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EU's 'Distorted Economy' Antidumping Approach Towards China: Improvement of Legal Certainty or New Legal Distortions?: Some Overall Observations

Henrik Andersen*

In 2017, the EU introduced the 'distorted economy' rules in EU antidumping law. The new rules target in particular China. The question is whether the new rules and their application by the Commission provide an improvement of legal certainty for Chinese exporters and EU importers compared to the old antidumping regime of non-market economy treatment of China. This article makes a comparison between the new and old rules and their application by the EU institutions. The article argues that the new rules slightly improve legal certainty but that new uncertainties emerge as well. For example, the context of international labour law and international environmental law raises new questions.

Keywords: antidumping, distorted economy, EU, China, WTO, legal certainty

1 INTRODUCTION

EU antidumping law and policies towards China have been subject to discussions by scholars and practitioners since the EU in 1998 introduced specific rules targeted at Chinese goods. The new *distorted economy approach* in EU law is no different. Although the debate is divided into groups against and in favour of the new rules,[1] from a legal certainty perspective, this article claims that the new rules are a slight improvement compared to the old *non-market economy* rules. However, the article points out new legal uncertainties arising from the new rules. For businesses, legal certainty is decisive in the risk assessments as improved clarity of law can reduce transaction costs.

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1 *See* for an overview of scholars involved in the debate: Weihuan Zhou & 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*, 52(3) J. World Trade 505–533, at 508, fn. 17 (2018).

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The article aims at comparing the new rules with the old rules from the perspective of legal certainty. The *old rules* refer to the rules where China was considered a non-market economy. The EU investigating authorities disregarded Chinese costs and prices and based normal value on data from producers in third countries (analogue countries). However, individual Chinese producers could get market economy treatment (MET) if they met certain market economy criteria. The *new rules* refer to the rules where China is not a non-market economy per se. Nonetheless, the EU Commission (the Commission) can disregard Chinese costs and prices if the country or sector has a distorted market economy. The new rules have basis in the *basic regulation,*[2] and the Commission has applied the new rules in several antidumping investigations. With focus on China, the article compares these new developments of EU antidumping law with the old rules and practice and discusses the potential improvement of legal certainty.[3]

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[2] Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 Jun. 2016 on protection against dumped imports from countries not members of the European Union, OJ L 176, 30 Jun. 2016, at 21–54 with amendments including Regulation (EU) 2017/2321 of the European Parliament and of the Council of 12 Dec. 2017 amending Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European Union and Regulation (EU) 2016/1037 on protection against subsidized imports from countries not members of the European Union, OJ L 338, 19 Dec. 2017, at 1–7.

