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# Not So Fast, China: Non-Market Economy Status is Not Necessary for the “Surrogate Country” Method

André J. Washington\*

## Abstract

*The expiration of Article 15(a)(ii) of the Accession Protocol of the People’s Republic of China to the World Trade Organization (WTO) calls into question the legal basis for employing the “surrogate country” method in antidumping investigations. China believes that it is entitled to Market Economy status, which it believes would preclude the use of the “surrogate country” method. The U.S. takes a different approach. Ignoring the protocol, the U.S. takes the position that an obligation to determine “comparable prices” in antidumping investigations affirmatively permits the “surrogate country” method if that method becomes necessary to finding a comparable price. This Comment argues that neither country is completely correct. Market Economy status is inconsequential to antidumping investigations, and the obligation to find a “comparable price” grants the authority to do just that, and nothing more. The legal basis for employing alternative pricing methodologies against China comes from the “particular market situation” principle in Article 2 of the Antidumping Agreement. This principle is based on the situation surrounding the individual sales of the product in the domestic market rather than the overall market situation. That situation becomes “particular” when it is distorted by factors other than supply and demand. The expiration of Article 15(a)(ii) leaves China in the same position as every other WTO Member—susceptible to a case-by-case analysis of the transactions that form the basis of the prices of products that it exports into other markets.*

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\* J.D. Candidate, 2019, The University of Chicago Law School. I would like to thank Professors Dhammika Dharmapala and Adam Chilton for their valuable feedback throughout the writing process. I would also like to thank the staff of the *Chicago Journal of International Law* for their helpful edits and comments.

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## I. INTRODUCTION

In international trade law, “dumping” is the technical term for the process of exporting goods at a price that is less than the “normal value” of that product “in the domestic market or third-country markets,” or less than the “production cost.”<sup>1</sup> World Trade Organization (WTO) law condemns dumping when it “causes or threatens material injury to an established industry . . . or materially retards the establishment of a domestic industry.”<sup>2</sup> If it is proven, following an investigation by domestic authorities of the importing country, that a product is being dumped and causing material injury, WTO law permits the importing country to levy an antidumping duty on the dumped product, which may not exceed the value of the “margin of dumping.”<sup>3</sup> This process of proving an instance of dumping, a resulting injury, and calculating the margin of dumping is called an antidumping investigation.

Article VI of the General Agreement on Tariffs and Trade (GATT) details the generally applicable method for calculating dumping margins in antidumping investigations.<sup>4</sup> It provides that importing countries should calculate the difference between the product’s export price and the price of the product in the domestic market of the exporting country “in the ordinary course of trade.”<sup>5</sup> In the absence of a domestic market, or sufficient sales in the domestic market, the investigating authority may use the difference between the export price and either the “highest comparable price for the like product for export to any third country,”<sup>6</sup> or “the cost of production” plus “a reasonable addition for selling cost and profit” to determine the dumping margin.<sup>7</sup>

GATT Article VI operates under the assumption that the domestic market of the exporting country produces reliable prices to which import prices may be compared. However, where it is determined that the exporting country has a state-controlled economy, the WTO recognizes that price comparisons in antidumping investigations may be “difficult,”<sup>8</sup> and thus makes an exception for

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<sup>1</sup> *WTO Glossary*, WTO, <https://perma.cc/PHJ9-3CZJ> (last visited Apr. 25, 2018).

<sup>2</sup> General Agreement on Tariffs and Trade art. VI:1, Apr. 15, 1994, 1867 U.N.T.S. 208 [hereinafter GATT].

<sup>3</sup> *Id.* at art. VI:2.

<sup>4</sup> *Id.* at arts. VI:1–2.

<sup>5</sup> *Id.* at art. VI:1(a).

<sup>6</sup> *Id.* at art. VI:1(b)(i).

<sup>7</sup> *Id.* at art. VI:1(b)(ii).

<sup>8</sup> *Id.* at Second *Ad Note*, art. VI:1.

importing companies to deviate from the specifically articulated methods in Article VI:1 for the purpose of calculating dumping margins.<sup>9</sup>

One such alternative method frequently employed by the U.S. and the E.U. is called the “analogue country” method.<sup>10</sup> It is popular for the same reasons that it is controversial. It permits investigating authorities to unilaterally select a third country whose domestic prices for the product in question are used in place of the actual prices reported by the exporting country.<sup>11</sup> This selection authority gives investigators substantial power to manipulate the outcome of a dumping margin calculation, which is the entire objective of an antidumping investigation.<sup>12</sup> This is because the margin of dumping is essential to determining the size of antidumping duties. Also, if the margin is not large enough, the investigator may not be able to impose antidumping duties at all.<sup>13</sup>

The U.S. and the E.U. find this tool to be especially valuable for antidumping investigations against China. This is the case because the U.S. and the E.U. have each initiated more antidumping proceedings against China (141 and 129 respectively) than any other nation except India (which has initiated 199 antidumping investigations against China).<sup>14</sup> Unsatisfied with what it perceives to be disparate treatment by Western powers, China challenges many of these investigations and files claims at the WTO. China is so active in challenging these measures that it is now a party to a greater percentage of cases before the WTO dispute settlement body than almost any other nation.<sup>15</sup>

China is important to the WTO not only because of the frequency with which it employs the dispute resolution mechanisms, but also because of the sheer size of its economy. China’s continued cooperation with WTO rules is important to the smooth functioning of the world economy.<sup>16</sup> Not yet a full

<sup>9</sup> *Id.*

<sup>10</sup> Also referred to as the “analogous country,” “surrogate country,” or “third-country” method.

<sup>11</sup> Review of E.U. Trade Defence Instruments in Brief: The Analogue Country Method in Anti-Dumping Investigations, KOMMERSKOLLEGIUM, <https://perma.cc/LE92-P2A3> (last visited Apr. 17, 2018).

<sup>12</sup> *Id.*

<sup>13</sup> “The importing country is only entitled to levy an anti-dumping duty when” the margin of dumping produces a “material injury to a domestic industry.” Panel Report, *Swedish Anti-Dumping Duties*, ¶ 8 WTO Doc. L/328 (adopted Feb. 26, 1955).

<sup>14</sup> Antidumping investigation initiations data with information on reporting country and exporting country available on the WTO website, *Antidumping*, WTO, <https://perma.cc/2ZPR-ZEZM> (last visited May 5, 2018).

<sup>15</sup> Mark Wu, The “China, Inc.” Challenge to Global Trade Governance, 57 HARV. J. INT’L L. 261, 264 (2016).

<sup>16</sup> “China is home to the second largest number of Fortune 500 companies,” four of the largest banks are domiciled in China, and a Chinese company holds the record for having the largest IPO. *Id.* at 269.

market economy and no longer a complete state-controlled economy, China's hybrid situation was not contemplated at the time the WTO agreements were written.<sup>17</sup> Because of China's unique economic situation, it is important to understand the role it plays in the WTO.<sup>18</sup>

There are many reasons for the lack of consideration given to China's status at the time the WTO agreements were written. First, many of the innovative forms that make up China's economy were not implemented until many years after the agreement was written. Second, China was not party to the agreements at the time they were written, so it did not have an opportunity to influence the development of the rules.

It was not until December 2001 that China joined the WTO by way of a thoroughly negotiated protocol.<sup>19</sup> The protocol incorporated many China-specific provisions that are not applicable to other countries in the WTO. One such provision is Article 15(a)(ii), which states: "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.*"<sup>20</sup> All authorities agree that this provision gives WTO members legal authority to employ the "surrogate country" method in antidumping investigations against China.<sup>21</sup> However, this provision was given a time limit. Article 15(d) states that "the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession."<sup>22</sup> December 11, 2016 marked fifteen years since the accession, so that provision, 15(a)(ii), is now expired.

Following the expiration of Article 15(a)(ii), China and many other WTO countries believe that the alternative "surrogate country" method is no longer

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<sup>17</sup> *Id.* at 269.

<sup>18</sup> The State is a corporate holder in all the largest companies. The Communist Party plays a role in choosing who will be the heads of companies. In exchange for bailouts, the government demands shares in companies, etc. *Id.* at 270–74.

<sup>19</sup> Ministerial Declaration of 23 November 2001, *Accession Protocol of the People's Republic of China*, WTO Doc. WT/L/432 (Nov. 23, 2001) [hereinafter *Accession Protocol*].

<sup>20</sup> *Id.* at art. 15(a)(ii) (emphasis added).

<sup>21</sup> Appellate Body Report, *European Communities—Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, ¶ 287, WTO Doc. WT/DS397/AB/R (July 15, 2011) [hereinafter *EC-Fasteners 2011*] ("[P]aragraph 15(a) of China's Accession Protocol *permits importing Members to derogate from a strict comparison with domestic prices or costs in China, that is, in respect of the determination of the normal value.*") (emphasis added).

<sup>22</sup> *Accession Protocol*, *supra* note 19, at art. 15(d).

available to investigating authorities.<sup>23</sup> Experts are split as to whether this conclusion is inevitable.<sup>24</sup> Nonetheless, because the E.U. and the U.S. do not believe that China's current market situation produces reliable domestic prices that can be compared to export prices, they are committed to subjecting Chinese imports to greater scrutiny under the "analogue country" method.<sup>25</sup>

The E.U. has demonstrated this commitment by passing a new law providing for the employment of alternative methods in cases of substantial distortion.<sup>26</sup> The U.S. has demonstrated this commitment by continuing to launch antidumping investigations against China<sup>27</sup> and releasing a new memo regarding China's Non-Market Economy (NME) status.<sup>28</sup> Undeterred by the

<sup>23</sup> See U. S. Dep't of Com., Memorandum on China's Status as a Non-Market Economy Country, 1, 9, A-570-053, (Oct. 26, 2017) [hereinafter DOC Memo]. The DOC Memo explains:

MOFCOM [Ministry of Commerce, People's Republic of China] urges the United States to comply with the expiration of Section 15(a)(ii) of China's Accession Protocol and explains that it would not submit comments in response to the notice of inquiry with respect to the criteria set forth in Section 771(18) of the Act because any determinations with respect to the criteria laid out in the Act would have no bearing on the United States' compliance with the General Agreement on Tariffs and Trade (GATT) and the Agreement on implementation of Article VI of the GATT ("Antidumping Agreement"). It also argues that the United States is obligated to no longer use a surrogate methodology with respect to all antidumping determinations targeting Chinese products after December 11, 2016.

