EU'S NEW ANTI-DUMPING METHODOLOGY AND THE END OF THE NON-MARKET ECONOMY DISPUTE?

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EU's New Anti-dumping Methodology and The End of The Non-Market Economy Dispute?

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Abstract

The EU's New Anti-Dumping ("AD") Methodology effectively maintains the long-standing distinction between market economies and non-market economies ("NMEs") and continues the entrenched practice of treating China discriminatively in AD actions. China challenged this discriminatory treatment immediately after the expiry of the relevant parts of Section 15 of its WTO Accession Protocol which permits such practices purportedly for fifteen years only. For unknown reasons, China decided to suspend the panel proceedings before the panel report was about to be released. While the suspension means that WTO Members including the EU may continue their existing AD practices against China, it would not stop China from retaliating against such discriminatory treatment. More significantly, the suspension does not mean the end of the dispute as China is likely to pursue it once the appellate function of the WTO is revived.

1. Introduction

The EU's latest reform of trade defence rules in 2016-2018, which was the first major overhaul of the rules for over two decades, has attracted widespread attention.[1] Amongst the various changes, the most significant and controversial has been the new anti-dumping ("AD") methodology designed to target market distortions caused by state intervention (hereinafter "New Methodology"). Although this methodology is ostensibly country-neutral, it is intended to target China or "like" countries which the EU regards as a non-market economy ("NME"). Indeed, in the face of the expiration of the so-called NME Methodology permitted under Section 15 of China's WTO Accession Protocol until 10 December 2016,[2] the New Methodology was introduced to balance EU's WTO obligation to discontinue the application of the NME Methodology and the domestic political need for an equivalently effective AD regime.

The New Methodology has generated considerable concerns about its WTO-legality both "as such" and "as applied".[3] In two recent sunset/expiry review cases both involving China,[4] the European

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1 For an official announcement of the reform, see European Commission, EU Trade Defence: Stronger and More Effective Rules Enter Into Force, 7 June 2018, available at: http://trade.ec.europa.eu/doclib/press/index.cfm?id=1859. For a discussion of various elements of the reform, see Wolfgang Muller, 'The EU's New Trade Defence Laws: A Two Steps Approach' in Marc Bungenberg et al. (eds) *The Future of Trade Defence Instruments: Global Policy Trends and Legal Challenges* (Switzerland: Springer, 2018) 45-62.

2 See *Protocol on the Accession of the People's Republic of China*, WT/L/432 (23 November 2001).

3 For a critique of the New Methodology, see Edwin Vermulst and Juhi Dion Sud, 'The New Rules Adopted by the European Union to Address "Significant Distortions" in the Anti-Dumping Context' in Marc Bungenberg et al. (eds) *The Future of Trade Defence Instruments: Global Policy Trends and Legal Challenges* (Switzerland: Springer, 2018) 63-87. For an analysis of the WTO-consistency of the methodology, see Christian Tietje and Vinzenz Sacher, 'The New Anti-Dumping Methodology of the European Union: A Breach of WTO Law?' in Marc Bungenberg et al. (eds) *The Future of Trade Defence Instruments: Global Policy Trends and Legal Challenges* (Switzerland: Springer, 2018) 89-105.

4 Commission implementing regulation (EU) 2019/687 of 2 May 2019 imposing a definitive duty on imports of certain organic coated steel products originating in the People's Republic of China following an expiry review pursuant to Article 11(2) of Regulation (EU) 2016/1036 of the European Parliament and of the Council (OJ L 116, 2019) [hereinafter "Organic Coated Steel Products"]. Commission implementing regulation (EU) 2019/915 of 4 June 2019 imposing a definitive anti-dumping duty on imports of certain aluminium foil in rolls originating

Commission ("Commission") has applied this methodology in a way that mirrors the NME Methodology in every essential aspect.

On 12 December 2016, China did initiate a WTO dispute against EU's AD law and practices including both the use of the NME Methodology under the old regime and the New Methodology (hereinafter "NME Dispute").[5] On 7 May 2019, however, China made an unprecedented move by requesting the panel to suspend the proceedings, which the panel accepted on 14 June 2019.[6] While the panel's findings will now remain confidential, the suspension of the dispute means that existing AD practices based on the NME Methodology may be continued.

