DISCUSSION PAPER

CHINA'S LONG MARCH TO MARKET ECONOMY STATUS:

STUDY OF THE EXPIRY OF SECTION 15 OF THE PROTOCOL OF ACCESSION AND THE TREATMENT OF CHINA IN ANTI-DUMPING PROCEEDINGS

Discussion Paper No. 2

6/2018

CENTRE FOR TRADE AND INVESTMENT LAW

James J. Nedumpara and Archana Subramanian

TABLE OF CONTENTS

CHINA'S LONG MARCH TO MARKET ECONOMY STATUS:

STUDY OF THE EXPIRY OF SECTION 15 OF THE PROTOCOL OF ACCESSION AND THE TREATMENT OF CHINA IN ANTI-DUMPING PROCEEDINGS

I. Introduction

"When is China Paraguay?" is the part title of a law review article authored by Harvard Professor William P. Alford in 1987 in the Southern California Law Review explaining the operation of antidumping investigations against non-market economies (NMEs).[1] The reference to Paraguay is not merely accidental since the United States Department of Commerce (USDOC) relied upon prices in Paraguay in its antidumping investigation on Natural Menthol against China in 1981.[2] As Alford's title of the article portrays, NME treatment reflects a certain type of country replacement, base shifting, and significant amount of arbitrariness and random selections in the use of benchmark prices for comparison in antidumping actions. Stripped of its complexities, antidumping is a duty imposed by an importing country to offset the differences between the normal value (a technical nomenclature for the home market price) and the export prices of a product.[3] China was not the only country that was treated as an NME when Alford's article was published.[4] Countries such as Albania, Bulgaria, Czechoslovakia, Hungary, Mongolia, Poland, Romania, Soviet Union, and Vietnam were subject to this treatment in antidumping investigations, especially during (1960-1995) on the presumption that excessive state interference rendered the domestic prices, for most commodities in these countries, extremely unreliable.

NMEs constitute a major problem in international trade law, especially in antidumping law. In order to establish international price discrimination as well as to find out whether the domestic sales are below cost — an additional requirement in antidumping — all antidumping investigations require a domestic reference price, which is formally

[1] William P Alford, *When is China Paraguay? An Examination of the Application of the "Non-Market Economies*, 61 SOUTHERN CALIFORNIA LAW REVIEW 79 (1987).
[2] U.S. Department of Commerce, *Final Determination of Sales at Less Than Fair Value: Natural Menthol from the People's Republic of China* 46 Fed. Reg. 24614 (1981).
[3] *See* Article VI of the General Agreement on Trade and Tariffs, April 15, 1994 1867 U.N.T.S. 187; *See* also Article 2.1 of the Agreement on Implementation of Article VI of the GATT, April 15, 1994, 1868 U.N.T.S. 201.
[4] Other NME countries included Albania, Bulgaria, Czechoslovakia, Hungary, Korea, Mongolia, Poland, Romania, Soviet Union, and Vietnam.

known as the "normal value".[5] NMEs are typically centrally planned economies and the domestic or even export prices in these economies could be established by the State or could be State-directed. In other words, the market principles of demand and supply are not assumed to work in NMEs to such an extent that the fair value of a product is not often reflected in its sales price.[6] Policies including production, investment, and pricing need not be subject to commercial considerations and could often be controlled or mandated by the State in the case of a typical NME.

Determination of a domestic reference price is challenging in the case of an NME as the prices in the whole of the economy or perhaps of the input industries could be distorted. Therefore, it may be inevitable to look at a functional market economy to compute the domestic price of the product under investigation. This is done with the help of cost of production of the same product consuming the same amount of inputs, including labour and energy, as applicable in the selected third market economy. In fact, the process of finding a surrogate country — a market economy at the same level of economic development with significant producers of comparable merchandise[7] — could be an endless search ending up often in arbitrary selections.[8] In many ways, it is the boundless possibility of arbitrary selection that makes this concept attractive to antidumping users.[9] The 'surrogate country' approach gained popularity after the United States (U.S.) conducted an antidumping investigation against *Electric Golf Carts from Poland* on the basis of analogue costs in Canada.[10] Strangely enough, Poland did not have golf courses and consequently any golf carts sale, neither did Canada produce any golf carts. The U.S. Treasury had only the data for carts that are similar to golf carts and had to work back to construct the data for Polish golf carts.[11]

[5] Anti-dumping Agreement, *supra* note 3, art. 2.1.
[6] Lydia Brashear, *Factors or Prices: An Evaluation of Antidumping Laws as Applied to Companies Existing in Nonmarket Economies* 5(3) AMERICAN UNIVERSITY OF INTERNATIONAL LAW REVIEW 893, 903 (1990).
[7] *See* for example, Tariff Act of 1930, 19 U.S.C. § 1677b(c)(4) [hereinafter Tariff Act].
[8] In the United States, although there is a preference for collecting information from a primary surrogate country, oftentimes, information could be collected from more than one country depending on a variety of factors. *See* Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951).
[9] K.D. RAJU, WORLD TRADE ORGANIZATION AGREEMENT ON ANTI-DUMPING: A GATT/WTO AND INDIAN JURISPRUDENCE, 291 (2008); International Bar Association - Divisions Project Team, Anti-Dumping Investigations Against China in Latin America (February 1, 2010), 5 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1555619.
[10] Electric Golf Carts from Poland, Inv. No. AA1921-147, USITC Pub. 740 (September, 1975) (Final).
[11] Ronald A. Cass and Stephen J. Narkin, *Antidumping and Countervailing Duty Law: The United States and the GATT* in DOWN IN THE DUMPS: ADMINISTRATION OF THE UNFAIR TRADE LAWS 215 (Richard Botluck eds., 1991).

The use of this methodology demonstrates that there is no reason to believe that the prices or costs gathered or extrapolated from a particular market economy adequately reflect and represent the comparative advantages of the NME in question. However, as Alford had identified, the problems of applying antidumping duties to NMEs was fairly well recognized even decades ago and remained a dark spot in international trade relationships.[12] Considering that the major users of anti-dumping had no incentive to discipline the concept of NME, there were no major initiatives to define or contextualize the term 'NME' in the Uruguay Round or the subsequent negotiations.[13] Furthermore, NME as a concept, had the potential of slowly slipping into oblivion with most of the command and control economies widely embracing free market economic policies in the last three decades.

In this regard, the fall of the Berlin Wall and the transition of a number of East European countries to market economies, was a major development in the late 1980's and early 1990's. By the time the WTO was established in 1995, the list of NMEs had dropped down substantially.[14] However, the two major economies that were outside the WTO and that had borne the brunt of antidumping actions were China and Russia.[15] While Russia received market economy status from the U.S. and the EU in 2002 (almost 10 years prior to accession)[16], WTO Members retained the ability to treat China as an NME for a period of 15 years from its accession to the WTO in 2001.

On 11 December 2016, China completed the 15th anniversary of its accession to the WTO. On 12 December 2016, China requested consultations with the U.S. and the European Union (EU) under the aegis of the WTO dispute settlement mechanism.[17]

[12] Alford, *supra* note 1, at 89.
[13] Vera Thorstensen, Daniel Ramos Carolina Muller, Fernanda Bertolaccini, *WTO – Market and Non-Market Economies: a hybrid case of China*, 1(2) LATIN AMERICAN JOURNAL OF INTERNATIONAL LAW, 765, 772 (2013).
[14] The list of NMEs at that time were China, Vietnam, Albania, Armenia, Azerbaijan, Georgia, Kyrgyzstan, Moldova, Mongolia, Belarus, North Korea, Tajikistan, Turkmenistan and Uzbekistan.
[15] While the WTO Members negotiated a special provision on China, no such provision is included in the Protocol of Accession of Russia.
[16] *See* U.S. Department of Commerce, Department of Commerce announces Market Economy Status for the Russian Federation (June 6, 2002), https://www.trade.gov/media/PressReleases/may2002/russianMESannounce_060602.html; EU Commission, EU announces formal recognition of Russia as "Market Economy" in major milestone on road to WTO membership (May 29, 2002), http://europa.eu/rapid/press-release_IP-02-775_en.htm.
[17] Request for Consultations by China, *European Union — Measures Related to Price Comparison Methodologies*, WT/DS516/1 (December 12, 2016) [hereinafter China-EU Consultations]; Request for

According to China, the use of NME treatment against Chinese exporters is not tenable and the WTO Members were required to terminate the use of NME methodologies in antidumping proceedings involving Chinese products pursuant to 11 December 2016.[18] While a panel has been established in the complaint against the EU[19], the complaint against the U.S is still at the consultation stage. However, any conclusion reached on it by the WTO would have serious ramifications for international trade considering the intensity and number of antidumping actions against China. According to an estimate, roughly US$100 bn, which is 7 percent of China's exports to G-20 economies, were subject to antidumping measures or other types of trade barriers.[20] Therefore, the economic consequence of the final outcome in this dispute is huge. The U.S. Trade Representative Robert Lighthizer has recently noted that the NME matter is "without question the most serious litigation matter" the United States has been engaged with at the WTO.[21]

This article seeks to examine the controversy involving the use of NME or surrogate methodologies against China in antidumping proceeding. Part I of this article discusses the legal basis of NME methodologies and the details of their application. In particular, this part examines the use of the 'surrogate country' method against China. Part II and III of the article examine the provisions of China's Protocol of Accession, 2001 (hereinafter "Protocol of Accession") and the permissible interpretations of the Protocol. These parts provide a detailed analysis of the legal arguments and counter-arguments of Section 15 of the Protocol of Accession. Part IV of the article is devoted to an examination of the practice of the key users of antidumping in relation to China and the implications of *EU—Biodiesel*[22], a recent WTO case, which many would argue,

Consultations by China, *United States — Measures Related to Price Comparison Methodologies*, WT/DS515/1 (December 12, 2016) [hereinafter China-US Consultations].

[18] China-EU Consultations, ¶ 4; China-US Consultations, ¶ 3.

[19] The WTO panel was established on 3 April 2017.

[20] Chad Brown, *China's Market Economy Status and Antidumping: A $100 Billion, $10 Billion, or $1 Billion Dispute? Part 1*, PETERSON INSTITUTE FOR INTERNATIONAL ECONOMICS (June 8, 2017), https://piie.com/blogs/trade-investment-policy-watch/chinas-market-economy-status-and-antidumping-100-billion-10 (last visited August 11, 2017).

[21] *Lighthizer: U.S. loss in China NME dispute would be 'cataclysmic' for WTO*, INSIDE U.S. TRADE (June 23, 2017), https://insidetrade.com/inside-us-trade/lighthizer-us-loss-china-nme-dispute-would-be-cataclysmic-wto (last visited July 23, 2017).

[22] Appellate Body Report, *European Union - Anti-Dumping Measures on Biodiesel from Argentina – Report of the Appellate Body*, WT/DS473/AB/R (adopted on Oct. 26, 2016) [hereinafter EU-Biodiesel (AB Report)].

could determine the future of surrogate price methodology in the future. Part V concludes.

Part I

II. Dumping and NME Status

The construct of a 'non-market economy' is a concept specific to antidumping under the GATT/WTO. However, this term is nowhere defined in any GATT or WTO Agreement or ancillary documents. Antidumping is a trade remedy to deal with 'dumping' which is said to have occurred when an exporter introduces goods in the markets of the importing country at a price less than that of the like product in the domestic market of the exporter.[23] The price of the product in the domestic market of the exporter, in the ordinary course of trade, is often referred to as the 'normal value'.[24] The concept of 'ordinary course of trade' is quite important here. A product may not be sold in the 'ordinary course of trade' if sufficient quantities of the product are not sold in the domestic market, or if the home market sales take place among related parties or affiliates or, in situations where the home market does not constitute a viable market for comparison, etc.[25] In such cases, normal value can also be based on the price of the product when sold to a third country or on the basis of cost of production plus the selling, general and administrative expenses as well as a reasonable estimation of profits (*i.e.*, constructed normal value).[26] Although the first option is the preferred one,[27] the constructed normal value method is also applied in anti-dumping proceedings. Again, if the price discrimination causes 'material injury' to the domestic industry in the importing country, the authorities have a right under WTO law to impose antidumping duties to the 'extent necessary to counteract the dumping that is causing injury'.[28]

The Agreement on Implementation of Article VI of the GATT (referred to as the Antidumping Agreement) under the WTO places a strong emphasis on the use of domestic costs and prices of the producers.[29] However, the domestic costs and prices

[23] The policy reasons underlying dumping include curtailing price discrimination and protection of domestic industries from unfair competition, by discouraging excessively low pricing of imported goods.
[24] Antidumping Agreement, *supra* note 3, art. 2.2.
[25] Antidumping Agreement, *supra* note 3, art. 2.2.1.
[26] Antidumping Agreement, *supra* note 3, art. 2.2.
[27] Antidumping Agreement, *supra* note 3, art. 2.4.2.
[28] Joseph Hornyak, *Treatment of Dumped Imports from Non-Market Economies* 15(1) MARYLAND JOURNAL OF INTERNATIONAL LAW 23, 28 (1991); Antidumping Agreement, *supra* note 3, art. 11.1.
[29] Antidumping Agreement, *supra* note 3, art. 2.2.1.

can be used only when such records are reliable and maintained in accordance with standard accounting practices. This requirement has inherent disadvantages in the case of an NME exporter. In fact, the use of domestic costs and prices was a contentious issue even in the early days of the GATT. A special provision, viz. Article VI (b) was inserted in the GATT after the 1954-55 Review Session based on a proposal from Czechoslovakia (then a communist state) to amend Article VI: 1(b) of the GATT 1947.[30]

The outcome of this proposal was not an amendment but the insertion of an *Ad Note* to Article VI of the GATT.[31] Czechoslovakia's proposal was to seek legitimacy for a different type of economic structure within the GATT and to preempt the discriminatory use of antidumping actions against command economies. More specifically, the purpose of the *Ad Note* was to avoid comparison of an administratively determined domestic price in command economies against an export price that reflected market conditions.[32] In 1955, the GATT Council adopted an interpretative *Ad Note*[33] to Article VI (Second *Ad Note*), which recognized that in case of imports from a country which "has a complete or substantially complete monopoly of trade and all domestic prices are fixed by the State", the importing parties need not resort to a 'strict comparison with domestic prices'.[34] The importance of the Second *Ad Note* is that it gave rise to the concept of NME in GATT and an acknowledgement that the signatories to the GATT may have different, yet other forms of legitimate economic structures. [35] In other words, Czechoslovakia's proposal only highlighted the "inappropriateness" of a strict comparison with domestic price. Coincidentally, the Second *Ad Note* to Article

[30] GATT Secretariat, *Proposal by the Czechoslovakian Delegation Relating to Article VI*, W9/86/Rev.1 (December 21, 1954).
[31] The purpose of the *Ad* Note is to further explain the GATT provisions.
[32] Jorge Miranda, *Interpreting Paragraph 15 of China's Protocol of Accession*, 9(3) GLOBAL TRADE AND CUSTOMS JOURNAL 94, 95 (2014).
[33] The "Ad" Articles are interpretative notes relating to specific articles of the GATT; *See* Carol J. Beyers, *The U.S./Mexico Tuna Embargo Dispute: a Case Study of the GATT and Environmental Progress*, 16 MARYLAND JOURNAL OF INTERNATIONAL LAW 229, 237 (1992).
[34] Antidumping Agreement, *supra* note 3, Note 2, Paragraph 1, Interpretative Note Ad Article VI from Annex I. It 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."
[35] Mark Wu, *The WTO and China's Unique Economic Structure* in REGULATING THE VISIBLE HAND?: THE INSTITUTIONAL IMPLICATIONS OF CHINESE CAPITALISM 319 (Benjamin L. Leibman eds., 2016).

VI did not provide an alternate methodology for the determination of the domestic prices for comparison with export prices.[36]

The Second *Ad Note* to Article VI permitted a flexibility to users of anti-dumping which was easily prone to misuse. While the Second *Ad Note* only recognized the concept of NMEs, over time, the GATT Contracting Parties and later the WTO Members rendered their own versions of a definition of NME in their domestic legislation or applicable domestic law. While there is no legal definition for NME under the GATT/WTO other than a vague language in the Second *Ad Note*, it is widely understood to be an economy wherein the State seeks to determine various economic activities through central planning and fixation or controlling of economic factors such as prices, costs, investment allocations, raw materials etc.[37] The definition of NME under the respective national laws also varied significantly. While the U.S.[38] considers factors such as currency convertibility, the extent to which wage rates are determined by free bargaining between labour and management, the extent to which the government has receded from state planning and whether market forces are firmly rooted in the economy[39], such considerations are not mirrored in jurisdictions such as India and the EU.[40]

The Second *Ad Note* that permitted a departure from a strict comparison with domestic prices evolved into a trade law instrument of ubiquitous practice capable of targeted misuse. The surrogate country prices were often based on factors of production such as land, labour, capital and utility costs borrowed from companies and countries that were not even remotely connected to the producers and exporters under investigation.[41] Chinese producer's data are supplanted with the data of another company perhaps

[36] Miranda, *supra* note 32, at 95.
[37] United Nations Conference on Trade and Development, Glossary of Custom Terms, http://www.asycuda.org/cuglossa.asp?term=market+economy (last visited Aug. 11, 2017).
[38] The United States typically applies six statutory criteria which are: (i) free currency convertibility; (ii) wages determined by labour market; (iii) openness to foreign investments; (iv) Government ownership or control over means of production, (v) allocation of resources and price; and (vi) output decisions of enterprises. *See* Tariff Act, *supra* note 6, § 771 (18)(b).
[39] Gary Clyde Hufbauer and Cathleen Cimino-Isaacs, *The Outlook for Market Economy Status for China*, PETERSON INSTITUTE FOR INTERNATIONAL ECONOMICS (April 11, 2017) https://piie.com/blogs/trade-investment-policy-watch/outlook-market-economy-status-china (last visited Aug. 11, 2017).
[40] European Commission, Council Regulation 1225/2009 of November 30, 2009, Protection against dumped imports from countries not members of the European Community OJ L 343/51.
[41] Miranda, *supra* note 32, at 96.

located in Bulgaria, Ecuador, India, Peru, Paraguay or Thailand. In the surrogate approach, the importing country relies on the data from a market economy at a comparable level of economic development.[42] The purpose is to provide an approximation of the domestic producer's domestic price assuming that the producer is operating in a market economy. The NME exporters or producers have no right as such to insist on the use of their company's data to establish the normal value (with certain possible exception).[43] This way, the surrogate approach represents a marked change in the determination of normal value. The surrogate approach draws criticism on account of the discretion available to importing WTO Members in their selection of a surrogate country.[44] The problem is further compounded by the lack of data availability and cooperation from producers of the country, thereby allowing the WTO Member to match up with another surrogate country, which may not offer the best comparison.[45] Further, it has also been argued that the surrogate methodology denies the Chinese producers the advantages enjoyed by them such as easier access to market resources and cheap labour, which may not be availed by producers in the surrogate market.[46]

China's dispute with the U.S. and the EU is a result of an extensive use of the surrogate country methodology against Chinese imports in anti-dumping proceedings. The basis for the use of the surrogate country methodology is contained in the Protocol of Accession. The next section of this article entails a careful examination of China's Protocol of Accession.

