

CHINA'S LONG ROAD TO MARKET ECONOMY STATUS

JEFFREY M. TELEP* AND RICHARD C. LUTZ**

ABSTRACT

In July 1986, China applied to become a participant in the World Trade Organization's predecessor, the General Agreement on Tariffs and Trade. This application began a fifteen-year negotiation, which culminated in China's acceptance into the WTO in December 2001. From China's perspective, its acceptance into the WTO also meant that it could finally put an end to being treated as a non-market economy in antidumping proceedings by other WTO members fifteen years following its accession. In particular, at the time of accession, China negotiated the removal of certain language from its WTO accession agreement that it believed served as the legal basis for non-market economy treatment in antidumping proceedings. With the removal of that language in December 2016, China believed that no WTO member would be able to legally

* Jeffrey M. Telep is a partner in the International Trade and Litigation practice group at King & Spalding LLP. Mr. Telep has over 25 years of experience litigating high profile international trade disputes, specifically antidumping and countervailing duty investigations under Title VII of the Tariff Act of 1930, unfair trade practice investigations at the U.S. International Trade Commission under Section 337 of the Tariff Act; Customs civil penalty prosecutions, seizures, and forfeitures; litigation involving international anti-money laundering; and other commercial disputes. Mr. Telep also advises the firm's clients on international trade regulatory matters, including Customs and Foreign Trade Zone issues, economic sanctions, and anti-money laundering and asset forfeiture issues. Before joining King & Spalding, Mr. Telep spent six years as a trial attorney with the Civil Division of the U.S. Department of Justice. During his tenure with the Justice Department, Mr. Telep was lead counsel for the United States in more than 75 cases involving international trade disputes, including antidumping and countervailing duty cases, Customs civil fraud prosecutions and trade embargo enforcement actions.

** Richard C. Lutz is a senior trade analyst in the International Trade and Litigation practice group at King & Spalding LLP focusing primarily on trade remedy investigations. Mr. Lutz represents both petitioners and respondents in antidumping and countervailing duty investigations before the U.S. Department of Commerce, the U.S. International Trade Commission, and foreign governments. Mr. Lutz has also successfully assisted clients involved in litigation at the Court of International Trade, The North American Free Trade Agreement, and the WTO. Before joining King & Spalding, Mr. Lutz spent 14 years as a trade analyst in the International Trade Group of Dewey & LeBoeuf LLP. Prior to his tenure at Dewey, Mr. Lutz was Acting Director of the Office of Accounting at the U.S. Department of Commerce. Prior to his involvement in international trade matters, Mr. Lutz was a Tax Consultant and Auditor for Deloitte and Touche where he also became licensed as a Certified Public Accountant.

This article represents the personal viewpoints of the authors and not those of King & Spalding. © 2018, Jeffrey M. Telep and Richard C. Lutz.

continue to treat it as a non-market economy in antidumping proceedings. December 2016 has come and gone, the language has been removed from its accession agreement, but the EU and the United States continue to treat China as a non-market economy, and it appears China will continue to be relegated to this status for the foreseeable future. This Article addresses the accession agreement language regarding China’s status as a non-market economy, the removal of that language, and the respective arguments of the EU and the United States in certain WTO proceedings regarding the significance of the terms of China’s accession.

I. INTRODUCTION	694
II. CHINA’S ACCESSION TO THE WORLD TRADE ORGANIZATION	695
III. POST-ACCESSION DEVELOPMENTS	698
IV. THE CURRENT WTO DISPUTE	699
V. RECENT EVENTS	703
VI. CONCLUSION	708

I. INTRODUCTION

This Article examines the history and current status of the trade dispute between China and the United States regarding the continued use of the non-market economy methodology in antidumping proceedings. China exported \$506 billion of goods to the United States during 2017, making it the largest exporter to the United States.¹ Mexico was a distant second, exporting \$314 billion of goods to the United States during the same period.² The major difference between the U.S. trade relationship with China and the U.S. trade relationship with Mexico is the significant trade imbalance. The United States’ 2017 trade deficit with Mexico was \$71 billion compared to the United States’ trade deficit with China of \$375 billion.³ For the U.S. government, this lopsided trade relationship is the focus of much attention and concern.⁴ Central to the issue of trade imbalances and unfair trade practices is whether China should be treated as a market economy or non-market economy

1. See U.S. CENSUS BUREAU & U.S. BUREAU OF ECON. ANALYSIS, U.S. INTERNATIONAL TRADE IN GOODS AND SERVICES: DECEMBER 2017, FT-900 (17-12), 16 (Feb. 6, 2018).