[3] *See* e.g., *Certain Organic Coated Steel Products II,* Commission Implementing Regulation (EU) 2019/687 of 2 May 2019, OJ L 116, 3 May 2019, at 5–38; *Certain Aluminium Foil in Rolls,* Commission Implementing Regulation (EU) 2019/915 of 4 Jun. 2019, OJ L 146, 5 Jun. 2019, at 63–97; *Ceramic Tableware and Kitchenware*, Commission Implementing Regulation (EU) 2019/1198 of 12 Jul. 2019, OJ L 189, 15 Jul. 2019, at 8–67; *Threaded Tube or Pipe Cast Fittings,* Commission Implementing Regulation (EU) 2019/1259 of 24 Jul. 2019, OJ L 197, 25 Jul. 2019, at 2–36; *Tungsten Electrodes*, Commission Implementing Regulation (EU) 2019/1267 of 26 Jul. 2019, OJ L 200, 29 Jul. 2019, at 4–32; *Bicycles II,* Commission Implementing Regulation (EU) 2019/1379 of 28 Aug. 2019, OJ L 225, 29 Aug. 2019, at 1–52; *Steel Road Wheels (Provisional Duty),* Commission Implementing Regulation (EU) 2019/1693 of 9 Oct. 2019, OJ L 259, 10 Oct. 2019, at 15–57 and *Steel Road Wheels (Definitive Duty),* Commission Implementing Regulation (EU) 2020/353 of 3 Mar. 2020, OJ L 65, 4 Mar. 2020, at 9–23. The Regulation is currently under review by the General Court, Case T-278/20, *Zhejiang Hangtong Machinery Manufacture and Ningbo Hi-Tech Zone Tongcheng Auto Parts v. Commission*; *Certain Woven and/or Stitched Glass Fibre Fabrics,* Commission Implementing Regulation (EU) 2020/492 of 1 Apr. 2020, OJ L 108, 6.4.2020, at 1–91; *Certain Hot Rolled Stainless Steel Sheets and Coils (Provisional Duty)*, Commission Implementing Regulation (EU) 2020/508 of 7 Apr. 2020, OJ L 110, 8 Apr. 2020, at 3–57, and *Certain Hot Rolled Stainless Steel Sheets and Coils (Definitive Duty),* Commission Implementing Regulation (EU) 2020/1408 of 6 Oct. 2020, OJ L 325, 7 Oct. 2020, at 26–73; *Certain Welded Pipes and Tubes of Iron or Non-alloyed Steel,* Commission Implementing Regulation (EU) 2021/635 of 16 Apr. 2021, OJ L 132, 19 Apr. 2021, at 145–193; *Aluminium Converter Foil (Provisional Duty)*, Commission Implementing Regulation (EU) 2021/983 of 17 Jun. 2021, OJ L 216, 18 Jun. 2021, at 142–201 and *Aluminium Converter Foil (Definitive Duty),* Commission Implementing Regulation (EU) 2021/2170 of 7 Dec. 2021, OJ L 438, 8 Dec. 2021, at 46–83; *Optical Fibre Cables,* Commission Implementing Regulation (EU) 2021/2011 of 17 Nov. 2021, OJ L 410, 18 Nov. 2021, p. 51–152; *Certain Utility Scale Steel Wind Towers*, Commission Implementing Regulation (EU) 2021/2239 of 15 Dec. 2021, OJ L 450, 16 Dec. 2021, at 59–136; *Certain Grain-Oriented Flat-Rolled Products of Silicon-Electrical Steel*, Commission Implementing Regulation (EU) 2022/58 of 14 Jan. 2022, OJ L 10, 17 Jan. 2022, at 17–76; *Certain Tube and Pipe Fittings, of Iron or Steel,* Commission Implementing Regulation (EU) 2022/95 of 24 Jan. 2022, OJ L 16, 25 Jan. 2022, at 36–62.

The article bases *legal certainty* on the premises of EU law. According to the European Court of Justice (ECJ), legal certainty requires that 'rules of law be clear, precise and predictable in their effect, especially where they may have negative consequences for individuals and undertakings'.[4] Furthermore, legal certainty should 'enable those concerned to know precisely the extent of the obligations which are imposed on them, and [to enable] those persons (…) to ascertain unequivocally what their rights and obligations are and take steps accordingly'.[5] Thus, the principle of legal certainty is a limit on the vagueness of antidumping law as well as a limit on the Commission's administrative discretion. In national systems, different techniques cope with the problems of obscure rules of law. For example, in US constitutional law, the Supreme Court applies the *vagueness doctrine* where a too vague law is not considered law.[6] In EU law, a secondary rule may be void if its text is ambiguous to such an extent that it prevents an individual from resolving any doubts about the meaning of the law.[7] However, legal certainty must be understood in its constitutional context, which provides a necessary discretionary space to the executive institutions.[8] For example, EU antidumping law leaves wide discretionary powers to the Commission, as it must engage in complex economic analyses of prices, costs, and markets. The judicial review is limited to 'examining whether the measure in question is vitiated by a manifest error or misuse of powers, or whether the authority in question has manifestly exceeded the limits of its discretion'.[9]

Notwithstanding that legal certainty encompasses that permissible interpretations and wide discretion can lead to a number of accepted conclusions, it is necessary for a business to be able to anticipate the methodological approach to law taken by the authorities and to anticipate the discretionary process in the dumping determinations. For example, the Commission must follow its own guidelines concerning the application of the provisions of the basic regulation to secure legal certainty for businesses.[10] Increased predictability should make it clearer for businesses to develop their price strategies without risking the imposition of antidumping duties. After all, legal certainty reduces the risk of transacting on the market.[11]

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4 Case C-611/17, *Italy v. Council* [2019] ECLI:EU:C:2019:332, para. 111.

