University of New South Wales Law Research Series

CHINA'S LITIGATION ON NON-MARKET ECONOMY TREATMENT AT THE WTO: A PRELIMINARY ASSESSMENT

WEIHUAN ZHOU

(2017) 5(2) *Chinese Journal of Comparative Law*
[2017] *UNSWLRS* 78

UNSW Law
UNSW Sydney NSW 2052 Australia

E: unswlrs@unsw.edu.au
W: http://www.law.unsw.edu.au/research/faculty-publications
AustLII: http://www.austlii.edu.au/au/journals/UNSWLRS/
SSRN: http://www.ssrn.com/link/UNSW-LEG.html

This article has been accepted for publication in (2017)5(2) of the *Chinese Journal of Comparative* Law, published by the Oxford University Press, in December 2017.

China's Litigation on Non-Market Economy Treatment at the WTO: A Preliminary Assessment

Weihuan Zhou*

ABSTRACT

As promised, China brought a WTO dispute against the US and the EU respectively regarding their antidumping laws, which continue to authorise the application of the so-called non-market economy (NME) methodology. This case was initiated one day after the expiry of paragraph 15(a)(ii) of China's WTO Accession Protocol on 11 December 2016. Through a preliminary analysis of China's claims in the request for consultation with the EU, this paper argues that the expiration of paragraph 15(a)(ii) has terminated the right of WTO Members to use surrogate prices or costs for price comparison in antidumping actions against China solely based on their national market economy criteria. The use of surrogate prices or costs must now comply with the relevant WTO rules applicable to all WTO Members. On this basis, the challenged EU measure is likely to be found WTO-inconsistent. Towards this end, WTO Members may continue to label China as an NME for political or other reasons under their national laws. However, whatever this label may entail, it no longer justifies the application of the NME methodology.

1 Introduction

By 1 September 2017, China has been a complainant in 15 disputes at the World Trade Organisation ("WTO"). These disputes have had two notable features: (1) they have exclusively targeted the United States ("US") and the European Union ("EU"); and (2) 11 out of the 15 disputes have been on trade remedies, particularly the US' and the EU's antidumping laws and practice. While China initiated these trade remedy disputes for various reasons, one enduring concern has been the US' and the EU's treatment of China as a non-market economy ("NME") in antidumping investigations.[1] This NME treatment has been criticised as being not only discriminatory but also prohibitive, as it often leads to the imposition of hefty antidumping duties.[2]

Upon its accession to the WTO on 11 December 2001, China agreed that for a period of 15 years, WTO Members may treat it as an NME in antidumping actions

* Senior Lecturer, Faculty of Law, University of New South Wales (UNSW Sydney). Member, China International Business and Economic Law (CIBEL) Initiative. Email: weihuan.zhou@unsw.edu.au. The normal disclaimer applies. All websites cited are current as of 10 October 2017.

[1] For a brief review of the disputes in which China was a claimant, see Gisela Grieger, "China's WTO Accession: 15 Years on Taking, Shaking or Shaping WTO Rules", European Parliament Briefing (December 2016) 6-7. For a comprehensive study of China's behaviour as a respondent in WTO trade remedy disputes, see Weihuan Zhou and Shu Zhang, "Anti-Dumping and China's Implementation of WTO Rulings" (2017)230 *The China Quarterly* 512-527.

[2] See, eg. Daniel Ikenson, "Nonmarket Nonsense: U.S. Antidumping Policy toward China", Cato Institute Trade Briefing Paper No. 22 (7 March 2005) 1-11 at 5.

unless the contrary is established by Chinese producers involved (known as the "NME Assumption"). Consequently, WTO Members may replace Chinese domestic prices or costs with those in a market economy ("ME") third country in determining normal value (known as the "NME Methodology").[3] This NME Methodology has arguably expired on 11 December 2016, as will be discussed below. However, this argument is not shared in the international trade community and certainly not among WTO Members. China's belief that it should gain an ME status automatically after the 2016 deadline confronted overwhelming political and industrial resistance in both the US and the EU.[4] As early as 2015, China warned that it would resort to the WTO dispute settlement system if the NME Methodology continued to be applied after 11 December 2016.[5]

On 12 December 2016, China requested consultations with the US and the EU concerning their continuous application of the NME Methodology.[6] While the case against the US stopped at the consultation stage, the case against the EU has resulted in the composition of a WTO panel to adjudicate the dispute on 10 July 2017. On average, it takes around 14 months for a WTO panel to circulate a final report after it is composed.[7] Accordingly, in this case, the panel on the China-EU dispute is expected to issue its report in September 2018.

This article discusses the major legal issues in China's WTO litigation against the use of the NME Methodology. Since the China-US dispute has not proceeded to the adjudication stage, the discussions will focus on the China-EU dispute. However, given the similarities of China's claims in both disputes, the legal analysis of the China-EU dispute should also apply to the China-US dispute under the corresponding US laws.

The article proceeds as follows. Section 2 summarises the legal claims China raised in its request for consultation with the EU. Section 3 engages in the ongoing debate on the legal effect of the expiration of paragraph 15(a)(ii) of the *Protocol on the Accession of China* to the WTO ("Accession Protocol"). It argues that the legal effect is to terminate the right of investigating authorities to use surrogate prices or

---

[3] See *Protocol on the Accession of the People's Republic of China*, WT/L/432 (23 November 2001) Article 15.

[4] See, eg. Francois Godement, "China's Market Economy Status and the European Interest", European Council on Foreign Relations, Policy Brief, June 2010; Chad P. Bown, "Trump Says China is Not a Market Economy", The Washington Post (12 December 2016), available at: www.washingtonpost.com/news/monkey-cage/wp/2016/12/12/trump-says-china-is-not-a-market-economy-heres-why-this-is-a-big-deal/?utm_term=.9233b85613b8. For a comprehensive analysis of the issue of NME status and the position of selected WTO Members, see Laura Puccio, "Granting Market Economy Status to China", European Parliamentary Research Service, November 2015.

[5] Inside US – China Trade, "China Warns of Potential WTO Fight Over NME Methodology in AD Cases", 13 November 2015.

