

China's Market Economy Status Adoption of Surrogate Country Methodology After 2016

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Abstract After the expiration of paragraph 15(a) (ii) of the Accession Protocol of the People's Republic of China on 11 December 2016, it is still in doubt whether China's market economy status will be automatically recognized. On 12 May 2016, the European Parliament adopted a non-legislative resolution to deny China market economy status. Through the analysis of the criteria of market economy status and the application of surrogate country methodology, this article comes to the conclusion that, in any case, no definite connection exists between awarding a country non-market economy status and applying the surrogate country methodology to this country's products. Regardless of China's market status, Paragraph 15(a) of the Accession Protocol of the People's Republic of China cannot be cited as the legal basis for applying the surrogate country methodology after its expiration. Finally, this article explore the possible way for WTO importing members to apply the surrogate country methodology substituting Paragraph 15(a) of the Accession Protocol of People's Republic of China, which is through the term "particular market situation", as stipulated in Article 2.2 of the Anti-Dumping Agreement.

Keywords Market Economy Status - Anti-dumping - Surrogate Country Methodology - Particular Market Situation

JEL Classification K33

Introduction

Market Economy is the economy where market decisions are based on supply and demand, and contains a free price system. ¹ Paragraph 15(a) of the Accession Protocol of the People's Republic of China (hereinafter Accession Protocol of the PRC), which serves to provide rules regarding the accession of the PRC into the WTO and went into effect on November 2011, denied China market economy status. The provision states that investigating authorities of WTO importing members may determine the normal value of a product in an anti-dumping

¹ *Gregory R. Stuart, Paul Robert: Comparing Economic Systems in the Twenty-First Century, Seventh Edition.* (Boston: Houghton Mifflin, 2004), 538.

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investigation by using the price of that product in a surrogate country. According to Paragraph 15(d) of the Accession Protocol of the PRC, paragraph 15(a) (ii), which provides that surrogate country methodology, shall expire 15 years after the date of accession, namely, 11 December 2016.

In the past decades, China's government has made significant progress in establishing a market economy. So far, more than 90 countries, including Australia, New Zealand and Singapore, have recognized China's full market economy status.² However, the United States, EU, Japan, Canada and India, among others, which are both major trading partners of China and countries that pursue an active approach in initiating anti-dumping investigations, still do not recognize China as a market economy country.

On May 12 2016, the European Parliament adopted a non-legislative resolution urging the European Commission not to recognize China's market economy status.³ On July 2016, a United States government official claimed that the US would not automatically grant China market economy status after December 2016.⁴ Therefore, it remains disputed questions that whether China may be automatically granted market economy status after 2016, and whether the surrogate country methodology can still be applied in the anti-dumping investigation after 2016..

2 The Criteria of Market Economy

It should be noted that there is no specific definition of "market economy" under the framework of the WTO. The criteria of "market economy" are based on the national laws of individual importing WTO members.⁵ The national laws mentioned above include not only laws but also decrees, regulations and administrative rules.⁶ Thus, WTO members have full autonomy over the determination of market economy status. For example, the United States (Hereinafter "the US") and European Union (hereinafter "the EU") both have their own criteria to establish whether a country qualifies as a market economy.

2.1 US's Criteria of Market Economy

According to Section 771 (18) of the Tariff Act 1930, The term "nonmarket economy country" means any foreign country that the administering authority determines does not operate on market principles of cost or pricing structures, so that sales of product in such country do not reflect the fair value. ⁷ When determining the market economy status of a country, the administering authority shall take into account, ⁸

1. the extent to which the currency of the foreign country is convertible into the currency of other countries;

2 "China Encounters Challenge of the normalization of Trade Conflict", China Daily, November 23 2015, accessed by May 15 2016, <http://chinawto.mofcom.gov.cn/article/dh/janghua/201511/20151101197595.shtml>.

3 See European Parliament, Resolution of 12 May 2016 on China's market economy status (2016/2667(RSP)).

4 "the US refused to Award China Market Economy Status Automatically", July 14 2016, Accessed by August 7 2016, <http://money.163.com/16/0714/23/BRVK9QER00253B0H.html>.

5 Accession Protocol of the People's Republic of China, WT/L/432 (23 November 2001) [hereinafter Accession Protocol of PRC], paragraph 15(d).