This paper starts by reviewing the evolution of the EU's approach to dealing with NMEs, especially China, in AD investigations in Section 2. This section will then provide an overview and brief discussion of the New Methodology including the Commission's application of it in the two sunset review cases. It shows how the New Methodology has maintained the previous AD methodology and practice against China. Section 3 offers a brief review and analysis of the NME Dispute focussing on its implications for the application of the New Methodology, the AD practices of other WTO Members, and China. Section 4 concludes.

2. The EU's Antidumping Regime

The New Methodology exclusively concerns the calculation of the normal value ("NV") of exported goods, particularly in circumstances where the domestic price of the goods is distorted by activities of the government of the exporting country. In the eyes of the Commission, distorted domestic prices or costs are not market-based prices, do not reflect the value at which the goods should be normally sold, and hence are not suitable for being used to determine the NV of the goods.[7] The New Methodology serves to "allow the Commission to establish and measure the actual magnitude of dumping being practised in normal market conditions absent distortions."[8] Specifically, it would allow the Commission to employ "undistorted" prices or costs in a third country to calculate NVs.[9]

The New Methodology was introduced at a time when the NME Methodology was purportedly due to expire (i.e. on 11 December 2016) and the EU regulators were under tremendous domestic political pressure to create an alternative approach to deal with imports from China.[10] In essence, the NME Methodology allowed WTO Members to treat China as an NME in AD investigations and consequently to replace Chinese domestic prices or costs with those in a market economy ("ME") third country in

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in The People's Republic of China following an expiry review under Article 11(2) of Regulation (EU) 2016/1036 of the European Parliament and of the Council (OJ L 146, 2019) [hereinafter "Aluminium Foil in Rolls"].

5 For an official summary of the case, see WTO, *European Union — Measures Related to Price Comparison Methodologies* (DS516), available at: www.wto.org/english/tratop_e/dispu_e/cases_e/ds516_e.htm. For discussions of the case, see eg Weihuan Zhou and Delei Peng, "EU - Price Comparison Methodologies (DS516): Challenging the Non-Market Economy Methodology in Light of the Negotiating History of Article 15 of China's WTO Accession Protocol" (2018)52(3) *Journal of World Trade* 505; Weihuan Zhou, "China's Litigation on Non-Market Economy Treatment at the WTO: A Preliminary Assessment" (2017)5(2) *Chinese Journal of Comparative Law* 345.

6 See WTO, *European Union — Measures Related to Price Comparison Methodologies*, Communication from the Panel, WT/DS516/13 (17 June 2019).

7 European Commission, Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European Union and Regulation (EU) 2016/1037 on protection against subsidised imports from countries not members of the European Union, COM(2016)721 final, 9 November 2016, available at: eur-lex.europa.eu/procedure/EN/2016_351.

8 Ibid.

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

10 See Vermulst and Sud, above n 3, at 67-8.

determining NVs.[11] As a China-specific obligation, the NME Methodology addressed the same concerns as those behind the EU's New Methodology.[12] The New Methodology, therefore, is designed to maintain the effects of the NME Methodology by ensuring the same level of AD duties as the EU had been able to impose through the NME Methodology.[13]

Below, we provide an overview of the development of the EU's approaches to dealing with NMEs in AD investigations, which will be followed by a brief discussion of the New Methodology.

2.1 The Development of EU's Approach to Non-Market Economies in Anti-dumping Investigations

The challenge that NMEs pose to AD investigations essentially arises from state intervention in commercial activities which causes market distortions and undermines the norms and principles that are generally applicable to market-oriented economies. The WTO AD rules have only one provision – the second Supplementary Provision to paragraph 1 of GATT Article VI[14] (hereinafter "Ad Note") – that specifically tackles NMEs. This provision, however, merely applies to economies in which "complete or substantially complete monopoly of trade and the fixing of all prices by the State" exist.[15] The EU's stance towards the treatment of NMEs in AD procedures has evolved from adherence to the AD Note to the application of a special treatment to counteract the anti-competitive effect of state intervention in economies in transition. As observed by Snyder, "[t]he distinction between 'market economy' and 'non-market economy' … runs like a red thread through EC anti-dumping actions against China and other so-called state-trading countries."[16]

The EU's first AD legislation was adopted in 1968.[17] It was applicable to imports from all countries, whether GATT signatories or not. Since China was not a Contracting Party to the GATT at the time,[18] the EU had no obligation to comply with GATT AD rules in respect of imports from China and could develop and implement a discriminatory AD practice.

