CHINA AND THE NON-MARKET ECONOMY TREATMENT IN ANTI-DUMPING CASES: CAN THE SURROGATE PRICE METHODOLOGY CONTINUE POST-2016?

James J Nedumpara and Archana Subramanian*

Abstract: In December 2001, China joined the World Trade Organization (WTO) after 14 long years of arduous negotiations. One of the most debated issues during the accession negotiations was the treatment of China as a non-market economy — an economy where costs and prices are not dependent on market forces of demand and supply. This classification has resulted in WTO Members resorting to a differential treatment of Chinese imports in anti-dumping investigations, especially with the use of the "surrogate country" — a third country which is at the same level of economic development — for the determination of Chinese home market cost or prices for comparison purposes. The use of this method against Chinese products stems from art.15(a)(ii) of China's Accession Protocol to the WTO. While the second sentence of art.15(d) of China's Accession Protocol prescribes an expiry date for the use of non-Chinese costs and prices, there are enough indications at different places in art.15 to support the continued application of the surrogate country method. It is within this framework that this article evaluates the text and context of China's Accession Protocol. It is argued that the expiry of art.15 subpara.(a)(ii) does not alter the scenario prevailing before 11 December 2016. At best, subpara. (a)(ii) is a mere tautological expression, whose expiry is inconsequential in the light of an indirect authorisation to use surrogate prices in subpara.(a)(i). The article argues that irreconcilable differences exist among the multiple strands of legal interpretation of art.15 and may require an adjudicative decision at the highest level, which could perhaps lay this controversy to rest.

Keywords: *China; accession protocol; anti-dumping; non-market economies; surrogate method; normal value; price comparison; WTO*

I. Introduction

"When is China Paraguay?" is part title of an article by Professor William P Alford explaining the operation of anti-dumping investigations against non-market

* James J Nedumpara is Professor and Head, Centre for Trade and Investment Law, Indian Institute of Foreign Trade, New Delhi and Associate Professor, Jindal Global Law School. Archana Subramanian is Senior Research Fellow, Centre for Trade and Investment Law, Indian Institute of Foreign Trade. The authors thank the reviewer for his comments and are extremely grateful to Professor Anton Cooray for the insightful comments and suggestions which have significantly improved this article.

economies (NMEs).[1] The reference to Paraguay is because of the reliance of the United States Department of Commerce (USDOC) on prices in Paraguay in its anti-dumping investigation on natural menthol against China in 1981.[2] As Alford's title of the article suggests, 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 anti-dumping actions.

Anti-dumping duty is a duty imposed by an importing country to offset the differences between the normal value (technical nomenclature for the home market price) and the export price of a product.[3] China was not the only country that was treated as an NME when Alford's article was published.[4] A large number of communist countries were subject to this treatment in anti-dumping investigations (especially during 1960–1995) on the presumption that in those countries excessive state interference rendered the domestic prices extremely unreliable for most commodities.

NMEs constitute a major problem in international trade law, especially in anti-dumping law. To find out whether the domestic sales are below cost, all anti-dumping investigations require a domestic reference price, which is formally known as the "normal value". This will help to determine whether there is price discrimination between the domestic price and the export price of the same goods. In market economies (which operate on market principles), the price discrimination is established on the basis of comparison between the export and domestic price. However, 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, it is assumed that market principles of demand and supply are not at work in NMEs to such an extent that often the sale price does not reflect what should be its fair price.[5] In an NME, policies including production, investment and pricing need not be subject to commercial considerations and could be often controlled or mandated by the State.

In an NME, the determination of a domestic reference price is challenging as the State-controlled economic system can distort the sale price of products or the costs of inputs. In the case of China, a solution to this problem was set out in art.15 of the China's Protocol of Accession, 2001 (Protocol of Accession) which

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1 William P Alford, "When is China Paraguay? An Examination of the Application of the 'Non-Market Economies'" (1987) 61 Southern California Law Review 79.

2 "Anti-dumping, Natural Menthol from the People's Republic of China; Final Determination of Sales at Less Than Fair Value", 46 Fed Reg 24614 (Department of Commerce, 1 May 1981).

3 See "General Agreement on Trade and Tariffs 1994" (15 April 1994, LT/UR/A-1A/1/GATT/1, art.VI), available at http://docsonline.wto.org; see also "Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994" (15 April 1994, art.2.1, LT/UR/A-1A/3, Pt.I), available at http://docsonline.wto.org (referred to as the Anti-dumping Agreement).

4 Other NME countries include Albania, Bulgaria, Czechoslovakia, Hungary, Korea, Mongolia, Poland, Romania, Soviet Union and Vietnam.

5 Lydia Brasher, "Factors or Prices: An Evaluation of Anti-dumping Laws as Applied to Companies Existing in Nonmarket Economies" (1990) American University of International Law Review 893, 903.

allows the use of a methodology that is not based on a "strict comparison with domestic prices and costs in China". However, the Protocol of Accession does not prescribe a price comparison methodology that could be followed by World Trade Organization (WTO) Members in case of NMEs.

To find a replacement for domestic prices and costs, WTO Members look at functional market economies to compute what is likely to be the domestic price of the product under investigation by making a comparison with another country. This is done by looking at the cost of production of the same product consuming the same amount of inputs, including labour and energy, in a selected third market economy called a surrogate country. 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[6] — could be endless often resulting in arbitrary selections.[7] In many ways, it is the boundless possibility of arbitrary selection that makes this concept attractive to anti-dumping users.[8]

The surrogate country approach gained popularity after the United States conducted an anti-dumping investigation against Electric Golf Carts from Poland (a centrally planned economy at the time) on the basis of analogue costs in Canada (used as the surrogate country in this case). Interestingly, Poland did not have golf courses and consequently any golf cart sales and Canada did not produce any golf carts. The US Treasury had only the data for carts that were similar to golf carts and had to work hard to construct the data for Polish golf carts.[9] 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 anti-dumping duties to NMEs was fairly well recognised decades ago. While importing countries had no incentive to discipline the concept and the former socialist/communist countries that acceded to the General Agreement on Tariffs and Trade (GATT)/ WTO often remained at the mercy of key importing Members for admission to the multilateral trading regime, there have been few attempts to reform this methodology. Furthermore, NME as a concept had the potential of slowly slipping into oblivion with most of the command and control economies widely embracing capitalist-oriented economic policies in the last three decades.

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6 See, for example, Tariff Act of 1930, 19 USC, s.1677b(c)(4).

7 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 US 593 (1951).

