

Nevertheless, the new constructed value methodology incorporated into the AD Regulation is slightly different from the approach set out in Article 2.2 of the AD Agreement. According to the EU version, the constructed value determined under the new AD rules would include, *inter alia*, international sources of undistorted prices and cost. In the event that the Commission makes exceptions for cases of "significant market distortions", the normal value will be "constructed exclusively on the basis of costs of production and sale reflecting undistorted prices or benchmarks" (Article 2.6a(a), New AD Regulation).

In determining such "undistorted prices or benchmarks", the Commission may use: (i) corresponding costs of production and sales in an appropriate representative country with a similar level of economic development as the exporting country; (ii) if it considers that it has appropriate, undistorted international prices, costs, or benchmarks; or (iii) domestic costs, but only to the extent that they are positively established not to be distorted, on the basis of accurate and appropriate evidence (Article 2.6a(a), New AD Regulation).

The Commission will have three options, including the analogue country method, international sources of undistorted prices and cost, and the domestic costs. With regard to the selection of the third country, the only requirement in the EU under the old AD regime was to choose the analogue country "in a not unreasonable manner" (Article 2.7(a), old AD Regulation (EU) 2016/136 of 8 June 2016), whereas the new approach adopts a more clear criteria, i.e., the economic development criteria currently applied by the U.S., to choose an analogue country (Sandkamp & Yalcin, 2016: 79). However, it is interesting to note that the new approach is distinct from the existing "cost adjustment methodology" applied to a market economy in "particular market situations", such as Russia.[6] The amended Regulation provides for the possibility of

[6] Since Russia was granted MES, the European Commission has used the so-called "cost adjustment methodology" under Article 2.2 ADA, in conjunction with Article 2.2.1.1 ADA, to replace or adjust domestic prices that are considered artificially low or out of

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applying a different methodology if it is proven that the producers operate in a distorted market economic environment.

Under the new AD regime, the newly constructed value methodology may, *prima facie*, reject the appropriateness of domestic Chinese prices in the calculation of anti-dumping duties by reference to costs not occurring in the country of origin. As a result, the new methodology is still one that is not based on a strict comparison with domestic prices and costs in the country of origin. This would hinder China from attaining the full benefits of a ME country, and simultaneously the amended regulation would provide the Commission with the discretion to use the analogue country methodology in exceptional circumstances. In this respect, the new methodology is considered to be a substitute for the analogue country methodology previously applied under the old AD regime. It is expected that, to a certain extent, the new methodology would lead to the calculation of anti-dumping duties similar to those obtained by using the analogue country method previously applied for conducting the anti-dumping investigations against exports from China as a NME (Suse, 2017: 29).

According to the new AD Regulation, "significant distortions" are defined as "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". The new AD Regulation sets out a non-exhaustive list of criteria which would be considered to determine the existence of "significant distortions", including: (i) the market 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; (ii) state presence in firms allowing the state to interfere with respect to prices or costs; (iii) public policies or measures discriminating in favor of domestic suppliers or otherwise influencing free market forces; (iv) the lack, discriminatory application or inadequate enforcement of bankruptcy, corporate or property laws; (v) wage costs being distorted; and (vi) access to finance granted by institutions which implement public policy objectives or otherwise not acting independently of the state (Article 2.6a(b), new AD Regulation). These criteria are quite similar to those applied by the Commission

line with the world market prices, prices in other representative markets or otherwise distorted because of market impediments such as government price regulation or the application of export duties. See Anderson (2009: 103); Tietje et al. (2011: 1076, 1086-1087); Pogoretskyy (2009: 316).

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in order to assess China's request to be granted MES in 2008.[7]

The EU has repeatedly stated that the new AD Regulation will not impose an additional burden of proof on EU industries in anti-dumping cases. The new methodology thus places the burden of proof on the exporting producers, who must establish that their domestic prices and costs are undistorted in the event that the Commission uses the sources of domestic costs, "but only to the extent that they are positively established not to be distorted, on the basis of accurate and appropriate evidence" (Article 2.6a(a), new AD Regulation). In addition, it also entails a reversal of the burden of proof, whereby it is up to the Commission to prove the existence of market distortions allowing for the application of the alternative method, i.e., the use of the constructed value. It provides that the Commission may publish reports on specific situations in certain countries based on the criteria set out for "significant trade distortions". EU importers would be able to rely on these evidence-based reports in making their case. Accordingly, the Commission published, on 20 December 2017, its report on the market circumstances in China (European Commission, 2017)[8]. It is recalled that the chapeau of Section 15(a) of China's Accession Protocol provides for the possibility of applying a different methodology, should the