The 1968 AD legislation contained a provision on State-controlled economy, which seems to have been derived from the Ad Note.[19] It set out the same extreme circumstances in which the investigating

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[11] There is a large volume of publications on the expiration of Section 15(a)(ii) of China's Accession Protocol including its legal, economic and political implications. See eg. Above n 5, Zhou and Peng, Footnote 17.

[12] For a negotiating history of the NME Methodology, see generally above n 5, Zhou and Peng.

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

[14] The Ad Note reads:

> It is recognized that, in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability for the purposes of paragraph 1, and in such cases importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate.

This special AD rule was added to the GATT during the Review Session of 1954-55 to deal with certain NMEs and was subsequently incorporated into the WTO Anti-Dumping Agreement. Article 2.7 of the Anti-Dumping Agreement provides that Article 2 of the agreement is "without prejudice to" this Ad Note.

[15] Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R (adopted 28 July 2011) FN 460.

[16] Francis Snyder, 'The Origins of the 'Nonmarket Economy': Ideas, Pluralism and Power in EC Anti-dumping Law about China' (2001)7(4) *European Law Journal* 369, 370.

[17] Regulation (EEC) No 459/68 of the Council of 5 April 1968 on protection against dumping or the granting of bounties or subsidies by countries which are not members of the European Economic Community.

[18] For a history of China's role in the GATT, see Ministry of Foreign Affairs of the People's Republic of China, 'Bilateral Agreement on China's Entry into the WTO Between China and the United States', undated, available at: www.fmprc.gov.cn/mfa_eng/ziliao_665539/3602_665543/3604_665547/t18051.shtml.

[19] See above n 17, Regulation (EEC) No 459/68 of the Council, Article 3.6. This provision states:

> In the case of imports from countries where trade is on the basis of near or total monopoly and where domestic prices are fixed by the State, account may be taken of the fact that an exact comparison between the export price of a product to the Community and the domestic prices in that country may

authority may disregard domestic prices in establishing NVs. This provision was removed, while alternative NME methodologies were introduced when the regulation was amended in 1979.[20] Article 3.2(c) of the 1979 regulation clarified the methodologies that may be employed in determining NVs of goods originating in NMEs, focussing on State-trading countries and China.[21] Notably, this provision created the so-called "analogue country" methodology, i.e. the use of prices of like products in a ME third country, which has become the standard approach to establishing NVs in NMEs.

The subsequent amendment of the AD regulation in 1998[22] introduced several important changes. Firstly, it created a list of NME countries including China. The designated NMEs may seek the grant of a ME status by satisfying five "country-wide" criteria including:

> (1) a low degree of government influence over the allocation of resources and decisions of enterprises, whether directly or indirectly (e.g. public bodies), for example through the use of state-fixed prices, or discrimination in the tax, trade or currency regimes;
>
> (2) an absence of state-induced distortions in the operation of enterprises linked to privatisation and the use of non-market trading or compensation system;
>
> (3) the existence and implementation of a transparent and non-discriminatory company law which ensures adequate corporate governance (application of international accounting standards, protection of shareholders, public availability of accurate company information);
>
> (4) the existence and implementation of a coherent, effective and transparent set of laws which ensure the respect of property rights and the operation of a functioning bankruptcy regime; and
>
> (5) the existence of a genuine financial sector which operates independently from the state and which in law and practice is subject to sufficient guarantee provisions and adequate supervision.[23]

According to the Commission, these criteria served to establish the "general absence of state interventions in costs and prices in the economy", and the reason why prices and costs in China have been usually disregarded in trade defence investigations is because "they are routinely distorted or rendered unreliable by state intervention and are not a credible measure of the true costs of production."[24] The EU maintains the position that most of the above criteria have not been met by China.[25] The designation of an NME status triggers the application of the "analogue country" methodology which remained in force until the New Methodology was introduced in December 2017. In this context, the "analogue country" methodology was elaborated and applied to determine a surrogate price or cost for the calculation of a constructed normal value ("CNV") as below:

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not always be appropriate, since in such cases special difficulties may arise in determining the comparability of prices.