*Id.* (emphasis added). See also Zhang Xiangchen, Opening Statement by Ambassador Zhang Xiangchen as a part of the Oral Statement of China at the First Substantive Meeting of the Panel in the Dispute: European Union—Measures Related to Price Comparison Methodologies, DS516 (Geneva, Dec. 6, 2017) [hereinafter Zhang Xiangchen Statement].

<sup>24</sup> For a review of those who believe that the expiration of section 15(a)(ii) requires China to be treated as a market economy automatically, see Matthew Nicely, *Time to Eliminate Outdated Non-market Economy Methodologies*, 9 GLOB. TRADE & CUSTOMS J. 160 (2014); Rao Wenjia, *China's Market Economy Status Under WTO Antidumping Law After 2016*, 5 TSINGHUA CHINA L. REV. 151 (2013). For a review of those that do not believe that China is entitled to automatic MES, see Brian Gatta, *Between 'Automatic Market Economy Status' and 'StatusQuo'*, 9 GLOB. TRADE & CUSTOMS J. 165 (2014); Jorge Miranda, *Interpreting Paragraph 15 of China's Protocol of Accession*, 9 GLOB. TRADE & CUSTOMS J. 94 (2014); Bernard O'Connor, *Market Economy Status for China Is Not Automatic*, VOX E.U. (Nov. 27, 2011), <https://perma.cc/7LRX-Q5WG>; Chad P. Bown & Petros C. Mavroidis, *One (Firm) Is Not Enough: A Legal-economic Analysis of EC-fasteners*, 12 WORLD TRADE REV. 243 (2013) (suggesting that the Appellate Body may have already laid down jurisprudence opening the door for WTO members to continue treating China as a NME beyond 2016).

<sup>25</sup> See U.S. Third-party Submission, *European Union—Measures Related to Price Comparison Methodologies*, WTO Doc. WT/DS516 (Nov. 21, 2017) [hereinafter U.S. Legal Interpretation]; First Written Submission by the European Union, *European Union—Measures Related to Price Comparison Methodologies*, WTO Doc. WT/DS516 (Nov. 14, 2017).

<sup>26</sup> Council Regulation 2016/1037 of June 8, 2016, Protection Against Subsidized Imports From Countries Not Members of the European Union, 2016 O.J. (L 176/55).

<sup>27</sup> Press Release, U.S. Dep't of Com., Department of Commerce Initiates Antidumping Duty Investigation Against Imports from People's Republic of China (Oct. 19, 2017), <https://perma.cc/LZ9W-VMES>.

<sup>28</sup> DOC Memo, *supra* note 23.

Western powers' muscle-flex, China is committed to forcing WTO Members to accept its interpretation of the protocol. It has demonstrated this position by ignoring calls by the U.S. to contribute to its NME investigation,<sup>29</sup> and by filing claims against both the E.U. and the U.S. before the WTO Dispute Settlement Body (DSB) for their continued use of alternative methodologies.<sup>30</sup>

This Comment takes the position that none of the parties is completely correct with respect to the WTO agreements. China believes that “the end of the ‘analogue country’ methodology under Section 15(a)(ii) was just a matter of time,” and that without Section 15(a)(ii) the analogue country method may not be used against it.<sup>31</sup> The U.S. stubbornly and incorrectly insists that permissive language in Article VI:1 of the GATT 1994 and Article 2 of the Antidumping Agreement (ADA), to disregard domestic prices in antidumping investigations, is a positive legal basis for employing the “surrogate country” method.<sup>32</sup> The language of the WTO agreements is less clear, and the proper understanding of the legal obligations are best understood as requiring a case-by-case analysis of the actual transactions that form the basis of the price to which importing producers turn when searching for normal value.

In Section II, this Comment will explain the legal framework that governs national investigating authorities while making dumping determinations. The GATT 1994 is the general governing document for international trade disputes. More precisely, Section II will discuss Article VI of the GATT, the Agreement for the Implementation of Article VI—also known as the Antidumping Agreement—and the Second *Ad Note* to the first paragraph of Article VI. Section II will also discuss the applicable laws for making market status determinations, and the implications of those determinations.

Next, this Comment will flesh out the debate surrounding the expiration of Article 15(a)(ii) of the Chinese Accession Protocol in Section III. First, the Comment will give context to China's accession to the WTO and describe the relevant provisions of the Protocol. Then the Comment will describe the various viewpoints concerning the implication of the expiration of Article 15(a)(ii) on China's market status and the remaining legal basis for employing the surrogate country method. The discussion will reveal that most scholars have assumed that China's market status is inextricably linked with the ability to

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<sup>29</sup> *Id.* at 9.

<sup>30</sup> Request for Consultations by China, *European Union—Measures Related to Price Comparison Methodologies*, WTO Doc. WT/DS516/1 (Dec. 15, 2016); Request for Consultations by China, *United States—Measures Related to Price Comparison Methodologies*, WTO Doc. WT/DS515/1 (Dec. 12, 2016).

<sup>31</sup> Zhang Xiangchen Statement, *supra* note 23.

<sup>32</sup> *See generally* U.S. Legal Interpretation, *supra* note 25.

employ the surrogate country method.

Finally, in Section IV, this Comment will propose that, regardless of whether the expiration of Article 15(a)(ii) requires granting Market economy status to China, WTO members may continue to employ the surrogate country method against it in antidumping investigations where certain conditions are met, such as where there is an absence of prices in the ordinary course of trade at the discrete level of product sales.

## II. DETERMINATION OF DUMPING

The first step in an antidumping investigation is for the domestic producer to file a complaint with the domestic investigating authority alleging an instance of dumping.<sup>33</sup> The investigating authority then collects information on the export price of the product in question and the price of the product in the domestic market of the exporting country.<sup>34</sup> The difference between those two prices is called the margin of dumping.<sup>35</sup> If the margin of dumping is greater than zero, that is to say that the export price is less than the foreign producer's domestic price, then dumping is deemed to be taking place.<sup>36</sup> If the domestic producer can also prove injury as a result of that dumping,<sup>37</sup> then Article VI of the GATT allows the importing country to impose antidumping duties on the dumped product up to the margin of dumping amount.<sup>38</sup>

The margin of dumping is important for two reasons. First, it proves that dumping is actually taking place.<sup>39</sup> Second, the margin of dumping determines the size of the antidumping duty designed to remedy the injury.<sup>40</sup> There are several relevant provisions in the WTO Agreements that govern this process: Article VI:1 of the GATT 1994, the Second *Ad Note* to Article VI:1, and Article 2 of the ADA.

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<sup>33</sup> *Summary of Antidumping and Countervailing Duty Investigation Procedures*, DRINKER BIDDLE & REATH, <https://perma.cc/U27L-Q37C> [hereinafter Antidumping Procedures].

<sup>34</sup> GATT, *supra* note 2, at art. VI:1.

<sup>35</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 art. 2.2, Jan. 1, 1980, 1186 U.N.T.S. 814 [hereinafter ADA].

<sup>36</sup> GATT, *supra* note 2, at art. VI:1.

<sup>37</sup> Antidumping Procedures, *supra* note 33 (“Material injury is measured by such factors as lost sales, price suppression, layoffs, increasing inventories, decreasing shipments, low capacity utilization, and reduced profits (or losses).”).

<sup>38</sup> GATT, *supra* note 2, at art. VI:2.

<sup>39</sup> *Id.* at art. VI:1.

<sup>40</sup> *Id.* at art. VI:2.

Since the margin of dumping is based on comparing the import price to the domestic price, it becomes important for the accuracy of the calculation that the information on prices or cost of production in the domestic market of the exporting country reasonably reflect the price for the product “in the ordinary course of trade.”<sup>41</sup>

A comparable price is one that is determined by market forces independent of influence by any central planning authority.<sup>42</sup> The status labels for “market economy” (MES) and “non-market economy” (NME) countries developed to distinguish between countries whose prices are comparable, and those whose prices are not. Prices in MES countries are deemed presumptively comparable. Conversely, imports from non-market economies are not generally considered comparable. Following a preliminary discussion on the WTO Agreements, this Section will explain the various laws governing market status determinations.

### A. The WTO Agreements

Article VI of the GATT provides for the international regulation of antidumping investigative procedures. Paragraph 1 states:

[A] product is to be considered as being [dumped] . . . if the price of the product exported from one country to another (a) is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country, or, (b) in the absence of such domestic price, is less than either (i) the highest comparable price for the like product for export to any third country in the ordinary course of trade, or (ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.<sup>43</sup>

There are three accepted procedures for determining when dumping is occurring. The dominant method is to compare the import price to the domestic price for the like product in the exporting country. Article VI also proposes two alternative methods. Those methods are employed only when the dominant method is unworkable due to “the absence of [a comparable] domestic price.”<sup>44</sup> These two GATT-authorized alternatives are: (1) comparing the export price to the price for the like product when exported to a third country, or (2) comparing the import price to the cost of production for the product in the exporting country.

Article VI of the GATT 1994 is supplemented by an interpretive note, referred to as the Second *Ad Note*. The Second *Ad Note* is a binding part of the

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<sup>41</sup> *Id.* at art. VI:1.

<sup>42</sup> *Id.* (stating “comparable price, in the ordinary course of trade”).