8 The term "anti-dumping users" has been used in this article to refer to those countries which impose anti-dumping duties.

9 Ronald A Cass and Stephen J Narkin, "Anti-dumping and Countervailing Duty Law: The United States and the GATT" in Richard Boltuck and Robert E Litan (eds), *Down in the Dumps: Administration of the Unfair Trade Laws* (Washington DC: Brookings Institution, 1991) p.215.

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 1980s and early 1990s. By the time the WTO was established in 1995, the list of NMEs had come down substantially. However, the two major economies that had remained outside the WTO and had to bear the brunt of anti-dumping actions were China and Russia.[10] China's accession negotiations to join the WTO lasted more than 14 years, and when China was finally admitted, WTO Members retained the ability to treat China as an NME for a period of 15 years for the purpose of anti-dumping determinations — an issue that has turned extremely contentious in the recent months. On the other hand, Russia also underwent a long period of negotiations but received market economy status at the time of its admission to the WTO.

11 December 2016 was China's 15th anniversary of WTO accession. On 12 December 2016, China requested consultations with the United States and the European Union (EU) under the WTO dispute settlement mechanism.[11] China claimed that henceforth WTO Members would be required to terminate the use of the surrogate country method in anti-dumping proceedings against Chinese exporters and producers.[12] A Panel was established to look into the complaint against the EU,[13] but no Panel has been established in relation to the complaint against the United States. Considering the intensity and number of anti-dumping actions against China, any conclusion reached by the WTO on this dispute will have serious ramifications for international trade. It is thought that products worth roughly US$100 billion, which is seven per cent of China's exports to G-20 economies, were subject to anti-dumping measures or some other types of trade barrier.[14] Therefore, the economic consequences of the outcome in this dispute are immeasurable. The US Trade Representative Robert Lighthizer recently noted that the NME matter is "without question the most serious litigation matter" the United States has been engaged with at the WTO.[15]

This article seeks to examine the controversy involving the use of the surrogate country method against China in anti-dumping proceeding. Section II discusses

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10 While the WTO Members negotiated a special provision on China, no such provision is included in the Protocol of Accession of Russia.

11 World Trade Organization, "European Union — Measures Related to Price Comparison Methodologies", Request for Consultations by China, 15 December, 2016, WT/DS516/1, available at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds516_e.htm; World Trade Organization, "United States — Measures Related to Price Comparison Methodologies", Request for Consultations by China, 15 December 2016, WT/DS515/1, available at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds515_e.htm.

12 *Ibid.*

13 The WTO panel was established on 3 April 2017.

14 Chas Brown, "China's Market Economy Status and Antidumping: A $100 Billion, $10 Billion, or $1 Billion Dispute? Part 2" *Peterson Institute for International Economics* (8 June 2016), available at https://piie.com/blogs/trade-investment-policy-watch/chinas-market-economy-status-and-antidumping-100-billion-10-0 (visited 11 August 2017).

15 Lighthizer, "U.S. Loss in China NME Dispute Would Be 'Cataclysmic' for WTO" *Inside U.S. Trade* (23 June 2017), available at https://insidetrade.com/inside-us-trade/lighthizer-us-loss-china-nme-dispute-would-be-cataclysmic-wto (visited 23 July 2017).

the legal basis of the surrogate country method against China and the details of its application. Section III examines the provisions of Protocol of Accession and the permissible interpretations of the Protocol of Accession. This section provide a detailed analysis of the legal arguments and counterarguments of art.15 of the Protocol of Accession. Section IV is devoted to an examination of the practice of the key users of anti-dumping in relation to China, and the implications of EU — Biodiesel, a recent WTO case, which many argue, could determine the future of the surrogate price methodology. Section V offers some conclusions.

II. Dumping and NME Status

Anti-dumping is a mechanism to deal with "dumping", which is said to occur when an exporter introduces goods in the markets of the importing country at a price less than that of the like product in the exporter's domestic market.[16] 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".[17] 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; 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. 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 (ie, "constructed normal value"). Although the first option is the preferred option,[18] there is also prevalent use of the "constructed normal value" method. 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 anti-dumping duties to the "extent necessary to counteract the dumping that is causing injury".[19]

The WTO Agreement on Implementation of art.VI of the GATT ("Anti-dumping Agreement") places strong emphasis on the use of domestic costs and prices of the producers.[20] However, the domestic costs and prices can be used only when records used to ascertain them 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. To address these concerns, a special provision, *viz* art.VI(b) was inserted in the GATT after the

16 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.

17 Anti-dumping Agreement (n.3) art.2.2.

18 *Ibid.*, art.2.4.2.

19 Joseph Hornyak, "Treatment of Dumped Imports from Non Market Economies" (1991) 15(1) Maryland Journal of International Law 23, 28; *Ibid.*, art.11.1.

20 Anti-dumping Agreement (n.3) art.2.2.1.

1954–1955 GATT Review Session based on a proposal from Czechoslovakia (then a communist state) to amend art.VI: 1(b) of the GATT 1947.[21]

The outcome of this proposal was not to amend art.VI of the GATT but to insert an *Ad* Note to it.[22] Czechoslovakia proposed to seek legitimacy for a different type of economic structure within the GATT and to pre-empt the discriminatory use of anti-dumping actions against command economies (ie, state controlled 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.[23] In 1955, the GATT Council adopted the interpretative *Ad* Note to art.VI (Second *Ad* Note), which recognised that in the 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".[24] 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 other forms of legitimate economic structures.[25] In other words, Czechoslovakia's proposal only highlighted the "inappropriateness" of a strict comparison with domestic price. Coincidentally, the Second *Ad* Note to art. VI, while allowing derogation from a strict comparison of domestic and export prices in cases where the state exercises complete or substantially complete monopoly of trade, did not provide an alternate methodology for the determination of the domestic prices for comparison with export prices.[26]

The Second *Ad* Note to art.VI permitted flexibility to the users of anti-dumping in their treatment of exports from NMEs, which was easily prone to misuse. While the Second *Ad* Note only recognised 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 the vague description in the Second *Ad* Note, it is widely understood to be an economy wherein economic activity is determined not by market forces but by the State centralising, manipulating, fixing and/or controlling factors such as price, cost, investment allocation and use of raw materials.[27]

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21 GATT Secretariat, "Proposal by the Czechoslovakian Delegation", Relating to Article VI, W9/86/Rev.1 (21 December 1954).

22 The purpose of an *Ad* Note is to further explain the GATT provisions. They 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" (1992) 16 Maryland Journal of International Law 229, 237.