[42] Michelle Zang, '*The WTO Contingent Trade Instruments against China: What Does Accession Bring?*, 58(2) THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 321, 329 (2009); *see* also Richard Lockridge, *Doubling Down on Market Economies: The Inequitable Application of Trade Remedies Against China and the Case for a New WTO Institution*, SOUTHERN CALIFORNIA INTERDISCIPLINARY LAW JOURNAL 249, 258 (2014).
[43] Folkert Graafsma & Elena Kumashova, '*In re China's Protocol of Accession and the Anti-Dumping Agreement: Temporary Derogation or Permanent Modification'*, 9(4) GLOBAL TRADE AND CUSTOMS JOURNAL 154 (2014).
[44] Zang, *supra* note 42, at 329.
[45] Aaron Ansel, '*Market Orientalism: Reassessing an Outdated Anti-Dumping Policy Towards the People's Republic of China*' 35(3) BROOKLYN JOURNAL OF INTERNATIONAL LAW, 883, 889 (2010).
[46] Zang, *supra* note 42, at 330.

III. China's Protocol of Accession and the Continuing Use of Surrogate Prices

The involvement of the Chinese government in Chinese economy was a major concern during China's accession negotiations.[47] The State's presence in various critical sectors and economic activities was unmistakable and state assets were heavily deployed in state owned entities. In light of these concerns, the representative of China undertook, in a statement to the Working Party that the "Government of China would not influence, directly or indirectly, commercial decisions on the part of state-owned or state-invested enterprises, including on the quantity, value or country of origin of any goods purchased or sold, except in a manner consistent with the WTO Agreement".[48] In short, China's accession instruments indicate a clear commitment on China's part in transitioning to a market economy.

Once a country has joined the WTO, the discriminatory use of antidumping methodologies could be a violation of the non-discrimination obligation. This is perhaps a reason why the WTO Members specifically negotiated a provision for continuing to treat China as an NME. However, Section 15 of the Protocol of Accession was special category. Section 15 (a) allows other WTO Members to use a methodology that is *not* based on Chinese costs or prices for price comparisons subject to the conditions specified in Section 15 (a)(i) and 15 (a)(ii). The provision also provided for a sunset clause in 15 (a) (ii). The relevant part of Section 15 reads as follows:

> *Section 15*
>
> (a) In determining price comparability under Article VI of the GATT 1994 and the Anti-Dumping Agreement, the importing WTO Member shall use either Chinese prices or costs for the industry under investigation or a methodology that is not based on a strict comparison with domestic prices or costs in China based on the following rules:
>
> (i) If the producers under investigation can clearly show that market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product, the importing

[47] Michael Flynn, *China: A Market Economy*, 48 GEORGETOWN JOURNAL OF INTERNATIONAL LAW 297, 320 (2016).
[48] Working Party on the Accession of China, *Report of the Working Party on the Accession of China*, WT/ACC/CHN/49 (October 1, 2001) at 46 [hereinafter China's Working Party Report].

> WTO Member shall use Chinese prices or costs for the industry under investigation in determining price comparability;
>
> (ii) The importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product.
>
> … …
>
> (d) Once China has established, under the national law of the importing WTO Member, that it is a market economy, the provisions of subparagraph (a) shall be terminated provided that the importing Member's national law contains market economy criteria as of the date of accession. In any event, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession. In addition, should China establish, pursuant to the national law of the importing WTO Member, that market economy conditions prevail in a particular industry or sector, the non-market economy provisions of subparagraph (a) shall no longer apply to that industry or sector.

Section 15 (a) provides for two methodologies to determine the prices to be compared with the export price in AD investigations; (i) under the normal methodology, domestic Chinese prices shall be used if the Chinese producers under investigation are able to show that market economy conditions prevail; and (ii) under the special methodology, non-Chinese costs and prices will be used if market economy conditions are not proven. The *chapeau* of Section 15 (a) permits the use of any methodology, which is *not based on a strict comparison* with Chinese costs and prices. For ease of reference, such an option can be referred to as the special methodologies. This option has indirectly directed the WTO Members to the surrogate methodology, since the chapeau does not prescribe an alternative to Chinese costs and prices. It must be noted that both the Second *Ad Note* and Section 15 (a) of the Protocol of Accession use the terms "not based on a strict comparison with domestic prices". Thus, both the Second *Ad Note* and Section 15 (a) provide for the use of special methodologies, but with key differences. While Section 15 (a) does not stipulate the 'market economy conditions' to be met, the Second Ad Note allows the use of non-Chinese costs and prices in an extreme case *i.e.* the government has a complete or near complete monopoly of trade and controls all

domestic prices. Further, Section 15 (a) places a rebuttable presumption of NME on Chinese producers and exporters, whereas the Second *Ad Note* merely sets out an extreme form of NME.[49]

While the market economy status of China could be matter of discussion, the gravamen of China's consultation request with the EU and the U.S. is that with the expiration of Section 15 (a)(ii), the application of the special methodology is no longer tenable. The basis of this view is the second sentence of Section 15 (d) of the Protocol of Accession, which states, "*in any event*, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession" (emphasis added). Further, China contends that after December 11, 2016, the provisions of the Antidumping Agreement and the GATT 1994 that ordinarily apply to the determination of normal value must apply to imports from China without derogation.[50]

There have been several commentaries and published opinions concerning the interpretation of Section 15 of China's Protocol of Accession.[51] In this Article, the authors have attempted to set out the various shades of interpretations regarding Section 15 and the course of action WTO Members can legitimately pursue until an authoritative opinion is available on this topic.

1. Surrogate Treatment and Sunset Clause

[49] Miranda, *supra* note 32, at 91.
[50] China-US Consultations, *supra* note 17; China-EU Consultations, *supra* note 17.
[51] *See* Jorge Miranda, *More on Why Granting China Market Economy Status after December 2016 Is Contingent upon Whether China Has in Fact Transitioned into a Market Economy* (2016) 11(5) GLOBAL TRADE AND CUSTOMS JOURNAL (2016); Bernard O'Connor, *'Much Ado About Nothing': 2016, China and Market Economy Status* 10 (5) GLOBAL TRADE AND CUSTOMS JOURNAL (2015); Matthew Nicely, *Time to Eliminate Outdated Non-market Economy Methodologies* 9(4) GLOBAL TRADE AND CUSTOMS JOURNAL (2014); Folkert Graafsma & Elena Kumashova, *In re China's Protocol of Accession and the Anti-Dumping Agreement: Temporary Derogation or Permanent Modification?* 9(4) GLOBAL TRADE AND CUSTOMS JOURNAL (2014), Brian Gatta, *Between 'Automatic Market Economy Status' and 'Status Quo': A Commentary on 'Interpreting Paragraph 15 of China's Protocol of Accession'* 9(4) GLOBAL TRADE AND CUSTOMS JOURNAL (2014), Rao Weijia, *China's Market Economy Status under WTO Antidumping Law After 2016*, 5 TSINGHUA CHINA LAW REVIEW 151, 162 (2013); European Institute for Asian Studies, *China: NME at the Gates? Section 15 of China's WTO Accession Protocol: A multi-perspective analysis* (November, 2016), http://www.eias.org/wp-content/uploads/2016/11/EIAS-Research-Paper-NOVEMBER2016-_-China-NME-at-the-Gates-1.pdf (last visited October 13, 2017), Li Zhenghao, '*Interpreting Paragraph 15 of China's Accession Protocol in Light of the Working Party Report*' 11(5) GLOBAL TRADE AND CUSTOMS JOURNAL (2016), Theodore R. Posner, '*A Comment on Interpreting Paragraph 15 of China's Protocol of Accession*' 9(3) GLOBAL TRADE AND CUSTOMS JOURNAL (2014).

The most important question is whether the surrogate treatment or what is explained as the special methodologies would cease to operate after 11 December 2016. Until this date, most of the antidumping agencies of Members applied the surrogate price only after providing the producers an opportunity to demonstrate that market economy conditions existed in the sector producing the like product. If Chinese manufacturers are unable to show that the market economy conditions exist, the surrogate prices were used. The application of either methodology was contingent and dependent on the satisfaction of the condition provided in the relevant subparagraphs. Consequently, the surrogate price approach was used *only if* the condition in Section 15 (a) subparagraphs were met.[52]

Fig. 1*:* Scenarios under Section 15 (a) (i)

Scenario I: Chinese exporter clearly shows that ME conditions prevails in the industry.	Outcome Mandatory use of Chinese domestic costs and prices.
Scenario II: Chinese exporter cannot clearly show that ME conditions prevail in the industry.	Outcome The investigating agency (IA) is not bound to use Chinese domestic costs and prices. What the IA should do is not very clear. However, a reference to the chapeau of Section 15 would imply that the surrogate methodology could be applicable.

Fig. 2: Scenario(s) under Section 15 (a) (ii)

Scenario I: Chinese exporter cannot clearly show that ME conditions prevail in the industry.	Outcome The investigating agency (IA) may use a method which is not based on Chinese domestic costs and prices. In other

[52] Rao Weijia, *supra* note 51, at 162.

	words, the IA can use third country prices/surrogate prices.

It is possible to argue that the language of Section 15 (a)(i) is in the nature of an either/or binary. The two binaries available are: Chinese costs and prices, and non- Chinese costs and prices. If the question is phrased this way, one interpretation of Section 15 (a)(i) would indicate that if Chinese producers are not able to clearly show that market economy conditions prevail in the industry, there is no obligation on the investigating agency to use Chinese costs and prices; as a logical corollary, non-Chinese costs and prices—or surrogate prices—could be used. China's lynchpin is the second sentence of Section 15 (d), which mandates that the scenario identified in Figure 2 (see above) would no longer exist. However, the situation captured in Scenario II of Figure 1 still exists. The latter scenario does not explicitly rule out the use of non-Chinese costs and prices or, in the other words, the surrogate price methodology itself.

Interpreted in this way, the deletion of Section 15 (a)(ii) is of no consequence. Even in the absence of this provision, the application of the special (or surrogate) methodologies is permissible under Section 15 (a)(i). There are several proponents of this view that in cases where the criteria under Section 15 (a)(i) are not met *i.e.* Chinese producers and exporters are unable to show that market economy conditions exist, WTO Members could continue to use the special methodologies.[53] This view was, in a way, affirmed by the Appellate Body in *EC- Fasters (China)*. The Appellate Body noted:

> "If Chinese producers are not able to "clearly show" that market economy conditions prevail in the industry in question, the importing WTO Member may use an alternate methodology that is not based on a strict comparison with domestic prices or costs in China, such as using surrogate third country or constructed normal value."[54] (emphasis added)

An 'a contrario' interpretation of Section 15 (a)(i) of the Protocol of Accession also suggests the possibility that the option to use the surrogate methodology is inherent in

[53] Bernard O'Connor, *The Myth of China and Market Economy Status in 2016*, WORLD TRADE LAW, http://worldtradelaw.typepad.com/files/oconnorresponse.pdf, at 3.
[54] Appellate Body Report, *European Communities — Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China* ¶ 286, WT/DS397/AB/R (adopted July 28, 2011).

Section 15 (a)(i).[55] An 'a contrario' argument means an 'argument from the contrary'; the argument for a different treatment is made through negative reasoning from another argument.[56] Where Chinese producers are unable to prove market economy conditions *i.e.* they don't meet the requirement under subparagraph (a)(i), the default option is the use of non-Chinese costs and prices (*i.e.* the surrogate methodology), which is implicit in subparagraph (a)(i) itself. Thus, the surrogate methodology can find application without recourse to Section 15 (a)(ii) of the Protocol of Accession.

In international law, *effet utile* or the "principle of effectiveness" is considered as one of the fundamental principles of treaty interpretation. It stems from the Roman Law doctrine of *ut res magis valeat quam pereat.*[57] Treaty interpretation is complex and no adjudicating body can render the whole of Section 15 inutile.[58] The second sentence of Section 15 (d) only speaks about the expiry of Section 15 (a)(ii) and not the whole of Section 15 (a). Consequently, it can be argued that the chapeau and subparagraph (a)(i) of Section 15 continue to be in operation even after December 2016, and therefore the presumption of NME also continues.

Admittedly, the standard rules of treaty interpretation provide that the terms of the treaty should be interpreted according to its terms and the interpreter must avoid attributing meaning to the terms.[59] While applying *effet utile* principle a treaty

[55] The so-called a contrario argument is fairly well accepted in the context of WTO jurisprudence. For example, in the examination of prohibited subsidies in the Illustrative List of the Subsidies and Countervailing Agreement, *a contrario* based arguments have been common. In Panel Report, *Brazil — Export Financing Programme for Aircraft* ¶ 4.52, WT/DS46/R (adopted August 20, 1999), Brazil contended that under first paragraph of Item (k) of the Illustrative List, the payment by governments "of all or part of the costs incurred by exporters or financial institutions in obtaining credits" constitutes and export subsidy "in so far as they are used to secure a material advantage in the field of export credit terms." According to Brazil, where the payments are not "used to secure a material advantage in the field of export credit terms, such payments do not constitute export subsidy. In Appellate Body Report, *Brazil — Export Financing Programme for Aircraft Recourse by Canada to Article 21.5 of the DSU* ¶ 80, WT/DS46/AB/RW (August 23, 2001), the Appellate Body noted as follows:
"If Brazil had demonstrated that the payments made under the revised PROEX were not "used to secure a material advantage in the field of export credit terms", and that such payments were "payments" of Brazil of "all or part of the cost incurred by exporters or financial institutions in obtaining credits", then we would have been prepared to find that the payments made under the revised PROEX are justified under Item (k) of the Illustrative List"

[56] AARON FELLMETH AND MAURICE HORWITZ, GUIDE TO LATIN IN INTERNATIONAL LAW, 36 (Oxford University Press, 2009).

[57] The latin maxim means, "it is better for a thing to have effect than to be made void".

[58] Appellate Body Report, *Canada — Measures Affecting the Importation of Milk and the Exportation of Dairy Products* ¶ 133, WT/DS103/AB/R, WT/DS113/AB/R (October 27, 1999).

[59] Appellate Body Report, *EC — Measures Concerning Meat and Meat Products (Hormones)* ¶ 181, WT/DS26/AB/R (adopted Feb. 13, 1999) [hereinafter *EC-Hormones*]; Appellate Body Report, *India —*

interpreter is bound to give effect to all the terms of the treaty.[60] Based on this approach, the interpreter should be able to uphold an interpretation that gives effect to the surviving clause of Section 15 (a) i.e. subparagraph (a)(i) which continues to allow the use of special methodologies if market economy conditions are not demonstrated by Chinese producers.

The problem is, however, far from resolved. If the treaty interpreter seeks to uphold the remaining parts of Section 15, especially Section 15 (a)(i) and a major part of Section 15 (d), it could still lead to a virtual redundancy of the second sentence of Section 15(d). There seems to be a clear conflict of obligations within these norms. This apparent conflict has to be either tackled or avoided by the adjudicating bodies. If the right to use the special methodologies is firmly tied only to Section 15 subparagraph (a)(ii), the interpreters will obviously have an answer. But as the Appellate Body has noted in a series of cases, the interpretative exercise must yield an interpretation that is harmonious and "sits comfortably in the treaty as a whole."[61] Such a holistic interpretation is not possible unless the whole of the Section 15 and other provisions of the Protocol of Accession, including the relevant provisions of the WTO Agreements are not taken into consideration. The chapeau is a very important element in this enquiry.

2. The significance of the Chapeau of Section 15

The chapeau of Section 15 provides immediate context to interpretation of various sub-paragraphs. There is an overwhelming view that the chapeau to Section 15 (a) permits the use of special methodologies when it provides for the use of either Chinese prices or costs or a '*methodology not based on a strict interpretation with domestic prices or costs*'.[62] Further, since the chapeau states that a price comparison should be 'based on' both subparagraphs (i) and (ii), even after the expiry of subparagraph (ii), the chapeau can continue to be read with the remaining parts of Section 15 (a) *i.e.* Section 15 (a)(i).

Patent Protection for Pharmaceutical and Agricultural Products ¶ 45, WT/DS50/AB/R (adopted Jan. 16, 1998).

[60] Appellate Body Report, *Japan — Taxes on Alcoholic Beverages* ¶ 12, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (adopted Nov. 1, 1998).

[61] Appellate Body Report, *United States — Continued Existence and Application of Zeroing Methodology* ¶ 268, WT/DS 350/AB/R (adopted Feb. 19, 2009); *See* also Appellate Body Report, *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* ¶ 399, WT/DS 363/AB/R (adopted Jan. 19, 2010).

[62] O' Connor, *supra* note 53, at 4.

The term 'based on' has been interpreted under several provisions of the WTO covered agreements. The ordinary meaning of this term refers to: something that "stands" or is "founded" or "built upon" or "is supported by" by another.[63] The use of Chinese prices or special methodologies as set out in the chapeau is not independent and is conditional and founded upon the trigger of subparagraphs (i) and (ii) respectively. If the only trigger for the use of special methodology was subparagraph (a)(ii), then the chapeau should also have practically reflected that change after December 11, 2016 along the following suggested lines:

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

[63] Appellate Body Report, *European Communities — Trade Description of Sardines* ¶ 242-245, WT/DS231/AB/R (adopted Oct. 23, 2002); Appellate Body Report, *European Communities — Measures Concerning Meat and Meat Products* ¶ 163, WT/DS26/AB/R, WT/DS48/AB/R (adopted Feb. 13, 1998), Appellate Body Report, *India – Measures Concerning the Importation of Certain Agricultural Products* ¶ 5.77, WT/DS430/AB/R (adopted June 19, 2015).

While the December 11, 2016 sunset could affect, in principle, only subparagraph (a)(ii), the effect of implying an absolute expiry of the surrogate price methodology could render most part of Section 15 of the Protocol *otiose*. This is an outcome, which could render more violence to the language of Section 15 of China's Protocol than a possible redundancy of the second sentence of Section 15(d).