<sup>43</sup> *Id.*

<sup>44</sup> See *id.*

agreement between WTO Members. It provides that a strict comparison between the import price and the domestic price in the exporting country “may not always be appropriate” due to state-sponsored distortions on the economy.<sup>45</sup> Specifically, the Second *Ad 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.<sup>46</sup>

The Antidumping Agreement gives further details on the implementation of Article VI for the Contracting Parties. The two agreements together must be interpreted coherently such that each provision is given relevant meaning.<sup>47</sup> Article 2 of the ADA is almost a direct restatement of the provision in Article VI:1. It says:

[A] product is to be considered as being dumped . . . if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country” or 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.<sup>48</sup>

The ADA provides the same three procedures for determining dumping. The dominant procedure is still the comparison between the import price and the domestic price in the exporting country. The condition for employing the other two alternatives is again the absence of domestic prices. However the ADA adds an additional circumstance in which a WTO Member can access the two enumerated alternatives: a “particular market situation” that would make a comparison improper.

## B. The Legal Definition of a Market Economy is Unsettled

The idea of a market economy is as varied as the number of countries that exist in the world. Each country has its own definition, and the WTO has no

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<sup>45</sup> GATT, *supra* note 2, at Second Addendum Note, art. VI:1.

<sup>46</sup> *Id.*

<sup>47</sup> See Appellate Body Report, *US—Measures Relating to Shrimp from Thailand*, ¶ 233, WTO Doc. WT/343/AB/R (adopted July 16, 2008) (“Article VI of the GATT 1994 (including the *Ad Note*) and the Anti-Dumping Agreement represent an inseparable package of rights and disciplines.”).

<sup>48</sup> ADA, *supra* note 35, at arts. 2.1–2.

definition at all.<sup>49</sup> Some countries—like the U.S. and the E.U.—employ multi-factor tests, while others—like Australia—allow their definitions to be molded by politics.<sup>50</sup> This wide-ranging variation becomes most obvious when China’s economic situation is taken into consideration. This Subsection will first explore the multi-factor legal tests employed by the U.S. and Europe. These tests lead to the conclusion that China is not a market economy country. Next, this Subsection will show how some countries that have legal tests for determining market economy status ignore them when under economic pressure to trade with China.<sup>51</sup> This Subsection will then highlight the WTO’s lack of a market economy definition and conclude that if the Second *Ad Note* should be considered some form of an NME definition, then by adverse inference China is a market economy under WTO law. This Subsection concludes that market economy status is an unreliable term to use as a proxy not only for a country’s actual economic situation, but also for determining the circumstances under which a sale took place within that market.

### 1. Countries employing legal tests.

The U.S. is one of the countries that has a legal test for market economy status that it employs regularly. Its definition focuses on the factors that it considers to render an economy an NME. In § 1677(18)(A) of the U.S. Tariff Act of 1930, the U.S. defines a non-market economy as any foreign country that “does not operate on market principles of cost and pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise.”<sup>52</sup> Under § 1677(18)(B), a U.S. investigating authority must consider: (1) the convertibility of currency, (2) whether wages are determined through “free bargaining,” (3) the extent to which foreign companies are permitted to invest, (4) the extent of government control over the means of production, (5) the extent of government control over resource allocation, prices, and output decisions of enterprises, and (6) other factors it considers appropriate.<sup>53</sup>

The U.S. regime for the determination of NME creates a balancing test where each factor is on a sliding scale. A conclusion about a country’s economic

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<sup>49</sup> Garrett E. Lynam, Note, *Using WTO Countervailing Duty Law to Combat Illegally Subsidized Chinese Enterprises Operating in a Nonmarket economy: Deciphering the Writing on the Wall*, 42 CASE W. RES. J. INT’L L. 739, 750 (2010).

<sup>50</sup> Andrew L. Stoler, *Market Economy Status for China: Implications for Antidumping Protection in Australia*, AUSTL.-CHINA BUS. COUNCIL OF S. AUSTL. (Sept. 28, 2004), <https://perma.cc/K2LM-KN3M>.

<sup>51</sup> *Id.*

<sup>52</sup> Tariff Act of 1930, 19 U.S.C. § 1677 (18)(A) (West) [hereinafter Tariff Act].

<sup>53</sup> *Id.*

status cannot be certain without extensive analysis of all the factors. Under U.S. law, if a country is not designated an NME following the prescription of the Tariff Act, it is presumed to be a market economy.

In October 2017, the U.S. Department of Commerce (DOC) released a memo analyzing China's economic status under these factors. The memo concluded that China continued to exhibit the characteristics of an NME, stating: "the framework of China's economy is set by the Chinese government and the Chinese Communist Party (CCP), which exercise control directly and indirectly over the allocation of resources through instruments such as government ownership and control of key economic actors and government directives."<sup>54</sup>

Under factor one, the DOC found that, while the Chinese currency was convertible, China still intervenes to limit the extent of price divergence between onshore and offshore currency.<sup>55</sup> Under factor two, the DOC recognized the existence of variable wages, but also noticed that there were many significant constraints to free wage bargaining.<sup>56</sup> Under factor three, the DOC noticed that China's foreign investment regime was particularly more restrictive relative to that of other major economies.<sup>57</sup> Under factor four, the DOC found that China's role in the private sector, through "state-invested enterprises," and its system of ownership and control over land use was an indication of government control over the means of production.<sup>58</sup> Under factor five, the DOC pointed to formal planning mechanisms through the CCP and ownership of the largest electrical grid operator as a sign of "resource allocation" control.<sup>59</sup> Under factor six, the DOC found that the CCP secures discrete economic outcomes through corruption and local protectionism.<sup>60</sup>

The E.U. employs a similar multi-factor test. Article 7(c) of the E.U. Council Regulation (EC) No. 384/96 details several market features that define a market economy.<sup>61</sup> These features include: (1) firm decisions on prices and outputs are made in response to market signals reflecting supply and demand, (2) firms' accounting records are independently audited in line with international accounting standards, (3) production costs are not distorted by non-market economy systems in relation to asset depreciation, write-offs, or payments via

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<sup>54</sup> DOC Memo, *supra* note 23, at 4.

<sup>55</sup> *Id.* at 19.

<sup>56</sup> *Id.* at 20.

<sup>57</sup> *Id.* at 32.

<sup>58</sup> *Id.* at 52.

<sup>59</sup> *Id.* at 117.

<sup>60</sup> *Id.* at 181, 187, 192–94.

<sup>61</sup> E.U. Council Regulation (EC) No. 384/96, art. 7(c) (Dec. 22, 1995).

compensation of debts, (4) firms are subject to bankruptcy and property laws, and (5) currency is exchanged at the market rate. Each factor being dispositive, by reasonable inference an economy that functions in the absence of one of them is not a market economy.<sup>62</sup> Considering that the U.S. and the E.U. share a commitment to treating China as an NME, it is unlikely that an assessment under the E.U. test would lead to a different conclusion. In fact, the *EC—Fasteners* case is an example of China failing to meet the standards outlined by the E.U.<sup>63</sup> In *EC—Fasteners*, the E.U. employed its market economy test against China in order to determine whether certain other European antidumping regulations (unrelated to dumping margin) may be applicable to China. For reasons unrelated to the topic of this Comment, the WTO Appellate Body did not allow the use of the E.U.’s test because it was not limited to the specific situation of finding comparable prices in the domestic market.<sup>64</sup>

Australia is another country that employs legal tests for the determination of MES. However, under pressure to trade with China, Australia disregarded its own law and granted China MES. For Australia, the choice was straightforward. China is Australia’s largest export market.<sup>65</sup> While negotiating its free trade agreement with China, China insisted on MES as a condition of concluding the agreement.<sup>66</sup> On balance, Australia’s government seems to have concluded that granting China MES was a small price to pay given the benefit to their domestic producers of having China’s market open to it.

## 2. The role of the WTO in determining MES.

The WTO does not grant MES.<sup>67</sup> In contrast to the fact-specific inquiry required under U.S. and E.U. law, the generally accepted definition of NME under WTO law is, “a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State.”<sup>68</sup> While this simple definition, provided in the Second *Ad Note* of Article VI of the GATT, does not use the term non-market economy, it has become the generally accepted definition because it is referenced as such by later authorities. These authorities will be discussed in this Subsection.

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<sup>62</sup> Council Regulation 1225/2009 of Nov. 30, 2009, Protection Against Dumped Imports from Countries Not Members of the European Community, 2009 O.J. (L 343/51), art. 2(A)(7)(c).

<sup>63</sup> *EC-Fasteners* 2011, *supra* note 21.

<sup>64</sup> *Id.*

<sup>65</sup> *Australia’s Trade Statistics at a Glance*, AUSTRALIAN GOV’T: DEP’T OF FOREIGN AFF. & TRADE (Apr. 27, 2018), <https://perma.cc/XUD7-XS3F>.

<sup>66</sup> *See Stoler, supra* note 50, at 2.

<sup>67</sup> Lynam, *supra* note 49, at 750.

<sup>68</sup> GATT, *supra* note 2, at Second *Ad Note*, art. VI:1.

The first of these references takes place in the addendum to Article 15 of the Tokyo Round Subsidies Code.<sup>69</sup> The Code merely makes reference to “a country described in [the addendum] to Article VI.”<sup>70</sup> The substance of this reference takes on meaningful form much later in the *United States—Definitive Antidumping and Countervailing Duties on Certain Products from China*<sup>71</sup> case. In that case, the panel said that the Tokyo Round Subsidies Code “explicitly addressed the . . . use of NME methodologies . . . in respect of imports from NMEs.”<sup>72</sup> By referencing the Tokyo Round Subsidies Code and stating that it “explicitly addresses” NMEs, the panel of the WTO adopted the description, provided in the Second *Ad Note* to paragraph 1 of Article VI of the GATT and which the Tokyo Round Code references, as a definition of an NME.