20 Council Regulation (EEC) No 1681/79 of 1 August 1979 amending Regulation (EEC) No 459/68 on protection against dumping or the granting of bounties or subsidies by countries which are not members of the European Community.

21 By reference to countries to which Council Regulation (EEC) No 925/79 and Council Regulation (EEC) No 2532/78 applied (respectively "State-trading countries" and China). Article 3.2(c) provides that normal value would be determined on the basis of one of the following criteria:

> (aa) the price at which the like product of a market economy third country is actually sold: i) for consumption on the domestic market of that country, or ii) to other countries, including the Community; or
>
> (bb) the constructed value of the like product in a market economy third country; or
>
> (cc) if the above did not provide an adequate basis, the price actually paid or payable in the Community for the like product, duly adjusted, if necessary, to include a reasonable profit margin.

22 Council Regulation (EC) No 905/98 of 27 April 1998 amending Regulation (EC) No 384/96 on protection against dumped imports from countries not members of the European Community.

23 Commission Staff Working Document on progress by the People's Republic of China towards graduation to market economy status in trade defence investigations, 19/09/2008, SEC(2008)2503 final.

24 Ibid., at 5.

25 See Vermulst and Sud, above n 3, at 65.

> In the case of imports from non-market economy countries, the normal value shall be determined on the basis of the price or constructed value in a market economy third country, or the price from such a third country to other countries, including the Union, or, where those are not possible, on any other reasonable basis, including the price actually paid or payable in the Union for the like product, duly adjusted if necessary to include a reasonable profit margin.[26] (footnote omitted)

Secondly, however, it was recognised that "the process of reform in Russia and the People's Republic of China has fundamentally altered their economies and has led to the emergence of firms for which market economy conditions prevail" and that they have "moved away from the economic circumstances which inspired the use of the analogue country methodology."[27] For this reason, it was found appropriate to specify that "normal value may be determined in accordance with the rules applicable to market economy countries in cases where it is shown that market conditions prevail for one or more producers subject to investigation in relation to the manufacture and sale of the product concerned."[28] Thus, individual producers from designated NMEs may seek ME treatment or the application of the standard methodology for determining NVs by establishing that their production and sales are based on ME conditions. To discharge this burden of proof, the producers must satisfy five "producer-specific" criteria:

> (1) decisions of firms regarding prices, costs and inputs, including for instance raw materials, cost of technology and labour, output, sales and investment, are made in response to market signals reflecting supply and demand, and without significant State interference in that regard, and costs of major inputs substantially reflect market values;
>
> (2) firms have one clear set of basic accounting records which are independently audited in line with international accounting standards and are applied for all purposes;
>
> (3) the production costs and financial situation of firms are not subject to significant distortions carried over from the former non-market economy system, in particular in relation to depreciation of assets, other write-off, barter trade and payment via compensation of debts;
>
> (4) the firms concerned are subject to bankruptcy and property laws which guarantee legal certainty and stability for the operation of firms; and
>
> (5) exchange rate conversions are carried out at the market rate.[29]

These criteria are very similar to the five country-wide criteria that apply to the determination of whether ME status should be granted to a particular NME country. Accordingly, those criteria were not only concerned about whether producers in an exporting country set prices of like products in the domestic market freely in response to market signals. They were also meant to assess, more generally, state influence in the economy, even when it had no bearing on businesses' pricing strategies. In other words, the rationale for these criteria was not limited to a consideration of whether domestic prices are the result of corporate decisions made without state interference, but also involved an assessment of whether state influence had conferred a competitive advantage to producers in general.