On the whole, the aforesaid interpretation seeks to give effect especially to Section 15 chapeau as well as subparagraph (a)(i). If Chinese producers are able to demonstrate that market economy conditions exist, then subparagraph (i) can immediately find application. But what if they are unable to show that market economy conditions exist? Even in the absence of subparagraph (ii), as illustrated earlier, the investigating agencies can apply the special methodologies since non-conformity with Section 15 (a)(i) allows the same. To explain, the second sentence of Section 15 (d) is in itself, not a restraint on the application of the special methodologies. It is more or less an enabling provision.

However, one might ask the question: why did the drafters insert the second sentence in Section 15 (d)? The same question can be asked about Section 15 (a)(ii) as well, which is nothing but a tautological explanation of subparagraph (a)(i). In retrospect, it is reasonable to interpret that the WTO Members did not envisage an automatic market economy treatment of China in antidumping investigations after 11 December 2016. It has been argued that China should be subjected to a factual enquiry before such a status can be given and considering that the Chinese economy continues to be characterized by heavy state intervention, it might not be possible to consider it as a market economy from a particular date.[64] Indeed, the Chinese economy is much more open and transparent than it was at the time of accession, but not many agree that it has converged along lines of a market economy.[65] State support in domestic manufacturing in China is considered to have created significant global oversupply.[66] Given these possibilities,

[64] David Bulloch, *China Doesn't Deserve Its 'Market Economy' Status By WTO*, FORBES (Dec. 12, 2016), https://www.forbes.com/sites/douglasbulloch/2016/12/12/china-doesnt-deserve-its-market-economy-status-by-wto/#555a0622b937 (last visited July 23, 2017).
[65] Mark Wu, *The 'China, Inc.' Challenges to Global Trade Governance* 57 HARVARD JOURNAL OF INTERNATIONAL LAW 262 (2006).
[66] *Id.*

an automatic NME treatment of China might never have been intended. The language of Section 15 (a) could have been a calculated step anticipating that if China were not to make substantial progress in reducing the role of the State and central planning with respect to various commercial activities and sectors, the importing WTO Members still had the flexibility to use non-Chinese costs and prices in antidumping investigations.[67]

An important consideration, in this setting, is the parallel provisions of the Second *Ad Note*. The use of non-Chinese costs and prices can be envisaged in two separate situations: under Section 15 of the Protocol as well as the Second *Ad Note* of GATT Article VI. Both these provisions can be the context for each other's interpretation. It must be remembered that the Second *Ad Note* also allows the use of special methodologies if the conditions therein are met. The text of the chapeau uses the same terms as the Second *Ad Note*, viz. a methodology not based on a "*strict comparison with domestic prices or costs*". As explained earlier, this phrase has historically allowed the use of special methodologies including the surrogate methodology. The phrase in the chapeau, therefore, can be the basis for invoking the surrogate methodology against Chinese importers after 11 December 2016.

In addition, the principle of *in dubio mitius*, which provides deference to the sovereignty of States or favours an interpretation that involves less general restrictions upon the parties assuming the obligations could be a useful interpretative tool here.[68] In this case, a holistic reading of Section 15 of China's Protocol is bound to lead to "vastly different interpretations", and a reliance only on the text is unlikely to yield results. [69] Therefore, there is a compelling case for the use of additional or supplementary tools of interpretation available in the field of customary international law.

[67] Charlene Barshefsky, the United States Trade Representative at the time of the negotiations of the Protocol of Accession noted during a congressional hearing "[n]o agreement on WTO accession has ever contained stronger measures to strengthen guarantees of fair trade and to address practices that distort trade and investment." *See Hearing on the Accession of China to the WTO Before the H. Comm. on Ways and Means*, 106th Cong. 39 (2000) (statement of Charlene Barshefsky, United Nations Trade Representative).

[68] Appellate Body Report, *EC-Hormones*, *supra* note 59, ¶ 195.

[69] Panel Report, *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* ¶ 7.1169, WT/DS363/R (adopted on Jan. 19, 2010).

3. Use of special methodologies and the negotiating history of Section 15

As set out above, the argument for the expiry of use of special methodologies assumes that the right to use special methodologies is intrinsically tethered to Section 15 (a)(ii) and not the rest of Section 15 (a), including the chapeau. This interpretation, as we have argued, is flawed. In our view, there is enough support in Section 15 (a) and its chapeau to continue with the special methodologies based on the tools of interpretation available under customary international law codified in the Vienna Convention on the Law of Treaties (VCLT). Article 31 of the VCLT places more emphasis on the text whereas Article 32 provides a basis for examining the historical evidence including the discussions, negotiations, statements and compromises that led to the acceptance of the treaty text—widely known as the *travaux preparatoires* (for short "travaux").[70] In the case of the continuing NME treatment of China, a reference to *travaux* is suggested either to confirm the meaning resulting from an interpretation of the text of Section 15 of the Protocol of Accession, Article VI: I of the GATT as well as the provisions of the Antidumping Agreement, or to resolve the complexity arising from the assumption that a text based interpretation is providing an outcome which is ambiguous or obscure. As Julia Ya Qin notes, considering the "imperfectly formulated text of the Protocol" it may be necessary for the WTO adjudicators to refer to the supplementary materials.[71] In this case, a reference to the supplementary materials of the Protocol of Accession may be helpful in finding out whether an "a contrario" interpretation of Section 15, subparagraph (a) (i) is specifically inapplicable or ruled out. Unless an "a contrario" interpretation is specifically excluded by the drafters, it is reasonable to sustain the surrogate country methodology based purely on subparagraph (a) (i).

Accession Protocols are generally integral parts of the WTO treaty. In addition, at least in the case of China's Protocol, there is an explicit reference to at least 143 paragraphs of specific commitments from China's Working Party Report.[72] Under the GATT/WTO practice, a Working Party is established to examine the application for accession, and the discussions are summarized in the working party report. The

[70] Vienna Convention on the Law of Treaties, art. 3.2, May 23, 1969, 331 U.N.T.S. 1155.
[71] Julia Ya Qin, *The Challenge of Interpreting 'WTO-Plus' Provisions*, 44 JOURNAL OF WORLD TRADE 127, 172 (2010).
[72] Julia Ya Qin, *The Conundrum of WTO Accession Protocols: In Search of Legality and Legitimacy*, 55(2) VIRGINIA JOURNAL OF INTERNATIONAL LAW 369, 392 (2015).

Working Party Report is conventionally written in the past tense and often incorporates the past future tense "would" at various places, which could imply that it is not a bundle of legal rights and obligations.[73] The standard practice in the WTO is to prescribe all country-specific rules in the Working Party Report and to incorporate the relevant commitments by explicit reference.[74] To clarify, whenever a specific reference is made, it will be treated as integral part of the WTO commitments. Paragraphs 151 and 152 of China's Working Party Report specifically deal with anti-dumping. However, the pertinent paragraph in relation to NME and anti-dumping measures is Paragraph 151.

Strikingly, Paragraph 151 is not incorporated by specific reference in China's Protocol. Article 1(2) of the Protocol of Accession stipulates that 'this Protocol, which shall include the commitments referred to in Paragraph 342 of the Working Party Report, shall be an integral part of the WTO Agreement'.[75] This issue was specifically dealt with in *EU-Footwear (China)*[76], in which China argued that the EU violated Paragraphs 151(e) and (f) of China's Working Party Report. Paragraphs 151(e) and (f) of the Working Party Report requires importing WTO Members to 'provide Chinese producers and exporters a full opportunity for the defence of their interests in a particular case' and to 'provide a sufficiently detailed reasoning of its preliminary and final determinations in a particular case' respectively, during anti-dumping proceedings.[77] The Panel held that Article 1(2) of the Protocol of Accession is clear on its face and cannot be understood to incorporate commitments not set out in Paragraph 342 of the Working Party Report.[78] Further, the Panel held that Paragraph 151 of Working Party Report is not referred to in Paragraph 342 of the Working Party Report and consequently cannot be understood to impose a legally blinding obligation on any WTO Member and cannot be the basis of a claim in WTO dispute settlement.[79] Therefore, Paragraph 151 cannot be considered as an integral part of the Protocol of

[73] *Id.*
[74] China's Working Party Report, *supra* note 48, at annex. 9.
[75] China's Working Party Report, *supra* note 48, ¶ 1.2
[76] Panel Report, *European Union — Anti-Dumping Measures on Certain Footwear from China*, WT/DS405/R (adopted on Feb. 22, 2012) [hereinafter EU-Footwear].
[77] China's Working Party Report, *supra* note 48, ¶ 151(e) and (f).
[78] EU-Footwear, *supra* note 76, ¶ 7.181.
[79] EU-Footwear, *supra* note 76, ¶ 7.181.

Accession and can, at best, be covered as the 'circumstances existing'[80] at the time of the Protocol.

However, it is also important to note Paragraph 150 of the Working Party Report. Paragraph 150 reads as follows:

> "Para. 150. Several members of the Working Party noted that China was continuing the process of transition towards a full market economy. Those members noted that under those circumstances, in the case of imports of Chinese origin into a WTO Member, special difficulties could exist in determining cost and price comparability in the context of anti-dumping investigations and countervailing duty investigations. Those members stated that in such cases, the importing WTO Member 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." (emphasis added)

Paragraph 150 of the Working Party Report indicates that the Working Party was influenced by the transition of China towards a full market economy. At the time of its accession, it was recognized that China was in the process of implementing economic reforms and transforming into a more market-based economic system.[81] The Chinese

[80] For an explanation of 'circumstances existing' see Aegean Sea Continental Shelf, Greece v. Turkey, Judgment (Greece v. Turkey), 1978 ICJ Rep 3, ¶105-107 (December 19). In deciding the issue of whether the Turkey and Greece had, pursuant to a joint communication in May 1975, agreed to the jurisdiction of the International Court of Justice, the ICJ analysed the communication in light of the subsequent diplomatic exchanges between the two states. The ICJ held, "The information before the Court concerning the negotiations between the experts and the diplomatic exchanges subsequent to the Brussels Communiqué appears to confirm that the two Prime Ministers did not by their "decision" undertake an unconditional commitment to submit the continental shelf dispute to the Court…. Accordingly, having regard to the terms of the Joint Communiqué of 31 May 1975 and to the context in which it was agreed and issued, the Court can only conclude that it was not intended to, and did not, constitute an immediate commitment by the Greek and Turkish Prime Ministers, on behalf of their respective Governments, to accept unconditionally the unilateral submission of the present dispute to the Court."

[81] Press Release, World Trade Organisation, WTO successfully concludes negotiations on China's entry (Sept. 17, 2001), https://www.wto.org/english/news_e/pres01_e/pr243_e.htm (last visited Oct. 25, 2017). Also see *Hearing on the Accession of China to the WTO Before the H. Comm. on Ways and Means* (1999) (statement of Charlene Barshefsky, United States Trade Representative), http://lobby.la.psu.edu/069_WTO_Membership/Congressional_Hearings/Testimony/H_Ways_Means_Trade_021199.htm (last accessed Oct. 24, 2017). As per Ms. Barshefsky, "Third, our trade policy will continue our progress toward integrating China, Russia and other economies in transition into the trading system…To support rather than undermine both domestic reform in these economies and the rules of the trading system, these countries must be brought into the WTO on commercially meaningful terms. The result must be enforceable commitments to open markets in goods, services and agricultural products; transparent, non-discriminatory regulatory systems; and effective national treatment at the border and in the domestic economy."

representative to the Working Party undertook commitments in respect of state-owned enterprises running on a commercial basis, reduction of availability of certain type of subsidies, which were inconsistent with the Subsidies and Countervailing Agreement, and reforming the Chinese tax system.[82] Thus, WTO Members chose to utilize the NME methodology against Chinese imports to protect themselves from the unfair trade practices that resulted from China's state or quasi state-run economy.[83] The choice of the 15 year period was made by the Working Party with the thought that China would make the transition to a market economy by December 11, 2016 pursuant to which subparagraph (a)(ii) of Section 15 would expire.[84] Thus, the use of the NME methodology is explicitly linked to the state of China's economy and is not independent of the same. However, as set out in Section 15(d) of the Protocol of Accession, the granting of ME status continues to be governed by the 'national law of the importing WTO Member'. The NME methodology would, therefore, continue to be in operation till the point China meets the requirements under the first or third sentences of subparagraph (d) of Section 15 *i.e.* the Chinese economy becomes market-based or the individual industry or sector qualifies for ME treatment.[85] Thus, any determination of market economy status to China must be made pursuant to a factual enquiry.[86] As Mark Wu argues, the Chinese economy continues to be heavily influenced by State intervention through state-owned enterprises in major sectors such as petrochemicals and telecommunications, firm control over financial institutions as well as control over prices of inputs through its central planning agency.[87]

In the Working Party Report to the Protocol of Accession, Members of the Working Party confirmed certain procedural criteria in respect of Section 15 (a)(ii).[88] These include transparency obligations such as publishing in advance the criteria for determining whether market economy conditions exist in the industry or company producing the like product as well as the methodology used to determine price

[82] China's Working Party Report, *supra* note 48, ¶ 172.
[83] *See Hearing on the Accession of China to the WTO Before the H. Comm. on Ways and Means*, 106th Cong. 39 (2000) (statement of Steve Appel, President, Washington State Farm Bureau, and Co-Chairman, Trade Advisory Committee, American Farm Bureau Federation).
[84] Paul Rosenthal & Jeffrey S. Beckington, *The People's Republic of China: A Market Economy or a Non-market Economy in Anti-dumping Proceedings Starting on December 12, 2016* 9(7) GLOBAL TRADE AND CUSTOMS JOURNAL 352,354 (2014).
[85] Miranda, *supra* note 51, at 249.
[86] Wu, *supra* note 65, at 306.
[87] Wu, *supra* note 65, at 262-285.
[88] China's Working Party Report, *supra* note 48, ¶ 151.

comparability.[89] It has been argued that since these procedural norms are expressly linked to Section 15 (a)(ii)[90], it is implied that the use of special methodologies is also solely tied to this subparagraph.[91] Consequently, it has been argued that if this subparagraph ceases to apply, these procedural safeguards would also cease to apply.[92] However, it is important to note that Paragraph 151 is not limited to providing procedural safeguards for a "methodology not based a strict comparison with domestic prices" i.e. special methodologies. For example, it also calls for WTO members to notify its market economic criteria before applying the same.[93] This bears importance in other provisions of Section 15 such as subparagraphs (a)(i) and paragraph (d) of China's Protocol, where Chinese producers have the burden to demonstrate that market economy conditions exist in the industry or sectors concerned. Other safeguards include the need for transparency of the process of investigation, ability of Chinese producers and exporters to present evidence in writing[94] and defend their interests,[95] as well as certain obligations on the investigating Members to provide detailed reasoning of its preliminary and final determinations in a particular case.[96] The first two of these safeguards is also applicable when Chinese producers and exporters have to prove that market economy conditions exist under the other provisions of Section 15. Thus, it can be argued that the safeguards mentioned in Paragraph 151 are generic in nature, and relate to various obligations set out in Section 15 of the Protocol of Accession. The expiry of Section 15 (a)(ii) after 11 December 2016 would not imply that these procedural safeguards are also no longer applicable. Since these procedural norms also apply to the remainder of Section 15, they would continue to find purpose even after December 2016.

The aforesaid analysis to the effect that the safeguards in Paragraph 151 are not intrinsically tied to Section 15 (a)(ii) is also supported by the drafts of the Protocol of Accession and the drafts of the China Working Party Reports. In the earlier drafts of

[89] China's Working Party Report, *supra* note 48, ¶ 151.
[90] The chapeau to paragraph 151 of the Working Party Report states, "…In response to these concerns, members of the Working Party confirmed that in implementing subparagraph (a)(ii) of Section 15 of the Draft Protocol, WTO Members would comply with the following…". See China's Working Party Report, *supra* note 48, ¶ 151.
[91] Graafsma and Kumashova, *supra* note 43, at 157.
[92] Graafsma and Kumashova, *supra* note 43, at 157.
[93] China's Working Party Report, *supra* note 48, ¶ 151 (b).
[94] China's Working Party Report, *supra* note 48, ¶ 151 (d).
[95] China's Working Party Report, *supra* note 48, ¶ 151 (e).
[96] China's Working Party Report, *supra* note 48, ¶ 151 (f).

the Working Party Report, the procedural safeguards were provided in Article 20 of the Draft Protocol[97], which is presently, Section 15 of the Protocol of Accession.[98] In the Working Party Report of 21 July 2000, certain procedural safeguards (such as the right of Chinese exporters and producers to provide evidence in writing and defend their interests) were linked to Section 20 (1)(b) (which corresponds to Section 15 (a)(ii)) whereas certain other safeguards including the definition of market economy criteria and transparency in the selection of a surrogate economy, continued to be linked to Article 20 (*i.e.* Section 15 in the final version) of the Draft Protocol.[99] In the final draft of the Working Party Report, the reference was limited to only Section 15 (a)(ii) and not the whole of Section 15. However, as explained before, many of these procedural safeguards find application in the other parts of Section 15 and are not merely confined to Section 15 (a)(ii). There is nothing in the previous versions of the Draft Protocols to indicate that the only recourse for surrogate country methodology stemmed exclusively from subparagraph (a)(ii) of Section 15 of the Protocol of Accession.