[6] A summary of the two disputes and their current status can be found at: *United States — Measures Related to Price Comparison Methodologies* (DS515) www.wto.org/english/tratop_e/dispu_e/cases_e/ds515_e.htm (against the US) and *European Union — Measures Related to Price Comparison Methodologies* (DS516) www.wto.org/english/tratop_e/dispu_e/cases_e/ds516_e.htm (against the EU)

[7] WorldTradeLaw.net, "Timing of Establishment, Composition, Issuance and Circulation of WTO Panel Reports", available at: www.worldtradelaw.net/databases/paneltiming.php

costs for price comparison in antidumping actions against China *solely* based on their national ME criteria. The use of surrogate prices or costs must now comply with the relevant rules under Article VI of the General Agreement on Tariffs and Trade[8] ("GATT"), as implemented by the WTO Antidumping Agreement[9] ("AD Agreement"). However, the expiration does not require WTO Members to grant China an ME status such that they may continue to label China as an NME under national laws. Section 4 analyses each of the claims raised in China's request for consultation with the EU. It argues that the current EU measure which authorises the application of the NME Methodology is inconsistent with the most-favoured-nation ("MFN") rule under GATT Article I:1 and the general rules for the calculation of normal value under Article 2 of the AD Agreement. The measure's subsequent amendments or replacement according to the EU's proposed new antidumping methodology are likely to be applied in a way that contravenes Articles 2.2 and 2.2.1.1 of the AD Agreement. Section 5 concludes.

2 China's Consultation with the EU

China's request for consultation with the EU centres on Article 2(7) of the Regulation (EU) 2016/1036[10] ("Basic Regulation") which continues to apply the NME Assumption and the NME Methodology against China. This requires Chinese producers under antidumping investigations to establish that they operate under ME conditions to be eligible for the use of the ordinary methodology to calculate normal value in accordance with Articles 2(1) to 2(6) of the Basic Regulation.[11] China argues that because of the expiry of paragraph 15(a)(ii) of the Accession Protocol,

- Articles 2(1) to 2(7) of the Basic Regulation are inconsistent with Article I:1 of the GATT, as they "provide for differential treatment of Chinese imports, as compared to imports from other WTO Members"; and
- Article 2(7) of the Basic Regulation is inconsistent with Articles 2.1 and 2.2 of the AD Agreement, GATT Article VI:1, and the second paragraph of the Ad Note to GATT Article VI:1 ("Ad Note to Article VI:1"). More specifically, China argues that the use of surrogate prices and costs is not allowed under Articles 2.1 and 2.2 of the AD Agreement, and must be justified under the AD Note to Article VI:1.

Given the EU's ongoing legislative process to amend the Basic Regulation, China's consultation request included "any modification, replacement or amendment to the

[8] *General Agreement on Tariffs and Trade*, opened for signature 30 October 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194.

[9] *Agreement on the Implementation of Article VI of GATT 1994*, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 201.

[10] 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, published in the Official Journal of the European Union, L176, 30.6.2016, at 21-54.

[11] WTO, *European Union – Measures Related to Price Comparison Methodologies*, Request for Consultations by China, WT/DS516/1 (15 December 2016).

This article has been accepted for publication in (2017)5(2) of the *Chinese Journal of Comparative* Law, published by the Oxford University Press, in December 2017.

measure … and any closely connected, subsequent measures." These claims will be discussed in detail below. The fundamental question is whether the expiry of paragraph 15(a)(ii) of the Accession Protocol completely removes the possibility of using the NME Methodology under paragraph 15.

3 Interpreting Paragraph 15 of the Accession Protocol

The legal implication of the expiration of paragraph 15(a)(ii) of the Accession Protocol has been one of the most debated and contentious issues in the international trade circle since 2016. The issue will remain unsettled until it is adjudicated by the Appellate Body, likely in the China-EU dispute. Paragraph 15 sets out in the relevant part:

> 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. (emphasis added)

Two opposing positions have emerged from the existing debate. One group of observers takes the position (favourable to China) that upon the expiration of paragraph 15(a)(ii), paragraph 15 no longer provides a valid basis for the application

of the NME Methodology.[12] The opposing view is that since the expired part is limited to paragraph 15(a)(ii), the surviving parts of paragraph 15 continue to operate in a way that permits the treatment of China as an NME and the use of the NME Methodology.[13] The author's analysis of this issue below lends support to the former view.

As a general principle, the interpretation of WTO agreements must consider the materials contemplated in the *Vienna Convention on the Law of Treaties*[14] ("Vienna Convention"), including "the *ordinary meaning* to be given to the terms of the treaty in their *context* and in the light of its *object and purpose*".[15] (emphasis added) In cases where these materials leave the issues under interpretation ambiguous or obscure, one can have recourse to supplementary materials – such as the preparatory work – to accomplish the interpretation.[16] Furthermore, an interpretation "must give meaning and effect to all the terms of" the WTO agreements, and must not reduce any clauses or paragraphs of the agreements to redundancy or inutility.[17]

Starting with the text, the chapeau of paragraph 15(a) sets out two options for investigating authorities to apply in determining "price comparability" within the meaning of GATT Article VI and the AD Agreement. This "price comparability" refers to the comparison between the export price and the normal value of the subject goods under antidumping investigations.[18] Under Article 2.1 of the AD Agreement, "normal value" refers to the price of the subject goods or like goods when sold in the ordinary course of trade in the country of exportation. Accordingly, the two options

---

[12] Andrei Suse, "Old Wine in a New Bottle: The EU's Response to the Expiry of Section 15(A)(II) of China's WTO Protocol of Accession", KU LEUVEN Working Paper No. 186 (May 2017) 1-32; Edwin Vermulst, Juhi Dion Sud and Simon J. Evenett, "Normal Value in Anti-Dumping Proceedings against China Post-2016: Are Some Animals Less Equal Than Others?" (2016)11(5) *Global Trade and Customs Journal* 212-228 at 212-219; Jochem de Kok, "The Future of EU Trade Defence Investigations against Imports from China" (2016)19(2) *Journal of International Economic Law* 515-547 at 525-528; Minyou Yu and Jian Guan, "The Non-Market Economy Methodology Shall be Terminated After 2016" (2017)12(1) *Global Trade and Customs Journal* 16-24; David Kleimann, "The Vulnerability of EU Anti-Dumping Measures against China after December 11, 2016", EUI Working Papers RSCAS 2016/37 (July 2016) 1-10 at 1-5; Folkert Graafsma and Elena Kumashova, "*In re* China's Protocol of Accession and the Anti-Dumping Agreement: Temporary Derogation or Permanent Modification?" (2014)9(4) *Global Trade and Customs Journal* 154-159.