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7 Commission Staff Working Document on Progress by the People's Republic of China Towards Graduation to Market Economy Status in Trade Defense Investigations (European Commission, 2008). The Commission's assessment were based on the following criteria: (i) a low degree of government influence over the allocation of resources and decisions of enterprises, whether directly or indirectly (e.g., public bodies), for example through the use of state-fixed prices, or discrimination in the tax, trade or currency regimes; (ii) an absence of state-induced distortions in the operation of enterprises linked to privatization and the use of non-market trading or compensation system; (iii) the existence and implementation of a transparent and non-discriminatory company law which ensures adequate corporate governance (application of international accounting standards, protection of shareholders, public availability of accurate company information); (iv) the existence and implementation of a coherent, effective and transparent set of laws which ensure the respect of property rights and the operation of a functioning bankruptcy regime; and (v) the existence of a genuine financial sector which operates independently from the state and which in law and practice is subject to sufficient guarantee provisions and adequate supervision. See European Commission (2008).

8 As reported by the European Commission, the report on China "simply reflects the fact that this is the country on which the majority of the EU's trade defence activity occurs". However, the question arises as to whether it will be sufficient for the EU industry to simply refer to the reports of the Commission or if it will need to further substantiate its claims concerning the existence of significant distortions. See Van Bael & Bellis (2017: 4).

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Commission find, in the course of a particular investigation, that the producers operate under distorted market economic conditions. In such a case, an objective assessment of economic conditions in China should be taken into consideration. The "significant distortions", while coated in different terms, nevertheless bear a resemblance to the NME.

The introduction of the "significant distortions" in the amended Regulation and the continued use of the analogue country methodology, are strongly criticized by China. China has repeatedly declared that it must be treated as a market economy so that the general AD rules must apply to its exports. On 12 December 2016, one day after the expiry of Section 15(a)(ii), China requested consultations with the EU at the WTO concerning certain provisions of the EU's old AD Regulation. China urged the EU to abide by its WTO commitments and abstain from the continued differential treatment of Chinese imports (WTO, 2016). Since consultations between the EU and China did not lead to a solution, a WTO dispute settlement panel is dealing with the case. The panel on the China-EU dispute had been expected to issue its report in September 2018 (Zhou & Peng, 2018: 506),but then it was delayed and still has not been issued. It remains unclear if China intends to file a complaint against the new AD Regulation as well.

B. Analysis of Market Distortions in the Economy of China

According to the specific report on significant distortions in the economy of China (European Commission, 2017), the European Commission has examined the current shape and structure of China's economy. In terms of cross-cutting distortions, the report comprehensively approaches this topic by discussing the concept of a "socialist market economy" delineated in Chinese laws, plans and regulations, as well as the role of the Chinese Communist Party in economic policy and planning. It also discusses, the Chinese system of plans and the impact on the economy, the extensive State-owned and/or State-controlled sector with its numerous State-owned enterprises, the role of the Chinese financial system and its impact on the country's economic performance, the public procurement market in China, and the significant barriers in place for foreign and domestic private investment. All these topics are closely interlinked (Shadikhodjaev, 2018: 897).

The report points out that China practices a socialist market economy which has been officially stipulated in the Chinese laws, and implies that China applies

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a planned economy on the basis of socialist public ownership. Furthermore, the involvement of the State and the Chinese Communist Party go clearly beyond broad macroeconomic control (European Commission, 2017: 20-21). The political, economic, judicial, financial structure and organization of China is entirely penetrated by the leadership of the Chinese Communist Party (European Commission, 2017: 39). The Chinese leadership relies on the existing planning system which strongly guides the direction of resources towards sectors deemed to be strategic or emergent. Five of the most prominent high-level plans are Made in China 2025, the Belt and Road Initiative (BRI), Supply-Side Structural Reforms (SSSR), China's central 13th Five Year Plan (FYP), Internet+ and Decision No 40 (European Commission, 2017: 41-42, 70). Therefore, the planning system has a decisive impact on the economy, whereby China fixes the conditions of competition based on public policy objectives (European Commission, 2017: 84).