23 Jorge Miranda, "Interpreting Paragraph 15 of China's Protocol of Accession" (2014) 9(3) Global Trade and Customs Journal 94, 95.

24 Anti-dumping Agreement (n.3), Note 2, para.1, Interpretative Note Ad Article VI from Annex I.

25 Mark Wu, "The WTO and China's Unique Economic Structure" in Benjamin L Liebman and Curtis J Milhaupt (eds), *Regulating the Visible Hand?: The Institutional Implications of Chinese Capitalism* (New York: Oxford University Press, 2016) p.319.

26 Miranda, "Interpreting Paragraph 15 of China's Protocol of Accession" (n.23) p.95.

27 UNCTAD, "Glossary of Custom Terms", available at http://www.asycuda.org/cuglossa.asp?term=market+economy (visited 30 May 2017).

The definition of NME under the respective national laws also varied significantly.[28] While WTO Members such as the United States[29] consider factors such as the extent to which the currency of a foreign country is convertible; the extent to which the wage rates in the foreign country are determined by free bargaining; and whether the government has receded from state planning and that "market forces are firmly rooted in the economy",[30] such considerations are not mirrored in jurisdictions such as India and the EU.[31]

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.[32] Chinese producers' data are supplanted with the data of a company perhaps 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.[33] 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).[34] That way, the surrogate approach represents a marked change in the determination of normal value.

It is important to recall that China's dispute with the United States and the EU is mainly on the use of surrogate or third country prices.[35] The discussion entails a careful examination of Protocol of Accession.

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28 Brian Gatta, "Between 'Automatic Market Economy Status' and 'Status Quo': A Commentary on 'Interpreting Paragraph 15 of China's Protocol of Accession'" (2014) 9(5) Global Trade and Customs Journal 165.

29 The United States typically applies six statutory criteria which are as follows: (1) free currency convertibility; (2) wages determined by labour market; (3) openness to foreign investments; (4) Government ownership or control over means of production; (5) allocation of resources and price and (6) output decisions of enterprises. See s.771(18)(B) of the Tariff Act of 1930 (19 USC 1677).

30 Gary Clyde Hufbauer and Cathleen Cimino-Isaacs, "The Outlook for Market Economy Status for China" *Peterson Institute for International Economics*, available at https://piie.com/blogs/trade-investment-policy-watch/outlook-market-economy-status-china (visited 11 August 2017).

31 Council Regulation (EC) 1225/2009 on protection against dumped imports from countries not members of the European Community (2009) OJ L 343/51.

32 Miranda, "Interpreting Paragraph 15 of China's Protocol of Accession" (n.23) p.96.

33 Michelle Zang, "The WTO Contingent Trade Instruments against China: What Does Accession Bring?" (2009) 58(2) The International and Comparative Law Quarterly 321, 329; 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" (2014) Southern California Interdisciplinary Law Journal 249, 258.

34 Folkert Graafsma and Elena Kumashova, "In Re China's Protocol of Accession and the Anti-Dumping Agreement: Temporary Derogation or Permanent Modification?" (2014) 9(4) Global Trade and Customs Journal 154.

35 World Trade Organization, "United States — Measures Related to Price Comparison Methodologies" (n.11) p.2.

III. Protocol of Accession and the Continuing Use of Surrogate Prices

The Chinese government's involvement in the economy was a major concern during China's accession negotiations.[36] The State's presence in various critical sectors and economic activities was clearly visible, 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."[37]

In short, China's accession instruments indicate a clear commitment to transition the Chinese economy to a market economy.

Once a country has joined the WTO, the discriminatory use of the surrogate country method could be a violation of the non-discrimination obligation. This is perhaps a reason why WTO Members specifically negotiated a provision for continuing to treat China as an NME, namely art.15 of the Protocol of Accession, which provides for special treatment of imports from China.

Article 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 art.15(a)(i) and 15(a)(ii). The article also provides for a sunset clause in 15(a)(ii). The relevant parts of art.15 read as follows:

> "Article 15
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> (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:
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> (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,

36 Michael Flynn, "China: A Market Economy" (2016) 48 Georgetown Journal of International Law 297, 320.

37 World Trade Organization, "Report of the Working Party on the Accession of China" (WT/ACC/CHN/49, 1 October 2001), para.46.

the importing WTO Member shall use Chinese prices or costs for the industry under investigation in determining price comparability;

(ii) The importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product. …

(d) Once China has established, under the national law of the importing WTO Member, that it is a market economy, the provisions of subparagraph (a) shall be terminated provided that the importing Member's national law contains market economy criteria as of the date of accession. In any event, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession. In addition, should China establish, pursuant to the national law of the importing WTO Member, that market economy conditions prevail in a particular industry or sector, the non-market economy provisions of subparagraph (a) shall no longer apply to that industry or sector."

Article 15(a) provides for two methodologies to determine the prices to be compared with the export price in anti-dumping investigations:[38] (1) the normal methodology based on Chinese costs and prices and (2) the methodology not based on Chinese costs and prices.

(1) Under the normal methodology, domestic Chinese price must be used for comparison if the Chinese producers are able to show that market economy conditions prevail the concerned domestic industry manufacturing the like product.[39]

(2) Non-Chinese costs and prices (in other words, the surrogate methodology) may be used where Chinese exporters or producers cannot prove that market economy conditions do not prevail in the concerned domestic industry. Where such market economy conditions are not demonstrated, the chapeau (in WTO parlance, a paragraph in the nature of an "introduction") of art.15(a) permits the use of any methodology, which is not based on a *strict comparison* with Chinese costs and prices. The surrogate methodology has been used by WTO Members since the *chapeau* does not prescribe an alternative to Chinese costs and prices. It is appropriate to recall that both

38 Under the Anti-dumping Agreement, an anti-dumping duty is imposed only after an anti-dumping investigation is conducted by the investigating authorities in the importing country. The investigation determines whether there has been "dumping" which has led to a "material injury" for the domestic industry.

39 "Accession of the People's Republic of China" (WT/L/432, 23 November 2001), art.15(a)(i), available at https://www.wto.org/english/thewto_e/acc_e/a1_chine_e.htm.