[13] Terence Stewart, *et al.*, "The Special Case of China: Why the Use of a Special Methodology Remains Applicable to China after 2016" (2014)9(6) *Global Trade and Customs Journal* 272-279; Theodore R. Posner, "A Comment on Interpreting Paragraph 15 of China's Protocol of Accession by Jorge Miranda" (2014)9(4) *Global Trade and Customs Journal* 146-153; Paul Rosenthal and Jeffrey Beckington, "The People's Republic of China: A Market Economy or A Non-market Economy in Anti-dumping Proceedings Starting on December 12, 2016?" (2014)9(7/8) *Global Trade and Customs Journal* 352-355; Bernard O'Connor, "Much Ado About 'Nothing': 2016, China and Market Economy Status" (2015)10(5) *Global Trade and Customs Journal* 176-180; 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" (2016)11(5) *Global Trade and Customs Journal* 244-250.

[14] *Vienna Convention on the Law of Treaties 1969*, 23 May 1969, 1155 UNTS (United Nations Treaty Series) 331. Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline* (*US - Gasoline*), WT/DS2/AB/R, adopted 20 May 1996, p.17.

[15] Article 31(1) of the Vienna Convention.

[16] Article 32 of the Vienna Convention.

[17] See above n 14, Appellate Body Report, *US - Gasoline*, p.23.

[18] See Article VI:1 of the GATT and Article 2.1 of the AD Agreement.

contemplated in the chapeau of paragraph 15(a) concern the determination of whether "domestic prices or costs in China" should be used to calculate a normal value for comparison with an export price in antidumping investigations.[19] Significantly, the chapeau states that a determination of whether Chinese prices or costs should be applied must be "based on" the rules laid down in sub-paragraphs (i) and (ii). The chapeau, therefore, does not set out the rules which investigating authorities must follow in determining whether to use Chinese prices or costs. It follows that such a determination cannot be based on the chapeau itself. Thus, the argument that the chapeau provides the basis for the continuous use of the NME Methodology is unconvincing as the operation of the chapeau is subject to the rules contemplated in the sub-paragraphs.[20]

Sub-paragraphs (i) and (ii) respectively set out the rules applicable to the two options, namely, the use of "Chinese prices or costs for the industry under investigation" (sub-paragraph (i)), or the use of non-Chinese prices or costs (sub-paragraph (ii)). Under both of the sub-paragraphs, it is incumbent upon Chinese producers under investigation to establish that "market economy conditions prevail in the industry" concerned. This burden of proof constitutes the sole condition for the application of the options. That is, if Chinese producers successfully discharge this burden, then investigating authorities "shall" use Chinese prices or costs under sub-paragraph (i). However, if the burden of proof is not fulfilled, then the authorities "may" employ non-Chinese prices or costs. Two important points flow from the above interpretation. First, it is evident that the two options are dealt with separately under sub-paragraphs (i) and (ii) which therefore are "two sides of one coin", being closely related but not overlapping in the scope of application. Second, while sub-paragraph (i) imposes an *obligation* on investigating authorities, sub-paragraph (ii) confers an autonomous *right* on the authorities to apply the NME Methodology.[21] Given the burden of proof, the exercise of the right is facilitated by a presumption that ME conditions do not prevail in China (i.e. the NME Assumption). These two points inform the interpretation of paragraph 15(d).

Paragraph 15(d) contains three sentences. The second sentence states that "*in any event*, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession." (emphasis added) Applying the two interpretative points above, the expiration of sub-paragraph (a)(ii) essentially terminates the right of investigating authorities to employ the NME Methodology *solely* on the basis of the NME Presumption. The language "in any event" suggests strongly that the NME Methodology must not be applied even if Chinese producers do not establish that ME

---

[19] Panel Report, *United States - Certain Methodologies and their Application to Anti-Dumping Proceedings Involving China*, WT/DS471/R, adopted 22 May 2017, para. 7.348.

[20] For a more detailed analysis of this issue, see above n 12, Yu and Guan, "The Non-Market Economy Methodology Shall be Terminated After 2016", at 20-21.

[21] This distinction draws on the Appellate Body's interpretation of the relationship between Articles 3.1 and 3.3 of the WTO *Agreement on the Application of Sanitary and Phytosanitary Measures*. See Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998. See also David Unterhalter, "Allocating the Burden of Proof in WTO Dispute Settlement Proceedings" (2009)42(2) *Cornell International Law Journal* 209-221.

conditions prevail in the industry concerned. Paragraph 15(a) does not specify the "market economy conditions". Read with the first and the third sentences of paragraph 15(d), the "market economy conditions" refer to those criteria laid down in "the national law of the importing WTO Member". Accordingly, due to the expiration of sub-paragraph (a)(ii), investigating authorities are no longer entitled to use non-Chinese prices or costs for price comparison solely on the ground that Chinese producers have failed to meet their national ME criteria. Sub-paragraph (a)(i), the surviving provision, cannot be interpreted *a contrario* or as also conferring the right to employ the NME Methodology, because the *a contrario* situation or such a right is captured or granted exclusively by sub-paragraph (a)(ii).[22] An *a contrario* reading of sub-paragraph (a)(i) would render sub-paragraph (a)(ii) redundant, contrary to the principle of effective treaty interpretation stated above. It would also make the second sentence of paragraph 15(d) meaningless because the right that it is intended to terminate survives anyway.

One of the main arguments made by the opponents is also based on the principle of effective treaty interpretation, that is, the view that the expiration of paragraph 15(a)(ii) must not be interpreted in a way which renders the surviving parts of that paragraph inutile. In particular, as the argument goes, "it cannot be the case that there is no circumstance in which an NME methodology can be applied"[23] as the chapeau of subparagraph (a) and subparagraph (a)(i) provide the basis for the continuous application of the NME Methodology.[24] This argument is flawed. As discussed above, an application of the NME Methodology must be based on both the chapeau of paragraph (15)(a) and the rules contemplated in the sub-paragraphs. The *right* to apply the methodology, granted under sub-paragraph (a)(ii), has expired. Consequently, what remains under sub-paragraph (a)(i) is the *obligation* for investigating authorities to use Chinese prices or costs as long as Chinese producers establish that the national ME criteria of the importing member are satisfied. However, the surviving parts of paragraph 15(a) are silent on what investigating authorities may do if Chinese producers fail to satisfy the national criteria. What they cannot do, as argued above, is apply the NME Methodology solely based on the failure of Chinese producers to qualify as an ME under the national criteria. This restriction, however, does not constitute an absolute ban on the application of non-Chinese prices or costs. It merely means that such an application must not be determined unilaterally based on the criteria created by individual WTO Members. The use of surrogate prices or costs remains possible in antidumping actions against China if the relevant WTO rules set out in GATT Article VI and the AD Agreement are satisfied. Therefore, as will be further explained below, the legal effect of the expiration of sub-paragraph (a)(ii) is limited to a shift from the unilateral

---

22 See above n 12, Vermulst *et al.*, "Normal Value in Anti-Dumping Proceedings against China Post-2016", at 216-217.

23 See above n 13, Posner, "A Comment on Interpreting Paragraph 15 of China's Protocol of Accession by Jorge Miranda", at 149.