4. Special Methodologies and China's NME Status

One of the central issues in this discussion is the market economy status of China. According to a few commentators, the piecemeal reporting of the issue in "sound bites and one-liners" has resulted in the mischaracterization of the discourse on the interpretation of Section 15 (a) (ii) as the debate about China's NME status.[100] It is true that the debate around Section 15 is about discontinuing the practice of special methodologies against Chinese producers after 11 December 2016. However, the market economy status of China is also relevant in terms of Section 15 (d), first sentence. If China attains market economy status, the provisions of subparagraphs (a) and (d)

[97] Working Party on the Accession of China, *Draft Report of the Working Party on the Accession of China*, WT/ACC/SPEC/CHN/1/Rev.1 (July 18, 2000), ¶ 12.
[98] Working Party on the Accession of China, *Draft Protocol on the Accession of China*, www.insidetrade.com, art.20.
[99] Working Party on the Accession of China, *Draft Report of the Working Party on the Accession of China*, WT/ACC/SPEC/CHN/1/Rev.1 (July 21, 2000), ¶ 12.
[100] *Ibid.*

have to be terminated altogether. This article has argued that even the sunset of subparagraph (a)(ii) does not entail the closure of the debate on China's market economy status. It is, however, true that the WTO laws do not provide for a definition of market economy or non-market economy, although the provisions of the Second *Ad Note* to GATT Article VI provide some criteria. There is also no clear judicial exposition on the defining characters of a market or non-market economy. The Member countries have significant freedom in identifying the NME criteria and they could continue to exercise this freedom.[101]

IV. Domestic Antidumping Investigations and Non-Market Economy Treatment of China

1. China as an NME: United States Practice

The Tariff Act of 1930 (Tariff Act) is the principal legislation governing antidumping investigations. According to Section 773 (c)(1) of the Tariff Act, if an antidumping investigation involves imports from a country designated as an NME and the USDOC finds that the available information does not permit determination of the normal value on the basis of the methodologies permitted by Section 773 (a) of the Tariff Act, the USDOC can determine the normal value on the basis of prices prevailing in a third country. According to Section 771(18)(C)(1), the administering authority *i.e.* the USDOC has to make a determination that a country is an NME on the basis of certain criteria set out in Section 771(18)(B).[102] Such determination remains in effect until revoked by the USDOC.[103] Further, any such determination is not subject to judicial review in any anti-dumping investigation conducted by the USDOC.[104]

---

[101] Brian Gatta, *Between 'Automatic Market Economy Status' and 'Status Quo': A Commentary on 'Interpreting Paragraph 15 of China's Protocol of Accession*, 9(5) GLOBAL TRADE AND CUSTOMS JOURNAL 165 (2014).

[102] In making an NME country determination under section 771(18)(A) of the Act, section 771(18)(B) requires that the Department take into account: (i) the extent to which the currency of the foreign country is convertible into the currency of other countries; (ii) the extent to which wage rates in the foreign country are determined by free bargaining between labor and management; (iii) the extent to which joint ventures or other investments by firms of other foreign countries are permitted in the foreign country; (iv) the extent of government ownership or control of the means of production; (v) the extent of government control over the allocation of resources and over the price and output decisions of enterprises; (vi) such other factors as the administering authority considers appropriate.

[103] Section 771(18)(C)(1) of the Tariff Act.

[104] Section 771(18)(D) of the Tariff Act.

On December 22, 2005, the USDOC received a request from the respondent in *Certain Lined Paper Products*[105] to review China's NME status. In its memorandum, the USDOC reviewed China's economy on the basis of the market economy factors set out in Section 771(18)(A) of the Tariff Act. The USDOC determined that in terms of currency, China controlled the value of its currency through significant restrictions on the interbank foreign exchange market and on capital account restrictions.[106] In respect of wages, the USDOC concluded that while wages in China were largely set as a product of negotiations between management and labour, the Chinese labour market was characterized by a lack of independent trade unions, prohibition of strikes and the lack of ability for workers to move freely throughout the country.[107] In respect of the investment climate in China, the USDOC determined that though the Chinese government was investment friendly, it nevertheless exercised substantial control over foreign investment and tended to guide investment towards export-oriented industries and specific regions, while shielding certain domestic firms from competition.[108] The USDOC found that in respect of the Chinese government ownership of the means of production, the Chinese economy continues to feature a significant degree of state-planned and state-driven development, and it was noted that China continued to combine market processes with continued state direction.[109] In respect of government allocation of resources, the USDOC noted that the Chinese government continued to be deeply entrenched in resource allocation especially in the financial sector through state-owned banks. It was noted that the banking sector in China distorts the flow of financial resources to their best use and underperforming state owned enterprises were observed to receive substantial financial support from state-owned banks.[110]

In March 2017, the USDOC launched a review of China's market economy status pursuant to Section 771(18)(C)(ii) of the Tariff Act, which states that the USDOC may

[105] U.S. Department of Commerce, *Fact Sheet: The People's Republic of China's Request for Review of Non-Market Economy Status*, http://enforcement.trade.gov/download/prc-nme-status/prc-nme-status-factsheet.pdf.
[106] U.S Department of Commerce, *Antidumping Duty Investigation of Certain Lined Paper Products from the People's Republic of China ("China")-China's status as a non-market economy* (Aug. 30, 2006), http://enforcement.trade.gov/download/prc-nme-status/prc-lined-paper-memo-08302006.pdf, at 13 [hereinafter Lined Paper Products Investigation].
[107] *Ibid*., at 2.
[108] Lined Paper Products Investigation, *supra* note 106, at 33.
[109] Lined Paper Products Investigation, *supra* note 106, at 46.
[110] Lined Paper Products Investigation, *supra* note 106, at 77.

make a determination with respect to a country's NME status 'at any time'.[111] This review of China's status as an NME as part of an anti-dumping and countervailing duty investigation on exports of aluminum foil from China, would be the first such review conducted by the USDOC since 2006.[112] In the preliminary determination conducted by the USDOC, it was determined that China should continue to be treated as an NME on account of the fact that the '*state's role in the economy and its relationship with markets and the private sector results in fundamental distortions in China's economy.*'[113] This determination was based on the factors set out in Section 771(18)(B) of the Tariff Act.[114] In respect of factor 1, which deals with currency convertibility, the USDOC observed that while the renminbi is convertible into foreign currencies for trade purposes, the Chinese government continues to maintain significant restrictions on capital account transactions and considerably intervenes in onshore and offshore foreign exchange markets.[115] Under factor 2 (determination of wages rates as a result of free bargaining), the USDOC found institutional constraints on the extent to which wage rates are determined through free bargaining. The prohibition on formation of independent trade unions and the lack of the legal right to strike was also considered by the USDOC. It was also noted that restrictions imposed by the Chinese government on labour mobility through the hukou (household registration) system was guiding labor flows and causing distortions to the supply side of the labour market.[116] When analyzing factor 3 (extent to which investments are allowed into the country), the USDOC found that the Chinese government continues to impose significant barriers to foreign investment, including equity limit, local partner requirements and unclear approval and regulatory procedures, technology transfer and localization requirements. The USDOC found that the Chinese government's control over foreign investment regime in the country allows them to limit investment into sectors that the government

[111] U.S. Department of Commerce, *Certain Aluminum Foil From the People's Republic of China: Notice of Initiation of Inquiry Into the Status of the People's Republic of China as a Nonmarket Economy Country Under the Antidumping and Countervailing Duty Laws*, 82 Fed. Reg. 62, 16162 (March 29, 2017), https://www.gpo.gov/fdsys/pkg/FR-2017-04-03/pdf/2017-06535.pdf.
[112] *Ibid*.
[113] Memorandum from Leah Wils-Owens, Office of Policy, Enforcement & Compliance to Gary Taverman, Associate Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, "China's Status as a Non-Market Economy" (Oct. 26, 2017), https://enforcement.trade.gov/download/prc-nme-status/prc-nme-review-final-103017.pdf [hereinafter China NME Memorandum].
[114] *See* fn.102.
[115] China NME Memorandum, *supra* note 113, at 4.
[116] China NME Memorandum, *supra* note 113, at 4.

deems strategically important while supporting foreign investment in other sectors.[117] On factor 4 (government control over factors of production), the USDOC found that the Chinese government continues to exert significant control and ownership over the means of production through the prevalence of state-invested enterprises (SIE) and the system of land ownership and land-use rights. In respect of SIEs, it was observed that the 'economic-weight' of SIEs in the Chinese economy is substantial and SIEs receive resources from the State to undertake large-scale investments to help stabilize China's macro-economy. SIEs are also shielded from the consequences of economic failure and their investments and acquisitions are motivated by governmental interests rather than enterprise objectives.[118] The Chinese government's control over rural land acquisition and monopolization over the distribution of urban land-use rights makes the government a final arbiter of who uses the land and for what purpose. Further, restrictions faced by land-use right holders with respect to tenure, challenging documentation and compensation procedures results in an inefficient urban and rural land market.[119] On factor 5 (extent of government control over the allocation of resources), the USDOC noted that the Chinese government continued to play a significant role in resource allocation. It was noted that state planning continues to remain an important feature of the Chinese economy with various state institutions participating in the formulation and execution of industrial policies. The Chinese government's use of industrial policies to influence the economy through industrial policies was noted through its control on science and technology development, geographic distribution of industry and industrial restructuring. The USDOC noted that the Chinese government exerted a high degree of control over prices it deems essential or strategic and is able to often set and guide factor input prices to distort costs and prices across the economy. The Chinese government's ownership and control over the largest commercial banks in China allows the government to direct financial resources to SIEs in spite of high levels of corporate debt, leading to soft budget constraints and affects the market-determined pricing of risk. Further, the USDOC also noted the emerging 'shadow banking' sector, which serves as a means for state-owned and controlled parties to lend and borrow capital through opaque institutions and channels

[117] China NME Memorandum, *supra* note 113, at 5.
[118] China NME Memorandum, *supra* note 113, at 6.
[119] China NME Memorandum, *supra* note 113, at 6.

outside the formal banking sector.[120] On the last factor (such other factors as the administering authority considers appropriate), the USDOC noted the Chinese legal system including courts are structured to respond to the government's policy goals, whether broad or case specific. Individuals and firms, notably, lacked the ability to make meaningful independent inputs into administrative rulemaking or challenge court decisions, thus not having the avenue to achieve their objectives. Further, firms were noted to face challenges in obtaining impartial decisions, because of corruption or local protectionism.[121]

The decision of the USDOC to not revoke China's NME status has lend some credence to the practice of the USDOC in treating China as an NME in anti-dumping cases after December 2016. In the initiation of the anti-dumping investigation involving *Cast Iron Soil Pipe Fittings*, China was treated as an NME and South Africa was chosen as a surrogate country for the purposes of computing normal value.[122] Similarly in the *Stainless Steel Flanges* from India and China, Thailand was chosen as a surrogate country since the NME presumption against China has not been revoked by the USDOC.[123] The reasoning of the USDOC to treat China as an NME is based on Article 771(18)(C)(i) of the Tariff Act (referred to above), which allows the USDOC to determine and treat any country as an NME and states that such status continues to be in effect until revoked by the USDOC. Since such status has still not been revoked by the USDOC, China continues to be treated as an NME in anti-dumping investigations.[124]In the recent anti-dumping investigation involving *Certain Hardwood Plywood Products*[125], China was considered an NME and consequently, the USDOC

[120] China NME Memorandum, *supra* note 113, at 6-7.
[121] China NME Memorandum, *supra* note 113, at 7.
[122] U.S. Department of Commerce, *Cast Iron Soil Pipe Fittings From the People's Republic of China: Initiation of Less-Than-Fair Value Investigation* 82 Fed. Reg. 37,053, 37,055 (2017).
[123] U.S. Department of Commerce, *Stainless Steel Flanges From India and the People's Republic of China: Initiation of Less-Than-Fair-Value Investigations* 82 Fed Reg. 42629, 42651 (2017).
[124]*See* U.S. Department of Commerce, *Certain Polyester Staple Fiber from the People's Republic of China: Decision Memorandum for the Preliminary Results of the 2015-2016 Antidumping Duty Administrative Review* (Feb. 27, 2017) http://enforcement.trade.gov/frn/summary/prc/2017-04134-1.pdf, at 3. In this case, the issue related to whether all the producers under investigation from a NME must be assigned at a single antidumping rate or whether the exporters/producers under investigation have demonstrated that they operate under market economy conditions, pursuant to which a separate rate is determinable for them; U.S. Department of Commerce, *Decision Memorandum for the Preliminary Results of Antidumping Duty…Citric Acid and Certain Citrate Salts from the People's Republic of China* (Jan. 31, 2017) http://enforcement.trade.gov/frn/summary/prc/2017-02528-1.pdf, at 3.
[125] U.S. Department of Commerce, *Decision Memorandum for the Preliminary Determination in the Antidumping Duty Investigation of Certain Hardwood Plywood Products from the People's Republic of China* (June 16, 2017),

assessed the normal value on the costs of production in surrogate market economy.[126] In this case, the normal value was constructed on the basis of costs in Romania since Romania had publicly available and reliable data.[127] In the anti-dumping investigation on imports of *1-Hydroxyethylidene-1 and 1-Diphosphonic Acid from China*[128], Mexico was chosen as the surrogate market economy and the normal value was constructed on the basis of the prices of the factors of production, as prevalent in Mexico. Similarly, in the investigation involving imports of *Glycerine from China*[129], Thailand was chosen as the surrogate country.

Surprisingly, in the aforesaid cases, the producers/exporters did not argue that with the expiry of Section 15 (a)(ii), the surrogate country methodology does not find application. It could be that since the USDOC has not revoked the NME status of China under domestic law, arguing the expiry of Section 15 (a)(ii) would not be of consequence to the anti-dumping proceeding. However, in the anti-dumping investigation involving *Certain Cased Pencils* from China, the Chinese exporter/producer under investigation argued that the Protocol of Accession unambiguously limits the application of the NME status of China to 15 years and no WTO Member can treat China as an NME pursuant to December 11, 2016.[130] It was further argued that the language of the Protocol of Accession is mandatory and immediate and 'self-executing' and since the Protocol of Accession is 'in-force' domestically, it automatically vests rights in the interested parties. The USDOC disagreed with the producer/exporter under investigation that the Protocol of Accession is 'in force' domestically and 'automatically vest{s} rights in the interested parties'.

http://www.hpva.org/sites/default/files/HWPW%20AD%20Prelim%20I&D%20Memo.pdf, at 9 [hereinafter Hardwood Plywood Products Investigation].

[126] In choosing such a surrogate market economy, the USDOC is required to take into account the following: (i) whether the surrogate country is at a similar level of development comparable to the NME country; and (ii) whether the surrogate country has significant producers of comparable merchandise. *See* U.S. Department of Commerce, *Non-Market Economy Surrogate Country Selection Process*, Bulletin No. 04:1 (Mar. 1, 2004), http://enforcement.trade.gov/policy/bull04-1.html.

[127] Hardwood Plywood Products Investigation, *supra* note 125, at 16.

[128] U.S. Department of Commerce, *Issues and Decision Memorandum for the Final Determination of the Less-Than-Fair-Value Investigation of 1-Hydroxyethylidene-1, 1-Diphosphonic Acid from People's Republic of China* (March 20, 2017), http://enforcement.trade.gov/frn/summary/prc/2017-05805-1.pdf, at 4.

[129] U.S. Department of Commerce, *Decision Memorandum for the Preliminary Results of Antidumping Duty Administrative Review: Glycine from the People's Republic of China; 2015-2016* (Mar. 31, 2017), http://enforcement.trade.gov/frn/summary/prc/2017-06994-1.pdf, at 11.

[130] U.S. Department of Commerce, *Issues and Decision Memorandum for Certain Cased Pencils from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2014-2015* (May 22, 2017), http://enforcement.trade.gov/frn/summary/prc/2017-11053-1.pdf, at 17.

According to the USDOC, the Uruguay Round Agreements (including the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994) and the Protocol of Accession "are not self-executing" and their legal effect in the United States is governed by the implementing legislation. It was held that anti-dumping proceedings are conducted by the USDOC and are governed by United States law which allows for the USDOC to determine, on the basis of a complete, fact-intensive analysis of a country's economy, whether such country must be treated as an NME for the purposes of anti-dumping. In the above case, no party had requested that China's NME status be revoked and hence the USDOC continued to treat China as an NME for the purposes of the review.[131]

Considering the importance of anti-dumping as a trade defence measure for the U.S. against China[132], an interesting recent development in the field is the use of the 'particular market situation' (PMS) by U.S. anti-dumping authorities for the first time. Under the Trade Preferences Extension Act of 2015 (TPEA), the USDOC was granted expanded authority to deviate from foreign producers' reported home market sales prices or production costs in cases 'outside the ordinary course of trade' in an anti-dumping investigation. The definition of 'ordinary course of trade' was amended to include 'situations in which the administering authority determines that the PMS prevents a proper comparison with the export price or constructed export price'.[133] Further, the TPEA also brings about an amendment in definition of 'constructed normal value'. Pursuant to the amendment, in case where PMS exists such that the costs of materials and fabrication or processing does not accurately reflect the cost of production in the ordinary course of trade, the administering authority is allowed to use any calculation methodology.[134] In April 2017, the USDOC found a case of PMS in the final results of the administrative review involving imports of oil country tubular goods (OCTG) from the Republic of Korea. The petitioners had argued PMS on the basis of the following distortions: (i) subsidies from the Korea government that benefit the Korean producers of hot-rolled steel (which is the primary input in the production of

[131] *Ibid*., at 19.
[132] As of December 2016, the U.S. had initiated 141 anti-dumping investigations against China. *See* World Trade Organization, Dumping Measures: Reporting Member v. Exporter (1/1/1995 – 30/6/2016), WTO Anti Dumping Gateway, https://www.wto.org/english/tratop_e/adp_e/AD_MeasuresRepMemVsExpCty.pdf.
[133] Trade Preferences Extension Act of 2015, Pub. L. 114–27, §504, 129 Stat. 362-419, (2015).
[134] *Ibid*., s. 504 (c).

OCTG); (ii) intervention by the Korean government in the electricity market which lead to distortions in the price of electricity; (iii) flood of low-priced hot-rolled steel imports into Korea from China which led to the domestic prices of hot-rolled steel being artificially suppressed; and (iv) "strategic alliances" between the Korean producers of OCTG and hot-rolled steel.[135]

In this case, the USDOC had determined in a preliminary memorandum in February 2017, that there was insufficient evidence to prove that PMS exists in the OCTG market in South Korea.[136] However, because Section 504 of TPEA does not provide any guidance on whether to consider the allegations individually or collectively, the USDOC analysed the four allegations collectively for the final results.[137] On considering the cumulative effect of the four allegations on the Korean OCTG market, the USDOC found that the aforesaid allegations represent 'facets of a single PMS'.[138] The USDOC held that while a sufficient level of evidence is required to prove a case of PMS, the petitioners had met the burden in this case. Interestingly, the USDOC did not renounce its earlier factual findings on the issue of PMS nor did it cite any new evidence in support of its finding of PMS. Instead, the USDOC described its reappraisal of the facts as a 'refocused analysis of the totality of the conditions in the Korean market' rather than addressing the impact of the individual allegations.[139] Further, in its analysis of PMS, the USDOC did not define a standard for PMS or the facts that constitute PMS. Rather, the USDOC left the meaning of the term PMS uncertain and promised to 'continue to develop the concepts and types of analysis that would be necessary to address future allegations'.[140]

[135] U.S. Department of Commerce, *Issues and Decision Memorandum for the Final Results of the 2014-2015 Administrative Review of the Antidumping Duty Order on Certain Oil Country Tubular Goods from the Republic of Korea* (Apr. 10, 2017), http://enforcement.trade.gov/frn/summary/korea-south/2017-07684-1.pdf, at 40-41 [hereinafter Korea OCTG Decision].
[136] *See* Memorandum from Gary Taverman, Associate Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Carole Showers, Executive Director, Office of Policy, Policy & Negotiations, "2014-2015 Administrative Review of the Antidumping Duty Order on Certain Oil Country Tubular Goods from the Republic of Korea: Memorandum on Particular Market Situation Allegations," dated February 21, 2017.
[137] Korea OCTG Decision, *supra* note 135, at 40.
[138] Korea OCTG Decision, *supra* note 135, at 40.
[139] Korea OCTG Decision, *supra* note 135, at 40.
[140] Korea OCTG Decision, *supra* note 135, at 43.