2. See *id.*

3. See *id.*

4. See, e.g., The White House, Office of the Press Secretary, Readout of President Donald J. Trump’s Call with President Xi Jinping of the People’s Republic of China (Jan. 16, 2018), <https://www.whitehouse.gov/briefings-statements/readout-president-donald-j-trumps-call-president-xi-jinping-peoples-republic-china-2/>.

in antidumping proceedings in the United States, as this determination establishes how fair trade is measured.

Historically, the dumping margins (and corresponding antidumping duties) on products from China have been calculated using the non-market economy methodology, where Chinese manufacturers' and exporters' export prices are compared to a normal value that is calculated using the Chinese producer's factors of production valued with surrogate amounts from an economically comparable country.⁵ Surrogate country values are used in lieu of the Chinese producers' own input values because prices and costs experienced in China are not based upon market principles.⁶ If China graduates to market-economy status, its dumping margins would be determined based upon Chinese prices and cost information.⁷ Many industry experts believe that treating China as a market economy country would lower or remove dumping margins significantly, further increasing the amount of products exported from China, further driving up the China trade imbalance, and further displacing the U.S. workers that compete with China's export industries.⁸ By example, a study focusing on the European Union estimated that granting market economy status would have a significant adverse effect on the EU economy with production output decreasing by €114.1 billion to €228 billion per year, putting at least 1.7 to 3.5 million jobs at risk.⁹

II. CHINA'S ACCESSION TO THE WORLD TRADE ORGANIZATION

In July 1986, China applied for admission to the WTO's predecessor, the General Agreement on Tariffs and Trade ("GATT"),¹⁰ triggering a lengthy negotiation process. At that time, the United States already treated China as a non-market economy when determining whether

5. 19 U.S.C. § 1677b (c)(4).

6. See INT'L TRADE ADMIN., U.S. DEP'T OF COM., ENFORCEMENT AND COMPLIANCE ANTIDUMPING MANUAL, ch.10, at 2 (2015).

7. See Request for Consultations by China, *United States—Measures Related to Price Comparison Methodologies*, at 1, WTO Doc. WT/DS515/1 (Dec. 15, 2016) [hereinafter *US—Price Comparison Methodologies*].

8. See, e.g., ROBERT E. SCOTT & XIAO JIANG, ECON. POL'Y INST., UNILATERAL GRANT OF MARKET ECONOMY STATUS TO CHINA WOULD PUT MILLIONS OF EU JOBS AT RISK, EPI BRIEFING PAPER #407, at 1 (Sept. 18, 2015).

9. *Id.* at 11.

10. Working Party on the Accession of China, *Checklist of Documents*, WTO Doc. WT/ACC/CHN/23/Rev.1 (July 31, 2001) (referencing document L/6017 dated July 14, 1986).

China's exported products were fairly traded.¹¹ From China's perspective, non-market economy treatment makes its situation extremely difficult because it ignores the cost and home market price experiences of the Chinese manufacturers exporting products to the United States and forces exporters to acquire information about manufacturing costs in other nations.¹² Currently, the countries that are deemed economically comparable to China include Romania, Mexico, Brazil, Bulgaria, Thailand, and South Africa.¹³ Thus, in order for a Chinese exporter to be confident that its product is not being dumped in the United States, the exporter would need to be familiar with the input costs and financial performance of comparable manufacturers located in these surrogate countries. In order to regulate the application of this requirement imposed on its exporters, China negotiated specific language as part of its World Trade Organization accession agreement.¹⁴ Specifically, regarding price comparability in the calculation of dumping margins, Paragraph 15 of China's December 11, 2001 protocol agreement stated the following:

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

11. *See, e.g.*, Petroleum Wax Candles from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 51 Fed. Reg. 25,085, 25,086 (U.S. Dep't of Com. July 10, 1986) (notice).

12. *See* 19 U.S.C. § 1677b (c)(4).

13. *See, e.g.*, Memorandum from Michael Rollin, Acting Director, Office of Pol'y, Enforcement and Compliance, to Andrew Medley, Senior Int'l Trade Compliance Analyst: Request for a List of Surrogate Countries for Administrative Review of the Antidumping Duty Order on Tapered Roller Bearings and Parts Thereof, Finished and Unfinished ("TRBs") from the People's Republic of China (Case No. A-570-601) (U.S. Dep't of Com. Nov. 20, 2017).