There is reason to believe, however, that the Second *Ad Note* definition is not the exclusive definition of an NME under the WTO. In *EC—Fasteners*, the Appellate Body states that “[t]he second *Ad Note* to Article VI:1 would thus not on its face be applicable to *lesser forms of NMEs* that do not fulfil [sic] both conditions.”<sup>73</sup> By stating “lesser forms” the appellate body is acknowledging that there are other forms of NMEs that are not captured within the definition provided in that addendum. The appellate body does not, however, provide a definition of a lesser-form NME.

It is clear from the discussion so far that there exists the idea of a distinction between market economies and non-market economies. It is also clear that the various authorities are in disagreement about where to draw the line for that distinction. The U.S. and E.U. have developed in-depth, fact-based legal tests for their domestic investigating authorities to use when assessing a country’s economic status. On the other hand, the WTO has provided a clear rule that would be difficult for any country to satisfy, while also leaving undefined the parameters of “lesser form NMEs.”

Depending on where the line is drawn, China may or may not be considered a market economy. *Vis-à-vis* the U.S. and E.U., it is an NME. Under the limited definition provided by the WTO, it is not an NME. Left uncertain is whether China would be considered a lesser-form NME under the WTO and, if so, what the legal implications would be of being a lesser-form NME.

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<sup>69</sup> Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade, art. 15:1, WTO Doc. LT/TR/A/3 (Apr. 12, 1979).

<sup>70</sup> *Id.*

<sup>71</sup> Panel Report, *United States—Definitive Anti-dumping and Countervailing Duties on Certain Products from China*, ¶ 14.119, WTO Doc. WT/DS379/R (adopted Oct. 22, 2010).

<sup>72</sup> *Id.*

<sup>73</sup> *EC-Fasteners* 2011, *supra* note 21, at ¶ 285 n. 460 (emphasis added).

### C. The Legal Implications of Non-Market Economy Status

When a country is deemed to be a non-market economy pursuant to the factors outlined in the 1930 Tariff Act, the U.S. concludes that the country “does not operate sufficiently on market principles to permit the use of [its] prices and costs for purposes of the Department’s [DOC’s] antidumping analysis.”<sup>74</sup> As a result, the U.S. government allows antidumping investigating authorities to employ alternative normal value calculation methods rather than relying on the exporting country’s domestic market prices. The NME determination remains in effect until revoked by the Department of Commerce.<sup>75</sup>

The E.U. draws the same conclusion when it, according to its law, gives a country NME status. The NME status “allows the European Commission to apply a different methodology to calculate antidumping margins for these countries.”<sup>76</sup> In these cases, the E.U. most frequently “relies on a surrogate country for the calculation of the normal value.”<sup>77</sup> This approach is justified because the E.U. believes that in an NME, “domestic prices are considered unreliable.”<sup>78</sup>

Under the U.S. and E.U. regimes, the NME status functions as a gateway to employing alternative normal value calculation methodologies during antidumping investigations. Under Section 1677 18(B)(iv) of the U.S. Tariff Act of 1930,<sup>79</sup> normal value in antidumping investigations involving products from NME countries is determined on the basis of factors of production in countries that the DOC has designated as market economies. NME status does not seem to have any other legal function under U.S. law.<sup>80</sup>

Under the WTO regime, the implication of NME status is unclear because the complete definition of NME is unsettled. All that can be said with certainty is that in the case of countries that meet the requirements of the Second *Ad Note* of Article VI of the GATT, “special difficulties may exist . . . for the purposes of [calculating the normal value of imports], and in such cases

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<sup>74</sup> DOC Memo, *supra* note 23, at 195.

<sup>75</sup> Tariff Act, *supra* note 52, at § 1677(18)(C)(i).

<sup>76</sup> Laura Puccio, Calculation of Dumping Margins: E.U. and US Rules and Practices in Light of the Debate on China’s Market Economy Status, EUROPEAN PARLIAMENTARY RESEARCH SERVICE, PE 583.794 § 2.1 (May 2016).

<sup>77</sup> *Id.* at 1.

<sup>78</sup> *Id.*

<sup>79</sup> Tariff Act, *supra* note 52, at § 1677 18(B)(iv).

<sup>80</sup> Vera Thorstensen et al., *WTO—Market and Non-Market Economies: The Hybrid Case of China*, 1 LATIN AM. J. OF INT’L TRADE L. 765, 778 (2013).

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.”<sup>81</sup> The U.S. believes that by deeming strict comparisons inappropriate in this situation, the GATT is permitting the use of alternative methodologies.<sup>82</sup> So, at the very least, this narrow definition of NME serves as a gateway to alternative normal value calculation methodologies. Left unsettled is whether such methods may be used against “lesser form NMEs” as well.

### III. DEBATE OVER CHINA’S STATUS AS A NON-MARKET ECONOMY

The debate over China’s status as a non-market economy is not a new one. Decades ago, when China first attempted to join the international rule-based trade organization then organized under the name GATT, contracting parties fiercely debated how China’s status could be accommodated by the system without undermining the goals of that same system. Even after the accession of China to the WTO in 2001, WTO Members were still skeptical of Chinese economic policies and made sure that their skepticism would be captured in the Protocol. Nonetheless, since acceding to the WTO, China has continued to make changes to its economy that WTO Members could not predict, and those changes, in conjunction with the expiration of a key provision of the Protocol, give rise to the present debate.

This Section will start by describing the political background surrounding China’s accession negotiations. Next, this Section will discuss the relevant text of the accession protocol giving rise to the current debate, followed by a discussion of how those provisions have factored into WTO disputes prior to their expiration. The last Subsection will detail the various policy considerations that influence scholars interpreting the implications of the expiration of Article 15 (a)(ii) and then lay out the various positions taken in this debate.

#### A. The Political Backdrop to China’s Accession

China first requested to join the predecessor to the WTO in 1986, and the GATT Council established the Working Party on China’s Status as a “Contracting Party.”<sup>83</sup> China stated as its objective the establishment of a

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<sup>81</sup> GATT, *supra* note 2, at Second Addendum Note, art. VI:1.

<sup>82</sup> U.S. Legal Interpretation, *supra* note 25.

<sup>83</sup> Working Party on the Accession of China, *Report of the Working Party on the Accession of China*, ¶ 1, WTO Doc. WT/ACC/CHN/49 (Oct. 1, 2001) [hereinafter China Working Party Report].

“socialist market economy” through “economic reform,”<sup>84</sup> and members of the WTO welcomed China’s accession, believing that it would strengthen the system and ensure the “steady development of the world economy.”<sup>85</sup> During negotiations, China praised itself for the developments it made to improve the macroeconomic regulatory system with “indirect” measures rather than direct measures.<sup>86</sup> Yet, despite all of its achievements to increase production and the per capita income of its citizens, China insisted that it was still developing and should receive the more favorable treatment reserved for developing country members.<sup>87</sup> While the members of the Working Party agreed, they were apprehensive and believed that the sheer size of China’s economy and the rapid nature of its growth called for a “tailored” approach “to fit the specific cases of China’s accession in a few areas.”<sup>88</sup>

With respect to China’s pricing policies, some members were concerned about the pricing controls utilized by the government through various central agencies. They took special care to convey to China that it should allow market forces to determine prices in every sector of the market of traded goods, and that if controls were to remain, they should conform to the requirements of Article III of the GATT and Annex 2.<sup>89</sup> These members were further concerned about the coercive effects of “guidance pricing.” Guidance pricing occurs when the government recommends certain product prices but allows industry actors to price their products within a limited percentage range of the price set by the government, usually 5 to 15 percent.<sup>90</sup> So, to these members, “guidance pricing” usurps the market just as much as the price control mechanism and should be eliminated.<sup>91</sup> In response, China explained that its pricing policies took into account normal costs of production and profits and assured the Working Party that price controls “would not be used for purposes of affording protection to domestic industries or service providers.”<sup>92</sup> Nonetheless, some Members remained worried that China could use its system of price controls as a way to limit imports.<sup>93</sup>

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<sup>84</sup> *Id.* at ¶ 4.

<sup>85</sup> *Id.* at ¶ 5.

<sup>86</sup> *Id.* at ¶ 6.

<sup>87</sup> *Id.* at ¶ 8. For example, developing countries can, under certain circumstances, receive favorable tariff treatment from developed countries while still maintaining high tariffs on their imports.

<sup>88</sup> *Id.* at ¶ 9.

<sup>89</sup> *Id.* at ¶ 50.

<sup>90</sup> *Id.* at ¶ 54.

<sup>91</sup> *Id.* at ¶ 51.

<sup>92</sup> *Id.* at ¶ 62.

<sup>93</sup> *Id.* at ¶ 63.

With respect to China's trading policies, the Working Party was concerned about how China restricted access to the international market. At the time of negotiations, the right to import and export products from China was limited to a small number of Chinese enterprises.<sup>94</sup> Foreign-invested enterprises could also trade, but their rights were limited to importation for production purposes and exportation within the scope of business.<sup>95</sup> Such restrictions were considered to be inconsistent with WTO requirements. Members were especially concerned about the link China required between an enterprise's trade and its scope of business.<sup>96</sup> Members asked China to commit to allow all foreign companies, whether or not they were invested or registered in China, to trade within three years of accession.<sup>97</sup>

Members of the Working Party for the Accession of China also took special care to note the "special difficulties . . . in determining cost and price comparability in the context of antidumping investigations" against China.<sup>98</sup> While these members recognized and applauded China for "continuing the process of transition towards a full market economy," they emphasized that because China had not yet reached "full market economy" status, countries that import Chinese goods "might find it necessary to take into account the possibility that a strict comparison with domestic costs and prices in China might not always be appropriate."<sup>99</sup>

China recognized the difficulties expressed by the Working Party Members with respect to antidumping investigations. In response, China made the concessions present in the Protocol, which allows countries to give it NME status essentially automatically,<sup>100</sup> but China insisted that Chinese companies should be given a full and fair opportunity to present evidence and defend their interests.<sup>101</sup> As a result, WTO members made the following commitments: (1) to publish in advance (a) their domestic requirements for market economy conditions and (b) methodologies that they would use to determine price comparability; (2) to notify the Committee on Antidumping Practices of its market economy criteria and methodology; (3) ensure a transparent process that allows an opportunity for Chinese producers to comment on the applicability of the alternative methodology in particular cases; (4) provide an opportunity to

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<sup>94</sup> *Id.* at ¶ 80.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at ¶ 82.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at ¶ 150.