According to the report, China's State-owned enterprises (SOEs) play a vital role in the country's economy. China's SOEs are beneficiary for preferential access to finances, land, energy etc., and they enjoy protection by market access restrictions, which result in distorting the effective allocation of resources (European Commission, 2017: 109). Since China's reform and opening up policy, the country has undergone a major transformation from a monobank system to a multi-layered financial system (European Commission, 2017: 112). However, the financial system, due to a high state presence on both the borrowing and lending side, as well as the absence of normal market mechanisms, remains highly distorted (European Commission, 2017: 150). Preferential treatment of domestic over foreign enterprises persists in China's public procurement policies and leads to a significant distortive effect (European Commission, 2017: 168). Although the Chinese leadership has repeatedly expressed their intentions to liberalize market access for domestic and foreign investment, unify the country's legal regime under a single, comprehensive Foreign Investment Law, significant barriers remain in place and a number of restrictions have been placed on foreign investment (European Commission, 2017: 201). Therefore, the overall picture that emerges concerning the framework in which severe market distortions due to government intervention taking place in China, is that the state continues to exert a decisive influence on the allocation of resources and their prices.

Taking the steel sector for example, on the basis of a top-down planning system, overarching national guidelines, policies and other documents trickle down into sectoral and regional policy, which is implemented by governmental entities in China's provinces, districts and cities. The regulatory framework

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governing China's steel industry is composed of China's 13th FYP on Economic and Social Development and Related Measures, and China's Steel Industry Adjustment and Upgrading Plan for 2016-2020 (European Commission, 2017: 347-348). The high degree of intervention exerted by the government emerges in the level of detail and the fact that the plan covers almost all aspects of the steel industry. It targets overcapacities and inefficiencies, far-reaching support policies for the industry such as fiscal, tax and financial measures, and restructuring strategies (European Commission, 2017: 349-354).

State-owned enterprises are one of the most important vehicles for the Chinese government to pursue its steel policy. Five Chinese state-owned steel companies are ranked in the global top ten of steel producers, and in practice those companies remain the hand puppets of the Chinese government. While intentions were formulated to modernize the state-owned industry according to market-oriented principles, extensive government intervention prevents those companies from operating under market conditions through the virtual control of SOEs (European Commission, 2017: 358-359). Chinese state-owned steel companies are also backed by the entire Chinese financial system, relying on low interest rates, cheap loans and bonds, etc (European Commission, 2017: 361). Moreover, the government's control over the supply and the price of certain raw materials and application of preferential tax policies, subsidies, tariff and VAT exemptions, and free land use rights constitute the intensive government intervention in the development of the steel sector which gives support to SOEs (European Commission, 2017: 363-365).

The market distortions due to government intervention have led to irrational investment, huge overcapacities, and an increasing number of zombie companies. As overcapacities and inefficiencies in Chinese steel industries became problematic, it in turn caused an increase of steel exports and the depression of steel prices on a global scale (European Commission, 2017: 376).

The Chinese government has noted that the EU introduced the concept of serious market distortion and issued a specific report on this subject. The response of the Chinese government to the EU's new anti-dumping practice recalls that every country has the right to choose its own development path, and should be respected by the international community. Chinese experiences prove that the market economy with Chinese characteristics, born out of the trials of the Chinese people, fits into China's reality and serves the economic development of China. The Chinese government opposes it when the EU imposes its so-called "market

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distortion" standards onto others and misleads businesses (Ministry of Commerce People's Republic of China, 2017b). According to the Chinese government, such a move lacks basis in WTO rules and compromises the authority of the WTO's anti-dumping legal system. In the meantime, the Chinese government is concerned with the potential abuse of the concept in the EU's future legal practices, and reserves its full rights under the WTO dispute settlement mechanism and will take necessary measures to protect its legitimate rights and interests (Ministry of Commerce People's Republic of China, 2017a).