24 See above n 13, 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".

approach/criteria to the multilateral approach/criteria in determining whether to use surrogate prices or costs in antidumping investigations against China.

Furthermore, the commentators in support of the continuous application of the NME Methodology under the surviving parts of paragraph 15(a) rely on the first and the third sentences of paragraph 15(d). These two sentences respectively impose the burden on China to prove that the Chinese economy as a whole, or a particular Chinese industry or sector satisfies the national ME criteria. In this regard, the Appellate Body in *EC – Fasteners* has observed:

> Paragraph 15(d) of China's Accession Protocol establishes that the provisions of paragraph 15(a) expire 15 years after the date of China's accession (that is, 11 December 2016). *It also provides that other WTO Members shall grant before that date the early termination of paragraph 15(a) with respect to China's entire economy or specific sectors or industries if China demonstrates under the law of the importing WTO Member "that it is a market economy" or that "market economy conditions prevail in a particular industry or sector".* Since paragraph 15(d) provides for rules on the termination of paragraph 15(a), its scope of application cannot be wider than that of paragraph 15(a). Both paragraphs concern exclusively the determination of normal value. In other words, *paragraph 15(a) contains special rules for the determination of normal value in antidumping investigations involving China. Paragraph 15(d) in turn establishes that these special rules will expire in 2016 and sets out certain conditions that may lead to the early termination of these special rules before 2016.*[25] (emphasis added)

As this observation was made in the context of establishing the rule that paragraph 15 does not allow derogation from the AD Agreement other than the calculation of normal value, it is not the *ratio decidendi* of that case but is an *obiter dictum*. However, it shows clearly the position of the Appellate Body on the function of the first and the third sentences of paragraph 15(d). That is, these two sentences provide the opportunity for China or Chinese industries to seek an "early termination" of the "special rules for the determination of normal value" before 11 December 2016. It suggests strongly that while the special rules may be terminated before the 2016 deadline if the national criteria are satisfied, they must not be applied after the deadline regardless of whether these criteria are met. Accordingly, the two sentences of paragraph 15(d) do not provide a basis for the application of the national criteria to trigger the application of the NME Methodology. Notably, when discussing the termination of the "special rules for the determination of normal value", the Appellate Body referred to "paragraph 15(a)" as a whole instead of "paragraph 15(a)(ii)". This suggests that in the eyes of the Appellate Body, all relevant provisions of paragraph 15(a) which create the special rules must be terminated according to the deadline. In *US - Stainless Steel (Mexico)*, the Appellate Body held that, to safeguard the "security and predictability" of the WTO dispute settlement system, the WTO tribunals, "absent cogent reasons, will resolve the same legal question in the same

[25] Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China* (*EC – Fasteners*), WT/DS397/AB/R, adopted 28 July 2011, para. 289.

way in a subsequent case."[26] This suggests that both the panel and the Appellate Body itself are expected to follow the same interpretation of a particular WTO rule as developed by the Appellate Body in previous cases. Given the Appellate Body's unequivocal observation on the structure of paragraph 15(d) in *EC – Fasteners*, it would be hard for the panel on the China-EU dispute to deviate from it.

The above interpretation also aligns with the object and purpose of the AD Agreement. In *EU – Biodiesel*, the Appellate Body stated:

> . . . Taken as a whole, the object and purpose of the Anti-Dumping Agreement is to recognize the right of Members to take anti-dumping measures to counteract injurious dumping while, at the same time, imposing substantive conditions and detailed procedural rules on anti-dumping investigations and on the imposition of anti-dumping measures.[27]

Thus, the AD Agreement does not target dumping but regulates the taking of actions against dumping. In this connection, Article 18.1 requires any actions against dumping to be adopted in accordance with GATT Article VI and the AD Agreement. Accordingly, multilateral approaches to the issue of dumping are clearly embedded in the WTO's rules-based system, with strict disciplines imposed on the unilateral application of antidumping measures. The introduction of the special rules under paragraph 15 of the Accession Protocol was not a "critical mass" request of the WTO membership but served mainly the interest of the US and the EU.[28] The national ME criteria in the US and the EU are purely unilateral approaches to antidumping actions. In practice, these criteria have little to do with "price comparability" and have been implemented in such an arbitrary manner that transitional economies are classified into different categories in different jurisdictions[29] and economies with common characteristics (e.g. China vs. Russia and Vietnam) are treated differently in the same jurisdiction.[30] It is evident that such a unilateral approach to the use of antidumping measures undermines the object and purpose of the AD Agreement and undercuts the credibility of the multilateral trading system if it is allowed to remain perennially. If the special rules were not intended to expire until China satisfies the national criteria, then the authors of paragraph 15 could have drafted to that effect in a clear and concise manner. In contrast, the intention to limit the operation of the special rules within the 15-year timeframe finds a clear demonstration in the text of paragraph 15. Therefore, the interpretation in favour of the continuous application of

---

[26] Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, adopted 20 May 2008, para. 160.

[27] Appellate Body Report, *European Union – Anti-Dumping Measures on Biodiesel from Argentina (EU - Biodiesel),* WT/DS473/AB/R, adopted 26 October 2016, para 6.25.

[28] See above n 12, Suse, "The EU's Response to the Expiry of Section 15(A)(II) of China's WTO Protocol of Accession", at 13-16. In particular, it was the US who led the process of imposing the special rules on China. See Revised Outline of the Draft Report of the Working Party on the Accession of China of the WTO, WT/ACC/SPEC/CHN/1, 14 June 2000, para. 78.

[29] Alexander Polouektov, "Non-Market Economy Issues in the WTO Anti-Dumping law and Accession Negotiations: Revival of a Two-tier Membership?" (2002)36(1) *Journal of World Trade* 1-37 at 30.

[30] See above n 12, Kok, "The Future of EU Trade Defence Investigations against Imports from China", at 523. (noting that the EU is expected to grant Vietnam market economy status "despite Vietnam satisfying only one of the five criteria")

the NME Methodology contradicts the object and purpose of the AD Agreement and paragraphs 15(a) and (d) of the Accession Protocol.