6 Working Party on the Accession of China, Report of the Working Party on the Accession of China, 149, WT/ACC/CHN/49 (1 October 2001).

7 the Tariff Act of 1930, 19 U.S.C 1667n, Section 771 (18).

8 Id.

2. the extent to which wage rates in the foreign country are determined by free bargaining between labor and management;
3. the extent to which joint ventures or other investments by firms of other foreign countries are permitted in the foreign country;
4. the extent of government ownership or control of the means of production;
- e. the extent of government control over the allocation of resources and over the price and output decisions of enterprises, and
6. such other factors as the administering authority considers appropriate.

When conducting anti-dumping investigations against transitional economy countries, the US utilizes a sector-based analysis method to monitor developments in the level of marketization in those countries. If a certain industry or enterprise in a non-market economy country is market-oriented and features virtually no government involvement, producers from this industry or enterprise may be treated as market economy producers, and the normal value of products from this industry or enterprise may be adopted for the purpose of the investigation. This is called the “market-oriented industry” test.

In the preliminary determination in the case regarding *Sebacic Acid from the People's Republic of China 1994*, the US Department of Commerce adopted the aforementioned “market-oriented industry” test. The test includes three conditions, namely,⁹

- (a) There must be virtually no government involvement in setting prices or production quantities with regards to the merchandise under investigation. For example, state-mandated production of the merchandise, whether for export or domestic consumption in the non-market economy country, would be an almost insurmountable barrier to deciding that this industry qualifies as a market-oriented industry.
- (b) The industry producing the merchandise under investigation should be characterized by private or collective ownership. There may be state-owned enterprises in the industry but substantial state ownership would weigh heavily against deciding that a certain industry qualifies as a market-oriented industry.
- (c) Market-determined prices must be paid for all significant inputs, whether material or non-material, and for an all but insignificant proportion of all the inputs accounting for the total value of the merchandise under investigation. For example, an input price will not be considered market-determined if the producers of the merchandise under investigation pay a state-set price for the input or if the input is supplied to the producers at the direction of the government. Moreover, if there are any state-mandated production quantities in the industry producing the input, the share of such state-mandated production quantities must be insignificant.

2.2 EU's Criteria of Market Economy

Contrary to the US's practice, the EU's anti-dumping legislation offers no specific definition of “market economy country”. Nonetheless, the EU included a list of nonmarket economy countries in its legislation, which includes Azerbaijan, Belarus, North Korea, Tajikistan, Turkmenistan and Uzbekistan.¹⁰ Although China is not included in the list of non-market economy countries, EU

9 Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: *Sebacic Acid From the People's Republic of China*, FR Doc No: 94-160, (January 5, 1994).

10 Council Regulation on protection against dumped imports from countries not members of the European Community, (EC) No 1225/2009 of 13 November 2009, L343/51[Hereinafter Basic Anti-Dumping Regulation], Note of Article 2.7 (a).

does not fully recognize China as a market economy, rather treating China as an “economy in transition”. Chinese export enterprises may only enjoy market economy treatment on an individual basis, after an application the exemption for the application of surrogate country methodology has been approved.¹¹ Article 2.7(c) of the Council Regulation on Protection against Dumped Imports from Countries Not Members of the European Community (hereafter the Basic Anti-Dumping Regulation) further set up five criteria for countries to be classified as “operating under market economy conditions”, namely,¹²

- decisions of firms regarding prices, costs and inputs, including for instance raw materials, cost of technology and labour, output, sales and investment, are made in response to market signals reflecting supply and demand, and without significant State interference in this regard, and costs of major inputs substantially reflect market values,
- firms have one clear set of basic accounting records which are independently audited in line with international accounting standards and are applied for all purposes,
- the production costs and financial situation of firms are not subject to significant distortions carried over from the former non-market economy system, in particular in relation to depreciation of assets, other write-offs, barter trade and payment via compensation of debts,
- the firms concerned are subject to bankruptcy and property laws which guarantee legal certainty and stability for the operation of firms, and
- exchange rate conversions are carried out at the market rate.

Concluding from the above criteria for Market Economy shows that , while the US’s criteria for countries’ classification as market economies mainly focus on “government involvement” and “state ownership”, the EU’s criteria emphasize the soundness of the markets in question. Regardless of the difference in criteria, awarding market economy status under both sets of criteria is subjective and uncertain. The recognition of market economy status will depend on investigate authorities’ interpretation of the terms “government involvement”, “state interference” and “government ownership”.