While the EU's NME treatment of China created many WTO-consistency issues, it was exempted from WTO's scrutiny largely due to the operation of Section 15 of China's Accession Protocol. China challenged the EU's approach at the WTO on 12 December 2016, the day after the expiration of Section 15. While the EU defended its AD laws and practice vigorously in this dispute,[30] it replaced the NME

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[26] Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union, Article 2.7(a). [hereinafter "Basic Regulation"]

[27] See above n 22, Council Regulation (EC) No 905/98, Preamble.

[28] Ibid.

[29] Ibid, formerly recital 2.7(c).

[30] For the EU's written submissions to the WTO panel, see *European Union – Measures Related to Price Comparison Methodologies (DS516), First Written Submission by the European Union*, 14 Nov. 2017, available at: http://trade.ec.europa.eu/doclib/docs/2017/november/tradoc_156401.pdf.

treatment and the "analogue country" methodology with the New Methodology, effectively on 20 December 2017.

2.2 An Overview of the New Methodology

The New Methodology was a compromised approach in response to the expiration of Section 15 of China's Accession Protocol. On the one hand, it replaced the discriminatory NME list with a country-neutral approach to the determination of NVs. As such, the New Methodology applies to all countries instead of a small group of countries designated as NMEs. On the other hand, the New Methodology is designed in a way that serves to maintain the EU's long-standing policy of counteracting competitive advantages resulting from state intervention through AD measures.

The New Methodology, introduced in a new paragraph 6a to Article 2 of the Basic Regulation,[31] grants the discretion to the Commission to disregard the "domestic prices and costs in the exporting country due to the existence in that country of significant distortions" and then to calculate a CNV "exclusively on the basis of costs of production and sale reflecting undistorted prices or benchmarks" (paragraph 6a(a)).

Whether "significant distortions" exist is to be determined according to the criteria contemplated in paragraph 6a(b). As a general rule, "significant distortions" may exist "when reported prices or costs, including the costs of raw materials and energy, are not the result of free market forces because they are affected by substantial government intervention." Specifically, the Commission shall consider six factors:

> (1) the market in question being served to a significant extent by enterprises which operate under the ownership, control or policy supervision or guidance of the authorities of the exporting country;
>
> (2) state presence in firms allowing the state to interfere with respect to prices or costs;
>
> (3) public policies or measures discriminating in favour of domestic suppliers or otherwise influencing free market forces;
>
> (4) the lack, discriminatory application or inadequate enforcement of bankruptcy, corporate or property laws;
>
> (5) wage costs being distorted; and
>
> (6) access to finance granted by institutions which implement public policy objectives or otherwise not acting independently of the state.

Apparently, these factors are largely based on the five country-wide criteria which are simply rephrased in an opposite way to essentially substantiate the existence of an NME (as opposed to the existence of a ME). The fact that the new factors are drafted in such a similarly ambiguous manner suggests strongly that the Commission will continue to have wide discretion to decide whether any of the factors are satisfied.[32] Due to the similarities between the old and new criteria and the longstanding position of the Commission that China is yet to be a ME, it is reasonable to predict that the application of the new factors is likely to lead to the continuing application of the "analogue country" methodology.

A decision that significant distortions exist may rely on findings that one or more of the above factors exist and therefore does not require the establishment of all the factors cumulatively. This contrasts with the position of the old rules which requires the satisfaction of all the EU criteria, country-wide or producer-specific, for the grant of ME treatment. The reason for this change has to do with the change to the burden of proof. Under the new rules, the burden is shifted to EU industries or AD petitioners to establish that the factors are satisfied, whereas the burden was on a designated NME country or its exporters under the old regulation. Thus, this change serves to relax the burden of proof on EU industries

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[31] Regulation (EU) 2017/2321 of 12 December 2017 amending Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European Union and Regulation 2016/1037 on protection against subsidised imports from countries not members of the European Union.