In addition, some commentators have argued persuasively that the *Report of the Working Party on the Accession of China*[31], particularly paragraphs 150 and 151, provides a context for the interpretation of paragraph 15 of the Accession Protocol and supports the interpretation that "no NME methodology on Chinese exports should be permitted when subparagraph 15(a)(ii) expires."[32] Others have provided abundant evidence to show that the drafting history of paragraph 15 also lends support to the interpretation favourable to China.[33] These arguments and materials are not repeated here.

Finally, it is important to elaborate on 'what WTO Members can do under the surviving parts of paragraphs 15(a) and (d) of the Accession Protocol?' The central argument advanced above is that the legal effect of the expiration of paragraph 15(a)(ii) is limited to the termination of the right of investigating authorities to use surrogate prices or costs for price comparison in antidumping actions against China on the *sole* basis of their national ME criteria. This interpretation does not take away the right of antidumping authorities to use surrogate prices or costs in accordance with the general rules set out in GATT Article VI and the AD Agreement. These rules involve: (1) the Ad Note to Article VI:1 which is incorporated into the AD Agreement under Article 2.7 of that agreement[34]; and (2) the two main circumstances envisaged under Article 2.2 of the AD Agreement, that is, (i) there are no domestic sales of the subject goods in the 'ordinary course of trade' and (ii) there is a 'particular market situation' ("PMS"). These rules will be discussed in Section 4 as they are invoked in China's request for consultation. Furthermore, the expiration of paragraph 15(a)(ii) does not require WTO Members to grant China an ME status under their national law and hence does not lead to an automatic graduation of China from the NME status according to the national standards. WTO Members may continue to label China as an NME for political or other reasons.[35] However, whatever this label may entail, it no longer justifies the application of surrogate prices or costs in antidumping investigations against China.[36]

---

[31] *Report of the Working Party on the Accession of China*, WT/ACC/CHN/49, 1 October 2001.

[32] Zhenghao Li, "Interpreting Paragraph 15 of China's Accession Protocol in Light of the Working Party Report", (2016)11(5) *Global Trade and Customs Journal* 229-237.

[33] See above n 12, Suse, "The EU's Response to the Expiry of Section 15(A)(II) of China's WTO Protocol of Accession", at 13-16; Kok, "The Future of EU Trade Defence Investigations against Imports from China", at 527-528.

[34] Article 2.7 reads "This Article [i.e. Article 2] is without prejudice to the second Supplementary Provision to paragraph 1 of Article VI in Annex I to GATT 1994". See also above n 25, Appellate Body Report, *EC – Fasteners*, para. 285.

[35] Christian Tietje and Karsten Nowrot, "Myth or Reality? China's Market Economy Status under WTO Anti-Dumping Law after 2016", Transnational Economic Law Research Center Policy Papers No. 34 (December 2011) 1-12 at 8; Brian Gatta, "Between 'Automatic Market Economy Status' and 'Status Quo': A Commentary on 'Interpreting Paragraph 15 of China's Protocol of Accession'" (2014)9(4) *Global Trade and Customs Journal* 165-172 at 166.

[36] See above n 12, Kok, "The Future of EU Trade Defence Investigations against Imports from China", at 525. (observing that "the NME tag would in such cases have a purely symbolic value")

4 An Evaluation of China's Claims

As shown in Section 2, China's claims under its consultation with the EU focus on Articles 2(1) to 2(7) of the Basic Regulation, including any amendments, replacements, or related subsequent measures. Accordingly, the claims are limited to violations "as such" without targeting applications of the measure in any specific antidumping investigations.

Articles 2(1) to 2(6) of the Basic Regulation set out the ordinary approaches to the calculation of normal value and are largely consistent with Article 2 of the AD Agreement. Article 2(7)(a) of the Basic Regulation, however, categorises certain countries as NME and provides that for those countries,

> … the 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 Union, or, where those are not possible, on any other reasonable basis, including the price actually paid or payable in the Union for the like product, duly adjusted if necessary to include a reasonable profit margin.

Article 2(7)(b) applies to all other NME WTO Members including China, to which the special rules for the determination of normal value under Article 2(7)(a) shall apply unless these countries satisfy the ME criteria contemplated in Article 2(7)(c). After subsequent development, these criteria currently include:

> (1) a low degree of government influence in the allocation of resources and in decisions of enterprises, (2) an absence of distortion in the operation of the privatised economy, (3) the effective implementation of company law with adequate corporate governance rules, (4) effective legal framework for the conduct of business and proper functioning of a free-market economy (including intellectual property rights, bankruptcy laws, …), and (5) the existence of a genuine financial sector.[37]

According to the latest assessment of the EU authorities, China met the second criterion only.[38] Consequently, the investigating authorities are mandated to treat China as an NME in antidumping actions and to apply the special rules by reference to surrogate prices or costs.

4.1 Article I:1 of the GATT

Given the mandatory nature of Article 2(7) of the Basic Regulation, an "as such" violation of Article I:1 of the GATT is not difficult to establish. Article I:1 sets out the MFN rule which reads:

> With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded

[37] See above n 4, Puccio, "Granting Market Economy Status to China", at 12.
[38] Ibid., at 13-15.

> immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

Articles 2(1) to 2(7) of the Basic Regulation are clearly related to the imposition of customs duties "on or in connection with importation" which has been interpreted very broadly under WTO jurisprudence.[39] Likewise, there is little doubt that the application of the usual approaches to the determination of normal value constitutes an "advantage or favour"[40] for countries which are not required to establish the ME conditions. As the use of surrogate prices or costs almost invariably leads to higher antidumping duties, the application of the usual approaches would create a competitive advantage for imports originating in ME countries.[41] It could also be argued that a "privilege or immunity" has been granted to imports from ME countries which are not required to satisfy the ME conditions for the application of the usual approaches. The measure at issue is origin-based distinguishing between ME and NME countries and applying the different treatment of imported goods exclusively based on their nationality. Therefore, "like products" are presumed to exist among the imports in the EU market.[42] Accordingly, the "advantage, favour, privilege or immunity" that imports from ME countries enjoy has not been accorded "immediately and unconditionally" to "like" goods originating in China as the latter are subject to the ME criteria because of their origin.[43] This reasoning finds support in the Panel Report on *EU – Footwear (China)* in which the EU's automatic grant of individual treatment of imports from ME countries along with the requirement for NME countries to satisfy certain conditions under Article 9(5) of the Basic Regulation was found to be in violation of the MFN rule.[44]

In short, Article 2(7) of the Basic Regulation mandates a violation of the MFN rule by creating an origin-based, discriminatory treatment between imports from China and those from ME countries. As discussed above, such a derogation from the MFN rule is no longer permissible under paragraph 15 of the Accession Protocol.