In recent years, the EU has been considering granting China market economy status, with attitudes divided into two groups. A group of supporters consists of economically competitive northern European countries, such as the United Kingdom, the Netherlands, Norway, Sweden and Denmark. Another group of opponents is made up of economically less competitive countries, headed by Italy. The economies of the opposing countries mainly consist of struggling traditional industries, such as steel, ceramics and textiles. Due to intense debates between the two aforementioned factions, the European Commission had to postpone the publication of a proposal to determine China’s market economy status in January 2016.¹³ The difficulties of European countries to reach a decision on the one hand reflect the European Commission’s willingness to recognize China’s market economy status; on the other hand show that impediments against the awarding of market economy status exist, hailing from both inside and outside the EU. For example, the US has warned the EU that recognizing China’s market economy status would be equivalent to unilaterally disarming Europe’s trade defenses against China.¹⁴ Moreover, United

¹¹ Basic Anti-Dumping Regulation. Article 2.7 (b)

¹² Id. Article 2.7 (c).

¹³ See “EU Postponed Resolution on China’s Market Economy Status”, Economic Information Daily, 15 January 2016, <http://finance.sina.com.cn/roll/2016-01-15/doc-ifxnqriy2917057.shtml>, accessed by May 15, 2016.

¹⁴ See Christian Oliver, US warns Europe over granting market economy status to China, accessed by 15 May 2016 <http://www.ft.com/cms/s/0/a7d12aea-a715-11e5-955c-1e1d6de94879.html#axzz48gVMLouj..>

Steel Workers (USW) wrote a letter to US trade representative Frohman on the subject of the Transatlantic Trade and Investment Partnership (TTIP), stating that the US's manufacturing industry would be adversely affected if the EU would recognize China's market economy status.¹⁵ This amounts to an admission that opposition against China's market economy status is not based mainly on legal principles and legal reasoning. Rather, it is based for a large part on policy considerations related to saving declining traditional industries.¹⁶

In conclusion, it is still doubtful whether China's major trade partners, headed by the US and the EU, will recognize China as a market economy country. Although paragraph 15(a) (ii) expires after 11 December 2016, the text of paragraph 15(a) does not require WTO members to automatically award China market economy status. Instead, the granting of such status depends on subjective and certain criteria, the interpretation of which is liable to be influenced by policy considerations rather than purely legal arguments.

Regardless, the absence of the granting of "market economy status" in itself does not lead to adverse effects on China's trade exports. Instead, it is the surrogate country methodology, applied to countries under a non-market economy status, that significantly influences China's cross-border trade.

3 The Adoption of Surrogate Country Methodology

The *surrogate country methodology* may be defined as a method in which the normal value of a product in a certain non-market economy country is determined not by examining the actual price or cost of such product in that country's domestic market, but instead by looking at the price or cost of such product in a third country. Under the current WTO framework, the surrogate country methodology may be applied on the basis of the note of Article 6.1 GATT, Article 2.2 of Anti-Dumping Agreement and Paragraph 15(a) (ii) of the Accession Protocol of PRC.

3.1 Note of Article 6.1 GATT

According to the note of Article 6.1 GATT,¹⁷

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, importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate.

This note opens up the possibility to apply the surrogate country methodology. However, compared to the EU's and the US's criteria towards determining whether a country qualifies as a market economy, the criteria under Article 6.1 GATT, namely, "substantially complete monopoly" and "prices [...] fixed by the State", are stricter and much harder to satisfy. Thus, WTO members are not likely to adopt the surrogate country methodology based on the note of Article 6.1 GATT.

15 "USW: EU's Decision on China's Market Economy Status must the negotiation of TTIP" 29 October 2015, accessed by 15 May 2016 <http://chinawto.mofcom.gov.cn/article/e/t/201511/20151101160413.shtml>

16 "EU opposition to China's MES may be less about legal doctrines than industrial policies to revive fading industries." See Dan Steinbock, The EU Division Over China's Market Economy Status, accessed on May 15, 2016, <http://www.economonitor.com/blog/2016/03/the-eu-division-over-chinas-market-economy-status/>,