[32] See Vermulst and Sud, above n 3, at 75-6.

and to ensure that "the new rules would not diminish in any significant way the availability of remedial action against cheap imports from China."[33]

In this regard, Article 2(6)a(c) mandates the Commission to collect the relevant evidence and issue a report on these factors. Immediately after the revised regulation took effect, the Commission published a 446-page long report providing a detailed analysis of market distortions in China according to the criteria contemplated in sub-paragraph (b)[34] (hereinafter "Market Distortion Report"). The report is divided into three main sections covering macro-level distortions in China (e.g. economic structure, state plan, the Communist Party, state-owned enterprises, etc.), distortions in factors of production (including land, energy, capital, raw materials and other material inputs and labour), and distortions in four major upstream sectors (including steel, aluminium, chemical and ceramic). The evidence and findings in the report largely relied on the Commission's previous findings that China did not satisfy the five country-wide criteria. EU industries are allowed to use this report in applications for AD actions (Article 2(6)a(d)). Thus, the effect of the report is to allow EU industries to discharge the required burden of proof in their petitions and shift the burden to exporters to prove that the "significant distortions" identified do not exist. This effectively reverses the burden of proof to the position under the old regulation. That is, as a result of the Market Distortion Report, China will continue to be deemed to be an NME or "significant distortions" will be assumed to exist unless exporters prove otherwise in individual investigations. Given the Commission's entrenched observation of China as an NME, Chinese exporters will face the same difficulties as they consistently encountered before in rebutting the NME assumption. The failure to rebut the presumption of the existence of "significant distortions" would result in the use of surrogate prices or costs to construct a NV. The benchmarks that the Commission is directed to use include:

- corresponding costs of production and sale in an appropriate representative country with a similar level of economic development … where there is more than one such country, preference shall be given, where appropriate, to countries with an adequate level of social and environmental protection;
- if it considers appropriate, undistorted international prices, costs, or benchmarks; or
- domestic costs, but only to the extent that they are positively established not to be distorted, on the basis of accurate and appropriate evidence, including in the framework of the provisions on interested parties in point (c).

To put the New Methodology in context, the Basic Regulation maintains the ordinary approach to determining NVs, that is, "normal value shall normally be based on the prices paid or payable, in the ordinary course of trade, by independent customers in the exporting country."[35] Domestic prices may be disregarded "when there are no or insufficient sales of the like product in the ordinary course of trade, or where, because of the particular market situation, such sales do not permit a proper comparison."[36] In these circumstances, NV will be determined through the constructed method. The cost to be used in a CNV "shall normally be calculated on the basis of records kept by the party under investigation, provided that such records are in accordance with the generally accepted accounting principles of the country concerned and that it is shown that the records reasonably reflect the costs associated with the production and sale of the product under consideration."[37]

It would be interesting to see how the New Methodology will fit in the unchanged rules. Specifically, it is not crystal clear from the New Methodology whether a finding that "significant distortions" exist would

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33 Andrei Suse, 'Old Wine in a New Bottle: The EU's Response to the Expiry of Section 15(a)(ii) of China's WTO Protocol of Accession', (2017)20(4) *Journal of International Economic Law* 951, 967.

34 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, SWD(2017) 483 final/2, 20 Dec. 2017.

35 See above n 26, Basic Regulation, Article 2.1.

36 Ibid., Article 2.3.

37 Ibid., Article 2.5.

lead to a finding that the circumstances relating to "ordinary course of trade" ("OCT") or "particular market situation" ("PMS") exist.

2.3 The Application of the New Methodology

As of this writing, the Commission has applied the New Methodology in two sunset/expiry review cases (as opposed to original investigations). In both reviews, the application of the New Methodology led to a finding that dumping will likely recur should the existing AD measures be discontinued.[38]

Both reviews were initiated by EU industries seeking to maintain the existing AD measures. In assessing the "likelihood of recurrence of dumping", the Commission accepted the applicants' claim that it was not appropriate to use domestic prices and costs in China due to the existence of significant distortions within the meaning of Article 2(6)a. In making this finding, the Commission relied predominantly on its Market Distortion Report, although it also considered additional evidence adduced by the applicants and invited the Government of China and Chinese exporters to provide relevant information.[39] According to the Commission's records,[40] neither the Chinese government nor the Chinese exporters responded to the requests for information or submissions. This lack of response may well have to do with the fact that such submissions would be unlikely to successfully rebut the findings of significant distortions in the Market Distortion Report. As a result, the Commission used the evidence already collected in the Market Distortion Report to reach the decisions that each of the six "market distortions" criteria is satisfied, and that overall, China's economic system "is at odds with the notion of free play of market forces" and the substantial government interventions result in market distortions throughout the economy.[41] This finding of "significant distortions" then led to the construction of NVs based on costs of production and sale in "an appropriate representative country".[42]