<sup>99</sup> *Id.*

<sup>100</sup> Accession Protocol, *supra* note 19, at art. 15(a)(ii).

<sup>101</sup> China Working Party Report, *supra* note 83, at ¶ 151.

present evidence in each case; (5) provide full opportunity for defense in each case; and (6) provide detailed reasoning for its determinations in each case.<sup>102</sup>

Present throughout the Working Party report is a sense of very real concern about China's continued progress toward a "full market economy" during the negotiations for its accession to the WTO. Members recognized and welcomed China's potential to contribute generously to the international marketplace, but at every occasion, took special care to highlight the areas where they considered China to fall short of "full market economy" standards: pricing, licensing restrictions for imports and exports, and most importantly for this Comment, antidumping investigations.

## B. The Accession Protocol of the People's Republic of China

After more than a decade of Working Party negotiations, the final Protocol of Accession included many concessions by China to assure WTO members of China's continued progress toward "full economy status." Under Article 9, the Protocol commits China to "allow prices for traded goods and services in every sector to be determined by market forces... except in exceptional circumstances."<sup>103</sup> China is also committed to allowing foreign companies to import and export as freely as domestic companies under Article 11.<sup>104</sup>

To address the concerns about price comparability in antidumping investigations, the Protocol contains extensively detailed provisions under Article 15. It should first be noted that in the *chapeau* (introduction) to the Article, the Protocol states that Article VI of the GATT 1994, the Antidumping Agreement on the Implementation of Article VI, and the Subsidies and Countervailing Measures Agreement ("SCM Agreement") shall apply to investigations against China.<sup>105</sup> Article 15 then goes on to provide additional provisions that are applicable specifically to China. Article 15(a) discusses price comparability for China under Article VI of the GATT 1994. Article 15(b) discusses proceedings under the SCM Agreement for China. Article 15(c) describes the commitments that WTO members must make with respect to providing China a full and fair opportunity to defend itself in investigations. Finally, Article 15(d) provides an "out" clause for China with respect to the special requirements of Article 15(a). It is the interplay between these two provisions—15(a) and 15(d)—that has become the source of much dispute. The text of the Article reads:

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<sup>102</sup> *Id.* at ¶¶ 151(a)–(f).

<sup>103</sup> Accession Protocol, *supra* note 19, at art. 9.1–2.

<sup>104</sup> *Id.* at art. 11.4.

<sup>105</sup> *Id.* at art. 15.

## Article 15:

(a) “In determining price comparability under Article VI of the GATT 1994 . . . the importing WTO Member shall use either Chinese prices or costs for the industry under investigation or . . . [an alternative methodology] based on the following rules:

(i) If the producers under investigation can clearly show that market economy conditions prevail in the industry . . . the importing WTO Member shall use Chinese prices or costs for the industry . . .

(ii) The importing WTO Member may use . . . [alternative methodologies] *if the producers under investigation cannot clearly show that market economy conditions prevail . . .*

(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.<sup>106</sup>

Under these provisions, Chinese producers have the burden of proving whether market economy conditions prevail under the national law of the importing country. If the producers do not meet these requirements, the importing member is permitted to employ alternative normal value calculation methodologies. Conversely, if the Chinese producers do meet the burden of proof established under national law, then the importing member is required to use Chinese prices when making a price comparison to determine the margin of dumping. The most controversial of these provisions, however, is subparagraph (d), which provides for the expiration of subparagraph (a)(ii) in fifteen years—effectively December 11, 2016. Subparagraph (a)(ii) grants permission to importing WTO members to use alternative methodologies, *if the Chinese producers cannot clearly show that market conditions prevail.*

Since subparagraph (a)(ii) expired in December of 2016, China, the U.S., the E.U., and scholars worldwide have disagreed about the implications of its expiration. Before discussing that debate in detail, it is necessary to understand what legal effect the provision had before its expiration.

### C. Antidumping Investigations against China prior to December 11, 2016

Both before and after the accession of China to the WTO, the U.S. frequently initiated antidumping investigations against China. In each case, the U.S. treated China as a non-market economy and therefore employed alternative calculation methodologies for the determination of normal value. At no point in

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<sup>106</sup> *Id.* at arts. 15(a), 15(d) (emphasis added).

any of the investigations did China challenge the application of NME status before the WTO dispute settlement body under Article 15 of the Accession Protocol. All of China's petitions are related to the treatment that is accorded China once it is given such status.

China challenged the simultaneous imposition of a countervailing antidumping duty in the *United States—Definitive Antidumping Countervailing Duties on Certain Products from China* case.<sup>107</sup> Following an investigation by the DOC, the American investigating authority deemed China to be an NME country, and treated it as such in calculating the margin of dumping by using the prices of a third surrogate country.<sup>108</sup> In *EC—Definitive Antidumping Measures on Certain Iron or Steel Fasteners from China*,<sup>109</sup> China challenged the European regulation that applied antidumping duties in NME countries to all producers equally and required exporting producers to prove why they should receive “individual treatment.”<sup>110</sup> China believed that it was Europe's responsibility to prove why individual producers did not deserve Independent Treatment (“IT”), rather than the responsibility of Chinese producers to prove that they meet the requirements for IT. Nonetheless, China accepted the NME status and focused its challenges on how its producers should be treated once given that status.<sup>111</sup> China took the same approach in several other disputes before the WTO.<sup>112</sup>

Two things can be concluded from surveying these antidumping cases against China. First, a challenge as to whether NME status may be applied in a particular case against China is unprecedented. So, the expiration of the Article 15(a)(ii) of the Accession Protocol will produce an interpretive challenge because the meaning of the provision has not been developed. Second, though NME status may be undisputed, the implications of what that status means with regard to how China should be treated in antidumping investigations remains a constant source of disagreement.

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<sup>107</sup> Request for the Establishment of a Panel by China, *United States—Definitive Anti-Dumping Countervailing Duties on Certain Products from China*, WTO Doc. WT/DS379/2 (Dec. 12, 2008).

<sup>108</sup> Panel Report, *United States—Definitive Anti-dumping and Countervailing Duties on Certain Products from China*, ¶ 2.4, WTO Doc. WT/DS379/R (adopted Oct. 22, 2010).

<sup>109</sup> See *EC-Fasteners 2011*, *supra* note 21.

<sup>110</sup> Request for Consultations by China, *European Communities—Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, ¶¶ 1, 2(ii), WTO Doc. WT/DS397/1 (Aug. 4, 2009).

<sup>111</sup> *Id.*

<sup>112</sup> See generally Panel Report, *European Union—Anti-Dumping Measures on Certain Footwear from China*, WTO Doc. WT/DS405/R (adopted Oct. 28, 2011); Appellate Body Report, *United States—Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, WTO Doc. WT/DS399/R/AB (adopted Sept. 5, 2011).

## D. Antidumping Investigations after December 11, 2016

The expiration of Article 15(a)(ii) raises several questions. The first question is whether China must now be considered a market economy for the purposes of antidumping investigations. In a recent antidumping investigation into certain aluminum foil imports from China,<sup>113</sup> the Ministry of Commerce, People's Republic of China (MOFCOM), insisted that the "United States is obligated to no longer use a surrogate methodology" in antidumping determinations targeting Chinese products after December 11, 2016.<sup>114</sup> In that investigation, China did not substantiate its claims with legal arguments, but other scholars that agree with China have spilled much ink to support this position. Their arguments are discussed below. The other side of the debate includes not only the U.S., but also a host of scholars who believe that the expiration of Article 15(a)(ii) either has no legal effect on the ability of WTO Members to give China NME status, or that the expiration of the provision merely changes the burden of proof for proving China's NME status.<sup>115</sup> This Comment argues that the expiration will not extinguish the power to employ the surrogate country method even if China is given MES.

There are several policy considerations that animate the debate amongst scholars and practitioners of international trade law. If the expiration of Article 15(a)(ii) means that China should not be accorded MES, then the consequences for a country that refuses to grant it, like the U.S., may be severe. The U.S. might risk antagonistic retaliation that hurts U.S. exporters and investors, further complicating U.S.-China relations while only providing a marginal benefit to select U.S. industries.<sup>116</sup> On balance, withholding MES might not do much in the way of restraining injurious imports anyway.<sup>117</sup>

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<sup>113</sup> See U.S. Dep't of Com., Memorandum on Certain Aluminum Foil from the People's Republic of China: Initiation of Less-Than-Fair-Value Investigation, Docket No. 170328324-7324-01 (Mar. 29, 2017), <https://perma.cc/T6K4-BQUN>.

<sup>114</sup> DOC Memo, *supra* note 23, at 9.

<sup>115</sup> U.S. Legal Interpretation, *supra* note 25, at ¶ 8.5; Michael Flynn, *China: A Market Economy?*, 48 GEO. J. OF INT'L L. 297, 302 (2016); O'Connor, *supra* note 24.