17 General Agreement on Tariffs and Trade, Oct.30 1947, [hereinafter GATT], Note of Article 6.1 GATT 1947.

3.2 Article 2.2 of Anti-Dumping Agreement

The procedure to determine the normal value of a product under Article 2.2 of the Anti-Dumping Agreement is as follows. In general, the domestic price of the product should be used. Only under special circumstances, a comparable price of the product in question when exported to an appropriate third country should be used as a basis for the determination.¹⁸ These special circumstances only exist where there are no sales of the product in question in the ordinary course of trade in the domestic market or where the domestic price should not be used due to other particular market situations or due to the low volume of the sales in the domestic market.¹⁹

3.3 Paragraph 15(a) (ii) of the Accession Protocol of PRC

Under Paragraph 15(a) (ii) of the Accession Protocol of the PRC, importing WTO Members 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.²⁰ However, in any event, Paragraph 15(a) (ii) shall expire 15 years after the date of accession.²¹ Thus, even if China is not awarded market economy status by the EU and the US after 2016, Paragraph 15(a) (ii) cannot be the legal basis for adopting the surrogate country methodology.

However, as early as 2011, a European scholar opined that the expiration of Paragraph 15(a) (ii) does not give rise to the expiration of the preamble of Paragraph 15(a) and Paragraph 15(a) (i). According to this line of reasoning, the surrogate country methodology could still be applied.²² Nonetheless, It should be noted that the methodology described under Paragraph 15(a) (i) and the preamble of Paragraph 15 is grounded on the effectiveness of Paragraph 15(a)(ii). In fact, the Summary of the U.S.-China Bilateral WTO Agreement specifies that,²³

The U.S. and China have agreed that we will be able to maintain our current antidumping methodology (treating China as a non-market economy) in future anti-dumping cases without risk of legal challenge. This provision will remain in force for 15 years after China's accession to the WTO.

Furthermore, in the *EC- Iron or Steel Fasteners* case, the appellate board held that,²⁴

Paragraph 15(d) of China's Accession Protocol establishes that the provisions of paragraph 15(a) expire 15 years after the date of China's accession (that is, 11 December 2016). [...] In other words, paragraph 15(a) contains special rules for the determination of normal value in antidumping investigations involving China. Paragraph 15(d) in turn establishes that these special rules will expire in 2016 and sets out certain conditions that may lead to the early termination of these special rules before 2016.

Moreover, the spokesperson of China's Ministry of Commerce, Danyang Shen, has emphasized

18 Agreement on Implementation Of Article VI of the General Agreement On Tariffs And Trade 1994, [Hereinafter Anti-Dumping Agreement], Article 2.2.

19 Id.

20 Accession Protocol of PRC, Paragraph 15(a) (ii) .

21 Accession Protocol of PRC, Paragraph 15 d.

22 Bernard O'Connor, *The Myth of China and Market Economy Status in 2016*, pp.3-4, available at <http://worldtradelaw.typepad.com/files/oconnorresponse.pdf> .See also Bernard O' Connor, *Market- economy status or China is not automatic*, in *Yale Global Online*, 8 December 2011.

23 Summary of U.S.-China Bilateral WTO Agreement, 2 February 2000, accessed by May 15 2016, <http://china.wto.com/wto/index-e.asp?sel=info&info=summary>.

24 Appellate Board Report, *European Communities – Definitive Anti-Dumping Measures On Certain Iron Or Steel Fasteners From China*, WT/DS397/AB/R, 15 July 2011, para. 289.

in a recent regular news conference that, regardless of China's market economy status, according to the Accession Protocol of the PRC, application of the surrogate country methodology in anti-dumping investigations will lose its multilateral legal basis after 11 December 2016.²⁵ Therefore, after the expiration of Paragraph 15(a) (ii), Paragraph 15(a) may no longer be cited as the legal basis of the surrogate country methodology.

In conclusion, Paragraph 15(a) of the Accession Protocol of the PRC is not the only legal foundation on which WTO importing members may base to apply the surrogate country methodology to Chinese products. Rather, the note of Article 6.1 GATT and Article 2.2 of the Anti-Dumping Agreement also contain grounds for the application of such methodology. After 11 December 2016, Paragraph 15(a) of the Accession Protocol of the PRC may no longer be cited as the legal basis for applying the surrogate country methodology. Meanwhile, the criteria under the note of Article 6.1 GATT are too high for WTO members to adopt the said methodology. Therefore, the term "particular market situation" under Article 2.2 of Anti-Dumping Agreement will soon replace Paragraph 15(a) of Accession protocol of PRC as the legal basis of WTO importing members for applying the surrogate country methodology.