Thus, the Commission's application of the New Methodology in the two reviews confirms that this methodology simply continues the NME Methodology and allows the Commission to maintain its long-standing approach towards China. Specifically, it continues to impose the evidentiary burden on the Chinese government or producers/exporters to rebut an assumption of "significant distortions". As before, such a rebuttal would be extremely difficult to substantiate in practice. Consequently, the disregard of Chinese prices or costs and the use of surrogate production costs for the construction of NVs will remain an exception to the ordinary approach envisaged under Article 2(1) of the Basic Regulation, as opposed to a solution to establish NVs when there are no or insufficient sales in the OCT or a PMS exists. In the two reviews, the Commission did not ground the recourse to CNVs on either circumstance (i.e. OCT or PMS). In short, the New Methodology remains a special rule applicable to China (and other NMEs) and accordingly is unlikely to be country-neutral as claimed by the EU.

3. The End of the NME Dispute?

While the NME Dispute was between China and the EU, it has attracted unparalleled attention from the US.[43] Amid the dispute, Robert Lighthizer, the United States Trade Representative, warned that it is "the most serious litigation that we have at the WTO right now" and "a bad decision with respect to the non-

[38] See above n 4, Organic Coated Steel Products, recitals 170-71; Aluminium Foil in Rolls, recitals 169-70.
[39] See above n 4, Organic Coated Steel Products, recitals 20-1; Aluminium Foil in Rolls, recitals 25-6.
[40] See above n 4, Organic Coated Steel Products, recitals 38, 41; Aluminium Foil in Rolls, recitals 42, 45.
[41] See above n 4, Organic Coated Steel Products, recitals 39-92; Aluminium Foil in Rolls, recitals 43-110.
[42] See above n 4, Organic Coated Steel Products, recital 93; Aluminium Foil in Rolls, recital 111.
[43] China did initiate a similar dispute against the US but did not proceed with it. See WTO, *United States – Measures Related to Price Comparison Methodologies* (DS515), available at: www.wto.org/english/tratop_e/dispu_e/cases_e/ds515_e.htm.

market economy status of China … would be cataclysmic for the WTO."[44] In response, Chinese Ambassador Zhang Xiangchen, in his opening statement at the first panel hearing of the dispute, stressed that this dispute is extraordinarily important to China and "concerns the credibility of the dispute settlement mechanism, the integrity of the World Trade Organization, and the membership's faith in the multilateral trading system."[45] It was against such considerable pressure that the WTO panel issued its interim decisions in April 2019 which were reportedly unfavourable to China.[46] In May, China decided to request a suspension of the dispute.

The reasons behind China's suspension are unknown. If as reported, the panel ruled in favour of the EU, then one possibility is that China intended to prevent the decision from becoming official and public. In the dispute, the EU's key argument was that the 15-year deadline contemplated under Section 15(d) merely shifts the burden of proof from Chinese exporters to EU petitioners and does not terminate the right to apply the NME Methodology. A decision that supports this position would effectively confer a permanent right to WTO Members to discriminate against China in AD actions. In anticipation of the impending paralysis of the appellate review function of the WTO and the resultant likelihood that the panel report will be adopted automatically, it is in China's interest to "block" the creation of such a bad precedent before it is adopted. In addition, given the significance and political sensitivity of the dispute, the suspension would help avoid domestic anti-WTO sentiment in China and maintain what is today much needed political support for the WTO.