<sup>116</sup> Gary Clyde Hufbauer, *Statement on Market Economy Status*, Testimony before the U.S.-China Economic and Security Review Commission, Hearing on China's Shifting Economic Realities and Implications for the United States, Panel 4 "Evaluating China's Non-Market Economy Status," 178-79 (Feb. 24, 2016). Also, in advance of a ruling on China's NME Status at the WTO, Trump has seemed to foreshadow unwillingness to comply if he does not get his way. See Michael Martina and Steve Holland, *Trump Threatens More China Tariffs, Beijing Ready to Hit Back*, REUTERS (Apr. 6, 2018), <https://perma.cc/HD93-T5ED>.

<sup>117</sup> Michael Wessel, Opening Statement of Commissioner Michael Wessel Hearing Co-Chair, Testimony before the U.S.-China Economic and Security Review Commission, Hearing on China's Shifting Economic Realities and Implications for the United States, 3 (Feb. 24, 2016).

China is extremely disadvantaged by the “surrogate country” method because of the high number of antidumping duties initiated against it, and the unpredictable nature of the method.<sup>118</sup> Between 2004 and 2007, China reported to the U.S. DOC that in all antidumping investigations against its producers, antidumping duties were on average thirteen times higher than for other countries.<sup>119</sup> Antidumping investigations that employ the surrogate country method are unpredictable because the importing country has discretion to choose which country it will use for the price comparison with respect to each particular investigation.

China has grown as an international economic powerhouse, from accounting for only one percent of international trade in 1978,<sup>120</sup> to more than nine percent by 2011,<sup>121</sup> and now is recognized as the leading international exporter.<sup>122</sup> As China’s importance as a trading nation has increased, its activity before the WTO has also multiplied to now represent more than a quarter of the WTO caseload.<sup>123</sup> China’s prominence also comes at a time when the powerful trading economies (the U.S., the E.U., and Japan) have decreased the number of complaints they file against each other, resulting in an “Established Power(s) versus China” dynamic.<sup>124</sup> This highlights their resistance to China’s enlarged role, which may seem irrational as they ignore signs of China’s market progress,<sup>125</sup> and insist on continuing to treat it in NME fashion.

If China is dissatisfied with the resolution of this question or feels that the outcome was arrived at unfairly, it might be tempted to leave the WTO

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<sup>118</sup> Richard Lockridge, *Doubling Down in Non-Market Economies: The Inequitable Application of Trade Remedies Against China and the Case for a New WTO Institution*, 24 S. CAL. INTERDISC. L.J. 249, 259–61 (2014).

<sup>119</sup> See Submission of the Gov’t of the People’s Republic of China Ministry of Commerce to the U.S. Dep’t of Com., Antidumping Methodologies in Proceedings Involving Nonmarket Economy Countries: Surrogate Country Selection and Separate Rates, at 3 (Apr. 20, 2007), <https://perma.cc/XR5H-N7KN>.

<sup>120</sup> See Xiaojun Li, *China as a Trading Superpower*, in CHINA’S GEOECONOMIC STRATEGY 25, 25 (Nicholas Kitchen ed., 2012).

<sup>121</sup> World Trade Organization, WORLD TRADE REPORT 2011, 25 (2011).

<sup>122</sup> See John Miller & Marcus Walker, *China Detrones Germany as Top Goods Exporter*, WALL ST. JOURNAL (Jan. 6, 2010), <https://www.wsj.com/articles/SB126272143898416853> [<https://perma.cc/R3C8-35VZ>]; see also Steven Mufson, *China Surpasses Germany as World’s Top Exporter*, WASH. POST (Jan. 11, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/10/AR2010011002647.html?noredirect=on> [<https://perma.cc/9PS3-WZM9>].

<sup>123</sup> Wu, *supra* note 15, at 262.

<sup>124</sup> *Id.* at 263–64.

<sup>125</sup> See generally NICHOLAS LARDY, MARKETS OVER MAO (2014).

Agreement and stake out its own course to resolve trading disputes.<sup>126</sup> Such a move would weaken the institution's legitimacy at a time when faith in its ability to craft clear rules and resolve conflict is already waning.<sup>127</sup> Further weakening may lead to a cascade of important economies electing not to bring their disputes before the body and seeking self-help methods instead.<sup>128</sup> This result may return international trade to undesirable levels of fragmentation.<sup>129</sup>

### 1. Arguments in favor of continuing China's NME status post-expiration.

Bernard O'Connor is one of the scholars who believes that China is not entitled to automatic MES after the expiration of Article 15(a)(ii) in 2016. In a column written in 2011, he analyzed the Protocol and concluded that in order for China to be recognized as a market economy by the E.U., it should comply with the explicit criteria of E.U. law.<sup>130</sup> The crux of O'Connor's argument is twofold. First, he argues that subparagraph (a)(ii) does not speak of granting MES, so its expiration should not result in MES. Second, subparagraph (a)(ii) is not the only source of authority for NME methodologies in the protocol.<sup>131</sup>

O'Connor asserts that all other parts of Article 15 will continue to apply after the expiration of subparagraph (a)(ii). This is significant because other portions of Article 15 (namely the *chapeau*) introduce the possibility for WTO Members to use NME methodologies against China.<sup>132</sup> O'Connor next asserts that the portion of 15(d) that announces the expiration of (a)(ii) has no legal effect on the rest of 15(d).<sup>133</sup> This is also significant because 15(d) contains a provision that requires Chinese firms to prove under the "national law" of the importing country.<sup>134</sup> O'Connor concludes from these observations that since China is still subject to the market economy standards announced under the "national law" of the importing country, and the *chapeau* permits NME methodologies, importing countries could deem China an NME under 15(d) and impose NME methodologies under the *chapeau* to Article 15 of the Protocol.<sup>135</sup>

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<sup>126</sup> Wu, *supra* note 15, at 266.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 266–67.

<sup>129</sup> *Id.* at 267.

<sup>130</sup> O'Connor, *supra* note 24, at 2.

<sup>131</sup> *Id.*

<sup>132</sup> Accession Protocol, *supra* note 19, at Chapeau to art. 15.

<sup>133</sup> O'Connor, *supra* note 24, at 2.

<sup>134</sup> Accession Protocol, *supra* note 19, at art. 15(d).

<sup>135</sup> O'Connor, *supra* note 24, at 2.

The U.S. fervently disagrees with the notion that the expiration of Article 15(a)(ii) of China's Accession Protocol removes WTO Members' ability to reject non-market domestic prices and replaces them with surrogate country prices in antidumping investigations.<sup>136</sup> Under its interpretation, the Protocol is a "specific expression of the principle that [price] comparability needs to be ensured."<sup>137</sup>

"Price comparability" is the requirement that the price used in the dumping margin calculation be a "comparable market-determined price." The expiration of 15(a)(ii) only means that the rule set out in that provision does not apply beyond fifteen years, and so it does not take away the basic "price comparability" requirement that flows from Article VI:1 of the GATT 1994.<sup>138</sup> Even after the expiration of that particular rule, if "market economy conditions do not prevail in China or in the industry or sector under investigation, then 'comparable' prices or costs do not exist," and Article VI:1 of the GATT 1994 would still require "surrogate country" prices in order to attain proper "price comparability."<sup>139</sup>

In order to appreciate the force of this interpretation, it is important to understand the concept of "price comparability." For the U.S., price comparability starts with comparison of export and domestic prices.<sup>140</sup> In order for the export and domestic prices to be comparable, the domestic price must be a "comparable price."<sup>141</sup> A comparable price is one that is determined in the "ordinary course of trade" or market-determined.<sup>142</sup> Price comparability cannot exist without a comparable price, and a comparable price cannot exist if it is not market-determined.

Some practitioners of international trade law also agree that China does not automatically receive MES unless "Chinese producers can show that they operate under market economy conditions."<sup>143</sup> These trade attorneys reiterate that the expiration of 15(a)(ii) does not affect the rest of the Article, parts of which they believe also create the obligation for Chinese producers to prove MES under the national law of the importing country.<sup>144</sup> They further buttress

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<sup>136</sup> U.S. Legal Interpretation, *supra* note 25, at ¶ 1.

<sup>137</sup> *Id.* at ¶ 117.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> GATT, *supra* note 2, at art. VI:1(a).

<sup>141</sup> *Id.* at ¶ 1.

<sup>142</sup> *Id.* at ¶ 5.

<sup>143</sup> Alan H. Price et al., *China Can Still Be Treated As a Nonmarket Economy After 2016*, LAW360 (Oct. 16, 2015), <https://perma.cc/4FDZ-YHE4>.

<sup>144</sup> *Id.*; see also Flynn, *supra* note 115, at 303.

their position with functional policy arguments, stating that “there is a great deal of evidence showing that China is not a market economy,”<sup>145</sup> and therefore “to require WTO members to apply [MES] . . . would be contrary to the underlying purpose of [Article] 15.”<sup>146</sup> As discussed at the beginning of this Section, that purpose is to help China to continue its progress toward becoming a full market economy.<sup>147</sup> To grant it MES before that is achieved would indeed defeat that stated intent.

## 2. Arguments against continuing China’s NME status post-expiration.

There are some scholars who fervently believe that China is either entitled to MES or that such status is inevitable and ought to be granted for policy reasons. These positions are discussed in this Subsection.

Professors Christian Tietje and Karsten Nowrot analyzed the text of the Protocol and of Article VI:1 of the GATT 1944 and reached the conclusion that following the expiration of 15(a)(ii) no WTO member has the authority to treat China as an NME.<sup>148</sup> The foundation for their argument is the assertion that under WTO law there are only two ways of dealing with NMEs. The first is the Second *Ad Note* of Art. VI:1. The second is the Accession Protocol of each country.<sup>149</sup>

Tietje and Nowrot argue that it is the addendum that “opens up the possibilities to determine normal value of products by using methodology as deemed appropriate by the investigating countr[ies].”<sup>150</sup> Since it is the addendum that introduces the authority to deviate from the settled norm of the WTO regulations, taking advantage of that exception must conform to the requirements therein.<sup>151</sup> The requirements of the addendum—(1) “complete or substantially complete” government monopoly and (2) “all domestic prices are fixed by the state”—are difficult to find in any country.<sup>152</sup> A transitional economy like China would not qualify for MES under this definition because

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<sup>145</sup> Price et al., *supra* note 143, at ¶ 9 (pointing to “the Chinese government continues to play the dominant role in the allocation of resources within the Chinese economy; and that prices for key inputs, including land, energy and credit, are not set by the market.”).