> the Second *Ad* Note to art.VI of the GATT and art.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 art.15(a) allow for the use of the surrogate methodology, but there are two key differences: art.15(a) permits a rebuttable presumption of NME on Chinese producers, whereas the Second *Ad* Note provides a significantly high threshold for any WTO Member to treat another Member as an NME.[40]

While the market economy status of China could be a matter of debate, the gravamen of China's consultation request with the EU and the United States is that with the expiration of art.15(a)(ii), the application of the surrogate methodology is no longer tenable. The basis of this view is the second sentence of art.15(d) of China's Protocol which states: "[i]n any event, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession". Furthermore, China contends that after 11 December 2016, the provisions of the Anti-dumping Agreement and the GATT 1994, which ordinarily apply to the determination of normal value, must apply to imports from China without exception.[41]

There have been several commentaries and published opinions concerning the interpretation of art.15 of Protocol of Accession, most of which are addressed in this article. An attempt is made to set out the various shades of interpretation regarding art.15 and as to what course of action the WTO Members can legitimately pursue until an authoritative opinion is made available on this topic.

A. Surrogate country treatment and sunset clause

The most important question is whether the surrogate country treatment would cease to operate after 11 December 2016. Before that date, most of the anti-dumping agencies of WTO Members applied the surrogate country 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 were unable to show that the market economy conditions existed, the surrogate country price was 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 art.15(a) subparagraphs were met.[42]

It is possible to argue that art.15(a)(i) presents at least two alternatives: (1) Chinese costs and prices and (2) non-Chinese costs and prices. Put that way, if Chinese producers are not able to clearly show that market economy conditions

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40 Miranda, "Interpreting Paragraph 15 of China's Protocol of Accession" (n.23) p.97.

41 See works referred to in note 11.

42 Rao Weijia, "China's Market Economy Status under WTO Anti-dumping Law After 2016" (2013) 5 Tsinghua China Law Review 151, 162.

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 country prices — could be used. In this event, removing art.15(a)(ii) will be of no consequence. Even in the absence of this provision, the application of the surrogate methodology is permissible under art.15(a)(i). There are several proponents of this view that in cases where the criteria under art.15(a)(i) are not met, ie, Chinese producers and exporters are unable to show that market economy conditions exist, WTO Members may continue to use the surrogate methodology.[43] 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 alternative 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."[44] (Emphasis added.)

An "a contrario" interpretation of art.15(a)(ii) of the Protocol of Accession also suggests the possibility that the option to use the surrogate methodology is implied in subpara.(a)(i).[45] It is rather self-evident that where Chinese producers fail to "clearly show" that market economic conditions prevail in the concerned industry, the default option is the use of the surrogate price methodology, without recourse to subpara.(a)(ii). Logically, the use of surrogate methodology, which is the use of non-Chinese costs and prices, is implicit in subpara.(a)(i).

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43 Bernard O'Connor, "The Myth of China and Market Economy Status in 2016" *World Trade Law*, available at http://worldtradelaw.typepad.com/files/oconnorresponse.pdf, p.3.

44 World Trade Organization, "European Communities — Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China" (Report of the Appellate Body, WT/DS397/AB/R, 2011) para.286.

45 An "a contrario" argument means an "argument from the contrary". An argument for different treatment is made by negative reasoning from another argument. 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, contrario-based arguments have been common. In "Brazil — Export Financing Programme for Aircraft" (Report of the Panel, 1999, WT/DS46/R) para.4.52, 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 "Brazil — Export Financing Programme for Aircraft Recourse by Canada to Article 21.5 of the DSU" (Report of the Appellate Body, 2000, WT/DS46/AB/RW) para.80, 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."

In international law, effet utile or the "principle of effectiveness" is a fundamental principle of treaty interpretation.[46] Treaty interpretation is complex, and no adjudicating body can render the whole of art.15 inutile.[47] The second sentence of art.15(d) only speaks about the expiry of art.15(a)(ii) and not the whole of art.15(a). Consequently, it can be argued that the chapeau and subpara.(a)(i) of art.15 continue to be in operation, 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.[48] While applying the effet utile principle, a treaty interpreter is bound to give effect to all the terms of the treaty.[49] Based on this approach, the interpreter should be able to uphold an interpretation that gives effect to the surviving clause of art.15(a), ie, subpara.(a)(i), which continues to allow the use of the surrogate methodology if market economy conditions are not demonstrated by Chinese producers.

However, the problem is far from resolved. If the treaty interpreter seeks to uphold the remaining parts of art.15, especially art.15(a)(i) and a major part of art.15(d), it could still lead to a virtual redundancy of the second sentence of art.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 surrogate methodology is firmly tied only to art.15 subpara.(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 "fits comfortably in the treaty as a whole".[50] Such a holistic interpretation requires that the whole of art.15 and other provisions of the Protocol of Accession, including the relevant provisions of the WTO Agreements, be taken into consideration. The chapeau is a very important element in this enquiry.

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46 It stems from the Roman Law maxim *ut res magis valeat quam pereat*: "It is better for a thing to have effect than to be made void".

47 World Trade Organization, "Canada — Measures Affecting the Importation of Milk and the Exportation of Dairy Products" (Report of the Appellate Body, 1999, WT/DS103/AB/R, WT/DS113/AB/R) para.133.

48 World Trade Organization, "EC Measures Concerning Meat and Meat Products (Hormones)" (Report of the Appellate Body, 1998, WT/DS26/AB/R) para.181; World Trade Organization, "India — Patent Protection for Pharmaceutical and Agricultural Products" (Report of the Appellate Body, 1997, WT/DS50/AB/R) para.45.

49 World Trade Organization, "Japan — Taxes on Alcoholic Beverages" (Report of the Appellate Body, 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 12).

50 World Trade Organization, "United States — Continued Existence and Application of Zeroing Methodology" (Report of the Appellate Body, 2009, WT/DS 350/AB/R) para.268; see also World Trade Organization, "China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products" (Report of the Appellate Body, 2009, WT/DS 363/AB/R) para.399.

B. Significance of the chapeau of art.15

The chapeau of art.15 provides immediate context to interpretation of various subparagraphs. There is an overwhelming view that the chapeau to art.15(a) permits the use of the surrogate method 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".[51] Furthermore, since the chapeau states that a price comparison should be "based on" both subparas.(i) and (ii), the chapeau can be continued to be read with the remaining parts of art.15(a), ie, art.15(a)(i) even after the expiry of subpara.(ii). 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" another.[52] The use of Chinese or non-Chinese prices, as set out in the chapeau, is not independent and is conditional and founded upon the trigger of subparas.(i) or (ii), respectively.