The use of the term "particular market situation" as ground for applying the surrogate country methodology is precedent through WTO importing members' treatment of Russia. Although Russia has been recognized as a full market economy country, its domestic product prices are still not used to determine the normal value of Russian products in some sectors, since investigative authorities have determined that a "particular market situation" exists in these sectors. Further precedent may be found in Australia's treatment of Chinese products. Australia has recognized China as a market economy country, but has also found that a "particular market situation" exists in some of China's economic sectors.

As a result of the abovementioned considerations, it is necessary to explore the definition and application of the term "particular market situation" on the basis of WTO laws, WTO members' national laws and anti-dumping practice.

4 The determination of particular market situation

4.1 GATT/WTO's Determination of Particular Market Situation

The Anti-Dumping Agreement provides neither a specific definition of the term "particular market situation" nor an illustrative list of countries that feature particular market situations. The British scholar Francis Snyder believes the term "particular market situation" originated from the term "non-market economy".²⁶ Meanwhile, Chinese scholars Sibao Shen and Tong Liu hold the view that the determination of a "particular market situation" must involve an analysis of elements such as the level of government interference, the soundness of the internal market and the method of market circulation.²⁷ Recent cases under the WTO dispute settlement mechanism exist concerning cost adjustment methodologies, such as the surrogate country methodology.²⁸

²⁵ "China Encounters Challenge of the Normalization of Trade Conflict", China Daily, November 23 2015, accessed by May 15 2016, <http://chinawto.mofcom.gov.cn/article/dh/janghua/201511/20151101197595.shtml>.

²⁶ Francis Snyder .2001. "The Origins of the 'Nonmarket Economy': Ideas, Pluralism and Power in EC Antidumping Law about China", European Law Journal, pp. 369-424.

²⁷ Shen, Sibao and Liu, Tong. 2006. Interpretation of WTO Anti-dumping Agreement. Hunan: Hunan Science and Technology Press. p33.

²⁸ See European Union-Cost Adjustment Methodologies and Certain Anti-Dumping Measures on Imports from Russia, DS 474, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds494_e.htm; see also European Union -Cost Adjustment Methodologies and Certain Anti-Dumping Measures on Imports from

However, only in the case regarding *European Economic Community-Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil* (hereinafter *EC-Cotton Yarn*)²⁹ in the era of GATT, did the GATT panel explain the application of the term “particular market situation”. In the *EC-cotton Yarn Case*, Brazil claimed that the EC had failed to properly consider the particular market situation prevailing in Brazil and had therefore acted in breach of Article 2.2.³⁰ Due to the very high level of inflation in Brazil in early 1989, the Brazilian government froze the exchange rate in an attempt to decrease the available money supply and to control inflation. The exchange rate freeze continued for three months, during which period domestic inflation continued. Following the unfreezing of the exchange rate, the currency depreciated.³¹ Brazil argued that this combination of a fixed exchange rate and domestic inflation had led to a gross distortion in the comparison between domestic prices (used as the basis for determining the normal value of products) and export prices, which distortion in turn had resulted in an inflated dumping margin.³²

The GATT panel noted that Article 2.2 of the Anti-Dumping Agreement specifies two situations under which the normal value of a country’s products may be determined through the use of cost adjustment methodologies, such as adopting a constructed normal value of products or using third country sales as a basis for applying the surrogate country methodology. The first situation occurs where no sales of the product in question in the ordinary course of trade exist in the domestic market. The second situation occurs where a particular market situation exists, due to which the use of domestic sales would not permit a proper comparison.³³ With regard to the second situation, the panel noted that the wording of Article 2.2 makes it clear that the test to determine whether cost adjustment methodologies may be applied is not whether or not a “particular market situation” exists *per se*.³⁴ Rather, a “particular market situation” is only relevant insofar as it has the effect of rendering domestic sales unfit to permit a proper comparison.³⁵ Although Brazil claimed that the exchange rate was affecting internal trade and product prices, it failed to demonstrate that the cost of raw cotton materials was affected.³⁶ Brazil also failed to specify whether domestic sales were affected to such an extent by the combination of high domestic inflation and a fixed exchange rate, that those sales did not permit a proper comparison.³⁷ Consequently, the GATT panel concluded that Brazil’s arguments had not demonstrated that the EC had acted inconsistently with the requirements of Article 2.2.