<sup>146</sup> *Id.*

<sup>147</sup> See China Working Party Report, *supra* note 83, and accompanying text.

<sup>148</sup> Christian Tietje & Karsten Nowrot, *Myth or Reality? China’s Market Economy Status Under WTO Anti-Dumping Law After 2016*, 34 *TRANSNAT’L ECON. L. CTR.* 1, 5–11 (2011).

<sup>149</sup> *Id.* at 4.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 4, 10.

those conditions are not met, so using alternative methodologies will not be permitted under this provision. Absent authority under the addendum, a WTO member would have to rely on the country's accession protocol.

Article VI:1 and the ADA, according to Tietje and Nowrot, are “subject to important modifications on the basis of relevant stipulations enshrined in China’s accession protocol.”<sup>153</sup> Again, Tietje and Nowrot assert that it is “precisely [Section 15(a)] that, at present, essentially permits other WTO members to deviate from the requirements of Art. 2(1) WTO ADA,”<sup>154</sup> and argues that the language of 15(d) supports this understanding. They are careful to clarify that the expiration of 15(a)(ii) “does not explicitly grant China MES” magically, but “it essentially creates a situation where other WTO members are no longer permitted” to use alternative methodologies.<sup>155</sup>

Tietje and Nowrot’s final claim is that following the expiration of 15(a)(ii), the burden of proof shifts to the importing country to prove that China is an NME.<sup>156</sup> However, per their understanding, the standard of proof would be according to the addendum and not the national law of the importing country,<sup>157</sup> a standard which most authorities believe is unprovable in the case of China.

Laura Puccio, a researcher for the European Parliament, also argues the validity of the position that the expiration of 15(a)(ii) would mark a shift in the burden of proof.<sup>158</sup> Contrary to the position held by Tietje and Nowrot, however, Puccio argues that the conditions to be proved are those required under “the domestic law of the importing country imposing the [antidumping] measure.”<sup>159</sup> This interpretation flows from the language of Section 15(d), which requires China to make proofs under the “national law” of the importing country.<sup>160</sup> According to Puccio, Tietje and Nowrot’s position that the strict definition of an NME under the addendum is required would “*de facto* allow a circumvention of the requirement under Section 15(d),” which provides for country-wide MES under domestic law.<sup>161</sup> In this way, MES is not automatic, and NME is not hard to prove for the importing country.

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<sup>153</sup> *Id.* at 5.

<sup>154</sup> *Id.* at 6.

<sup>155</sup> *Id.* at 7.

<sup>156</sup> *Id.* at 10.

<sup>157</sup> *Id.*

<sup>158</sup> Laura Puccio, *Granting Market Economy Status to China, An Analysis of WTO Law and of Selected WTO Members’ Policy*, EUR. PARLIAMENTARY RESEARCH SERV., at 7 (Nov. 2015), <https://perma.cc/B8DT-5CV2>.

<sup>159</sup> *Id.* at 4, 12.

<sup>160</sup> *Id.* at 7.

<sup>161</sup> *Id.* (emphasis in original).

In this Section, this Comment has so far demonstrated that the current debate on China's economic status does not occur in a vacuum. Many years before China joined the WTO, other members took pains to get assurances from China that it would liberalize its domestic market in order to make trade with it suitable for the international system. The concessions made by China and WTO Members as reflected in the Working Party report and the Protocol itself represent an agreement by the parties to promote that goal. The present debate on the implications of the expiration of 15(a)(ii) should not be considered absent that background. Some scholars have taken that background into account when interpreting the text. Others have approached the issue on a purely textual basis.

In the next Section, this Comment proposes additional context for practitioners and scholars to consider when interpreting the expiration of 15(a)(ii): the WTO Agreements, specifically Article VI and the ADA. This Comment will argue that these agreements will have a larger impact on the treatment of China no matter what conclusions are drawn when interpreting 15(a)(ii) and the implications of its expiration on China's economic status.

#### IV. NME STATUS IS NOT A NECESSARY PRECONDITION FOR THE APPLICATION OF THE SURROGATE COUNTRY METHOD

Though well-reasoned and grounded in the text of the applicable legal provisions, the arguments above miss a larger point. In this Section, this Comment will revisit the legal authority for WTO members to apply the "surrogate country" method and argue that, while sufficient to justify its use, NME status is not a necessary prerequisite.

There are two relevant provisions that allow using alternative pricing methodologies under certain circumstances. Both provide a solid legal foundation for national authorities to use third country prices against China regardless of an overall NME determination. These provisions are Article VI of the GATT 1994 and Article 2 of the Antidumping Agreement.

##### A. Article VI of the GATT

The first justification for using alternative pricing methodology comes from Article VI of the GATT 1994:

[A] product is to be considered as being [dumped], if the price of the product exported from one country to another (a) is less than the comparable price, in the ordinary course of trade . . . or (b) in the absence of such domestic price, is less than either (i) the highest comparable price for

the like product for export to any third country in the ordinary course of trade.<sup>162</sup>

This language indicates that normal value must be market-determined.<sup>163</sup> Under this notion, price comparability is the objective that drives the force of this requirement.<sup>164</sup> In its third-party submission,<sup>165</sup> the U.S. supports this conclusion by pointing to the historical practice of WTO Members applying Article VI in antidumping investigations. This historical practice, which reveals a common understanding among all contracting parties, is the foundation of its belief that Article VI requires market-determined prices.

In a review of legislation passed by contracting parties to implement Article VI,<sup>166</sup> the GATT Secretariat confirmed the understanding that Article VI requires market-determined prices for “price comparability.”<sup>167</sup> The Secretariat’s analysis focused on the fact that contracting parties “universally relied on market-determined prices” for the bases of the calculations.<sup>168</sup> Furthermore, the Secretariat also deemed the “application of duties to be practically in conformity with the obligations laid down” in Article VI.<sup>169</sup> In summarizing its review, the Secretariat states: “There is a clear tendency [among all contracting parties] to arrive at a normal value which is really a comparable value . . . namely to base the normal value on a similar product . . . or on prices in a third countries . . . due to the lack of comparable figures.”<sup>170</sup> This review reveals that at least since 1957, contracting parties apply Article VI in a manner that demonstrates an awareness that it provides the legal authority to calculate normal value on the basis of market-determined prices.<sup>171</sup> Based on this history, Article 31(3)(b) of the Vienna Convention on the Law of Treaties<sup>172</sup> leads to the conclusion that a “subsequent practice in the application of Article VI”

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<sup>162</sup> GATT, *supra* note 2, at art. VI:1.

<sup>163</sup> U.S. Legal Interpretation, *supra* note 25, at § 116.

<sup>164</sup> See *supra* note 141 and accompanying text.

<sup>165</sup> See generally U.S. Legal Interpretation, *supra* note 25.

<sup>166</sup> GATT Secretariat, *Antidumping and Countervailing Duties: Secretariat Analysis of Legislation*, 10–11, GATT Doc. L/712 (Oct. 23 1957) [hereinafter *Legislation Analysis*].

<sup>167</sup> U.S. Legal Interpretation, *supra* note 25, at § 5.

<sup>168</sup> *Legislation Analysis*, *supra* note 166, at 5–6.

<sup>169</sup> *Id.* at 5–6.

<sup>170</sup> *Id.* at 11.

<sup>171</sup> U.S. Legal Interpretation, *supra* note 25, at 4, 10–11.

<sup>172</sup> Vienna Convention on the Law of Treaties art. 31(3)(b), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 No. 18232 (“There shall be taken into account, together with the context . . . Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.”).

established an agreement by the contracting Parties of the meaning of Article VI.<sup>173</sup>

Historical practice also reveals that “non-market economy prices and costs may be rejected pursuant to Articles VI:1 and VI:2 of GATT 1994.”<sup>174</sup> The various accessions of non-market economies (Poland, Romania, and Hungary) contain understandings in the Working Party Reports that the protocols did not create exceptions to what already exists under the Article, but instead they simply recognized a pre-existing ability to reject non-market economy prices.<sup>175</sup> When Poland, a non-market economy, acceded in 1967, the Working Party recognized that authority to reject Polish prices flowed from Article VI.<sup>176</sup> The same was true for the accessions of Romania in 1971 and Hungary in 1973.<sup>177</sup> None of the protocols contained legally operative language in relation to rejecting non-market economy prices. Instead, in all Working Party Reports, the members relied on the legal authority of Article VI.<sup>178</sup> As in the case of the Secretariat review,<sup>179</sup> these three instances of accession amount to a subsequent practice establishing agreement on the interpretation of Article VI:1 of the GATT.<sup>180</sup>

One complication for this interpretation of Article VI is the Second *Ad* Note. The Second *Ad* Note says 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.”<sup>181</sup> This is a problem because few countries have a complete monopoly over their trade or set prices for all products domestically. If it is the case that, through the Second *Ad* Note, special difficulties exist only in these specific situations, then few countries, including China, would satisfy this requirement.

However, the U.S. has argued this provision can be interpreted as merely one example in which “special difficulties may exist in determining price comparability.”<sup>182</sup> This is the proper conclusion for two reasons. First, there is no text in Article VI:1 nor in the addendum which suggests that the described

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<sup>173</sup> U.S. Legal Interpretation, *supra* note 25, at § 114.

<sup>174</sup> *Id.* at § 128.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at § 118.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at § 128.

<sup>179</sup> Legislation Analysis, *supra* note 166.