If the right to use surrogate prices was linked exclusively to subpara.(a)(ii) and its expiry meant the discontinuation of the surrogate approach, then the language in the chapeau (which allows for comparison of prices *not* based on a strict comparison with domestic prices) should also reflect the change after 11 December 2016 along the following lines, with the struck out words being practically redundant:

> "(a) In determining price comparability under Article VI of the GATT 1994 and the Anti-Dumping Agreement, the importing WTO Member shall use Chinese prices or costs for the industry under investigation".

While the sunset could affect, in principle, only subpara.(a)(ii), the effect of implying an absolute expiry of the surrogate price methodology could render most part of art.15 of the Protocol otiose. This is an outcome — as the parts that are struck through above would highlight — that could render more violence to the language of art.15 of China's Protocol than a possible redundancy of the second sentence of art.15(d). A treaty interpreter is expected to use an interpretation, which aims to preserve the overall structure and text of the treaty or, in other words, to avoid an interpretation which potentially wrecks or destroys the existing elements.

On the whole, an interpretation that suggests that the use of the surrogate methodology is not tied to subpara.(a)(ii) alone seeks to give effect especially to the chapeau of art.15 as well as subpara.(a)(i). If Chinese producers are able to demonstrate that market economy conditions exist, then subpara.(a)(i) can immediately find application. But what if they are unable to show that market economy conditions exist? Even in the absence of subpara.(a)(ii), as illustrated earlier, the investigating agencies can apply the surrogate methodology where

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51 O'Connor, "The Myth of China and Market Economy Status in 2016" (n.43) p.4.

52 See World Trade Organization, "European Communities — Trade Description of Sardines" (Report of the Appellate Body, 2002, WS/DS231/AB/R) paras.242–245.

market conditions are not proven since non-conformity with art.15(a)(i) allows for the same. To explain, the second sentence of art.15(d) is in itself not a restraint on the application of the surrogate methodology. It is more or less an enabling provision.

However, one might ask the question: Why did the drafters insert the second sentence in art.15(d)? The same question can be asked about art.15(a)(ii) as well, which is nothing but a tautological explanation of subpara.(a)(i). In retrospect, it is reasonable to assume that the WTO Members did not envisage an automatic market economy treatment of China in anti-dumping 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 characterised by heavy state intervention, it might not be possible to consider it as a market economy from 11 December 2016.[53] 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.[54] State support in domestic manufacturing is considered to have created significant global oversupply.[55] Given these possibilities, an automatic NME treatment of China might never have been intended. The language of art.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 anti-dumping investigations.[56]

In this setting, the parallel provisions of the Second *Ad* Note are an important consideration. The use of non-Chinese costs and prices can be envisaged in two separate situations: under art.15 of the Protocol and the Second *Ad* Note of GATT art.VI. Both these provisions can be the context for each other's interpretation. It must be remembered that the Second *Ad* Note also allows for the use of the surrogate method 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 the surrogate methodology in anti-dumping and can therefore be the basis for invoking the surrogate methodology against Chinese importers even after 11 December 2016.

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53 David Bulloch, "China Doesn't Deserve Its 'Market Economy' Status by WTO" *Forbes* (12 December 2016), available at https://www.forbes.com/sites/douglasbulloch/2016/12/12/china-doesnt-deserve-its-market-economy-status-by-wto/#555a0622b937 (visited 23 July 2017).

54 Mark Wu, "The 'China, Inc.' Challenges to Global Trade Governance" (2016) 57 Harvard Journal of International Law 1001.

55 *Ibid.*

56 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).

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.[57] In this case, a holistic reading of art.15 of China's Protocol, as the Appellate Body noted, in a related context *China — Audiovisual Products*, is bound to lead to "vastly different interpretations", and reliance only on the text is unlikely to yield results.[58] Therefore, there is a compelling case for the use of additional or supplementary tools of interpretation available in the field of customary international law.

C. *Use of the surrogate method and the negotiating history of art.15 of the Protocol of Accession*

As set out above, the argument for the expiry of use of the surrogate methodology assumes that the right to use the surrogate methodology is intrinsically tethered to art.15(a)(ii) and not the rest of art.15(a), including the chapeau. This interpretation, as we have argued, is flawed. In our view, there is enough support in art.15(a) and its chapeau to continue with the use of the surrogate methodology 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 art.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").[59] 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 art.15 of the Protocol of Accession, art.VI(I) of the GATT as well as the provisions of the Anti-dumping 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.[60]

Accession Protocols are generally an integral part of a WTO treaty. In addition, at least in the case of China's Protocol, there is an explicit reference to at least 143

57 World Trade Organization, "EC Measures Concerning Meat and Meat Products (Hormones)" (n.48) para.195.

58 World Trade Organization, "China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products" (Report of the Panel, 2012, WT/DS363/R) para.7.1169.

59 VCLT (adopted on 23 May 1969 and entered into force on 27 January 1980), 331 UNTS 1155 art.32.

60 Julia Ya Qin, "The Challenge of Interpreting 'WTO-Plus' Provisions" (2010) 44 Journal of World Trade 127, 172.

paragraphs of specific commitments from China's Working Party Report.[61] Under the GATT/WTO practice, a Working Party is established to examine the application for accession, and the discussions are summarised in the Working Party Report. The 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.[62]

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.[63] To clarify, whenever a specific reference is made, it will be treated as an 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 para.151. Strikingly, para.151 is not incorporated by specific reference in China's Protocol and therefore cannot be considered as an integral part of China's Protocol. At best it may be categorised as the "circumstances existing"[64] at the time of the Protocol.

In the Working Party Report to the Protocol of Accession, Members of the Working Party confirmed certain procedural criteria in respect of art.15(a)(ii).[65] 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 comparability.[66] It has been argued that since these procedural norms are expressly linked to art.15(a)(ii)[67], it is implied that the use of the surrogate methodology is also solely tied to this subparagraph.[68] Consequently, it has been argued that if this subparagraph ceases to apply, these procedural safeguards would also cease to apply.[69]

Paragraph 151 is not limited to providing procedural safeguards for a "methodology not based a strict comparison with domestic prices". For example, it also calls for WTO members to notify its market economic criteria before applying the same.[70] This bears importance in other provisions of art.15 such as subparas.(a)(i) and para.(d) of China's Protocol, where Chinese producers have

61 Julia Ya Qin, "The Conundrum of WTO Accession Protocols: In Search of Legality and Legitimacy" (2015) 55(2) Virginia Journal of International Law 369, 392.