4.2 Articles 2.1 & 2.2 of the AD Agreement

China argued that the EU measure, which authorises the use of surrogate prices or costs unless China fulfils the ME conditions, breaches Articles 2.1 and 2.2 of the AD Agreement. In essence, this is a claim that the usual methods for the calculation of

---

[39] See eg. Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R/MEX, adopted 25 September 1997, para. 7.107.

[40] These terms have also been interpreted very broadly by WTO tribunals. See eg. Appellate Body Report, *Canada - Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, para. 79; Panel Report, *Colombia - Indicative Prices and Restrictions on Ports of Entry*, WT/DS366/R, adopted 20 May 2009, para. 7.352.

[41] See Panel Report, *United States - Certain Measures Affecting Imports of Poultry from China*, WT/DS392/R, adopted 25 October 2010, paras. 7.416-7.417.

[42] Ibid., paras. 7.424-7.427.

[43] WTO Panels seem to have developed two different approaches to the test of "unconditionally". However, no matter which approach is applied, the Basic Regulation must fail the test given its origin-specific nature. See Panel Report, *Canada - Certain Measures Affecting the Automotive Industry*, WT/DS139/R, WT/DS142/R, adopted 19 June 2000, paras. 10.22-10.25.

[44] Panel Report, *European Union - Anti-Dumping Measures on Certain Footwear from China*, WT/DS405/R, adopted 22 February 2012, paras. 7.98-7.105.

This article has been accepted for publication in (2017)5(2) of the *Chinese Journal of Comparative* Law, published by the Oxford University Press, in December 2017.

normal value must be applied to Chinese imports after the expiration of paragraph 15(a)(ii) of the Accession Protocol. This claim is supported by the author's analysis in Section 3.

Article 2 of the AD Agreement contemplates a number of ways to calculate a normal value, the primary of those being the actual sale price of the subject goods in the domestic market of the export country (Article 2.1). However, Article 2.2 provides:

> When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.

Accordingly, a normal value may also be determined by reference to the export price of the "like" goods to a third country, or by reconstructing such value on the basis of the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and profits (known as "constructed normal value" ("CNV")). As mentioned above, Article 2.2 contemplates two main circumstances in which domestic prices or costs of the producers under investigation may be disregarded and the alternative methods applied. These circumstances concern (1) whether the domestic sales involved are made "in the ordinary course of trade" and (2) whether a PMS exists in the relevant market. Therefore, after the expiration of paragraph 15(a)(ii), the EU authorities cannot employ the alternative methods based on non-Chinese prices or costs unless either of the two circumstances is proved to exist. To the extent that Article 2(7) of the Basic Regulation mandates the application of the NME Methodology solely based on the national ME criteria, it is inconsistent with the general rules to the determination of normal value as contemplated in Articles 2.1 and 2.2 of the AD Agreement.

In this connection, it would be useful to consider briefly the extent to which the two circumstances may accommodate the EU's concerns about price distortions associated with government intervention in China. Neither of the term "in the ordinary course of trade" nor "PMS" is defined in the AD Agreement. The test of "in the ordinary course of trade" was examined by the Appellate Body in *US – Hot-Rolled Steel* in the context of determining the WTO-consistency of the treatment of sales between affiliated parties under the US antidumping law. The Appellate Body clarified that this test concerns whether the terms and conditions for a transaction are compatible with normal commercial practice for such transactions in the market in question.[45] Therefore, it deals with *business activities* that cause the transaction prices to be lower or higher than arm's length prices[46], not state influence on or regulation of prices. Furthermore, this test concerns not only prices but also other

[45] Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, para. 140.
[46] Ibid., paras. 141, 143.

terms and conditions of the transactions.[47] Therefore, in determining whether sales are made "in the ordinary course of trade", investigating authorities must rely on an objective assessment of the terms and conditions of commercial transactions, regardless of whether there is state intervention in the market. Indeed, state intervention such as state trading may result in sales not "in the ordinary course of trade". However, state intervention, by itself, does not satisfy the "ordinary course of trade" test.[48]

There has been no WTO jurisprudence on the meaning of PMS. This author has offered a detailed analysis of how this term should be interpreted and applied in a separate article.[49] Due to the lack of WTO jurisprudence, the term PMS has been used as a substitute for the NME Methodology in countries like Australia. Policymakers in the EU and the US have been exploring new approaches that would allow their authorities to continue to apply, in effect, the NME Methodology or one similar to it. The notion of PMS has become one of the major options. While the term may be interpreted to allow consideration of price distortions associated with state intervention, it distinguishes from the NME Methodology in several important aspects. First, unlike the NME Assumption, the burden of proving that a PMS exists is on investigating authorities and not on the exporters or producers or governments of exporting countries involved in antidumping investigations. Second, a PMS would arise only if the situation concerned precludes a "proper comparison" between export price and normal value. Accordingly, and given the burden of proof, investigating authorities must establish that the situation at issue has actually affected the comparability of the two prices. Third, the comparability of normal value and export price will not be affected unless the market situation has caused a distortion in the normal value but not in the export price. In other words, the price comparability should not be treated as being affected if the situation has caused a distortion in both the normal value and the export price in an even-handed manner. Accordingly, neither the existence of a situation in the market nor a finding of distortion in the domestic price of the subject goods, by itself or collectively, constitute sufficient evidence for a finding that a PMS exists. A situation in the exporting market under investigation should not be treated as being "particular" unless it affects the price comparability.

In short, as the expiration of paragraph 15(a)(ii) has terminated the right to use surrogate prices or costs solely based on national ME conditions, Article 2(7) of the EU Regulation is in breach of Articles 2.1 and 2.2 of the AD Agreement. The EU authorities must now comply with the general rules for the calculation of normal value, including the use of alternative methods through satisfying either the test of

[47] Ibid., para. 142.

[48] See Stéphanie Noël and Weihuan Zhou, "Replacing the Non-Market Economy Methodology: Is the European Union's Alternative Approach Justified Under the World Trade Organization Anti-Dumping Agreement?" (2016)11(11/12) *Global Trade and Customs Journal* 559-567 at 563-565; Stéphanie Noël, "Why the European Union Must Dump So-Called 'Non-Market Economy' Methodologies and Adjustments in Its Anti-Dumping Investigations" (2016)11(7/8) *Global Trade and Customs Journal* 296-305 at 302-304.