C. Providing Room for Mitigating Measures?

Following the expiry of Section 15(a)(ii) of China's Accession Protocol, the amended AD Regulation of the EU raises the question of whether some intermediate solution or methodology is allowed. Any methodology that is not rooted in a strict comparison with domestic prices must be based on the derogations laid down in the rest of Section 15 that remain in force, or the general rules set forth in the ADA and the GATT 1994. Should WTO members continue to use criteria set in their legislations and the analogue country methodology after the deadline, the possibilities involve: (1) the second interpretative *AD Note* to Article VI:1 of the GATT which points out where there is a "complete monopoly of the trade" and "all domestic prices are fixed by the state"[9]; (2) a "particular market situation" according to Article 2.2 of the ADA; and (3) the surviving parts of Sections 15(a) and (d) of China's Accession Protocol.

After the deadline, one possibility for the investigating authorities to use the alternative methodology could theoretically still find its legal basis in the second interpretative *AD Note* to Article VI:1 of the GATT. Should the Commission establish that special difficulties exist in determining price comparability, it would not be able to take away the right to use a methodology that is not based on strict comparison with domestic prices in China on the basis of the second interpretative *AD Note*. However, the conditions for

[9] *AD Note* to Article VI:1; "2. It is recognized that, in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability for the purposes of paragraph 1, and in such cases importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate."

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applying alternative methodologies were adopted almost seven decades ago and limited to a "complete or substantially complete monopoly of the trade", and in the event that "all domestic prices are fixed by the state". This gives rise to the question as to whether "significant market distortions", according to the criteria contemplated in the Amended Regulation, fall into these categories after the expiry of Section 15(a)(ii).

Derogation from the use of the domestic prices and costs, and the application of alternative methodologies, is allowed in the occasion of a "particular market situation", set out in Article 2.2 of the ADA. For instance, Australia has had recourse to the use of "particular market situation" methodologies in handling AD cases against China since 2010. When an appropriate comparison of prices cannot be made, alternative means of calculation can be applied. This article provides that a non-standard methodology can still be used as long as an importing country considers the situation in an exporting country to qualify as a "particular market situation". However, it remains unclear in this article as to what determines a particular market situation. If a "particular market situation" implies "significant market distortions", it is allowed to deviate from the normal method by resorting to: (i) a comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, and (ii) a determination with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs, and for profits. Moreover, Art. 2.2.1.1 and 2.2.2 lay down detailed rules as to how to calculate costs of production, administrative, selling and general costs, and profits in the case of using the constructed value method. Accordingly, the investigating authorities shall use the cost of the domestic product as comparator to determine price comparability under Art. 2.2. It is therefore likely that the new constructed value methodology incorporated into the AD Regulation lacks the adequate justification and legal basis even if a "particular market situation" may be deemed to exist, since the Commission may refuse to use the domestic Chinese prices in the calculation of anti-dumping duties.

If the non-standard methodology used after 11 December 2016 is not grounded in Article 2.2 of the ADA, the last possibility would lie in the rest of Section 15 remaining in force, which could be interpreted as allowing for the use of a methodology not based on a strict comparison with domestic prices and costs in the country of origin. However, the debate over the interpretation of China's Accession Protocol prompts the question as to whether Section 15(a)(ii) is the sole basis in the Accession Protocol for the right to use

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non-Chinese prices and costs. In this matter, opinions vary among legal experts. Some commentators contend that after the expiry of Section 15(a)(ii), no legal ground will remain in Section 15 for detracting from the standard practice for AD investigations according to the WT rules, i.e., using domestic prices of Chinese exporters. By contrast, some commentators argue that Section 15(a) of the Accession Protocol allows the importing WTO Member, subject to certain procedural conditions, to use a methodology that is not based on a strict comparison with domestic prices or costs in China, based on the rules of Section 15(a)(i) or Section 15(a)(ii) (Sacerdoti, 2016: 7). Therefore, if its expiry does not result in the termination of the analogue country methodology for Chinese exporters, the meaning of this provision would be reduced to only providing a presumption that abnormal market conditions may exist. According to the amended Regulation, China should first pass through the test of "significant market distortions" and comply with the EU's market economy criteria, then the ordinary method in AD proceedings would be used. In other words, the expiry of Section 15(a)(ii) does not constitute an absolute ban on the application of non-Chinese prices or costs. It merely implies that such an application will be determined based on the criteria set by individual WTO Members. The use of the analogue methodology remains possible in antidumping actions against China in accordance with the surviving parts of Section 15, even if the relevant WTO rules set out in GATT Article VI and the ADA are not fully satisfied.