62 *Ibid.*

63 World Trade Organization, "Report of the Working Party on the Accession of China" (n.37) annex.9.

64 For an explanation, see International Court of Justice, *Aegean Sea Continental Shelf, Greece v Turkey* [1978] ICJ Rep 3, [100].

65 World Trade Organization, "Report of the Working Party on the Accession of China" (n.37) para.151.

66 *Ibid.*

67 *Ibid.*: The chapeau to para.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…".

68 Graafsma and Kumashova, "In re China's Protocol of Accession" (n.34) p.157.

69 *Ibid.*

70 World Trade Organization, "Report of the Working Party on the Accession of China" para.151(b).

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[71] and defend their interests,[72] as well as certain obligations on the investigating Members to provide detailed reasoning of its preliminary and final determinations in a particular case.[73] These safeguards are also applicable when Chinese producers and exporters have to prove that market economy conditions exist under the other provisions of art.15. Thus, it can be argued that the safeguards set in para.151 of China's Working Party Report are generic in nature and relate to various obligations set out in art.15 of the Protocol of Accession. The expiry of art.15(a)(ii) after 11 December 2016 would not imply that these procedural safeguards are no longer applicable. Since these procedural norms also apply to the remainder of art.15, they would continue to find purpose even after 11 December 2016.

The aforesaid analysis that the safeguards in para.151 are not intrinsically tied to art.15(a)(ii) is also supported by the drafts of the Protocol of Accession and the Working Party Reports. In the earlier drafts of the Working Party Report, the procedural safeguards were provided in art.20 of the Draft Protocol,[74] which is presently art.15 of the Protocol of Accession.[75] 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 art.20(1)(b), which corresponds to art.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 art.20 (ie, art.15 in the final version) of the Draft Protocol.[76]

In the final draft of the Working Party Report, the reference was limited to only art.15(a)(ii) and not the whole of art.15. However, as explained before, many of these procedural safeguards find application in the other parts of art.15 and are not merely confined to art.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 subpara.(a)(ii) of art.15 of the Protocol of Accession.

The next part will examine the practices of some of the major users of the anti-dumping instrument against China.

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71 *Ibid.*, para.151(d).

72 *Ibid.*, para.151(e).

73 *Ibid.*, para.151(f).

74 World Trade Organization, "Report of the Working Party on the Accession of China" (18 July 2000, WT/ACC/SPEC/CHN/1/Rev.1) para.12.

75 See "Draft Protocol on the Accession of China" *Inside U.S. Trade* (10 July 2001), available at https://insidetrade.com/sites/insidetrade.com/files/documents/pdf2/2001_3226_1.pdf, art.20.

76 World Trade Organization, "Report of the Working Party on the Accession of China" (21 July 2000, WT/ACC/SPEC/CHN/1/Rev.2) para.12.

IV. Domestic Anti-dumping Investigations and NME Treatment of China

A. China as an NME: United States practice

In the United States, the Tariff Act of 1930 (Tariff Act) is the principal legislation governing anti-dumping investigations. Section 773(c)(1) of the Tariff Act provides that if an anti-dumping 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 s.773(a) of the Tariff Act, the USDOC can determine the normal value on the basis of prices prevailing in a third country. The United States last designated China as an NME in 2006[77] and that designation can only be revoked by the USDOC.[78] To date, the USDOC has not revoked the NME status of China, and, as provided under its national laws, the surrogate methodology continues to be used against China. However, on 29 March 2017, the USDOC began a review of China's status as an NME as part of an anti-dumping and countervailing duty investigation on Chinese foil exports, which is USDOC's first such review since 2006.[79]

While there is scope for review of China's designation as an NME, it is unlikely that the United States will grant China a change in status. A recent brief by the US Trade Representative argues that China does not meet market economy criteria since the Chinese government continues to maintain extensive control over foreign investment, means of production and resource allocation. Furthermore, it has also argued that the Chinese currency is not fully convertible and Chinese labour standards continue to remain unsatisfactory.[80] In addition, there is considerable opposition from the political class and the US administration against granting market economy status to China for the fear of impact on domestic industries such as steel and other manufacturing industries.[81]

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77 Department of Commerce, "The People's Republic of China (PRC) Status as a Non-Market Economy (NME)" (15 May 2006), available at http://enforcement.trade.gov/download/prc-nme-status/prc-nme-status-memo.pdf.

78 Section 771(18)(c) of the United States Tariff Act 1930, available at http://enforcement.trade.gov/regs/title7.txt.

79 Department of Commerce, "Certain Aluminium 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 Anti-dumping and Countervailing Duty Laws" (29 March 2017), available at http://docs.regulations.justia.com/entries/2017-04-03/2017-06535.pdf.

80 United States Trade Representative, "2016 Report to Congress on China's WTO Compliance" (January 2017), available at https://ustr.gov/sites/default/files/2016-China-Report-to-Congress.pdf, pp.100–106.

81 Rep. Robert Pittenger, "Rep. Robert Pittenger: Why Commerce Must Not Give China 'Market Economy' Status" *Fox News* (9 December 2016), available at http://www.foxnews.com/opinion/2016/12/09/rep-robert-pittenger-why-commerce-must-not-give-china-market-economy-status.html (visited 11 August 2017).

B. China as an NME: European Union practice

Like the United States, the EU is also reluctant to grant market economy status to China especially in view of the rigorous market economy criteria set out by the EU.[82] The basis of the use of the surrogate method in the EU is art.2.7 of the EU Anti-Dumping Regulation. It provides that in case of imports from NMEs, including China,[83] if the exporting 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.[84]

Recently, the European Commission proposed to abandon this practice 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.[85] According to this proposal, domestic costs and prices would apply to all WTO Members, except in the case of "significant distortions"[86] in the market of the exporting country, in which case the EU would be allowed to "construct" values based on international prices or benchmarks or costs and prices in an "appropriate representative country". The difference between the earlier practice and the proposed method is that it allows 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. Taking into account the difficulty that the EU industry may face in gathering evidence of market distortions in the exporting country, the proposal indicates that the EU Commission may publish reports on prevailing market distortions that could be relied upon by the industry to show that the domestic prices and costs in the exporting country are unreliable.[87]

The above-mentioned proposal cannot be taken to mean that EU is in favour of 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. Although China welcomed the proposal to the

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82 European Parliament, "European Parliament Resolution of 12 May 2016 on China's Market Economy Status" (12 May 2016), available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2016-0223+0+DOC+XML+V0//EN.

83 European Parliament, "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" (8 June 2016), available at http://trade.ec.europa.eu/doclib/docs/2016/june/tradoc_154702.en.L176-2016.pdf.