14. World Trade Organization, Protocol on the Accession of the People's Republic of China, ¶ 15, WTO Doc. WT/L/432 (Nov. 10, 2001) [hereinafter Protocol on China's Accession].

- (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.¹⁵

At the time of this negotiation China believed that subparagraph 15 (d) meant that an importing country's ability to use the non-market economy methodology would expire in fifteen years on December 11, 2016.¹⁶ For its part, when explaining the safeguard mechanisms contained in the Agreement, the United States Trade Representative referenced "the continued ability to utilize a special non-market economy methodology for measuring dumping in anti-dumping cases against Chinese companies (available for fifteen years)."¹⁷ China believes there was a recognition that non-market economy treatment would expire in 2016. In contrast, the US Government interprets this statement as meaning China's non-market economy treatment would be guaranteed at least through 2016. In any event, whatever USTR stated is not legally controlling, because what matters ultimately is the interpretation of the text of Paragraph 15 in WTO dispute settlement.

15. *Id.* ¶ 15. Note subparagraphs 15(b) and (c) relating to countervailing duty methodologies have been deleted for ease of illustration.

16. See *US—Price Comparison Methodologies*, *supra* note 7, at 1.

17. OFFICE OF THE USTR, EXEC. OFFICE OF THE PRESIDENT, 2002 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE 7 (2002), <http://usinfo.state.gov/topical/econ/wto/02121202.htm>.

III. POST-ACCESSION DEVELOPMENTS

Shortly after China's fifteen-year agreement was set into place, the United States began graduating certain countries from non-market economy to market economy status. Russia graduated to market economy status effective April 2, 2002.¹⁸ Romania graduated to market economy status effective January 10, 2003.¹⁹ On December 22, 2005, a Chinese exporter requested a reexamination of China's status as a non-market economy, and, on February 2, 2006, the Chinese government expressed support for this request.²⁰ The United States subsequently denied this request.²¹

Although China did not graduate to non-market economy status, joining the WTO nevertheless resulted in an explosion of its exports to the United States. In the first five years from 2002 to 2007, China's exports to the United States grew at an average growth rate of 23 percent per year.²² By the time the fifteen-year period expired, China's exports to the United States had grown by an average annual rate of 11 percent.²³ Even more troubling from the U.S. perspective, the trade deficit with China grew at the same alarming average rate of 11 percent per year resulting in the current \$375 billion trade in goods deficit.²⁴ As can be expected from the magnitude of this trade imbalance, U.S. sentiment toward China became negative. For example, President Trump recently stated that "[a]fter my tour of Asia, all Countries dealing with us on TRADE know that the rules have changed. The United States has to be treated fairly and in a reciprocal fashion. The massive TRADE deficits must go down quickly!"²⁵ As pervasive involvement of the Chinese government has resulted in numerous subsidies being provided to

18. See Issues and Decision Memorandum dated May 2, 2005 that is adopted in *Solid Urea from the Russian Federation: Final Results of Expedited Sunset Review of the Antidumping Duty Order*, 70 Fed. Reg. 24,528 (U.S. Dep't of Com. May 10, 2005).

19. See Issue 1 of the Issues and Decision Memorandum that is adopted in *Notice of Final Results of Antidumping Duty Administrative Review and Final Partial Rescission: Certain Cut-to-Length Carbon Steel Plate from Romania*, 71 Fed. Reg. 7008 (U.S. Dep't of Com. Feb. 10, 2006).

20. *Notice of Final Determination of Sales at Less Than Fair Value, and Affirmative Critical Circumstances, In Part: Certain Lined Paper Products from the People's Republic of China*, 71 Fed. Reg. 53,079, 53,080 (U.S. Dep't of Com. Sept. 8, 2006).

21. *Id.*

22. See U.S. CENSUS BUREAU, U.S. INTERNATIONAL TRADE DATA: TRADE IN GOODS WITH CHINA, <https://www.census.gov/foreign-trade/balance/c5700.html> (last visited Mar. 30, 2018).

23. See *id.*

24. See *id.*

25. See Donald J. Trump @realDonaldTrump, TWITTER (Nov. 13, 2017, 9:20 PM), <https://twitter.com/realdonaldtrump/status/930304414564352000?lang=en>.