IV. Conclusion

Due to the different interpretations of China's Accession Protocol, there is no consensus about the consequences of the expiry of Section 15(a)(ii), and accordingly, the responses to the surviving parts of Section 15 may differ substantially. Nevertheless, the rest of Section 15 remaining in force is silent on what investigating authorities may do if Chinese producers fail to satisfy the national criteria required to qualify as a market economy. In consequence, the EU has decided to use a non-standard methodology in AD investigations on Chinese imports, contending that the remaining applicability of section 15(a)(i) provides room for the application of the non-standard methodology. This approach does not lead to an absolute ban on the application of non-Chinese prices or costs. It implies that such an application would be determined unilaterally based on the criteria created by individual WTO Members, in the absence of the multilateral approach and criteria. In this respect, the notion of "significant market distortions" has been applied by the EU in order to replace the NMEs,

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and the use of surrogate prices or costs remains possible in antidumping actions against China. Questions arise, however, about the conformity of the mitigating measures with WTO rules which lay down derogations in ADA and GATT 1994. This leads to a fervent debate as to whether individual WTO Members may still have recourse to an analogue methodology after the expiry of Section 15(a)(ii), on the basis of China's Accession Protocol, ADA or GATT. It seems to have been the Commission's goal to create a methodology that is tantamount to the analogue country approach. The WTO compatibility of the new approach must be examined on a case-by-case basis.

The decisions on how to treat Chinese products in the AD investigations vary among countries. Australia, New Zealand, Peru, Chile and ASEAN countries have already decided to grant MES to China in order to conclude the free trade agreements (Puccio, 2015: 25). By contrast, the EU, the US, Canada, Japan, Mexico and India still refuse to grant MES to China. China has filed complaints against the EU and the U.S. over the continued differential treatment of Chinese imports as they regard to the determination of normal value in their respective domestic laws. If the WTO were to find that the EU breaches WTO rules when applying non-standard methodologies, the EU would have around three years (the average duration of a case at WTO) to ensure the continued use of surrogate prices and costs. The EU would therefore have a lot to gain by using the new methodology before finally adhering to its international obligation. In this respect, the prominence of the political and economic considerations over the legal reasoning is omnipresent. The WTO will have the final word in the use of a methodology which is not based on a strict comparison with domestic prices and costs in the country of origin, while individual WTO Members may act with a hidden motive.

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將非市場經濟國家重新定位爲市場扭曲經濟體國家：處於風暴中心之歐盟新反傾銷調查法*

李貴英**

摘　要

歐洲聯盟於 2017 年 12 月通過新反傾銷規則，旨在保護歐盟業者以對抗不公平之貿易行爲，尤其是來自中國之傾銷進口。歐盟執委會於 2016 年 11 月提出修正反傾銷規則之草案，適逢中國大陸加入世界貿易組織 15 週年（2016 年 12 月 11 日）前夕。中國大陸認爲 15 週年屆滿後應取得市場經濟地位，在反傾銷調查中不應再被視爲非市場經濟國家。而根據歐盟新規則，歐盟在計算傾銷差額時，不再適用市場經濟與非市場經濟間之區分。反之，歐盟執委會應證明產品銷售價格與其生產成本之間存在顯著市場扭曲。在此基礎上，歐盟執委會可參考具有類似經濟發展水準國家之商品價格，或相關未受扭曲之國際成本與價格，以認定產品價格。爲了遵守世界貿易組織協定下之義務，歐盟執委會在新反傾銷規則下採取「國別中立」原則。然而此一新方法受到諸多批評，成爲歐中雙邊貿易關係中最具爭議之一環。本文擬探討關於中國大陸入會議定書關鍵條款之解釋問題，並分析 2016 年 12 月 11 日後評估中國大陸涉案貨品反傾銷稅之替代方式與計算方法。

關鍵詞：中國大陸入會議定書、非市場經濟、類似國價格法、舉證責任轉換、顯著市場扭曲

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* DOI:10.6166/TJPS.201906_(80).0003

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收稿日期：107 年 10 月 9 日；通過日期：108 年 5 月 28 日

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