84 *Ibid.*, art.2.7(a).

85 European Parliament, 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 (27 June 2017).

86 The proposal sets out a non-exhaustive list of criteria, including (1) the widespread presence of enterprises which the state owns or which operate under its control, policy supervision or guidance, (2) the presence of the state in companies allowing interference with respect to prices and costs, (3) public policies or measures discriminating in favour of domestic companies, or otherwise influencing free market forces and (4) the access to finance granted by institutions implementing public policy objectives.

87 *Ibid.*

extent that it abolished the NME list, it criticised the introduction of the market distortions clause, which it said amounts to prolonging the surrogate methodology under a new label.[88]

C. *China as an NME: Indian practice*

Like the United States and the EU, Indian law also prescribes the use of the surrogate approach in cases of countries designated as NMEs by India.[89] India's treatment of China assumes special significance in light of anti-dumping final measures[90] imposed by India against Chinese exporters — 149 measures as of June 2016.[91] The law governing anti-dumping investigations in India is found in 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 (Indian Anti-dumping Rules). The Indian Anti-dumping Rules provide for a country to be designated as an NME if the authority determines that such country does not operate on market principles of supply and demand or where prices are not reflective of their fair value on account of significant state intervention. In addition, the agency enquires whether bankruptcy and property laws are applicable to firms and whether the exchange rate conversions are carried out at prevailing market rates.

Before 2002, India used to maintain 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 that a country is an NME, if in the preceding three years the competent authority of any WTO member or the Indian anti-dumping agency had categorised it as an NME.[92] The presumption

88 The proposed amendment to the EU law does not mandate the use of domestic costs and prices in anti-dumping investigations concerning Chinese products. In cases where "significant distortions" are shown, the amendment allows for the use of international prices or the prices in an approporiate third country. This is similar to the surrogate country approach where prices in a third country are used in anti-dumping comparisons as opposed to the domestic prices. "EU Fails to Quit 'Analogue Country' Practice on China as Required by WTO" *China Daily* (13 December 2016), available at http://www.chinadaily.com.cn/bizchina/2016-12/13/content_27656900.htm (visited 11 August 2017).

89 Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995, para.7, Annexure 1.

90 While art.7 of the AD Agreement allows for an investigating authority to impose provisional measures (in the form of a provisional duty usually such that this duty does not exceed the margin of dumping) in case a preliminary determination of dumping and consequent injury to the domestic industry has been made. Such provisional measures can be imposed for a period of four months (can be extended to six months). A final measure is imposed after a final determination by the investigating authority as to the existence of dumping and causal injury to the domestic market. A final measure is imposed as long and to the extent neessary to counteract the dumping causing injury but must be terminated no later than five years from imposititon unless determination, in a review initiated prior to that date, that expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury.

91 "Anti-dumping Measures: Reporting Member Vs. Exporter 01/01/1995–31/12/2016", WTO Anti Dumping Gateway, available at https://www.wto.org/english/tratop_e/adp_e/AD_MeasuresRepMemVsExpCty.pdf.

92 Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Rules (n.89), para.8(2), Annexure1.

can be rebutted if producers under investigation can establish that their decisions are motivated by market principles and other commercial considerations which demonstrate a lack of state interference and by additionally meeting the criteria set out more particularly in para.7(3), Annexure 1 of the Indian Anti-dumping Rules. The NME presumption can be rebutted by the exporters in their responses to various questions listed in the market 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.[93]

In the event of an NME producer failing to rebut the presumption, the Indian Anti-dumping Rules permit the construction of normal value. Paragraph 7 of Annexure 1 of the Indian Anti-dumping 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 a 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."[94] (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. Since this method also poses administrative difficulties, the DGAD constructs the normal value based on any reasonable basis.[95] More often than not, the DGAD relies on the international price of raw materials and inputs for the construction of the normal value. Other relevant information such as the consumption of raw materials, conversion cost and the selling, general and administrative expenses are often based on "best information available".

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93 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" (7 December 2011), available at http://www.dgtr.gov.in/sites/default/files/adfin_ssr_saccharin_chinapr.pdf, para.46.

94 Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Rules (n.89), para.7, Annexure 1.

95 For example see, Director General of Anti-dumping and Allied Duties, "Final Finding — Anti-dumping 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" (22 May 2014), available at http://commerce.nic.in/writereaddata/traderemedies/adfin_Solar_Cells_Malaysia_ChinaPR_Chinese_Taipei_USA.pdf, para.47; "Final Findings — Sunset Review Anti-dumping Investigation Concerning Imports of 'Peroxosulphates' Originating in or Exported from China PR and Japan" (12 March 2013), available at http://www.dgtr.gov.in/sites/default/files/adfin_ssr_peroxosulphates_chinapr_japan.pdf, para.19.

It may be argued 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".[96] However, cost adjustments are made to ensure that the constructed costs reflect 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 calculate the cost in the exporting/investigated country.

While India employs the "constructed value" method as described above, the frequency of anti-dumping actions against China makes the market economy treatment issue extremely relevant to the trading relations between the two leading Asian economies. Presently, India maintains that it is still deliberating on granting market economy status to China. Although India has begun discussions with industry stakeholders, the final determination is likely to be influenced by a variety of considerations including the practices of other leading users of the anti-dumping and the outcome of the ongoing WTO dispute.[97]

D. Mix and match approach: the implications of the EU — Biodiesel Case

It is not likely that key anti-dumping users would completely abandon a surrogate country methodology to calculate the normal value of Chinese goods. 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,[98] the right of a WTO Member to use the costs and prices of a surrogate country has been considerably constrained.

It is helpful to set out briefly the facts of EU — Biodiesel. The case related to an anti-dumping investigation initiated in the EU against biodiesel exported from Argentina. Soybeans constitute 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. The taxes imposed on the raw materials were higher than the taxes imposed on the exports of the finished product.[99] The high export taxes on the raw materials, according to the EU, allegedly distorted the soybean prices.[100] The high export tax on raw materials led to a decrease in exports and a consequent increase in

96 World Trade Organization, "European Union — Anti-Dumping Measures on Biodiesel from Argentina" (Report of the Appellate Body, 2016, WT/DS473/AB/R).

97 "India is 'Non-committal' about Market Economy Tag for China" *The Hindu* (2 December 2016), available at http://www.thehindu.com/business/India-is-%E2%80%98non-committal%E2%80%99-about-market-economy-tag-for-China/article16667486.ece.