To conclude, although the panel did not explore the specific definition of the term “particular market situation”, the panel did make an effort to explain the application of the term. Namely, a particular market situation may be found to exist where a particular situation has the effect of rendering domestic sales unfit to permit a proper comparison.

Russia (Second complaint), DS 494, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds474_e.htm.

29 GATT Commission on Anti-Dumping Practices, *European Economic Community- Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil* (hereinafter “*EEC-Cotton Yarn*”), ADP/137, 4 July 1995.

30 Panel Report, *EC-Cotton Yarn*, para.467.

31 *Id.*

32 *Id.* Para. 468.

33 *Id.* Para. 477.

34 *Id.* Para. 478.

35 *Id.*

36 Panel Report, *ECC-Cotton Yarn*, para.479.

37 *Id.*

4.2 EU's Determination of Particular Market Situation

The current effective EU legislation on anti-dumping is the Basic Anti-Dumping Regulation, which has been amended via Regulation No 765/2012 and Regulation No 1168/2012. Under Article 2.3 of the Basic Anti-Dumping Regulation, a “particular market situation” exists (a) when prices are artificially low, (b) when there is significant barter trade, or (c) when there are non-commercial processing arrangements.³⁸

The *Russian potassium chloride* case was the first case to apply the term “particular market situation” in anti-dumping investigations after the EU had recognized Russia's market economy status.³⁹ It was also the first case to apply the term “particular market situation” after the publication of Council Regulation No 1972/2002, which provides an interpretation of the term “particular market situation” and enumerates a number of examples.⁴⁰ Therefore, this case forms a significant precedent for the EU investigative authority in its application of the term “particular market situation”. In the *Russian potassium chloride* case, the EU investigative authority stated that the situations enumerated under Article 2.3 of the Basic Anti-Dumping Regulations are not exhaustive. Moreover, the investigative authority held that any decision on whether a “particular market situation” exists must include an evaluation of price variations and price trends, rather than be solely based on the absolute level of prices.⁴¹

4.3 Australia's Determination of Particular Market Situation

Article 269TAC 2 (II) of the Australian Custom Act 1901 also refers to the term “particular market situation”.⁴² More specifically, where the situation in the market of an exporting country is such that sales are not suitable to be used to determine the price of a product, the price of the same product in an appropriate third country may be adopted instead.⁴³ The Dumping and Subsidy Manual published by Australian Customs and Border Protection explores the issue in further detail, stating that whether a “particular market situation” exists depends on (a) whether the prices are artificially low; or (b) whether there are other conditions in the market which render sales in that market not suitable for use in determining prices under s.269TAC(1).⁴⁴ With regard to “government influence”, which is regarded as a specific form of particular market situation, the manual defines it as influence from any level of government. When investigating whether a particular market situation exists due to government influence, the Commission will seek to determine whether the impact of the government's involvement in the domestic market has materially distorted competitive conditions.⁴⁵ Any finding that competitive conditions have been materially distorted may give rise to a finding that domestic prices are artificially low or not substantially the same as they would be if they were determined in a competitive market.⁴⁶

38 Basic Anti-Dumping Regulation, Article 2.3.

39 See Council Regulation (EC) No 1972/2002, Amending Regulation (EC) No 384/96 on the protection against dumped imports from countries not members of the European Community, L 305/1, p1.

40 See Id.

41 Council Regulation (EC) No 1891/2005, Amending Regulation (EEC) No 3068/92 imposing a definitive anti-dumping duty on imports of potassium chloride originating in Belarus, Russia or Ukraine, L 302/14, 19.11.2005, p3.