The decision of the USDOC leaves the meaning and criteria of the concept PMS ambiguous and leaves the door open for similar allegations against China, where U.S. producers can claim that state interference creates market distortions which do not allow for proper price comparison. While the decision in *OCTG imports from Korea* allows for U.S. anti-dumping authorities to disregard the costs and prices prevalent in the exporting country, the ruling would have to be tested against the decision of the Appellate Body in *EU – Biodiesel*. Until the U.S anti-dumping authorities or the WTO dispute settlement body sheds further light on the meaning of PMS, the scope of the term remains uncertain. It has, however, garnered criticism with China, Russia and South Korea terming the decision as having 'serious implications for the fundamental fairness and legitimacy of the trading system'.[141]

2. China as an NME: Practice of the European Union

Like the U.S., the EU's argument to not grant China a market economy status is contingent on the fact that China does not fulfill the market economy criteria set out by the EU.[142] The basis of the use of the surrogate method in the EU is Article 2.7 of the EU Anti-Dumping Regulation. It provides that in case of imports from NMEs, including China[143], if Chinese producers are unable to show that market economy conditions exist, the normal value shall be determined on the basis of the prices or constructed value in a surrogate country.[144] Even after December 2016, the surrogate country method continues to find application in EU anti-dumping proceedings. In the initiation notice involving imports of new and retreated tyres for buses and lorries originating in China, the EU Commission chose the U.S. as the surrogate country.[145] In

[141] *U.S. 'particular market situation' ruling on Korean steel sparks concern at WTO*, INSIDE U.S. TRADE (May 2, 2017), https://insidetrade.com/daily-news/us-particular-market-situation-ruling-korean-steel-sparks-concern-wto (last visited Oct. 25, 2017).
[142] European Parliament resolution of 12 May 2016 on China's market economy status (May 12, 2016), http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2016 0223+0+DOC+XML+V0//EN.
[143] Regulation 2016/1036 of the European Parliament and of the Council of 8 June 2016 on Protection Against Dumped Imports from Countries not Members of the European Union (June 8, 2016) http://trade.ec.europa.eu/doclib/docs/2016/june/tradoc_154702.en.L176-2016.pdf.
[144] *Ibid*., art. 2. 7 (a). Article 2.7 (a) states, "An appropriate market-economy third country shall be selected in a not unreasonable manner, due account being taken of any reliable information made available at the time of selection. Account shall also be taken of time limits. Where appropriate, a market-economy third country which is subject to the same investigation shall be used."
[145] European Commission, *Notice of initiation of an anti-dumping proceeding concerning imports of new and retreaded tyres for buses or lorries originating in the People's Republic of China*, 2017 O.J. (C 264) 14,16.

the initiation notice for the expiry review of anti-dumping measures applicable to imports of lever arch mechanisms originating in China, the Commission intended to construct the normal value by using prices and costs in third market surrogate countries such as India or Thailand.[146] Similarly, according to the initiation notice for the anti-dumping proceeding involving imports of tartaric acid, China was considered to be an NME and accordingly, the Commission considered looking at prices in market economies such as Australia, Brazil, Chile and India.[147]

The EU Commission recently imposed definitive anti-dumping duties on imports of stainless steel and pipe buttwelding fittings from China and Taiwan[148] wherein the normal value was computed on the basis of the prices in a third market economy i.e. Taiwan. In this case, two Chinese producers under investigation and the China Chamber of Commerce of Metals, Minerals and Chemical Importers & Exporters (CCCMC) raised the issue that the EU Commission could not use the surrogate methodology to determine the normal value for the Chinese exporting producers since the right to use such methodology under the Protocol of Accession has expired on 11 December 2016. The EU Commission noted that it does not have any discretion on whether or not to apply the provisions of the EU Regulation.[149] In the case involving imposition of definitive anti-dumping duty on imports of certain hot-rolled flat products of iron, non-alloy or other alloy steel[150], China was treated as an NME and Chinese producers were required to fill in the market economy treatment questionnaire to show that they fulfill the market economy criteria set out in Article 2(7)(c) of the EU Anti-dumping Regulation.[151] The U.S. was chosen as the analogue country in this case and the normal

[146] European Commission, *Notice of initiation of an expiry review of the anti-dumping measures applicable to imports of lever arch mechanisms originating in the People's Republic of China*, 2017 O.J (C 290) 3, 5.
[147] European Commission, *Notice of initiation of an expiry review of the anti-dumping measures applicable to imports of tartaric acid originating in the People's Republic of China*, 2017 O.J (C 122) 8, 10.
[148] European Commission, *Commission implementing Regulation (EU) 2017/141 of 26 January 2017 imposing definitive anti-dumping duties on imports of certain stainless steel tube and pipe buttwelding fittings, whether or not finished, originating in the People's Republic of China and Taiwan*, 2017 O.J (L 22).
[149] *Ibid*., ¶ 109.
[150] European Commission, *Commission implementing Regulation (EU) 2017/649 of 5 April 2017 imposing a definitive anti-dumping duty on imports of certain hot-rolled flat products of iron, non-alloy or other alloy steel originating in the People's Republic of China*, 2017 O.J (L 92) 68 [hereinafter EC Hot-rolled Flat Products Decision]
[151] *Ibid*., ¶ 28. As per Art. 2(7)(b) of the EU Anti-dumping Regulation, the exporting producers have to demonstrate in particular that: (i) business decisions and costs are made in response to market conditions and without significant State interference; (ii) firms have one clear set of basic accounting records which

value was constructed on the basis of the costs prevalent in the U.S.[152] In the investigation involving imports of certain seamless pipes and tubes of iron (other than cast iron) or steel (other than stainless steel) of circular cross-section of an external diameter exceeding 406.4 mm originating in China[153], definitive anti-dumping duties were imposed using Mexico as an analogue country for the construction of the normal value.[154]

The continued treatment of China as an NME as the use of the surrogate methodology in anti-dumping investigations involving Chinese imports after December 2016 demonstrates that domestic anti-dumping agencies are unwilling to take a call on the market economy treatment of China on the basis of the expiry of Section 15 (a)(ii) of the Protocol of Accession. While the WTO is yet to decide on the issue, the EU is continuing to evolve new practices, which will allow it to keep Chinese dumping at bay. On October 5, 2017, the EU Parliament and the Council agreed to amend the EU Anti-Dumping Regulation following a proposal by the EU Commission in November 2016.[155] The new methodology seeks to abandon the NME classification of countries vis-à-vis WTO Members (including those Members like China which have been classified as an NME) but continue to apply it to non-WTO Members.[156] Under the new practice, domestic costs and prices would apply to all WTO Members, except in case of 'significant distortions'[157] in the market of the exporting country, in which case, EU

---

are independently audited in line with international accounting standards and are applied for all purposes; (iii) there are no significant distortions carried over from the former non-market economy system; (iv) bankruptcy and property laws guarantee legal certainty and stability and (v) exchange rate conversions are carried out at market rates.

[152]EC Hot-rolled Flat Products Decision, *supra* note 150, ¶ 28.

[153] European Commission, *Commission implementing Regulation (EU) 2017/804 of 11 May 2017 imposing a definitive anti-dumping duty on imports of certain seamless pipes and tubes of iron (other than cast iron) or steel (other than stainless steel), of circular cross-section, of an external diameter exceeding 406,4 mm, originating in the People's Republic of China* 2017 O.J (L 121) 3.

[154]*Ibid*., ¶ 36.

[155] European Parliament, *Regulation (EU) of the European Parliament and of the Council od 12 December 2017 amending Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European Union and Regulation (EU) 2016/1037 on protection against subsidized imports from countries not members of the European Union*, 2017 O.J (L338/1) 60 [hereinafter EU Regulation].

[156] Report on the on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European Union and Regulation (EU) 2016/1037 on protection against subsidised imports from countries not members of the European Union (COM (2016) 0721) (2016).

[157] The proposal sets out a non-exhaustive list of criteria, including i) the widespread presence of enterprises which the state owns or which operate under its control, policy supervision or guidance, ii) the presence of the state in companies allowing interference with respect to prices and costs, iii) public

anti-dumping authorities would be allowed to 'construct' values based on international prices or benchmarks or costs and prices in an 'appropriate representative country', with similar levels of economic development as the exporting country.[158] Under this new methodology, 'state interference' can occur when the market contains a large number of firms operating under the ownership, guidance or control of the authorities of the exporting country. It could also occur when the state authorities allow interference in the prices or costs when pursuing policy objectives or public policies, which discriminate in favour of domestic suppliers.[159] In order to determine instances where such 'significant distortions' exist, the EU Commission will consider several criteria such as state policies and influence, the widespread presence of state-owned enterprises, discrimination in favour of domestic companies and the lack of independence of the financial sector.[160] Further, taking into account the difficulty that the EU industry may face in gathering evidence of market distortions in the exporting country, the EU Commission intends to prepare reports detailing specific circumstances of market distortions in a particular country or sector. These reports would be publicly available and are intended for the use by EU industry when lodging a complaint or a request for review.[161] It is rather interesting to note that the first such report that the EU plans to release is on China.[162] The new EU methodology also allows the Commission to take into account the 'level of social and environmental protection', when choosing 'appropriate third countries' for comparison.[163] However, it is still unclear as to how such levels of social and environmental protection will be taken into account or whether the same finds a basis in WTO law.

On December 20, 2017, the EU Commission released its first report on the significant distortions in the economy of China. According to the EU, China was chosen as the first country to prepare a report because the investigations and measures against China account for the largest proportion of the EU's anti-dumping investigations and trade

policies or measures discriminating in favour of domestic companies, or otherwise influencing free market forces, and iv) the access to finance granted by institutions implementing public policy objectives.
[158] EU Regulation, *supra* note 155, art. 2(6a(a)).
[159] EU Regulation, *supra* note 155, art. 2(6a(b)).
[160] European Commission Press Release, Commission welcomes agreement on new anti-dumping methodology, IP/17/3668 (Oct. 3, 2017).
[161] EU Regulation, *supra* note 155, art. 2(6a(b)).
[162] Philip Blinkinsop, *EU to single out Chinese imports in report on market distortions*, REUTERS (Oct. 5, 2017), https://www.reuters.com/article/us-eu-china-trade/eu-to-single-out-chinese-imports-in-report-on-market-distortions-idUSKBN1CA1N2 (last visited Oct. 21, 2017).
[163] EU Regulation, *supra* note 155, art. 2(6a(a)).

defence measures.[164] The report on China contains a fact-based source of information to be used in anti-dumping investigations, and discusses the macro-economic details of the Chinese economy, the production factors used in the manufacturing process as well as certain sectors of the Chinese economy including steel and ceramics.[165] The report on China does not represent any political views, preferences or judgments and is purely descriptive on the basis of information provided by various ministries and official organisations in China.[166]

The EU report on China sets out that the Communist Party of China (CPC) and the state continue to have significant control over the macroeconomic factors in the Chinese economy and the state and the party wish to further strengthen state-ownership through an interventionist government policy using a broad array of tools, including guiding catalogues, investment screening, financial incentives etc., which leads to non-market based resource allocations.[167] The report highlights that the control of the CPC extends to individual enterprises, SOEs and at times, even privately owned enterprises, which means that business decisions are influenced by the various policy objectives pursued by the CPC.[168]

In respect of the planning system in China, the report sets out that even though the five-year plans maintain the stated objective of allowing the markets to determine a decisive role in resource allocation, the Chinese leadership relies on a planning mechanism that encourages allocation of resources towards sectors deemed to be strategic or emergent, regardless of whether or not it results in overcapacities.[169] In respect of SOEs, the report highlights the importance of SOEs in the Chinese economy. Further, Chinese authorities are said to have extensive supervision over the mergers and acquisitions of SOEs as well through nominating and dismissing the management of these SOEs.[170] The overall institutional setup and legal environment are also said to be conducive to

[164] European Commission Press Release, The EU's new trade defence rules and first country report, MEMO/17/5377 (Dec. 20, 2017) [hereinafter EU China Press Release].
[165] *Id.*
[166] EU China Press Release, *supra* note 164.
[167] European Commission, Commission Staff Working Document on Significant Distortions in the Economy of the People's Republic of China for the Purposes of Trade Defence Investigations (Dec. 20, 2017), http://trade.ec.europa.eu/doclib/docs/2017/december/tradoc_156474.pdf, at 20 [hereinafter EU China Report].
[168] *Ibid*., at 39.
[169] EU China Report, *supra* note 168, at 84.
[170] EU China Report, *supra* note 168, at 109.

business practices of SOEs including preferential access to land and energy, which distorts the effective allocation of resources.[171] In respect of the financial system, the report highlights a strong presence of state-owned banks and a widespread influence of the state which imposes a number of policy objectives on the financial system, thereby undermining the operation of market forces of demand and supply.[172] The report also highlights other macroeconomic issues such as the significant role of public procurement in the Chinese GDP (about 20%), and the lack of a competitive market rules have a distortive effect.[173] The report also sets out the extent of state involvement in regulating domestic and foreign extent through industrial policies, laws, regulations, and approval processes for investment.[174] The report also highlights the distortions caused by governmental influence over factors of production including state control over allocation of land, energy prices, regulation of the corporate credit system as well as supply of raw materials such as coal and water.[175]

The difference between the earlier practice and the new method is that it allows for the EU investigating agency to take into account international sources of undistorted prices and costs when constructing the normal value rather than solely rely on figures from a surrogate economy. Further, the proposal reverses the burden of proof and which is now on the complainant to demonstrate the existence of significant distortions. It must be noted, that the aforesaid proposed amendments are not tantamount to the EU granting market economy status to any economy classified as an NME. The proposal merely eliminates the need for classification of any economy as an NME since the proposal differentiates between WTO Members and non-Members rather than market economies and NMEs. Though China welcomed the proposal to the extent it abolished the NME list, it criticized the introduction of the market distortions clause, which it said amounts to prolonging the surrogate methodology under a new label.[176] Some commentators argue that this revised methodology "eerily resembles" the NME methodology.[177]

[171] EU China Report, *supra* note 168, at 109.
[172] EU China Report, *supra* note 168, at 150.
[173] EU China Report, *supra* note 168, at 168.
[174] EU China Report, *supra* note 168, at 200.
[175] EU China Report, *supra* note 168, at 310.
[176] *EU fails to quit "analogue country" practice on China as required by WTO*, CHINA DAILY (Dec. 13, 2016), http://www.chinadaily.com.cn/bizchina/2016-12/13/content_27656900.htm (last visited Aug. 11, 2017).
[177] Gatta, *supra* note 51, at 238.

3. China as an NME: Indian practice

Like the U.S. and the EU, Indian law also prescribes the use of the surrogate approach in cases of countries designated as NMEs.[178] India's treatment of China assumes special significance in light of antidumping final measures imposed by India against Chinese exporters—149 measures as of June, 2016.[179] The law governing antidumping investigations in India is the Customs Tariff Act, 1975 and the Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 (for short, "Indian Antidumping Rules"). The Indian Antidumping Rules provide for a country to be designated as an NME if the authority determines that such country does not operate on market principles or where prices are not reflective of their fair value on account of significant state intervention. In determining this, the authorities are required to consider aspects of whether factors of production operate on market signals without significant state interference, whether bankruptcy and property laws are applicable to firms and whether the exchange rate conversions are carried out at market rate.