<sup>180</sup> U.S. Legal Interpretation, *supra* note 25, at § 6.

<sup>181</sup> GATT, *supra* note 2, at Second Addendum Note, art. VI:1.

<sup>182</sup> U.S. Legal Interpretation, *supra* note 25, at ¶ 113.

example is “the exclusive situation” where special difficulties may exist.<sup>183</sup> Merely describing one situation where there may be an exception to the rule “does not logically imply that there could be no other ‘case.’”<sup>184</sup> Second, Article VI already recognizes that there are pricing difficulties in some situations. One of those situations is the absence of market-determined prices in the domestic market, and Article VI provides that countries may resort to alternative methods in that situation.<sup>185</sup>

### B. Article 2 of the Antidumping Agreement

The Antidumping Agreement gives further details on the implementation of Article VI for the Contracting Parties. The two agreements together must be interpreted coherently such that each provision is given relevant meaning.<sup>186</sup>

Article 2 of the Antidumping Agreement confirms the principle of price comparability expressed in Article VI:1 of the GATT 1994.<sup>187</sup> A side-by-side comparison of the language employed in both agreements will be helpful to highlight the drafters’ intent to recreate the same legal obligations.

Article VI:1, GATT 1994		Article 2, ADA	
(a)(1)	A product is to be considered as being introduced at less than its normal value, if the price is  “less than the comparable price, in the ordinary course of trade”	2.1	Product . . . [is] being dumped, i.e. introduced . . . at less than the normal value, if  “less than the comparable price, in the ordinary course of trade”
(b)(1)	In the absence of such domestic price, [it is dumped if price] is less than  “highest comparable price” “to any third country in the	2.2	“When there are no sales in the domestic market, or because of <i>the particular market situation</i> . . . margin of dumping is determined by comparison to:

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> See Appellate Body Report, *US—Measures Relating to Shrimp from Thailand*, *supra* note 47, at ¶ 233 (“Article VI of the GATT 1994 (including the *Ad Note*) and the Anti-Dumping Agreement represent an inseparable package of rights and disciplines.”).

<sup>187</sup> ADA, *supra* note 35, at ¶ 2.2.

	<p>ordinary course of trade”, or</p> <p>The cost of production plus reasonable profit etc.</p>		<p>Comparable price when exported to an appropriate third country</p> <p>Cost of production . . . plus reasonable profit etc.</p>
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As discussed previously, price comparability is the idea that in order to calculate the margin of dumping the price used for the normal value of the imported product must represent “market-determined price or cost” in order to permit a “proper comparison.”<sup>188</sup> The U.S. has argued that prices are not properly comparable when they are not market-determined (or “determined under market economy conditions for the industry under investigation”),<sup>189</sup> and thus, alternative sources are required for the calculation of normal value.<sup>190</sup> The requirement under the ADA to make a “proper comparison” is the same requirement that permits, or even compels, the use of “surrogate country” prices to calculate the margin of dumping.

The features of Article 2 of the ADA are consistent with this interpretation. The first aspect of the Article supporting this interpretation is the language it employs similar to the GATT: “a product is to be considered as being dumped . . . if the export price of the product being exported from one country to another is less than the comparable price, in the ordinary course of trade.”<sup>191</sup> The same language appears in Article VI:1(a) of the GATT 1994. With the same language comes the same legal authority to discard non-market-determined prices in favor of market prices in order to make a “proper comparison.”<sup>192</sup>

Beyond recreating the same principle established in Article VI of the GATT, Article 2 of the ADA introduces a new principle which itself might also independently permit the use of third-country prices. The ADA says that a “particular market situation” might warrant the use of alternative pricing methodologies in order to make a “proper comparison” of export prices and normal value.<sup>193</sup>

<sup>188</sup> *Id.* (internal quotations omitted).

<sup>189</sup> U.S. Legal Interpretation, *supra* note 25, at ¶ 116.

<sup>190</sup> *Id.* at ¶ 113.

<sup>191</sup> ADA, *supra* note 35, at art. 2.1.

<sup>192</sup> U.S. Legal Interpretation, *supra* note 25, at § 118.

<sup>193</sup> ADA, *supra* note 35, at art. 2.2.

While the notion of a particular market situation may seem vague on its face, and while such uncertainty is compounded by the absence of a definition in the ADA, the broadest definition supported by the text is a market situation that affects the terms of sale and the domestic price of the product. This definition is divined from the purpose of Article 2 of the ADA. The provision serves to designate a reason that investigating authorities should depart from normal price comparisons and shift to alternative pricing methodologies. The baseline situation creates a domestic price “in the ordinary course or trade.” So, this particular situation must create domestic prices that are not in the ordinary course of trade. This reasoning leads to the conclusion that a particular market situation must be very broad.

Next, it must be established that it is the “sales themselves” that take place in a particular market situation and do not permit a proper comparison.<sup>194</sup> This is not referring to a general market situation, but instead the situation surrounding the sale. Since those sales are unfit for a proper comparison, it forces the importing country to look to other sales of a like product but under the conditions of a market economy.

Some WTO members have interpreted the “particular market situation” with respect to those sales as “government control over pricing, interference with competitively set prices, artificially low prices, barter trade, or non-commercial processing arrangements.”<sup>195</sup> Such a detailed definition is not necessary because the text of Article 2 is broad enough to encompass many definitions defining a distorted market situation.

Other interpretations were also offered during the Kennedy Round discussion for the Antidumping Code. Representatives from MES and NME countries all enumerated certain conditions that might satisfy their interpretation of a “particular market situation.”<sup>196</sup> Some of the noted conditions were: “structural imbalance arising from the development process,” “inadequacies of technology,” “insufficient transport facilities,” “weak marketing and distribution services,” “[m]easures taken for balance-of-payments reasons or developmental purposes,” and “prices of domestically produced and imported essential raw materials as well as intermediate products . . . at artificially high levels.”<sup>197</sup> These

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<sup>194</sup> Panel Report, *European Communities—Imposition of Anti-dumping Duties on Imports of Cotton Yarn from Brazil*, ¶ 478, WTO Doc. ADP/137 (adopted July 4, 1995) [hereinafter *Duties on Cotton Yarn*].

<sup>195</sup> U.S. Legal Interpretation, *supra* note 25, at ¶ 7.6.1.2.

<sup>196</sup> ADA, *supra* note 35, at art. 2.2.

<sup>197</sup> *Anti-Dumping Duties*, ¶ 3.2(i), GATT Doc. MTN/INF/30 (June 30, 1978) (circulated at the request of certain developing countries during the Kennedy Round of Multilateral Trade Negotiations at the GATT).

conditions all indicate a departure from the normal market situation of a market economy and are believed to contribute to distorted prices.

Consistent throughout these interpretations and proposed conditions of a “particular market situation” is the notion that the normal market value of products can be distorted by external forces. There is no reason to think that these distortions must occur on a system-wide level. Instead, it is entirely consistent with the general understanding in these definitions to conclude that a “particular market situation” is broad enough to also include distortions at the level of individual sales. For example, distortions may result from direct or indirect subsidies from the government. Governmental subsidies are present even in so-called market economy countries. There are also less direct forms of government interference that may cause market distortions without system-wide governmental control. Such interference may be brought about by regulations that limit the production of certain products, or a hostile or inhospitable political environment.

In China, such market distortions may result from the CCP involvement in government, or the fact that the government owns four of the largest banks in the world. Even with the expiration of Article 15(a)(ii) of the Accession Protocol, China remains a member of the WTO agreement and is subject to the requirements of the GATT and the ADA. Under the agreements, a WTO Member that seeks to employ the surrogate country method against China would first demonstrate that the product it is investigating lacks comparable prices in China’s domestic market. They can prove this fact by pointing to any of the discrete ways in which the government is involved in China’s economy and building the case for a causal link from those interventions to the distortion. Once the chain is developed, the WTO Member would rely on Article VI:1 and Article 2 of the ADA to disregard those prices because they are not comparable. Next, the Member would point to the “particular market situation” language as the basis for employing the surrogate country method.

One final note: if China remains subject to alternative methods even as some countries recognize it as a market economy, then the method of treating countries with NME methods could be applied to any WTO member so long as a “particular market situation” is proven. The status of the country itself does not matter—it is “the sales themselves.”<sup>198</sup> Such a result would lead to a more frequent deployment of protectionist methods by MES countries against other MES countries. It is beyond the purview of this Comment to take a position on the desirability of this outcome.

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<sup>198</sup> See Duties on Cotton Yarn, *supra* note 194, at ¶ 478.

## V. CONCLUSION

The expiration of Section 15(a)(ii) of the Chinese Accession Protocol created an opportunity for China to pressure western nations into granting it MES under their own national laws. It was politics and not law that led to these decisions. The law is clear that the Protocol has not created legal rights to classify China's economy or to employ alternative methods. NME status is irrelevant, and the source for these methods is instead embedded in the text of Article VI of the GATT 1994 and Article 2 of the ADA. The U.S. and the E.U. are not interested in ignoring the special situation happening in China's economy because protecting the domestic economy is a high priority of the new political regimes.

The texts of Article VI:1 and Article 2 of the ADA state that the antidumping investigation requires "comparable prices, in the ordinary course of trade." The ordinary course of trade is a market situation, absent external distortions, based on supply and demand. Distortions are not absent from China's market. More importantly Article 2 of the ADA introduces the idea of a "particular market situation." This principle is broad enough to encompass various situations that are not simply NME status. So, no matter the consequence of the expiration of Article 15(a)(ii) on China's official market status, WTO Members can still rely on a "particular market situation" determination to employ alternative pricing methodologies. Since the "particular market situation" focuses on the sales themselves, and not a general market status, a full-blown MES country could be subject to alternative pricing methodologies if the situation of the sales of an exported product were distorted by external forces other than supply and demand.