Chinese companies leading to artificially low-priced manufactured goods,²⁶ the current trade imbalance is a result of China's failure to abide by its WTO commitment of moving toward market economy conditions with the Chinese government taking a less pervasive role in the affairs of its economy.

IV. THE CURRENT WTO DISPUTE

With the expiration of subparagraph 15(a) (ii) of China's accession protocol agreement on December 11, 2016, China commenced dispute resolution proceedings in the WTO.²⁷ The legal question before the WTO is whether the United States and other countries can continue to apply the non-market economy provisions.²⁸ China believes that it negotiated an end to non-market economy treatment as of December 11, 2016.²⁹ The United States and many other countries disagree with this interpretation.³⁰ As a result of this disagreement, on December 12, 2016, China requested consultations with the United States at the WTO, contending that the ability of the United States to calculate dumping margins "not based on a strict comparison with domestic prices or costs in China" expired December 11, 2016.³¹ On the same day, China filed a similar request for consultations with the EU.³² These filings triggered the initiation of the current active dispute before the WTO. Even though China has not yet formally pursued this complaint against the United States, it elected to proceed with its complaint against the EU.³³ While the United States and EU have different views on addressing the changes required with the expiration of

26. See, e.g., Countervailing Duty Investigation of Certain Hardwood Plywood Products from the People's Republic of China, 82 Fed. Reg. 53,473 (U.S. Dep't of Com. Nov. 16, 2017) (final determination); Certain Hardwood Products from the People's Republic of China, 83 Fed. Reg. 504 (U.S. Dep't of Com. Jan. 4, 2018) (amended final determination).

27. See *US—Price Comparison Methodologies*, *supra* note 7, at 1.

28. *Id.* at 3.

29. *Id.*

30. See, e.g., Responses of the United States to EU's Questions Following First Panel Meeting, *European Union—Measures Related to Price Comparison Methodologies (DS516)*, ¶¶ 39-45 (Jan. 19, 2018), <https://ustr.gov/sites/default/files/enforcement/DS/US.3d.Pty.As.EU.Qs.fin.%28public%29.pdf>.

31. See *US—Price Comparison Methodologies*, *supra* note 7, at 1.

32. See Request for Consultations by China, *European Union—Measures Related to Price Comparison Methodologies*, WTO Doc. WT/DS516/1 (Dec. 15, 2016).

33. See Constitution of the Panel Established at the Request of China – Note by the Secretariat, *European Union—Measures Related to Price Comparison Methodologies*, WTO Doc. WT/DS516/10 (July 11, 2017). No panel has been established with respect to China's parallel complaint with the United States.

subparagraph 15(a) (ii) of China's Accession Protocol Agreement, both trading partners have adopted interpretations that continue to allow the practice of rejecting China's home market prices or costs in favor of surrogate values.³⁴

The essence of China's arguments before the WTO panel focuses on the requirement for a change as a consequence of the expiration of paragraph 15(a) (ii).³⁵ If importing countries continue to treat China in the same manner as before the expiration of Section 15(a) (ii), then China views these actions as inconsistent with its WTO commitment, which by definition must change after December 11, 2016.

The contrary arguments can be examined through the United States' third-party submission.³⁶ In that submission, the United States focused on the remaining text of China's Accession Protocol Agreement, as well as the broader rules set forth in Article VI of the GATT 1994 (Article VI) and Article 2 of the Agreement on the Implementation of Article VI of GATT 1994 (Anti-Dumping Agreement or ADA).³⁷

Notably, the revised language of Paragraph 15 of the China's Protocol Accession Agreement provides discretion for disregarding Chinese prices and costs. For example, the remaining text of paragraph 15(a) states that "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.*"³⁸ Further, the remaining text of subparagraph 15(a) (i) states that "[i]f the producers under investigation can clearly show that market economy conditions prevail in the industry producing the like product with regard to the

34. See Protection Against Dumped and Subsidized Imports from Countries Not Members of the EU, EUR. PARL. DOC. P8_TA-PROV(2017)0437, items (3)-(7) (2017) (text adopted-provisional edition) (stating that when prices or costs are not the result of free market forces because of substantial government intervention, "costs should be replaced by undistorted costs"); see also Memorandum from Leah Wils-Owens, Office of Pol'y, Enforcement & Compliance, to Gary Taverman, Deputy Assistant Sec'y for Antidumping and Countervailing Duty Operations, China's Status as a Non-Market Economy, Inv. No. A-570-053 (U.S. Dep't of Com. Oct. 26, 2017) [hereinafter Memorandum, *China's Status as a Non-Market Economy*].