Prior to 2002, India maintained a list of countries presumed to be NMEs for the purposes of antidumping investigations which was subsequently changed after an amendment in 2002. Pursuant to the 2002 amendment, the Indian Antidumping Rules provide that there exists a rebuttable presumption of an NME, if in the preceding three years, the competent authority of any WTO Member or the Indian anti-dumping agency has categorised a country as an NME.[180] The presumption can be rebutted by producers by showing that decisions of producers under investigations are motivated by market signals which demonstrate a lack of state interference and by additionally meeting the criteria set out more particularly in paragraph 7 (3), Annexure 1 of the Indian Antidumping Rules. In antidumping investigations, the NME presumption can be rebutted by the exporters in their responses to various questions listed in the market

[178] Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995, ¶ 7, annexure 1 [hereinafter Indian Antidumping Rules].
[179] World Trade Organization, Dumping Measures: Reporting Member v. Exporter (1/1/1995 – 30/6/2016), WTO Anti Dumping Gateway, https://www.wto.org/english/tratop_e/adp_e/AD_MeasuresRepMemVsExpCty.pdf.
[180] Indian Antidumping Rules, *supra* note 166, ¶ 8 (2), Annexure 1.

economy questionnaire. The market economy questionnaire generally elicits responses on aspects including ownership details, nature of contracts for inputs, utilities etc. In cases where information is unavailable, investigating authorities are compelled to resort to prices which are domestically available. [181]

In the event of an NME producer failing to rebut the presumption, the Indian Antidumping Rules permit the construction of normal value. Paragraph 7 of Annexure-1 of the Indian Antidumping Rules reads as follows:

> In case of imports from non-market economy countries, normal value shall be determined on the basis of the price or constructed value in the market economy third country, or the price from such a third country to other countries, including India or where it is not possible, or on any other reasonable basis, including the price actually paid or payable in India for the like product, duly adjusted if necessary, to include a reasonable profit margin.[182] (emphasis added)

In practice, the Directorate of Anti-Dumping & Allied Duties (DGAD) in India does not often determine normal value for an NME exporter on the basis of the surrogate methodology in the strict sense as cooperation from third country exporters would often be unavailing. This method is also more administratively difficult. In such situations, the DGAD constructs the normal value based on 'any reasonable basis'. In the anti-dumping investigation involving solar cells from Malaysia and China[183], the DGAD found that the Chinese companies under investigation did not operate under market economy conditions. The DGAD took into account that authorities in the US and EU also did not grant Chinese companies market economy treatment in recent cases

[181] *See* Director General of Anti Dumping and Allied Duties, *Final Findings- Sun Set Review of Anti-dumping duties imposed on imports of Saccharin originating in or exported from China PR* (Dec. 7, 2011), http://www.dgtr.gov.in/sites/default/files/adfin_ssr_saccharin_chinapr.pdf, ¶ 46.
[182] Indian Antidumping Rules, *supra* note 166, ¶ 7, Annexure 1.
[183] For example see, Directorate General of Antidumping and Allied Duties, *Final Finding, Antidumping investigation concerning imports of Solar Cells, whether or not assembled partially or fully in Modules or Panels or on glass or some other suitable substrates, originating in or exported from Malaysia, China PR, Chinese Taipei and USA* (May 22, 2001), http://commerce.nic.in/writereaddata/traderemedies/adfin_Solar_Cells_Malaysia_ChinaPR_Chinese_Taipei_USA.pdf, ¶ 47; Directorate General of Antidumping and Allied Duties *Final Findings, Sunset Review Anti-dumping investigation concerning imports of 'Peroxosulphates' originating in or exported from China PR and Japan* (March 12, 2013), http://www.dgtr.gov.in/sites/default/files/adfin_ssr_peroxosulphates_chinapr_japan.pdf, ¶ 19.

involving solar cells.[184] Consequently, the DGAD had to resort to Paragraph-7 of the Annexure-1 to the Indian Anti-dumping Rules for calculation of normal value. In this case, the DGAD noted that the surrogate method cannot be employed since the DGAD did not have the complete and exhaustive data on third country export sales nor the domestic prices in a third market economy. Therefore, the DGAD proceeded to construct the normal value on 'any other reasonable basis' i.e. on the basis of the constructed costs of production of the most efficient domestic industry, duly adjusted to include selling, general and administrative costs/expenses and reasonable profits. The DGAD's construction of normal value on 'any other reasonable basis' also includes reliance on international prices of raw materials and inputs.[185] The DGAD takes into account the prices of the inputs, conversion cost, cost of utilities and selling, general and administrative expenses based on the 'best information available'. [186]

It is possible to argue that the use of international prices could well come within the ambit of the surrogate methodology since the constructed cost is not based on the 'cost of production of the said article in the country of origin'.[187] However, cost adjustments are made to ensure that the constructed cost reflects the costs in the exporting country. This approach provides the DGAD the flexibility to use Chinese costs and prices if some of the inputs or utilities in China are valued at market determined prices or to use international prices or costs, which are duly adjusted to arrive at the cost in the exporting/investigated country.[188]

In several cases post December 2016, the DGAD has touched upon the effect of the expiry of Section 15 (a)(ii) of the Protocol of Accession. Chinese exporters under

[184] The EU and US authorities took into account factors such as the distortions created by an income tax system that favours certain companies and that the financial statements of certain Chinese companies did not adhere to international accounting standards.
[185] Directorate General of Antidumping and Allied Duties, *Anti-Dumping Investigations concerning imports of Diethyl Thio Phosphoryl Chloride originating in or exported from China PR* (May 6, 2010), http://www.dgtr.gov.in/sites/default/files/adfin_Diethyl_Thio_Phosphoryl_Chloride_ChinaPR.pdf, ¶ 68; Directorate General of Antidumping and Allied Duties, *Anti-dumping investigation concerning imports of "Albendazole" originating in on exported from China PR*, http://www.dgtr.gov.in/sites/default/files/adifin_Albendazole_ChinaPR.pdf, ¶ 29.
[186] Directorate General of Antidumping and Allied Duties, *Sunset Review of Anti-Dumping duty on mports of 'Melamine' originating in or exported from China PR* (December 5, 2015), http://www.dgtr.gov.in/sites/default/files/adfin_SSR_2_melamine_chinaPR.pdf , ¶ 31.
[187] *See* EU-Biodiesel (AB Report), *supra* note 22.
[188] *India is 'non-committal' about market economy tag for China*, THE HINDU (Dec. 2, 2016), http://www.thehindu.com/business/India-is-%E2%80%98non-committal%E2%80%99-about-market-economy-tag-for-China/article16667486.ece (last visited Aug. 11, 2017).

investigation have argued that while determining the normal value, the DGAD must consider domestic selling prices and costs since China has transitioned to a market economy in December 2016 as per its Protocol of Accession.[189] On the other hand, the domestic industry in anti-dumping investigations has argued that China continues to remain a non-market economy and none of the exporters under investigation satisfy the conditions laid down in domestic law to qualify for market economy treatment.[190]

The DGAD has noted in several cases that since "the factum of dumping causing injury to the domestic industry is established based on the conditions prevalent during the period of investigation (POI), only the conditions applicable during the POI is relevant for the purposes of the investigation". As a matter of fact, the POI was prior to December 2016. As per the DGAD, since Section 15 (a)(ii) of the Protocol of Accession was in existence during such period of investigation, the DGAD could use a methodology, which is not based on strict comparison with Chinese costs and prices, unless Chinese producers and exporters demonstrate that they operate under market economy conditions.[191]

---

[189] Directorate General of Antidumping and Allied Duties, *Anti-dumping investigation concerning imports of "Wire Rod of Alloy or Non-Alloy Steel" originating in or exported from China PR* (August 30, 2017), http://www.dgtr.gov.in/sites/default/files/FF%20WR-NCV.pdf, ¶ 35.

[190] Directorate General of Antidumping and Allied Duties, *Anti-dumping investigation concerning imports of Castings for Wind Operated Electricity Generators, whether or not machined, in raw, finished or subassembled form…from China PR* (July 28, 2017), http://www.dgtr.gov.in/sites/default/files/casting.pdf ¶ 54.

[191] Directorate General of Antidumping and Allied Duties, *Anti-dumping investigation concerning imports of "Color coated / prepainted flat products of alloy or non-alloy steel" originating in or exported from China PR and European Union-reg* (August 30, 2017), http://www.dgtr.gov.in/sites/default/files/FF%20CC-%20NCV.pdf, ¶ 30, Directorate General of Antidumping and Allied Duties, *Anti-dumping Investigation concerning imports of 'Toulene Di-Isocyanate (TDI)' originating in or exported from China PR, Japan or Korea RP* (March 28, 2017), ¶ 29, Directorate General of Antidumping and Allied Duties, *Sunset Review investigation of Anti-dumping duty imposed on the imports of Certain Rubber Chemicals, namely, TDQ & PX-13 originating in or exported from the European Union and MOR and MBTS originating in or exported from the Peoples Republic of China* (September 2, 2017) http://www.dgtr.gov.in/sites/default/files/RC.NCVdona.final-english.pdf, ¶ 42; Directorate General of Antidumping and Allied Duties, *Anti-dumping investigation concerning imports of "Wire Rod of Alloy or Non-Alloy Steel" originating in or exported from China PR* (August 30, 2017), http://www.dgtr.gov.in/sites/default/files/FF%20WR-NCV.pdf, ¶ 38; Directorate General of Antidumping and Allied Duties, *Sunset Review of Anti-dumping duty imposed on the imports of Sodium Nitrite originating in or exported from China PR* (July 19, 2017), http://www.dgtr.gov.in/sites/default/files/SNI-NCV.FFV1_.pdf, ¶ 27; Directorate General of Antidumping and Allied Duties, *Final Findings in the Sunset Review of Anti-dumping duty imposed on the imports of Pentaerythritol originating in or exported from China PR* (May 12, 2017), http://www.dgtr.gov.in/sites/default/files/penta%20FF.V1_0.pdf, ¶ 24; Directorate General of Antidumping and Allied Duties, *Sunset Review (SSR) Anti-dumping investigation concerning imports of '1– Phenyl-3-Methyl-5-Pyrazolone' originating in or exported from China PR* (August 9, 2017), http://www.dgtr.gov.in/sites/default/files/Final%20Finding%20-NCV%20Ver.%20Final.pdf, ¶ 21, Directorate General of Antidumping and Allied Duties, *Anti-dumping investigation concerning imports*

The practice established by the DGAD would also allow Chinese exporters and producers under investigation, to claim market economy status in those cases where the POI includes a period post December 2016.[192] This approach is slightly different from the practice followed by jurisdictions such as the United States.

4. *China as a Market Economy: Australian practice and the 'particular market situation'*

While the debate on the expiry of the NME methodology continues to divide scholars and trade specialists, WTO Members continue to develop possible alternatives to the use of domestic costs and prices in anti-dumping proceedings. An example of this is demonstrated in the practice of Australia, which has relied on the 'particular market situation' method to disregard Chinese costs and prices in antidumping proceedings.

As per Article 2.2 of the Anti-dumping Agreement, domestic prices of products may be disregarded in cases where there are no domestic sales of the product in the ordinary course of trade, the volume of domestic sales is low or there is a 'particular market situation'. In such cases, normal value is determined by reference to the export price of the 'like' product to a third country or by constructing the normal value on the basis of the cost of production in the country of origin plus a reasonable amount of selling, administrative and general expenses.[193] Thus, in cases of PMS, domestic prices can be replaced with a constructed normal value.

While the US and EU have incorporated the concept of PMS in their domestic legislations, it has not found much use considering that these Members were able to employ the NME methodology against Chinese exports.[194] However, the US has recently employed the PMS method against imports of oil country tubular goods (OCTG) from Korea, which resulted in an increased anti-dumping duty on OCTG from

---

of Castings for Wind Operated Electricity Generators, whether or not machined, in raw, finished or subassembled form…from China PR (July 28, 2017), http://www.dgtr.gov.in/sites/default/files/casting.pdf ¶ 56.

[192] Directorate General of Antidumping and Allied Duties, *Anti-Dumping investigation concerning imports of "Belting Fabric" originating in or exported from People's Republic of China* (August 23, 2017), http://www.dgtr.gov.in/sites/default/files/Belting%20Febric%20Initiation.pdf.

[193] Anti-dumping Agreement, *supra* note 3, art. 2.2.

[194] Weihuan Zhou and Andrew Percival, *Debunking the Myth of 'Particular Market Situation' in WTO Antidumping Law*, 19 (4) JOURNAL OF INTERNATIONAL ECONOMIC LAW 863,865 (2016).

Korea.[195] However, the use of the PMS method has come under scrutiny – Indonesia recently requested consultations with Australia over the anti-dumping measures imposed by the Australian Anti-Dumping Commission (Australian Commission) on A4 copy paper imported from Indonesia.[196] In this case, the Australian Commission found a PMS in the domestic paper market in Indonesia because the Government implements policies that increase the supply of timber, which lowers the price of timber and therefore the price of paper.[197]

Consequently, the Australian Commission used a constructed value method to determine the normal value. Indonesia alleges that Australia has acted inconsistently with Article 2.2 of the Anti-dumping Agreement as: (i) no PMS existed within the meaning of the term; and (ii) even if a PMS existed, both domestic and export prices would have been affected and a proper comparison could have been made without resorting to the constructed value method.[198] The case, if not resolved at the consultation stage, could offer the WTO DSU an opportunity to specify and detail the meaning of PMS.

a. Particular Market Situation – Meaning

The use of the PMS in anti-dumping proceedings raises certain red flags since neither the GATT nor the Anti-dumping Agreement offer any clarity on the meaning of the term. Article VI of the GATT (which serves as the starting point to the Anti-dumping Agreement) does not mention the term 'particular market situation'.[199] Further, the inclusion of the Second *Ad Note* also does not provide much clarity to the issue of PMS. The Second *Ad Note* was intended to deal with former communist states such as Poland, Romania and Hungary, where state control was widespread through the economy. As

[195] *See* Korea OCTG Decision, *supra* note 135.
[196] Request for Consultations by Indonesia, *Australia – Anti-Dumping Measures on A4 Copy Paper*, WT/DS529/1 (September 5, 2017).
[197] Anti-Dumping Commission, *Alleged Dumping of A4 Copy Paper Exported from the Federative Republic of Brazil, the People's Republic of China, the Republic of Indonesia and the Kingdom of Thailand* (March 17, 2017), http://adcommission.gov.au/cases/EPR%20301%20%20350/EPR%20341/221%20-%20Report%20-%20Final%20Report%20-%20REP%20341.pdf, at 30.
[198] Request for Consultations by Indonesia, *Australia – Anti-Dumping Measures on A4 Copy Paper*, WT/DS529/1 (September 5, 2017).
[199] The term 'particular market situation' was not discussed during the negotiations of the GATT. *See* TERENCE STEWART, THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986-1992)(VOLUME II)(Kluwer Law Publishers, 1993).

noted by the EEC during the Tokyo Round, the Second *Ad Note* 'had nothing to do with the special situation for certain enterprises in other types of economies'.[200] The discussions around the Second *Ad Note* indicate that it intends to cover only particular type of market situations where there is complete or substantial state monopoly, and may not find much relevance in the interpretation of PMS.

The insertion of PMS in the Anti-Dumping Agreement was undertaken during the course of the Kennedy Round. While the negotiations did not involve a discussion on PMS, it found a mention in the draft Anti-Dumping Code, which was circulated pursuant to the negotiations.[201] While the reasons for the inclusion of PMS in the draft Anti-Dumping code are unclear, it has been argued that the parties intended to have the term cover all other circumstances (other than ordinary course of trade) which affects price comparability between domestic and export prices.[202] There was no discussion on PMS during the course of the Tokyo Round but the term was agreed by parties to be different than 'sales at a loss'.[203] Similar to previous negotiations, the Uruguay Round also did not involve discussions on PMS, though the term 'low volume of sales' was inserted in Article 2.2 as another case wherein the constructed value method could be employed.[204] As per Zhou and Percival, the negotiating history of PMS indicates that Parties intended it to cover all situations (other than those referred in the Anti-Dumping Agreement *i.e.* ordinary course of trade and low volume of sales), which affect price comparability.[205]

In terms of jurisprudence, the only case to have touched upon the meaning of PMS is *EEC-Cotton Yarn*.[206] The case concerned an anti-dumping action by the European Economic Committee (EEC) on cotton yarn imported from Brazil. The EEC had relied on the domestic prices of cotton yarn in Brazil in the computation of normal value. As

[200] *See* Committee on Anti-Dumping Practices, Minutes of the Meeting held on 4-6 October 1976 (COM.AD/41), March 11, 1976, 11-12.
[201] *See* Sub-Committee on Non-Tariff Barriers, Report of the Group on Anti-Dumping Policies (TN.64/NTB/W/16), March 3, 1967.
[202] Zhou and Percival, *supra* note 194, at 874.
[203] *See* Committee on Anti-Dumping Practices, List of Priority Issues in the Anti-Dumping Field (COM.AD/W/79), May 31, 1978.
[204] Zhou and Percival, *supra* note 194, at 876.
[205] Zhou and Percival, *supra* note 194, at 890.
[206] GATT Panel Report, *European Economic Community – Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil*, ADP/137, adopted 30 October 1995, BISD 42S, at 17 [hereinafter EC-Cotton Yarn].

per the Brazil, by determining the normal value based on the domestic sales price of cotton yarn in Brazil, EEC had acted inconsistently with the Anti-dumping Agreement. In early 1989, the Brazilian Government, on account of the high inflation, froze the exchange rate of the Brazilian Cruzado (the currency of Brazil between 1986 to 1989) at one Cz$ to one USD. Inspite of the measure, the domestic prices continued to rise while export earnings converted into Cruzados remained stable. A normal value, based on domestic prices, therefore lead to a higher dumping margin. As per the Brazil, the situation in Brazil constituted a 'particular market situation' within the meaning of Article 2.2 of the Anti-dumping Agreement, as a result of which establishment of normal value based on domestic prices would not permit a 'proper comparison' with export prices.[207] The GATT Panel held that the test for resorting to a constructed normal value of third country sales, under Article 2.2, was not whether a PMS existed *per se*. Rather, as per the Panel, a situation of PMS was relevant 'insofar as it had the effect of rendering the sales themselves unfit to permit a proper comparison'.[208] The EEC argued that the situation described by Brazil does not constitute PMS since it had no impact on domestic sales.[209] Rejecting Brazil's claim, the Panel held that Brazil did not demonstrate that the freezing of the exchange rate affected the price of the raw materials of cotton yarn and therefore distorted the domestic price of cotton yarn.[210] Thus, as per the Panel in *EEC-Cotton Yarn*, for a situation of PMS, it must be demonstrated that the situation had an impact on the nature of the domestic sales rendering them unfit for proper comparison.