What does the suspension mean for the EU's New Methodology, and more generally for China's NME status in AD actions worldwide? The immediate consequence is that there is no WTO decision on whether the NME Methodology has expired so that China cannot treat the continuing application of it by WTO Members as a breach of WTO rules. In other words, other Members may continue to treat China as an NME in AD investigations by relying on their existing AD law and practice. As a result, Chinese firms will continue to face hefty AD duties inflated by the NME Methodology. Indeed, a recent US investigation imposed an AD duty as high as 1,731% on Chinese mattresses.[47]

As far as the New Methodology is concerned, the suspension means that the legality of it remains unsettled under the WTO AD Agreement, particularly under the OCT and PMS tests. Nevertheless, as Section 15 remains alive, the New Methodology may be justified as an application of the NME Methodology. Since the Basic Regulation had ME criteria at the time of China's WTO accession,[48] the fact that such criteria, as well as the designation of NMEs, no longer exist does not preclude the EU from utilizing Section 15. In any event, the "market distortions" criteria essentially serve to continue the distinction between MEs and NMEs in AD actions.

In the face of the continued application of the NME Methodology, China may respond in a number of ways. First, China could utilize the flexibilities embedded in the WTO AD Agreement, particularly the OCT or PMS tests or other provisions that have the potential to allow the use of surrogate prices/costs

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[44] Shawn Donnan, 'Trump Trade Tsar Warns Against China 'Market Economy' Status', Financial Times (22 June 2017), available at: www.ft.com/content/4d6ba03e-56b0-11e7-9fed-c19e2700005f.

[45] *European Union – Measures Related to Price Comparison Methodologies* (DS516), Opening Statement by Ambassador Zhang Xiangchen as a part of the Oral Statement of China at the First Substantive Meeting of the Panel in the Dispute (China Opening Statement), 6 December 2017, http://images.mofcom.gov.cn/wto2/201712/20171213174424357.pdf.

[46] Bryce Baschuk, 'China Loses Market-Economy Trade Case in Win for EU and U.S.', Bloomberg (18 April 2019), available at: www.bloomberg.com/news/articles/2019-04-18/china-is-said-to-lose-market-economy-trade-case-in-eu-u-s-win.

[47] David Shepardson, 'U.S. Imposes New Anti-Dumping Duties on Chinese Mattresses, Beer Kegs', Reuters (30 May 2019), available at: www.reuters.com/article/us-usa-trade-china-duties/u-s-imposes-new-anti-dumping-duties-on-chinese-mattresses-beer-kegs-idUSKCN1SZ2X1.

[48] See Edwin Vermulst, Juhi Dion Sud and Simon Evenett, 'Normal Value in Anti-Dumping Proceedings against China Post-2016: Are Some Animals Less Equal Than Others?' (2016)11(5) *Global Trade and Customs Journal* 212, 215 (arguing that only countries that had ME criteria in their national laws at the time of China's accession could use Section 15).

for the calculation of NVs, to target countries that use the NME Methodology. Indeed, retaliatory AD actions are not foreign to China.[49] Second, China may resort to measures other than AD duties to retaliate the discriminatory treatment of it in AD actions. Arguably, measures that target foreign investment or new areas of trade may not be captured by the existing WTO rules. Finally, China may continue the NME Dispute once the Appellate Body becomes fully functional. It is very unlikely that China will accept the discriminatory NME Methodology, which it resents constantly and furiously, as perennial. Thus, the suspension of the panel proceedings will not be the end of the NME Dispute but rather represent a strategic decision made by China to protect its right to appeal as well as the public support needed for the multilateral trading system.

4. Conclusion

The distinction between MEs and NMEs is firmly embedded in EU's AD law and practice. The introduction of the New Methodology, which allegedly establishes a country-neutral approach, is intended to maintain that distinction and continue the entrenched practice of treating NMEs like China discriminatively in AD actions. This practice was previously immune from WTO legal proceedings due to the operation of Section 15 of China's Accession Protocol, which permits the use of the NME Methodology for fifteen years after China's WTO accession. The NME Dispute, initiated by China after the expiry of the fifteen-year timeframe, did not provide any concrete results as China decided to suspend the panel proceedings. While the suspension means that WTO Members including the EU may continue to rely on the NME Methodology or its variations in their domestic laws and practices, it would not stop China from retaliating against such discriminatory treatment. Once the appellate function of the WTO is revived, China is likely to continue to challenge the New Methodology or similar practices.

[49] Weihuan Zhou and Shu Zhang, 'Anti-dumping Practices and China's Implementation of WTO Rulings' (2017)230 *China Quarterly* 512.