35. The written submission by China at the WTO is not publicly available. Portions of China's arguments can be found in the European Union's response submission. See First Written Submission by the European Union, *European Union—Measures Related to Price Comparison Methodologies (DS516)* (Nov. 14, 2017) as available at http://trade.ec.europa.eu/doclib/docs/2017/november/tradoc_156401.pdf

36. See Third Party Submission of the United States of America, *European Union—Measures Related to Price Comparison Methodologies (DS516)* (Nov. 21, 2017) [hereinafter US 3rd Party Submission, *EU—Price Comparison Methodologies*].

37. See *id.* at Attachment 1, ¶¶ 1.1-1.8.

38. Protocol on China's Accession, *supra* note 14, ¶ 15(a) (emphasis added).

manufacture, production and sale of that product, the importing WTO member shall use the Chinese prices or costs for the industry under investigation.”³⁹ Thus, the remaining text within Paragraph 15 continues contemplating a methodology that is not based upon Chinese prices and costs when market economy conditions are not present.⁴⁰

Regarding the change that resulted from the expiration of subparagraph 15(a)(ii) that China believes is required, the removal of this text could be interpreted to mean that the burden of proof regarding the presence or absence of market economy conditions shifted from China to the importing member. For example, the first sentence of remaining subparagraph 15(d) states that “[o]nce China has established under the national law of the importing WTO member, that it is a market economy, the provision of subparagraph (a) shall be terminated.”⁴¹ Similarly, the third sentence of remaining subparagraph 15(d) states that “*should China establish*, pursuant to national law of the importing WTO member, that market economy conditions prevail in a particular industry or sector, the non-market economy provision of subparagraph (a) shall no longer apply to that industry or sector.”⁴² Under this interpretation, subparagraph 15(a)(ii), which has been removed, required China to demonstrate the presence of market economy conditions, but now that burden has shifted to the importing member.⁴³ Another point raised by the United States’ third-party submission is that the non-market economy provisions in the Accession Protocol Agreement are preserved in the remaining text, as opposed to the expired text.⁴⁴ Specifically, expired subparagraph 15(a)(ii) referenced the “the non-market provisions of subparagraph (a).”⁴⁵ An interpretation that the non-market economy provisions are still contained in subparagraph 15(a) as opposed to expired subparagraph 15(a)(ii), provides additional support for the U.S. argument that the text drafters contemplated the burden shifting to the importing countries to establish certain facts, as opposed to the expiration of the non-market economy methodology altogether.

39. *Id.* (emphasis added).

40. See US 3rd Party Submission, *EU—Price Comparison Methodologies*, *supra* note 36, at Attachment 1, ¶ 8.4.5.

41. Protocol on China’s Accession, *supra* note 14, ¶ 15(a) (emphasis added).

42. *Id.* (emphasis added).

43. See US 3rd Party Submission, *EU—Price Comparison Methodologies*, *supra* note 36, at Attachment 1, ¶¶ 8.5.5-8.5.6.

44. See *id.* at Attachment 1, ¶ 8.3.7.

45. Protocol on China’s Accession, *supra* note 14, ¶ 15(a).

More importantly, the United States references Article VI and Article 2 of the ADA as supporting WTO members' continued use of the non-market economy methodology.⁴⁶ Article VI states that the domestic prices used in the comparison to export prices in dumping calculations must be "comparable" and "in the ordinary course of trade," thereby acknowledging that domestic prices can be flawed or inconsistent with market-determined prices.⁴⁷ Further, Article VI provides an example of flawed domestic prices as follows:

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 be always be appropriate.⁴⁸

To further illustrate the ample discretion afforded to WTO members for disregarding prices that are not set by market forces, the United States provided several examples of those situations.⁴⁹ Prices determined as part of a liquidation sale, for instance, could be considered outside the ordinary course of trade and therefore not subject to normal market conditions.⁵⁰ Disregarding domestic prices among affiliated parties is another example where WTO members can exercise their discretion in rejecting prices that are not subject to normal market forces.⁵¹ Similarly, members are free to disregard the sales price of

46. See US 3rd Party Submission, *EU—Price Comparison Methodologies*, *supra* note 36, at Attachment 1, ¶¶ 1.1-1.8.

47. General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, art. VI, ¶ 1(a), 1867 U.N.T.S. 187 (1994) [hereinafter GATT 1994]; see also Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, art. 2, ¶ 2.1, 1868 U.N.T.S. 201 (1994).