While the *EEC- Cotton Yarn* case does require a situation to result in the distortion of prices for it to constitute a PMS, it does not provide a definition of PMS. The lack of definition and clarity on the term PMS allows it to be an easy tool for misuse. In several cases (discussed below), the Australian investigating authorities have found a case of PMS based on the level of involvement of the Government of the exporting country. As discussed below, PMS has been found to be in cases where regulatory policies of the Government mandate financial assistance to particular industries, import and export tariffs and quotas, which have an impact on the domestic sales volume etc. The mere

[207] *Ibid*., ¶ 79.
[208]EEC-Cotton Yarn, *supra* note 206, ¶ 478.
[209]EEC-Cotton Yarn, *supra* note 206, ¶ 472.
[210]EEC-Cotton Yarn, *supra* note 206, ¶ 478.

existence of such Governmental measures, however, it has been argued, do not impose a PMS.[211] As per Zhou and Percival, a case of PMS is not limited to an alleged market distortion on account of governmental intervention but rather must cause distortions in the price of the final product.

b. Australian Law and the use of the 'Particular Market Situation'

As a precondition for negotiation of the China-Australia Free Trade Agreement, Australia recognized China as a full market economy in 2005 and committed to not seek recourse to Section 15 of the Protocol of Accession.[212] However, the Anti-Dumping Commission frequently treats China as having a 'particular market situation' in AD proceedings.[213]

The Customs Act, 1901 (Customs Act) requires that the normal value be calculated as per the selling price of the product in the domestic country.[214] However, the Minister of Customs is allowed to divert from the aforesaid rule in cases where the '*situation in the market* of the country of export is such that sales in the market are *not suitable* for use in determining [normal value]…'[215] Thus, in such cases, the Minister is empowered to use other methods to determine normal value, including the constructed value method. The phrase 'situation in the market' is not defined in the Customs Act nor does the Customs Act provide any criteria to determine suitability of sales in determining normal value. In determining whether a 'market situation' exists, the Antidumping Commission will seek to determine if the impact of the government's involvement in the domestic market has led to materially distorted conditions of competition.[216] In practice, the authorities have relied on evidence such as China's macroeconomic

[211] Zhou and Percival, *supra* note 194, at 871.
[212] *Memorandum of Understanding between the Department of Foreign Affairs and the Trade of Australia and the Ministry of Commerce of the People's Republic of China on the Recognition of China's Full Market Economy Status and the Commencement of Negotiation of a Free Trade Agreement between Australia and the People's Republic of China* (Apr. 18, 2005), https://dfat.gov.au/trade/agreements/chafta/Documents/mou_aust-china_fta.pdf.
[213] Stephanie Noel and Weihuan Zhou, *Replacing the Non-Market Economy Methodology: Is the European Union's Alternative Approach Justified under the World Trade Organization Antidumping Agreement?* 11 GLOBAL TRADE AND CUSTOMS JOURNAL, 559, 560 (2016).
[214] *Customs Act, 1901*, s. 269TAC (1) (Austl.)
[215] *Ibid*., s. 269TAC(2)(a)(ii).
[216] Anti-Dumping Commission, *Dumping and Subsidy Manual* 35 (Nov. 2015), http://www.adcommission.gov.au/accessadsystem/Documents/Dumping%20and%20Subsidy%20Manual%20-%20April%202017.pdf.

policies promoting industrial development, financial assistance to domestic industries and measures such as tariffs and quotas.[217] In the anti-dumping case involving 'certain hollow structural sections' (HSS), the Australian Customs and Border Protection Service ('Customs Service') imposed anti-dumping duties on imports of hollowed structural sections from China, Korea, Malaysia and Taiwan. In this case, the normal value for the goods exported from China was calculated by reference to an external benchmark on the grounds that a case of PMS has made the domestic prices of HSS in China unreliable. A case for PMS was found on account of several Governmental macro-economic policies such as National Steel Policy, National and Regional 5-Year Plans and the Blueprint for Steel Industry Adjustment and Revitalisation. The Customs Service noted that the macroeconomic measures imposed by the Chinese Government increased the supply of the inputs for HSS, which suppressed the domestic price of HSS. However, the review authority i.e. the Trade Measures Review Officer (TMRO) held that a 'market situation' that renders domestic sales unsuitable for determining normal value does not arise if the government merely exercised ordinary functions by imposing regulatory controls on the market which may affects their costs and therefore the price of the products.[218] As per the TMRO, PMS exists only with the suitability of domestic sales for the purposes of assessing normal value, so as to allow proper comparison with export price.[219] Referring to domestic case law, the TMRO held that for a 'market situation' there must be 'a degree of distortion in the market that renders arms length transactions in the ordinary course of trade unsuitable to give a true normal value, but that this unsuitability will not necessarily be brought about by any factor that simply depresses or inflates domestic prices'.[220]

The sufficiency and availability of evidence regarding government intervention and its impact on prices is crucial for a finding of PMS.[221] In the case involving Aluminum Road Wheels (ARW), the concerned measures involved certain tax policies, which imposed higher export tax on the inputs of aluminum while imposing low or no export

[217] Noel and Zhou, *supra* note 213, at 561.
[218] Trade Measures Review Officer, *Decision of the Trade Measures Review Officer – Hollow Structural Sections* (Dec. 14, 2012), http://www.adcommission.gov.au/cases/Documents/TMRO-HollowStructuralSections-Decision14Dec12.pdf [hereinafter HSS Decision].
[219] *Ibid*., ¶110.
[220] HSS Decision, *supra* note 218, ¶58.
[221] Weihuan Zhou, *Australia's Anti-Dumping and Countervailing Law and Practice: An Analysis of Current Issues Incompatible with Free Trade with China* 49(6) JOURNAL OF WORLD TRADE, 980, 988 (2015).

tax on aluminum.[222] As per the TMRO, the cumulative effect of such policies was to encourage the domestic manufacture of aluminum and the implementation of such policies increased the supply of aluminum in China. Consequently, this reduced the domestic price of aluminum in China, which lowered the domestic ARW prices.[223] As opposed to the HSS investigation, the TMRO found positive evidence of PMS on the following grounds: (i) the tariff and tax policies had a more direct impact on the goods under consideration since it impacted aluminum which is a direct input in ARW; and (ii) the policies in the HSS case also had a rationale of environmental and labour protection, which was lacking in the measures under consideration in the ARW case.[224]

It must be noted that the Australian authorities had no direct evidence of the precise extent to which the policies of the Chinese Government impacted the domestic price of aluminum. The determination was made on the basis of a comparison between the domestic price of aluminum against a competitive market benchmark *i.e.*, the price of aluminum on the London Metal Exchange (LME). As set out by the TMRO, the analysis by the Customs Service did not isolate the extent to which tariffs contributed to the lower prices since it would be extremely difficult to do so.[225] However, the only alternative suggested for the low price of aluminum prevailing in China was the competitiveness of the Chinese aluminum industry. As per the TMRO, this was not a material factor in the low price of aluminum in China since the domestic price of aluminum was markedly different from the international benchmark *i.e*. the LME price and there was also no increase in aluminum exports - which would have occurred had there been greater competition in the domestic market in China.[226]

A perusal of Australian cases on the issue highlights three major issues in respect of PMS determination by the Australian authorities. *Firstly*, it has been argued that the determination of PMS by Australian authorities does not include an analysis on whether government intervention in raw materials has actually passed through and caused

[222] Trade Measures Review Officer, *Decision of the Trade Measures Review Officer – Aluminium Road Wheels* (Dec., 2012), http://www.adcommission.gov.au/cases/Documents/TMROReportDecember2012.pdf [hereinafter ARW Decision].
[223] *Ibid*., ¶ 95-96.
[224] ARW Decision, *supra* note 222, ¶ 100.
[225] ARW Decision, *supra* note 222, ¶ 98.
[226] ARW Decision, *supra* note 222, ¶ 99.

distortions in the prices of the final goods.[227] It cannot be assumed, like in the ARW investigation, that because the price of aluminum (the raw material in the manufacture of ARW) is lower than competitive market prices, the price of the final product (ARW, in this case) is also artificially low.[228] A finding of distortions in input prices 'passing through' to the final product is supported by WTO jurisprudence[229], and in the absence of such an affirmative finding, a PMS cannot be assumed to exist.[230]*Secondly,* in several cases, the Australian authorities have relied on external benchmarks to replace the costs of raw materials actually incurred by Chinese exporters, in constructing the normal value.[231] In the ARW investigation, the domestic price of aluminum was substituted with the price of aluminum on the LME. In the investigation on galvanized steel, the normal value was calculated based on the prices of hot rolled coil (an input in the case) in Korea and Taiwan.[232] The use of external benchmarks is inconsistent with the ruling of the Appellate Body in *EU-Biodiesel* and Article 2.2.1.1.[233] While the decision in *EU – Biodiesel* does not preclude the use of surrogate country prices, such prices may have to be adapted to arrive at the cost of production in the country of origin.[234] But pursuant to the ruling in *EU-Biodiesel,* Australian anti-dumping authorities will find it difficult to disregard Chinese costs and prices, if they have been recorded accurately.[235]

In the constructed value method, it has been argued that Australian authorities find that the prices of inputs are distorted due to State influence. This leads the authorities to replace domestic Chinese costs with benchmark prices such as raw material costs in a third country.[236] It has been argued that this approach leads to an inflation in import

[227] Noel and Zhou, *supra* note 213, at 579.
[228] Zhou, *supra* note 221, at 988.
[229] In Appellate Body Report, *United States — Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada* ¶ 140,WT/DS397/AB/R (adopted July 28, 2011), the Appellate Body held, "where the producer of the input is not the same entity as the producer of the processed product, it cannot be presumed…that the subsidy bestowed on the input passes through to the processed product. In such case, it is necessary to analyse to what extent subsidies on inputs may be included in the determination of the total amount of subsidies bestowed upon the processed products…"
[230] Zhou, *supra* note 221, at 988.
[231] Zhou, *supra* note 221, at 990.
[232] *Dumping of Zinc Coated (Galvanised) Steel and Aluminum Zinc Coated Steel Exported from the People's Republic of China, the Republic of Korea, Taiwan*, Australian Customs and Border Protection Service, Report to the Minister No. 190 (Apr. 30, 2013), at 60-63.
[233] Zhou, *supra* note 221, at 990.
[234] EU-Biodiesel (Appellate Report), *supra* note 22, ¶ 6.76 and 6.76.
[235] Weihuan Zhou and Andrew Percival, *Panel Report on EU- Biodiesel: A Glass Half Full? Implication for thee Rising Issue of 'Particular Market Situation'* 2 (2) CHINESE JOURNAL OF GLOBAL GOVERNANCE 142, 161 (2016).
[236]Noel and Zhou, *supra* note 213, at 561.

costs, which consequently inflates the constructed normal value, the dumping margin and ultimately the anti-dumping duties.[237] Further, it has also been argued that the practice of the Australian authorities in determining a 'particular market situation' is not based on positive evidence of government interference in inputs *actually* impacting the final price.[238] While China has opposed the Australian practice of determining a 'particular market situation', Australia continues to engage in the determination of a 'particular market situation' while recognizing China as a full market economy.[239]

5. China as a Market Economy: The practice of Brazil

On the occasion of the visit of Chinese President Hu Jintao in November 2004, Brazil recognized China as a market economy. This was undertaken pursuant to the *Memorandum of Understanding on Trade and Investment Cooperation Between the People's Republic of China and the Federative Republic of Brazil* signed on November 12, 2004 ('Memorandum').[240] However, Brazil never declared China to be a market economy in its domestic law, with some attributing this to low Chinese investment in Brazil as well as China's broken promise to support Brazil for a permanent seat in the United Nations Security Council.[241] Further, Chinese exporters continue to receive and provide responses to questionnaires on their market economy status, indicating that there is no difference in treatment of Chinese products by Brazilian authorities even after granting market economy status.[242]

Under Decree 8.058/2013[243] – the legislation governing the anti-dumping regime in Brazil (Brazilian Antidumping Decree), the Chamber of Foreign Trade is tasked with

[237]Zhou, *supra* note 221, at 991.
[238]Zhou, *supra* note 221, at 985; Noel and Zhou, *supra* note 213, at 561.
[239]Zhou and Percival, *supra* note 194, at 887.
[240] Embassy of People's Republic of China in Ireland, Brazil Recognizes China's Market Economy Status in the Memo (2004), http://ie.china-embassy.org/eng/jbwzlm/NewsPress/t170382.htm.
[241]International Bar Association, *supra* note 9, at 26.
[242] International Trade Association, Business Guide to Trade Remedies in Brazil (2008), http://legacy.intracen.org/publications/Free-publications/Trade_Remedies_Brazil.pdf, at 108.
[243]Committee on Anti-Dumping Practices, Notification Of Laws And Regulations under Article 18.5 Of The Agreement by Brazil, WTO Doc. G/ADP/N/1/BRA/3 (Sept. 20, 2013), http://enforcement.trade.gov/trcs/downloads/documents/brazil/GADPN1BRA3.pdf [hereinafter Brazilian Anti-dumping Decree].

providing market economy status to a county for the purpose of trade defense.[244] Unlike the US or India, Brazil does not have a defined criteria for designating a country as an NME. As per Section 15 of the Brazilian Antidumping Decree, the normal value is determined on the basis of: (i) the sale price of the like product in a third country; (ii) the constructed value of the like product in a third country; (iii) the export price of the like product from a third country to other countries, except Brazil; and (iv) where none of the aforesaid methods are feasible, any other reasonably determined price including the price to be paid for the like product in the Brazilian domestic market, properly adjusted, to include a reasonable profit margin. In choosing a surrogate country, Brazilian authorities are required to take into account reliable information submitted by the producer and exporter under investigation including the volume of exports of the like products from the third country to Brazil and to other main markets across the world, the volume of sales in such third market economy, similarity of the product under investigation and the product sold in the domestic market or exported by the third country, availability of statistical information and degree of appropriateness of the information submitted in respect of the ongoing investigation.[245]

However, producers or exporters from NMEs such as China are permitted to submit evidence of the existence of market economy conditions within a period of 70 days from the date of initiation.[246] The evidence submitted by the exporter or producer must demonstrate that the prices, costs and inputs of raw materials, technology, labour etc., are based on market conditions, that such producer or exporter maintains a transparent internal accounting system which is based on international accounting principles, the costs incurred by such producer or exporter are not subject to significant distortions stemming from current or past ties to the government and the producer or exporter is subject to bankruptcy or property laws.[247] It must further be noted under Brazilian law the interested parties are notified of the appropriate third country to be utilized at the stage of initiation itself, and if the producer/exporter disagree with the selection of such country, the producer/exporter may recommend an alternative third country.[248]

[244]*Ibid*, art. 4.
[245]Brazilian Antidumping Decree, *supra* note 243, art. 15(1).
[246]Brazilian Antidumping Decree, *supra* note 243, art.16.
[247]Brazilian Antidumping Decree, *supra* note 243, art. 17(1).
[248]Brazilian Antidumping Decree, *supra* note 243, art. 15(3).

Inspite of recognizing China as a market economy pursuant to the Memorandum, Brazilian authorities continue to treat China as an NME. In the case of *Technical Porcelain originating in the People's Republic of China*[249], the Council of Ministers of the Foreign Trade Chamber (CAMEX) held that China, for the purposes of trade defense, is not considered a predominantly market economy.[250] It was noted that with respect to anti-dumping investigations in Brazil, a country can be designated only as a market economy pursuant to a notification by CAMEX. Since the Memorandum was not self-administered and CAMEX had not issued any notification on the matter, China could continue to be treated as an NME.[251] CAMEX noted that under Brazilian law, the producers/exporters under investigation are entitled to present elements of proof of operating under market economy conditions.[252] In this case, however, it was concluded that the Chinese exporters and producers under investigation did provide sufficient evidence to support their claim that the Chinese technical porcelain tile industry operated under market conditions. Consequently, CAMEX determined the normal value on the basis of the export price of a like product from a market economy to other countries. In this case, the normal value was calculated on the basis of the export price of tiles from Turkey to Russia.[253]

---

[249]Ministry of Industry, Foreign Trade and Services, *Resolution No.122 of December 18, 2014: Applies a trade defense measure, for a period of up to five (5) years, to Brazilian imports of technical porcelain, originating in the People's Republic of China* (December 18, 2014), http://www.camex.gov.br/component/content/article/62-resolucoes-da-camex/em-vigor/1446-resolucao-n-122-de-18-de-dezembro-de-2014 [hereinafter Technical Porcelain Decision].

[250] *Ibid*., ¶ 4.1.1.

[251]Technical Porcelain Decision, *supra* note 249, ¶ 4.1.5.

[252]Technical Porcelain Decision, *supra* note 249, ¶ 3.1.2; *See* Secretariat of Foreign Trade, Circular No. 59, dated 28 November 2001 (Nov., 2001) http://www.sice.oas.org/antidumping/legislation/brasil/SCX59_e.asp. [hereinafter SECEX Circular] In the investigation, the producer/exporter under investigation and the respective government will be entitled to present elements of proof with the aim of requesting a reassessment of this qualification, involve information, inter alia, on exchange rates, interests, wages, prices, equity control, stock exchange, investment, price formation of relevant inputs and others that are considered adequate by the party or by SECEX. Article 3.3 of the SECEX Circular states, 'for the assessment of the existence of market economy conditions, the following elements, "inter alia", will be observed: (a) the degree of government control over the companies or over the means of production; (b) the level of state control over the allocation of resources, over prices and over the production decisions by companies; (c) the legislation to be applied in terms of ownership, investment, taxation and bankruptcy; (d) the degree of freedom in the determination of wages in negotiations between employers and employees; (e) the level at which distortions inherited from the centralized economy system persist in relation to, inter alia, assets amortization, other assets deductions, direct swap of assets and payments in the form of debt compensation; and (f) the level of state interference on currency exchange operations.

[253]Turkey was chosen as a third market economy since the analysis of exports from Turkey showed that the country is proven to be globally representative in technical porcelain exports. In addition, in comparison with the other alternatives proposed, this country presents consumer market and socioeconomic conditions more similar to those existing in China. Russia was chosen as the country of destination since Russia represents the seventh largest importer of technical porcelain in the world in the period of investigation, which is closer to the volumes imported by Brazil.

The NME treatment of Chinese products by Brazilian authorities continues to be in operation even after December 2016. In the recent anti-dumping investigation involving *Thermal Bottles originating in China*[254], China was not considered a market economy and the applicants suggested the use of prices in a third market economy – Germany in this case. However, considering the difficulties in obtaining the domestic prices of domestic flasks in Germany, CAMEX decided on the use of export price of the like product from Germany to USA.[255] While the Brazilian authorities have predominantly based the normal value on the basis of export price of the like product from a third market economy to other countries[256], the surrogate method has also been used to compute the normal value in anti-dumping investigations involving China.

Similarly, in the anti-dumping investigation involving *Brazilian imports of tempered and rolled automative glass originating in China*[257], China was considered an NME and the initiation document provided to use Mexico as a third country market economy to calculate the normal value of Chinese products under investigation since it was one of the traditional markets for automative glass and the reply of the Mexican producer to the third market country was found sufficient to establish similarity between the Chinese and Mexican products. Several Chinese producers/exporters under investigation opposed the selection of Mexico as a third country market economy in this case and suggested India or South Korea as alternatives. However, CAMEX adopted Mexico as the analogue country for the purpose of calculating normal value

[254] Ministry of Industry, Foreign Trade and Services, *Resolution No. 46 of July 5, 2017: Extending a definitive anti-dumping duty for a period of up to five (5) years, applied to Brazilian imports of thermal bottles originating in the People's Republic of China* (July 5, 2017), http://www.camex.gov.br/component/content/article/62-resolucoes-da-camex/em-vigor/1878-(resolucao-n-46-de-5-de-julho-de-2017.

[255] *Ibid*., ¶ 5.

[256] Ministry of Industry, Foreign Trade and Services, *Resolution No. 07 of February 16, 2017: Extending a definitive anti-dumping duty for a period upto 5 (five) years in respect of Brazilian imports of viscose fabrics originating in the People's Republic of China* (February 16, 2017), http://www.camex.gov.br/component/content/article/62-resolucoes-da-camex/em-vigor/1787-resolucao-n-07-de-16-de-fevereiro-de-2017.

[257] Ministry of Industry, Foreign Trade and Services, *Resolution No. 5 of February 16, 2017: Imposes definitive anti-dumping duty for a period of up to five (5) years on Brazilian imports of tempered and rolled automotive glass originating in the People's Republic of China* (February 16, 2017), http://www.camex.gov.br/component/content/article/62-resolucoes-da-camex/em-vigor/1785-resolucao-n-05-de-16-de-fevereiro-de-2017.

since the replies of the Mexican company to the third market questionnaire was found to be satisfactory and the same was validated on the basis of an on-site verification.[258]

The granting of market economy status to China by Brazil does not seem to have brought a change in the domestic anti-dumping practice and Chinese domestic prices continue to be disregarded in anti-dumping investigations. Further, the expiry of Section 15 (a)(ii) of the Protocol of Accession does not seem to impact the NME treatment of Chinese imports in Brazilian anti-dumping investigations. The practice of Brazil indicates that the granting of market economy status is a political act which is often not followed in practice.