98 World Trade Organization, "European Union — Anti-dumping Measures on Biodiesel from Argentina" (Report of the Panel, 2016, WT/DS473/R).

99 *Ibid.*, para.5.5.

100 *Ibid.*, para.7.113.

the domestic supply of soybeans leading to the low domestic price of soybeans in Argentina.

Since the domestic prices of soybean in Argentina were lower than the international prices, the EU authorities argued that the costs of the soybean and soybean oil were not reasonably reflected in the records kept by the Argentinean producers under investigation. Consequently, the EU authorities disregarded the costs provided by the Argentinean producers and replaced the domestic prices 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.[101] 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 arts.2.2 and 2.2.1.1 of the Anti-dumping Agreement and "cost of production of the product in the country of origin" in art.VI: 1(b)(ii) of the GATT.

The WTO Panel and later the Appellate Body noted that art.2.2 of the Anti-Dumping Agreement requires that the normal value be constructed on the basis of, *inter alia*, the "costs of production … in the country of origin". The question before the Panel and the Appellate Body was whether the EU was in contravention of art.2.2 by disregarding the domestic prices of soybean in the "country of origin", ie, Argentina. Specifically, the issue related to whether the EU was required to use the producer's cost in the country of origin in the calculation of normal value under art.2.2 of the Anti-Dumping Agreement. The Appellate Body (as well as the Panel) held that the term "cost of production … in the country of origin" does not limit the sources of information or evidence which may be used in establishing the cost of production in the country of origin.[102] However, the Appellate Body held that the investigating authority must use the relevant information available to arrive at the cost of production prevailing in the country of origin. In this case, the Appellate Body concurred with the Panel that the cost used by the EU did not *represent* the domestic cost of soybean in Argentina but was merely used to cancel out the effect of the distortion on account of the DET. The Appellate Body and the Panel held that by utilising a surrogate price which was not representative of the domestic prices of soybean in Argentina, the EU acted inconsistently with art.2.2 of the Anti-Dumping Agreement.

The above findings in EU — Biodiesel have been cited to argue that surrogate prices can no longer be used to calculate constructed normal value in anti-dumping investigations for any perceived distortions in costs.[103] However, EU — Biodiesel is by no means an authority for the proposition that out-of-country information

101 *Ibid.*, para.7.257.

102 *Ibid.*, para.6.82.

103 Weihuan Zhou and Andre Percival, "Debunking the Myth of 'Particular Market Situation' in WTO Anti-dumping Law" (2016) 19(4) Journal of International Economic Law 863–892; see also Weihuan Zhou and Andrew Percival, "Panel Report on EU-Biodiesel: A Glass Half Full? Implication for thee Rising Issue of 'Particular Market Situation'" (2016) 2(2) Chinese Journal of Global Governance 142.

cannot be used for the "cost of production in the country of origin". It is worth noting 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 the investigating authority to adapt that information".[104]

In essence, the Appellate Body did not rule out the use of out-of-country prices, provided the surrogate prices are "apt to or capable of yielding a cost of production in the country of origin".[105]

The second issue in EU — Biodiesel was whether an anti-dumping agency had to use the costs recorded by producers/exporters in Argentina, 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 under art.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 emphasised the need for using the production costs actually incurred by the producers or exporters for the 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. As the Appellate Body observed:

> "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."[106] (Emphasis added.)

If an exporter's records do not properly capture the "cost" because of some distortions, or are not otherwise "faithful" or "accurate", can the investigating agency disregard them? The Panel and the Appellate Body reports leave room for such action.[107]

The Appellate Body's findings may be of limited value in relation to China, since art.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

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104 World Trade Organization, "European Union — Anti-Dumping Measures (n.96) paras.6.82 and 6.76.
105 *Ibid.*, para.6.70.
106 *Ibid.*, para.6.37.
107 *Ibid.*, para.6.41.

industry producing the like product. The surviving parts of art.15 could still form the context and inform the operation of art.2.2 of the Anti-dumping Agreement in relation to China.

What is likely to happen in the future is the selection of a method, which may involve the use 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 United States has used such an approach in a number of cases.[108] Under this "mix-and-match" approach, if the producer in an NME can establish that the inputs were purchased at market-oriented prices, the actual prices might be used without resorting to surrogate value.[109] The significance of this approach is that it limits the arbitrariness in the selection of a surrogate economy.

V. Conclusion

The use of the surrogate methodology against Chinese exporters in anti-dumping investigations post-2016 has attracted conflicting legal opinions. The language of Protocol of Accession is as ambiguous as it could be. In view of conflicting legal opinion, a political solution to this conundrum may not be easy, especially given the vast number of countries employing NME methodology against China.

This article has argued that the expiry of para.(a)(ii) of art.15 of the Protocol of Accession need not make the use of surrogate methodology totally inapplicable in the future. The expiry of this paragraph does not mean the prohibition of such a practice, especially when subpara.(a)(i) permits a default choice of non-Chinese costs and prices — an indirect term for surrogate country values. Again, the Second Ad Note of art.VI of the GATT 1994 permits the use of a surrogate country methodology, although the thresholds in the situation are fairly rigorous. It is important to note that in view of the surviving provisions of art.15 of China's Protocol, the burden of establishing that the market economy conditions exist in the concerned sector or industry is still on the Chinese exporter or producer. This burden has not shifted to the WTO Member conducting anti-dumping investigation against Chinese producers or exporters.

Notwithstanding the argument that the surrogate country methodology does find application even after December 11, 2016, an explicit selection of a market economy third country and the use of this methodology in all future anti-dumping actions seems quite unfair to China. What is likely to happen in the future is that a

108 See 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 (5 June 1991); Department of Commerce, "Chrome-Plated Lug Nuts from the People's Republic of China", 56 Fed Reg 46,153, 46,154 (10 September 1991).

109 See Wenton Sheng, "Trade Law's Response to the Rise of China" (2016) 34(2) Berkeley Journal of International Law 109, 121.

number of countries will shift to the use of Chinese costs and prices in developing constructed normal values, as far as possible, on the basis of a finding that prices of a number of inputs and utilities in China are market determined. 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.

The constructed normal value approach will also obviate the need for an explicit selection of a surrogate country in anti-dumping actions involving China. However, the constructed normal value method can be used only on a case-by-case basis. This is also true with the "particular market situation" mentioned in art.2.2 of the Anti-dumping Agreement. A more appropriate remedy would be to shift towards countervailing duty actions to address situations dealing with artificially low prices of inputs caused by state intervention.