[49] Weihuan Zhou and Andrew Percival, "Debunking the Myth of 'Particular Market Situation' in WTO Antidumping Law" (2016)19(4) *Journal of International Economic Law* 863-892.

"in the ordinary course of trade" or the test of PMS. While both tests provide certain flexibility for the consideration of government intervention and associated price distortions, they require investigating authorities to establish the relevant legal elements.

4.3 Ad Note to Article VI:1

China claims that the only exception to the usual methods for the calculation of normal value is provided under the AD Note to Article VI:1. This interpretative note states:

> 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.

This note provides for a situation where an importing country can deviate from a strict comparison with domestic prices in an exporting country. Therefore, it provides a basis for the use of surrogate prices or costs. However, the applicability of the note is very restrictive as it was originally intended to deal with the extreme market conditions in some countries (such as Poland, Romania, and Hungary) where the market was dominated by state monopolies.[50] It is commonly observed that the transition and development of these economies has rendered the note inapplicable in most if not all cases.[51] In *EC – Fasteners*, the Appellate Body clarified that for the note to apply, two conditions must be fulfilled cumulatively, including (1) a "country which has a complete or substantially complete monopoly of its trade", and (2) "where all domestic prices are fixed by the State".[52] It would be next to impossible for the EU to establish that these extreme market conditions exist in the Chinese economy, which has undergone decades of opening-up and market-oriented transformation. As Watson has correctly pointed out:

> Many of the nonmarket aspects of China's economic policies that Commerce points to are, in fact, common in other countries comfortably recognized as market economies. For example, direct currency controls and limits on capital account transactions are used in various ways throughout Asia and Latin America. Likewise, many countries maintain state-owned monopolies and restrict foreign investment in priority industries.[53]

Thus, the conditions of the Chinese economy are at least comparable to many other WTO Members and do not constitute such extreme market conditions as prevailed in

---

[50] See GATT Analytical Index, Article VI Anti-Dumping and Countervailing Duties, at 228, available at: www.wto.org/english/res_e/booksp_e/gatt_ai_e/art6_e.pdf.

[51] See above n 4, Puccio, "Granting Market Economy Status to China", at 4; above n 35, Tietje and Nowrot, "China's Market Economy Status under WTO Anti-Dumping Law after 2016", at 10.

[52] Appellate Body Report, *EC – Fasteners*, FN 460.

[53] William Watson, "Will Nonmarket Economy Methodology Go Quietly into the Night?", Cato Institute Policy Analysis No. 763 (28 October 2014) 1-20 at 8.

certain economies during the Cold War. Accordingly, after the expiry of paragraph 15(a)(ii), the AD Note to Article VI:1 does not provide a convenient alternative for WTO Members to continue the application of the NME Methodology.

4.4 The EU's New Methodology

In the face of the EU's ongoing amendments to the Basic Regulation, China's request for consultation included any amendments, replacements, or related subsequent measures. The EU's new approach, proposed by the EU Commission in November 2016, seeks to replace the NME list with a country-neutral methodology which is primarily aimed at addressing market distortions caused by state intervention.[54] According to the European Council, "[w]hen a significant distortion is recognized in an exporting country", the new methodology would allow the Commission to "set a price for the product by referring either to the costs of production and sale prices in a country with similar levels of economic development or to appropriate undistorted international costs and prices".[55] It is intended that the new methodology would lead to the same level of antidumping duties as the EU had been able to impose through the NME Methodology.[56] On 3 October 2017, the European Parliament and the European Council reached an agreement on the new approach which is expected to come into effect before the end of 2017.[57]

Specifically, the new approach will lead to an amendment of the Basic Regulation by introducing a new Article 2(6)a which will apply to antidumping investigations of imports from WTO Members. Currently, the main sections of Article 2(6)a state:

> (a) In case it is determined, when applying this provision or any other relevant provision of this Regulation, that it is not appropriate to use domestic prices and costs in the exporting country due to the existence of significant distortions, the normal value shall be constructed on the basis of costs of production and sale reflecting undistorted prices or benchmarks. For this purpose, the sources that may be used include 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, provided the relevant cost data are readily available. The constructed normal value shall include a reasonable amount for administrative, selling and general costs and for profits.
>
> (b) Significant distortions for the product concerned within the meaning of point (a) may be deemed to exist, *inter alia*, when reported prices or costs, including the costs of

54 See European Commission, "Commission Proposes Changes to the EU's Anti-Dumping and Anti-Subsidy Legislation", Press Release (9 November 2016), available at: europa.eu/rapid/press-release_IP-16-3604_en.htm

55 See European Council, "Anti-Dumping Methodology: Council Agrees Negotiating Position", Press Release (3 May 2017), available at: www.consilium.europa.eu/en/press/press-releases/2017/05/03-anti-dumping/

56 See European Commission, "Joint Press Conference by Jyrki Katainen, Vice-President of the EC, and Cecilia Malmström, Member of the EC, on the Treatment of China in Anti-Dumping Investigations", 20 July 2016, available at: ec.europa.eu/avservices/video/player.cfm?ref=I124960

57 See European Commission, "Commission Welcomes Agreement on New Anti-Dumping Methodology", Press Release, 3 October 2017, available at: http://europa.eu/rapid/press-release_IP-17-3668_en.htm

> raw materials, are not the result of free market forces as they are affected by government intervention. In considering whether or not significant distortions exist regard may be had, *inter alia*, to the potential impact of the following: the market in question is to a significant extent served by enterprises which operate under the ownership, control or policy supervision or guidance of the authorities of the exporting country; state presence in firms allowing the state to interfere with respect to prices or costs; public policies or measures discriminating in favour of domestic suppliers or otherwise influencing free market forces; and access to finance granted by institutions implementing public policy objectives.[58]

This new approach will replace Articles 2.7(b) and 2.7(c) which currently authorize the treatment of China as an NME (i.e. the NME Assumption) and the application of the NME Methodology against China. On its face, Article 2(6)a removes the NME Assumption and shifts the burden to EU industries in establishing state intervention and price distortions according to the factors contemplated in sub-paragraph (b). However, under sub-paragraph (c) of Article 2(6)a (which was not set out above), the EU Commission proposes to collect the relevant evidence and issue a report on these factors for domestic industries to use in applications for antidumping investigations. By doing so, the Commission seeks to "assure the EU industry and Member States, that the new rules would not diminish in any significant way the availability of remedial action against cheap imports from China."[59] More importantly, given the text and the intended effect of the new methodology, it may constitute both an "as such" and an "as applied" violation of Article 2.2 of the AD Agreement. As discussed above, the use of surrogate prices solely based on price distortions caused by government intervention is unlikely to pass the test of "in the ordinary course of trade" or the test of PMS. Furthermore, the use of surrogate production costs is regulated by Articles 2.2 and 2.2.1.1 of the AD Agreement, as recently interpreted in the *EU – Biodiesel* dispute[60]. As the author has discussed elsewhere[61], the Appellate Body's rulings in *EU – Biodiesel* have established that state intervention and resultant price distortions do not constitute sufficient ground for the use of surrogate/benchmark production cost for the calculation of a CNV. The production costs used for the construction of normal value must reflect the market

[58] European Commission, "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 subsidised imports from countries not members of the European Union", COM(2016)721 final, 9 November 2016, at 8-9, available at: eur-lex.europa.eu/procedure/EN/2016_351.