48. GATT 1994, *supra* note 47, Ad art. VI, ¶ 1(2).

49. See US 3rd Party Submission, *EU—Price Comparison Methodologies*, *supra* note 36, at Attachment 1, ¶ 7.3.2.

50. See *id.* ¶ 7.3.2.2 (citing Appellate Body Report, *United States—Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, ¶¶ 141, 143 n.106, WTO Doc. WT/DS184/AB/R (adopted July 24, 2001)).

51. See *id.* ¶ 7.3.2.3 (citing Appellate Body Report, *United States—Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, ¶¶ 141, 143, WTO Doc. WT/DS184/AB/R (adopted July 24, 2001)).

an input that is deemed not to be reflective of an arm's length transaction.⁵² Given that domestic prices and costs are routinely disregarded in antidumping proceedings, China faces a difficult task in its WTO appeal.

V. RECENT EVENTS

U.S. law defines a non-market economy country as “any foreign country that the administering authority determines not to operate on market principles of costing or pricing structures, so that sales of merchandise do not reflect the fair value of the merchandise.”⁵³ U.S. law identifies the following six factors that should be evaluated in order to determine if a particular country is a non-market economy:

- i. the extent to which the currency of the foreign country is convertible into the currency of other countries;
- ii. the extent to which wage rates in the foreign country are determined by free bargaining between labor and management,
- iii. the extent to which joint venture or other investments by firms of other foreign countries are permitted in the country,
- iv. the extent of government ownership or control of the means of production,
- v. the extent of government control over the allocation of resources and other price and output decisions of enterprises, and
- vi. such other factors as the administering authority considers appropriate.⁵⁴

Based on its interpretation that China's Accession Protocol Agreement merely shifted the burden of proof to establish certain facts to the importing country, the U.S. Commerce Department recently reexamined these six factors and concluded that China remains a non-market economy country.⁵⁵ Some of the key findings in this assessment include lingering problems associated with the convertibility of Chinese currency and findings that China “still maintains significant restrictions

52. See *id.* ¶ 7.3.2.4 (citing Appellate Body Report, *European Union—Anti-Dumping Measures on Biodiesel from Argentina*, ¶ 6.41, WTO Doc. WT/DS473/AB/R (adopted Oct. 6, 2016)).

53. 19 U.S.C. § 1677 (18) (A).

54. *Id.* § 1677 (18) (B).

55. Memorandum, *China's Status as a Non-Market Economy*, *supra* note 34, at 7.

on capital account transactions and intervenes considerably in on shore and offshore [foreign exchange] markets.”⁵⁶ Regarding whether China’s wage rates are determined based on free bargaining between labor and management, Commerce found that Chinese workers “do not have the legal right to strike or organize independently, and as such have no meaningful freedom of association” and that all trade unions are affiliates of government-controlled entities.⁵⁷ Regarding foreign investment, Commerce found that the Chinese government continues “to impose significant barriers to foreign investment including equity limits and local partner requirements” and that the Chinese government is able “to channel foreign investment into the producers, products technologies, and industries it seeks to support, while limiting foreign investment in those sectors that it finds strategically important to develop.”⁵⁸

Regarding the Chinese government’s control over production, Commerce referenced its significant control over land as a key means of controlling production.⁵⁹ Commerce noted that “[t]here is no private land ownership, rural and urban land markets are segmented, and the government remains the final arbiter of how land is used.”⁶⁰ Commerce also found that the Chinese government exerted control over production through its ownership interest in companies “throughout the enterprise sector” and that these “sectors and industries extended beyond those that typically raise natural monopoly or public goods and services policy considerations.”⁶¹

Regarding government control over the allocation of resources and over price and output decisions, Commerce stated that “[i]ndustrial policies remain a prominent mechanism through which the Chinese government influences the allocation of resources.”⁶² Commerce also stated:

An essential element of a market-based economic system is the predominance of prices that reflect relative scarcity. In a well-functioning market economy, scarcity-based prices determine the allocation of resources, guide the selection of investments, and help determine the relationship between supply and

56. *Id.* at 19.