6. China as a Market Economy: Canadian practice

Canada has enacted Special Import Measures Act (SIMA)[259] and Special Import Measures Regulations (SIMR)[260] to deal with imposition of anti-dumping and counter-veiling duties. Section 20 of SIMA addresses cases where there is substantial determination of prices by the foreign government and presents an alternate method of calculating the normal value.[261] The current NME provision-related policy titled '*Information on the Application of Section 20 of the Special Import Measures Act ("Non-market Economies")'* came into effect only in 2003.[262] The Canada Border Services Agency (CBSA) and Canadian International Trade Tribunal (CITT) are the domestic agencies jointly responsible for its administration.

Sections 20(1)(a) and (b) of SIMA deal with two types of situations: exports from prescribed countries and from non-prescribed countries, respectively. Section 20(1)(a) governs goods shipped from a country, which fulfills the twin conditions of: (i) the domestic prices in the exporting country being "substantially determined by the government of that country"; and (ii) the existence of "sufficient reason to believe", based on determination by the President of the CBSA, that the prices of these goods are "not substantially the same as they would be if they were determined in a competitive

[258] *Ibid.*, ¶ 5.3.
[259] Special Import Measures Act, R.S.C., 1985, c. S-15 (Can.) [hereinafter SIMA].
[260] Special Import Measures Regulations, SOR /84-927 (1984) (Can.) [hereinafter SIMR].
[261] SIMA, *supra* note 259 s.20.
[262] Information on the Application of Section 20 of the Special Import Measures Act ("Non-market Economies"), August 2007, WTO, G/ADP/Q1/CAN/15, at 14.

market". A list of such 'prescribed countries' is set out in Regulation 17.2 of SIMR, which includes China, Vietnam and Tajikistan.[263]

Notably, a previous version of Regulation 17.2 of the SIMR, when designating China as a 'prescribed country', stated that such designation would cease to have effect on December 11, 2016.[264] However, in 2013, this expiry date provision of SIMR was deleted by an amendment and as a result, even after December 11, 2016, China continues to be on the list.[265] The rationale given in the amendment was that "without this amendment, prescribed countries under the Regulations would expire automatically and Canada's trade remedy regime would potentially not be able to take into account whether prescribed countries are operating according to market economy conditions. Consequently, there would be a risk of unfairly traded imports entering Canada and causing injury to domestic producers' operations."[266]

In any case, removal from the list would not have made Chinese products immune from Section 20 inquiry. Even after removal of China from the list, it would have been possible to subject it to inquiry under the Section 20(1)(b) category. Under Section 20(1)(b), the non-prescribed countries fulfilling the additional requirement of government monopoly, substantially or more, of export trade, can be subject to the alternate method of calculating anti-dumping duties given in the section. Thus, in accordance with the Canadian domestic law, the expiry of Section 15(a)(ii) of the Protocol of Accession before 2013 amendment would have merely made it tougher to put Chinese goods under NME inquiry, but not impossible.

The normal values in any of the two situations Section 20(1) above is calculated in conformity with Section 20(1)(c) by "surrogate country" method with domestic prices of goods adjusted according to terms and conditions of sale, taxation, price comparability in a country other than Canada and for use in that country. Alternatively, the "constructed value" method of calculating the aggregate of cost of production of

263 *See* SIMR, *supra* note 260 Regulation 17.1

264 See SIMR, *supra* note 260, Regulation 17.1, http://laws-lois.justice.gc.ca/eng/regulations/SOR-84-927/section-17.1-20060322.html#wb-cont (last visited Oct. 26, 2017).

265 Regulations Amending the Special Import Measures Regulations, SOR/2013-81, s. 1 (2013).

266 *See Regulations amending the Special Import Measures Regulations – Regulatory Impact and Analysis Statement* (Jun. 14, 2013), http://www.gazette.gc.ca/rp-pr/p2/2013/2013-05-08/html/sor-dors81-eng.html (last visited Oct. 26, 2017).

"like goods", costs and profits is also used. If satisfactory data is not available to implement one of these methods, CBSA can rely on prices of like goods imported in Canada from a third country. It must be noted that instead of applying to an entire country, Section 20 only applies to sectors. Therefore, any inquiry under this provision will be for the determination of non-market characteristics of a sector and even then, SIMA does not provide for blanket designation of the sector or market with the label of "non-market". The two key principles under Section 20 are: (i) non-discrimination based on country, sector or product under investigation, with the presumption being that Section 20 of the Act does not apply to the sector under investigation (unless there is evidence to suggest otherwise); and (ii) the complainant having to provide early evidence for recourse to Section 20.

Based on the past practice, the presence of China's name on the prescribed list has made the task of proving Chinese sector's NME status easier, despite the initial burden of proof being on the complainant. This is evident from cases like *Silicon Metal* case[267] and *Large diameter carbon and alloy steel line pipe* case[268]. It would have been interesting to observe how removing China's removal the prescribed list would have affected Section 20 inquiry. But as of date, there has been no change in China's inclusion on prescribed list or any other treatment post December 2016. In the *Polyethylene Terephthalate Resin Investigations* case[269], investigated from April 1, 2016 to March 31, 2017, it was held that the evidence was insufficient to initiate a Section 20 inquiry against China. In another investigation of *Fabricated Industrial Steel Components*[270], where period of investigation was from January 1, 2014 to June 30, 2016 and the final determination was given on May 10, 2017, the Section 20 inquiry was held under Section 20(1)(a) and hence shows no change for China in post-December 2016 treatment. Similarly, the re-investigation case of *Concrete Reinforcing Bar*[271] of an older 2015 CITT finding began on May 1, 2017. CBSA didn't take note of

[267] Canada Border Services Agency, *Certain Silicon Metal Originating In Or Exported From The People's Republic Of China- Statement Of Reasons*, AD1400/4214-39 (May 21, 2013).
[268] Canada Border Services Agency, *Large diameter carbon and alloy steel line pipe from China and Japan-Statement of Reasons,* AD1408 / 4214-47 (November 28, 2016).
[269] Canada Border Services Agency, *Certain Polyethylene Terephthalate Resin Statement of Reasons, PETR 2017 IN* (September 1, 2017).
[270] Canada Border Services Agency, *Certain Fabricated Industrial Steel Components-Statement of Reasons*, FISC 2016 IN (May 10, 2017).
[271] Canada Border Services Agency, *Certain Concrete Reinforcing Bar from Republic of Belarus (Belarus), Chinese Taipei, the Hong Kong Special Administrative Region of the People's Republic of*

any change in China's status. Thus, Canadian treatment of China continues to be the same after expiry of Section 15(d).

7. The Implications of the EU – Biodiesel Case

The possibility of key antidumping users completely abandoning the surrogate country methodology for calculating the normal value of Chinese exporters looks highly remote at this stage. However, there is an overwhelming view among several commentators that with the recent findings of the WTO panel and the Appellate Body in *EU – Biodiesel*[272], the space available to a WTO Member for using surrogate values in the case of market distortions in producing/exporting countries has been considerably constrained.

A brief sketch of the facts in *EU – Biodiesel* is pertinent to this discussion. The case related to an antidumping investigation against biodiesel exported from Argentina. Soybeans (which are crushed to obtain soybean oil) is the major raw material and also the largest cost component in producing biodiesel. According to the EU, Argentina imposed differential export taxes (DET) on exports of soybeans, soybean oil, and biodiesel and the taxes imposed on the raw materials were higher than the taxes imposed on the exports of the finished product.[273] The export taxes, according to the EU, allegedly distorted the soybean prices.[274] In this case, the EU authorities had disregarded the costs provided by Argentinian producers on the grounds that the price of soybean was kept artificially low in the domestic markets on account of imposition of an export tax. Several commentaries on China's NME treatment post-2016 anticipate striking similarities between the EU's response to a possible market distortion in the Argentine market in the *EU – Biodiesel case* and the use of surrogate prices against Chinese producers in the future.

As already explained in the previous section, use of constructed normal value is a permitted option when there are no comparable domestic sales in the ordinary course

China, Japan, the Portuguese Republic and the Kingdom of Spain- Notice of Initiation of Section 20 Inquiry, RB 2017 RI (November 7, 2016).

[272] Panel Report, *European Union — Anti-Dumping Measures on Biodiesel from Argentina*, WT/DS473/R (adopted on Oct. 26, 2016)[hereinafter EU-Biodiesel (Panel Report)].

[273] *Id.*, ¶ 5.5.

[274] EU-Biodiesel (Panel Report), *supra* note 272, ¶ 7.113.

of trade (implies normal course of business), or in view of the particular market situation or low volume of sales in the domestic market of the exporter. In the *Biodiesel* case, the EU authorities noted that the domestic price of soybeans in Argentina was "artificially lower" than the international prices in view of the export taxes, and consequently replaced this cost with the average reference price for soybeans for exports published by the Argentine Ministry of Agriculture. The EU authorities considered that the surrogate price for soybeans reflected the international prices and what the Argentine producers would have paid in the absence of the export taxes.[275] Argentina contested this methodology of the EU authorities. In particular, the Argentine challenge was based on the phrases "cost of production in the country of origin" in Article 2.2 of the Antidumping Agreement and "cost of production of the product in the country of origin" in Article VI: 1(b) (ii) of the GATT. The WTO panel and later the Appellate Body ruled that the EU acted inconsistently with their obligations under the Antidumping Agreement and GATT 1994 by not using the cost of production in Argentina when constructing the normal value of biodiesel.

The above findings in *EU – Biodiesel* have been cited to argue that surrogate prices can no longer be used in calculating constructed normal value in anti-dumping investigations for any perceived distortions in costs.[276] However, *EU – Biodiesel* is by no means an authority for the proposition that out-of-country information cannot be used for the "cost of production in the country of origin". It is worth citing what the Appellate Body has stated in its concluding observations.

> …When relying on any out-of-country information to determine the "cost of production in the country of origin" under Article 2.2, an investigating authority has to ensure that such information is used to arrive at the "cost of production in the country of origin", and this may require an investigating authority to adapt that information."[277]

[275] EU-Biodiesel (Panel Report), *supra* note 272, ¶ 7.257.
[276] *See generally* Zhou and Percival, *supra* note 194.
[277] EU-Biodiesel (AB Report), *supra* note 22, ¶ 6.82 and 6.76.

In essence, the Appellate Body did not rule out the use of out-of-country prices, provided that the surrogate prices are "apt to or capable of yielding a cost of production in the country of origin".[278]

The second issue in *EU – Biodiesel* was whether an anti-dumping agency has to use the costs recorded by producers/exporters in the constructed normal value if it is of the view that the actual costs are far higher than what is stated in their accounting records. This issue is a narrower subset when compared to the issue of the out-of-country costs or prices and is limited to the treatment of costs of individual parties. Obviously, one of the issues was whether Article 2.2.1.1 includes a general standard of "reasonableness" implying that the cost must be reasonable and undistorted. While the panel and the Appellate Body emphasized the need for using production costs actually incurred by the producers or exporters for calculation of constructed normal value, the Appellate Body's findings are not wholly satisfactory in terms of treating costs, which are distorted significantly due to state intervention. It is pertinent to quote the following part of the Appellate Body Report.

> …To the extent the costs are genuinely related to the production and sale of the product under consideration in a particular anti-dumping investigation, we do not consider that there is an additional abstract standard of "reasonableness" that governs the meaning of "costs" in the second condition in the first sentence of Article 2.2.1.1.[279] (emphasis added)

The above observation is not free from ambiguities. The key issue is if a particular exporter's records do not properly capture the 'cost' in view of certain distortion or are not otherwise 'faithful' or 'accurate', can the investigating agency disregard them. The panel and the Appellate Body reports give enough room for admitting this possibility.[280] Furthermore, in the context of China, the Appellate Body's findings may have limited value. It is important to state that one should not lose sight of the fact that Section 15 of China's Protocol has not expired in its entirety. The Chinese exporters will still have to establish that market economy conditions prevail in the industry producing the like

[278] EU-Biodiesel (AB Report), *supra* note 22, ¶ 6.70.
[279] EU-Biodiesel (AB Report), *supra* note 22, ¶ 6.37.
[280] EU-Biodiesel (AB Report), *supra* note 22, ¶ 6.41,

product. The surviving parts of Section 15 could still form the context and inform the operation of Article 2.2 of the Antidumping Agreement in relation to China.

What is likely to happen in the future is the selection of a method, which may involve use of the choice of Chinese costs and prices on a case-by-case basis. As previously illustrated the constructed normal value method, which India has used in several cases in the past, could be an alternative approach. Even the U.S. has used such an approach in a number of cases.[281] Under this "mix-and-match" approach if the producer can establish that the inputs were purchased in an NME at market-oriented prices, the actual prices might be used in the place of surrogate value.[282] The significance of this approach is that it discounts the arbitrariness in the selection of a surrogate economy.

V. Conclusion

The use of surrogate methodology against Chinese exporters in anti-dumping investigations post-2016 is a matter of diverging legal opinion. The language of China's Protocol of Accession is as ambiguous as it could be. While the legal opinion is divided, a political solution to this conundrum may not be easy, especially given the vast number of countries employing NME methodology against China.

This discussion paper has argued that the expiry of Paragraph (a)(ii) of Section 15 of the Protocol of Accession need not make the use of surrogate methodology completely inapplicable in the future. The expiry of this paragraph does not mean the prohibition of such a practice, especially when subparagraph (a)(i) permits a default choice of non-Chinese costs and prices — an indirect term for surrogate country values. Again the Second *Ad Note* permits the use of a surrogate country methodology, although the thresholds in the situation are fairly rigorous. The negotiating history of the Protocol of Accession also connects the use of the surrogate country methodology to the level of state interference in China's economy. Thus, until market economy conditions are proven by Chinese exporters (under Section 15 (a)(i) or by the Chinese government

[281] *See* U.S. Department of Commerce, *Oscillating Fans and Ceiling Fans from the People's Republic of China (preliminary determinations of sales at less than fair value)* 56 Fed. Reg. 25,664, 25,667 (1991); U.S. Department of Commerce, *Chrome-Plated Lug Nuts from the People's Republic of China*, 56 Fed. Reg. 46,153, 46,154 (1991).
[282] *See* Wenton Sheng, *Trade Law's response to the Rise of China* 34(2) BERKELEY JOURNAL OF INTERNATIONAL LAW 109, 121.

(under Section 15 (d)), the NME treatment of China finds basis under the Protocol of Accession.

A study of key Members such as the United States and the European Union demonstrate that such Members are not willing to grant market economy status to China. While the U.S. continues its NME treatment of Chinese imports, the EU has proposed to construct values based on international costs and benchmarks. A similar approach has been used by Australia despite designating China as a market economy. Australian authorities continue to arrive at a conclusion of 'particular market situation' and construct the normal value based on benchmark prices including prices in third countries and international price benchmarks. Similarly, while Brazil has also designated China as a market economy, it continues to rely on the surrogate methodology in anti-dumping proceedings involving Chinese imports. On the other hand, while India has used the constructed value method against Chinese exporters, it has also allowed for the use of Chinese costs and prices when market economy conditions have been proven. Further, even when relying on the constructed value method, Indian authorities adjust international prices or costs to arrive at the cost in the exporting country. This approach is consistent with the recent panel and Appellate Body findings in *EU – Biodiesel*. This case has not expressly ruled out the use of out-of-country costs and prices in determining constructed normal value. What is likely to happen in the future is that a number of countries are likely to shift to the use of Chinese costs and prices in developing constructed normal values, to the extent possible, on the basis of a finding that prices of a number of inputs and utilities in China are market determined.

The constructed normal value approach will also obviate the need for an explicit selection of a surrogate country in antidumping actions involving China. However, the constructed normal value method can only be used on a case-by-case basis, and must allow for adjustments to reflect the prices in the exporting country. This is also true with the 'particular market situation' mentioned in Article 2.2 of the Anti-Dumping Agreement.

***

AUTHORS

James J. Nedumpara is Professor and Head of Centre for International Trade and Investment Law (CTIL) established by the Government of India at the Indian Institute of Foreign Trade (IIFT). In this capacity he advises the Government on various aspects relating to international trade and investment law. He is currently on leave from Jindal Global Law School where he joined as a founding faculty. James has several years of experience in the field of international trade and economic law and has worked with leading law firms, corporate firms and also UNCTAD's India programme before joining academia. He was also part of the Indian delegation that appeared in the proceedings on *India- Agricultural Products* (Avian Influenza dispute) before the WTO Appellate Body. James has taught as a visiting faculty at FGV Law School, São Paolo, Brazil, ITAM Mexico City, NUJS Kolkata, NLSIU Bangalore and the CWS-WTI Joint Summer Academy. He has also served visiting fellowships in several leading law schools.

James received his Ph.D. in Law from the National Law School of India University, Bangalore and earned his first Masters degree in Law from the University of Cambridge, UK as a Cambridge Commonwealth Scholar. He also holds LL.M degrees from the New York University School of Law, USA and the National University of Singapore. He took his Bachelor of Laws degree from Mahatma Gandhi University, Kerala. He is the Co-Chair of the South Asia International Economic Law Network (SAIELN).

Archana Subramanian is a Senior Research Fellow at the Centre for Trade and Investment Laws, IIFT. Before joining CTIL, she worked as a Research Fellow at the Centre for International Trade and Economic Laws at Jindal Global Law School and as an Associate with AZB & Partners, Mumbai for 2 years. At AZB, Archana's work focused on mergers and acquisitions, securities laws and foreign exchange laws. She has been part of teams advising international financial firms and corporations on the acquisition of securities of Indian private, public and listed companies. Archana has a B.A.LL.B (Hons.) degree from the National Law School of India University, Bangalore and is interested in the field of international trade law and law and development.

ABOUT THE CENTRE FOR TRADE AND INVESTMENT LAW

The Centre for Trade and Investment Law (CTIL) was established in 2016 by the Ministry of Commerce and Industry, Government of India at the Indian Institute of Foreign Trade. CTIL's primary objective is to provide sound and rigorous analysis of legal issues pertaining to international trade and investment law to the Government of India and other governmental agencies. CTIL will eventually be a part of the Centre for Research in International Trade (CRIT), which is being established by the Ministry of Commerce and Industry. CTIL aims to create a dedicated pool of legal experts who could provide technical inputs for enhancing India's participation in international trade and investment negotiations and dispute settlement.

ctil.iift.ac.in ctilindia CTIL CTIL