[59] See above n 12, Suse, "The EU's Response to the Expiry of Section 15(A)(II) of China's WTO Protocol of Accession", at 19-20.

[60] Panel Report, *European Union—Anti-Dumping Measures on Biodiesel from Argentina*, WT/DS473/R, adopted 26 Oct 2016 (as modified by the Appellate Body Report); Appellate Body Report, *Union—Anti-Dumping Measures on Biodiesel from Argentina*, WT/DS473/AB/R, adopted 26 October 2016.

[61] See Weihuan Zhou, "Appellate Body Report on *EU-Biodiesel*: The Future of China's State Capitalism under the WTO Anti-Dumping Agreement", Centre for Trade and Economic Integration (CTEI) Working Paper 2017-11, August 2017, available at: graduateinstitute.ch/files/live/sites/iheid/files/sites/ctei/shared/CTEI/working_papers/CTEI-2017-11_ZHOU-Weihuan.pdf. For an analysis of the panel report, see Weihuan Zhou and Andrew Percival, "Panel Report on *EU – Biodiesel*: A Glass Half Full? – Implications for the Rising Issue of 'Particular Market Situation'" (2016)2(2) *Chinese Journal of Global Governance* 142-163.

conditions prevailing in the country of exportation. Such market conditions include government policies and regulations that directly or indirectly affect prices. Therefore, if benchmark prices are employed to counteract price distortions, adjustments to the benchmarks must be made to reintroduce the distortions into the production costs under Article 2.2 or Article 2.4 of the AD Agreement. Accordingly, to the extent that sub-paragraphs (a) and (b) of Article 2(6)a mandate the EU authorities to use un-distorted benchmark costs for the construction of normal value on the sole basis that Chinese costs are distorted by government intervention, these provisions are not only inconsistent with Articles 2.2 and 2.2.1.1 of the AD Agreement by themselves, but also will most likely be applied in a way that contravenes these WTO rules.

5 Conclusion

The NME Methodology originated from concerns about price distortions in state-dominated economies during the Cold War,[62] and was originally endorsed in the AD Note to Article VI:1. However, due to the limited scope of the note, almost all of the transitional economies with WTO membership or seeking WTO accession no longer fall within the definition of an NME under the note. Therefore, it has become a standard practice of WTO Members to negotiate special antidumping rules with transitional economies via their individual accession to the WTO. However, neither the AD Note to Article VI:1 nor these special rules are intended to treat any country as an NME for the purpose of antidumping on a permanent basis. Rather, the narrow definition of NME under the note and the various timeframes under accession protocols suggest that any differential treatment of transitional economies is of a temporal nature and must be replaced by the general WTO rules as these economies become increasingly market-oriented or the timeframes expire. In this regard, Nicely has correctly observed that

> … the current NME methodologies being used throughout the world as outdated vestiges of the cold war. They do not take into account sufficiently the fact that the countries we call NMEs – at least the ones that are active members of the global economy and members of the WTO – have thriving market economies. The fact that the state is involved in the economy in these countries is not significantly different … from the manner in which many governments across the globe influence the market.[63]

A closer assessment of the degree of state intervention in certain "market economies" by Toohey and Crowe has shown that the distinction between ME and NME is fundamentally flawed given "the diversity of regulatory regimes and market

[62] See generally Gary Horlick and Shannon Shuman, "Nonmarket Economy Trade and U.S Antidumping/Countervailing Duty Law" (1984)18(4) *The International Lawyer* 807-840 (discussing the development of the NME Methodology in the US); Francis Snyder, "The Origins of the 'Nonmarket Economy' Ideas, Pluralism and Power in EC Anti-Dumping Law about China" (2001)7(4) *European Law Journal* 369-434.

[63] Matthew R. Nicely, "Time to Eliminate Outdated Non-Market Economy Methodologies" (2014)9(4) *Global Trade and Customs Journal* 160-164 at 160-161.

This article has been accepted for publication in (2017)5(2) of the *Chinese Journal of Comparative* Law, published by the Oxford University Press, in December 2017.

mechanisms around the world."[64] Given widespread state intervention, the ME conditions created by individual WTO Members are hard to satisfy even by established market economies.[65] Furthermore, the fact that the WTO provides no definition of ME and merely an extreme case of NME shows the lack of consensus on what factors or conditions should be considered in distinguishing between ME and NME, or on whether such a distinction should be created at all. Therefore, the practice of grouping WTO Members as an NME based on administrative discretion[66] and political considerations[67] is simply unilateral, arbitrary and unjustified according to the law of comparative advantage, and is detrimental to the rules-based system.

Government regulations exist in all markets; and such regulations, combined with various types of industrial financial assistance and other governmental measures, undoubtedly affect prices, either directly or indirectly. If the central issue is price distortion, then such distortions must be examined on a case-by-case basis in accordance with the multilateral rules applicable to all WTO Members. In the case of China, the proposition that China remains an NME after 15 years of WTO membership puts into question the effectiveness of the multilateral trading system on the liberalisation of state-controlled market, economic reforms and development of transitional economies, and domestic policy-making in general.

---

64 Lisa Toohey and Jonathan Crowe, "The Illusory Reference of the Transitional State and Non-Market Economy Status" (2014)2(2) *Chinese Journal of Comparative Law* 314-336 at 333-334.

65 See above n 29, Polouektov, "Non-Market Economy Issues in the WTO Anti-Dumping law and Accession Negotiations", at 19.

66 See above n 2, Ikenson, "U.S. Antidumping Policy toward China", at 3.

67 European Institute for Asian Studies, "China: NME at the Gates? Article 15 of China's WTO Accession Protocol: A Multi-Perspective Analysis", Research Paper (November 2016) 1-48 at 28.