57. *Id.* at 31.

58. *Id.* at 51.

59. *Id.* at 116.

60. *Id.*

61. *Id.* at 115.

62. *Id.* at 178.

demand of factors of production and goods and services. The prices of most goods and services in China today are not formally controlled by the government. However, the Chinese government retains substantial discretion and employs an extensive system of national and local government policies and regulations through which it explicitly determines or otherwise exerts a high degree of control over prices it deems essential or strategic.⁶³

Regarding the last discretionary factor, Commerce's analysis included a focus on China's legal system noting that it is designed and operates to be subordinate to the Chinese communist party ("CCP") and state policy and guidance, further noting that "[k]ey legal institutions are structured to be able to respond to CCP direction."⁶⁴ Commerce found that the "CCP ultimately has the power to shape judicial activities on a large scale by retaining the ability to directly intervene on a case-by-case basis."⁶⁵

The European Commission ("EC") recently issued a similar report commenting on the significant market distortions caused by Chinese government interventions.⁶⁶ Some of the key findings in the EC report include a description of China's socialist economy:

Hence, this unique economic system grants the State, as well as the CCP, a decisive role in the economy. The leadership role of the CCP and its all-encompassing controls are inherent in China's official designation as a socialist market economy. The basic features of the socialist market economy are a dominant state-ownership, which the State and the party wish to further strengthen and expand e.g. by the creation of national champions, an extensive and sophisticated economic planning system, an interventionist government policy in the economy in order to implement these plans by using a broad array of tools, including guiding catalogues, investment screening, financial incentives etc. There are very close linkages between these features as they all appear to follow the same goal of tight control

63. *Id.* at 179.

64. *Id.* at 195.

65. *Id.*

66. Eur. Commission (EC), Corrigendum to 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 (Dec. 20, 2017).

by the State on the economy. All this leads to non-market based resource allocations and to the creation of overcapacities in many sectors.⁶⁷

In addition, the EC found countrywide market distortions related to land, energy, capital, raw materials and other material inputs, and labor.⁶⁸ Regarding the energy sector, the EC noted that while “regulatory control is normal for this sector, the Chinese energy sector has a number of features that go beyond it.”⁶⁹ The EC concluded that “the overall picture emerging is one where normal market considerations do not prevail on the Chinese market for energy, given the significant state intervention in production and pricing.”⁷⁰ The EC also commented upon the Chinese government’s ability to “significantly influence the prices of raw materials,” noting that “[b]y artificially increasing or decreasing the level of the raw materials supply, or simply by centrally setting the prices, the government can steer the prices upwards or downwards.”⁷¹

The EC report also examined market distortions that exist in specific sectors including the steel, aluminum, chemical, and ceramics industries.⁷² Within these industries, the EC found that market distortions were caused by the Chinese government’s intervention through all levels of government including the national, regional, and municipal levels via various planning and regulatory directives.⁷³ In addition, the Chinese government exercises its control through its State Owned Enterprises (SOEs), which are defined in the EC report as “under the control of the state, either by the state being the ultimate beneficiary owner of the majority of voting shares or otherwise exercising an equivalent degree of control.”⁷⁴ Within the steel sector, the EC found that SOEs account for roughly half of all the steel producers.⁷⁵ Similarly, within the aluminum sector, the EC found that SOEs account for more than half of all aluminum producers.⁷⁶ And, within the chemical sector,

67. *Id.* at 21.

68. *See id.* at 203-344.

69. *Id.* at 234.

70. *Id.*

71. *Id.* at 325.

72. *See id.* at 345-463.

73. *Id.* at 375, 398, 434, 462.

74. *Id.* at 85.

75. *Id.* at 358.

76. *Id.* at 387-88.

the EC found that SOEs represent 52 percent of total assets of the chemical companies.⁷⁷

The findings of the U.S. government and the European Commission illustrate the lack of market economy forces in China. Indeed, in some respects, other recent developments suggest that China may be headed in the opposite direction than expected when it joined the WTO. As opposed to the Chinese government divesting its interests in the wide array of industries in which it currently holds an ownership interest, the Communist Party recently pushed through changes that more formally recognize its role in those industries.⁷⁸ Historically, a Chinese government entity (or its investment arm) was the visible aspect of an SOE.⁷⁹ In the past year, the articles of association of SOEs have been revised to acknowledge the role of the Communist Party as opposed to the Chinese state.⁸⁰ By example, CSC Financial Co. Ltd, a leading Chinese investment bank and brokerage firm, reported that it

establish[ed] an organization of Communist Party of China (the “Party”) in accordance with the relevant regulations of the Constitution of the Communist Party of China and Company Law of China, and the Party Committee shall play the role as the leader, setting the direction, managing the overall situation and ensuring implementation.⁸¹

This change undermines the company boards and demonstrates that the Communist party is tightening, not loosening, its grip over SOEs.