42 Custom Act 1901, Compilation No. 137(Austl), section 269TAC 2 (II).

43 Custom Act 1901, Compilation No. 137(Austl), section 269TAC 2 (II)(d).

44 Australia Customs and Border Protection, Dumping and Subsidy Manual, June 2015, p35.

45 Australia Customs and Border Protection, Dumping and Subsidy Manual June 2015, p35.

46 Id.

On 19 Sept 2011, Australian Customs and Border Protection initiated a dumping and countervailing investigation against a certain type of steel products named “hollow structural sections” exported from China, Korea, Malaysia, Taiwan and Thailand.⁴⁷ In the *Hollow Structural Sections* case, Customs and Border Protection considered that a particular market situation existed in China’s relevant industry, since the government of China influences the Chinese iron and steel industry through (a) provision of the raw materials of steel at less than adequate remuneration; (b) the prevalence of SOEs (SIEs) in the manufacture of hollow structural section components, resulting in artificially low prices of hollow structural sections; (c) reduced or subsidized energy input prices in the manufacture of hollow structural section components; (d) Chinese government benefits received by manufactures of hollow structural sections, including reductions in tax, exemptions of duty and VAT, as well as the provision of grants.⁴⁸

5 Conclusion

Whether China’s major trade partner will recognize China as market economy is still at doubt. The recent resolution adopted by the European Parliament to deny China market economy status is non-legislative. To grant China market economy status, the EU must go through a three-step procedure. Firstly, the European Commission must make a proposal regarding China’s market status, which means a consensus must previously have been reached inside the Commission. Secondly, the European Council, consisting of representatives of the 28 member states, must vote for the proposal, which means that at least 16 member states, representing at least 65% of the EU population, must vote in favor. Thirdly, the proposal must be adopted by a majority vote in the European Parliament.⁴⁹ The three-step procedure is expected to be initiated in the latter half of 2016. Regardless, expectations with regards to the outcome of the procedure are not particularly high.

The Chinese government maintains that China deserves to be awarded market economy status 15 years after China’s accession to the WTO and Chinese government officials reiterated this position in the WTO meeting on July 14 2016.⁵⁰ Simultaneously, we note that, despite the expiration of Paragraph 15(a) of the Accession Protocol of the PRC, WTO importing members may still not be willing to grant China market economy status. Instead, they might raise the standard for being awarded “market economy status” through a stricter interpretation of the criteria for being classified as a “market economy”. Such an approach would constitute a disguised form of trade protection, since it would stem mainly from policy considerations and would be less convincing as to its legal merits.

The current focus for China should be on how to approach and deal with future possible investigations. It should be noted that, regardless of whether China will be recognized as a market economy country, paragraph 15(a) of the Accession Protocol of the PRC will soon no longer be cited as the legal basis for adopting the surrogate country methodology. In this light,

47 Australian Government Anti-dumping Commission, *Certain Hollow Structural Sections Exported from the People’s Republic of China, the Republic of Korea, Malaysia, Taiwan and the Kingdom of Thailand* Case No. IRT 177[Hereinafter *Hollow Structural Sections*]. accessed by 15 May 2016, <http://www.adcommission.gov.au/cases/ITR177.asp>.

48 Australian Customs and Border Protection Service, Report To The Minister No.177, 7 June 2012, (REP 177), p 110.

49 French Foreign Minister Speaks about China’s Market Economy Status: Supporting Talks between China and EU, 13 May 2016, accessed by 15 May 2016, <http://international.caixin.com/2016-05-13/100943490.html>.

50 “China Advocates for the Abandon of Surrogate Country Methodology Against China”, 15 July 2016, accessed by 15 May 2016, http://news.xinhuanet.com/world/2016-07/15/c_1119228189.htm.

it is worth noting that the EU is considering modifying its trade defense legislation. The EU Trade Commission is currently involved in an attempt to delete the list of nonmarket economy countries and transitional economy countries from the EU Basic Anti-Dumping Regulation, while advocating for the application of new anti-dumping methodology to all WTO members equally, including the non-standard methodology against government interference which leads to price distortions.⁵¹ Another possible reform direction would be to base the application of the surrogate country methodology on the determination of “particular market status” under Article 2.2 of the Anti-Dumping Agreement.

Differences do exist between classifying a country as a market economy and determination whether or not a particular market situation exists. Firstly, the criteria regarding the term “market economy” are exclusive, while the list of “particular market situations” is non-exhaustive. Secondly and more importantly, while awarding non-market economy status to a country directly leads to the application of the surrogate country methodology to that country’s products, the determination that a “particular market situation” exists *per se* does not lead to application of the surrogate country methodology. Only where the particular market situation leads to a gross distortion in the comparison between domestic prices, may the surrogate country methodology be applied. In other words, the application of the surrogate country methodology under Article 2.2 of the Anti-Dumping Agreement is stricter and tougher than that under Paragraph 15(a) of the Accession Protocol of PRC.

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