77. *Id.* at 403.

78. CSC Financial Co., Ltd., Announcement: Proposed Amendments to the Articles of Association (Nov. 23, 2017) [hereinafter CSC Financial Announcement]; see also *Guidelines Regarding Incorporating Party Construction Work into the Articles of Association of Central Financial Enterprises*, Cai Jin (2017) No. 48, May 27, 2017, by the Ministry of Finance of the PRC; *Circular on Firmly Promoting the Incorporation of Party Construction Work Requirements into the Articles of Association of State-owned Enterprises*, Zu Tong Zi (2017) No. 11, March 15, 2017, by the Communist Party Committee of the SASAC and the Organization Department of the Central Committee of the Chinese Communist Party.

79. See e.g., CSC FINANCIAL CO., LTD., 2016 ANNUAL REPORT 91 (Apr. 20, 2017) (identifying investment arms of Chinese government entities “BSCOMC” and “Central Huijin” as its cumulative majority shareholders).

80. See e.g., CSC Financial Announcement, *supra* note 78.

81. *Id.*

VI. CONCLUSION

As made apparent by this Article, China will continue on the long road in its quest for market economy treatment into the foreseeable future. China's oral arguments for market economy treatment in the EU case were heard for the first time by a WTO panel in December 2017.⁸² The WTO panel in that case indicated that it does not expect to issue its final report before the second half of 2018.⁸³ If that decision is appealed to the WTO appellate body, final resolution of that case could extend into 2019 or beyond. To the extent that the WTO agrees with China on this issue, the United States could still ignore the ruling. Under this scenario, China would need to find a way of changing the position of the United States through avenues such as negotiation or retaliation. Alternatively, to the extent that the WTO agrees with the EU and the United States on this issue, China would be subject to the non-market economy methodology until it adopts the market reforms that were expected after it joined the WTO.

A spokesman for the European Commission defended the EU's response to China's request for change in its non-market economy status stating "[i]t is a proposal, which is not against any country, it is neutral, the idea is for trade defense instruments be fit for purpose, and fit to meet the challenges that exist globally."⁸⁴ Similarly, David Malpass, U.S. Treasury Undersecretary for International Affairs expressed concern that "China's economic liberalization seems to have slowed or reversed, with the role of the state increasing."⁸⁵ Lastly, the U.S. Trade Representative has stated that a loss to China at the WTO regarding market economy treatment would be a "cataclysmic" event, emphasizing the broad ramifications associated with this matter.⁸⁶

82. See Office of the USTR, Exec. Office of the President, Pending WTO Disputes, *European Union—Measures Related to Price Comparison Methodologies (DS516)*, <https://ustr.gov/issue-areas/enforcement/dispute-settlement-proceedings/wto-dispute-settlement/pending-wto-dispute-32> (last visited Apr. 2, 2018).

83. Communication from the Panel, *European Union—Measures Related to Price Comparison Methodologies*, WTO Doc. WT/DS516/11 (Dec. 11, 2017).

84. See Eszter Zalan, *EU Defends New Trade Rules after Chinese Criticism*, EU OBSERVER (Dec. 21, 2017), <https://euobserver.com/eu-china/140392>.

85. See David Lawder, *U.S. Formally Opposes China Market Economy Status at WTO*, REUTERS (Nov. 30, 2017), <https://www.reuters.com/article/us-usa-china-trade-wto/u-s-formally-opposes-china-market-economy-status-at-wto-idUSKBN1DU2VH>.

86. *The President's Trade Policy Agenda Fiscal Year 2018 Budget: Hearing Before the S. Comm. on Finance*, 115th Cong. (2017) (statement of Robert E. Lighthizer, United States Trade Representative, Executive Office of the President), <https://www.finance.senate.gov/hearings/the-presidents-trade-policy-agenda-and-fiscal-year-2018-budget>.