5 Case C-352/09 P, *ThyssenKrupp Nirosta v. Commission* [2011] ECLI:EU:C:2011:191, para. 81.

6 *See* e.g., *United States v. Davis* et al., 588 U.S. (2019).

7 Case C-110/03, *Belgium v. Commission* [2005] ECLI:EU:C:2005:223, paras 30–31; Case T-216/05, *Mebrom v. Commission* [2007] ECLI:EU:T:2007:148, para. 108; Case T-81/12, *Beco v. Commission* [2014] ECLI:EU:T:2014:71, para. 68.

8 Joined Cases C-191/09 P and C-200/09 P, *Council and Commission v. Interpipe Niko Tube and Interpipe NTRP* [2012] ECLI:EU:C:2012:78, para. 63.

9 Case C-331/88, *Fedesa and Others* [1990], ECLI:EU:C:1990:391, para. 8.

10 Case T-81/12, *Beco v. Commission* [2014] ECLI:EU:T:2014:71, paras 68–70.

11 *See* about legal certainty and economic behaviour: Yannis Katsoulacos & David Ulph, *Legal Uncertainty, Competition Law Enforcement procedures and optimal Penalties*, 41 Eur J L. Econ 255 (2016); Richard Craswell & John E. Calfee, *Deterrence and Uncertain Legal Standards*, 2 J. L., Econ., & Org. 279,

The article proceeds as follows: First, it provides an overview of World Trade Organization (WTO) law and the political considerations behind the new rules. Second, the article compares the old and new rules concerning the disregard of Chinese costs and prices. Third, the article compares the old and new rules concerning the artificial normal value established for Chinese exporters. Finally, the article sums up its findings.

2 WTO LAW AND EU ANTIDUMPING POLICIES TOWARDS CHINA

WTO law largely regulates the trade relationship between China and the EU.[12] Article VI of the General Agreement on Trade and Tariffs (GATT) 1994 and the Antidumping Agreement (ADA) regulate antidumping. It is a protectionist tool to counter unfair and aggressive price conduct of foreign producers. Dumping occurs if 'the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country'.[13]

Antidumping law leaves wide discretion to the investigating authorities to calculate dumping and it often leads to disputes between states. In the WTO dispute settlement system, antidumping is the most challenged area of WTO law. One noticeable challenge from the perspective of legal certainty is that the panels and the Appellate Body (AB) must accept 'permissible' interpretations by the investigating authorities.[14] That will be situations where the text of a provision offers a range of interpretations. The point is then not to pursue *the right* interpretation among the permissible ones,[15] but to accept an interpretation of the investigating authorities if it is within the range of the acceptable lower and upper limits of the legal text.[16]

298–299 (1986); Stephan Haggard & Lydia Tiede, *The Rule of Law and Economic Growth: Where are We?,* 39(5) World Dev. 673 (2011).

12 EU and China have agreed in principle on the bilateral Comprehensive Agreement on Investment, which also will affect the trade relationship.

13 Article 2.1 of the ADA.

14 Article 17.6(ii) of the ADA.

15 *US – Continued Zeroing*, WT/DS350/AB/R, adopted by the DSB on 19 Feb. 2009, paras 267–273 (and note the concurring statement from one AB member, paras 304–313).

16 The US has criticized the AB for not accepting a wider interpretative and discretionary space for the investigating authorities. That has partly led to the current conflict in the Dispute Settlement Body (DSB) where the US blocks for any new nominees to the AB.

2.1 The root of uncertainty: WTO law

Chinese producers have referred to the Chinese Accession Agreement as well as Article 2.2 and Article 2.2.1.1 of the ADA as legal basis for claims that the new rules violate WTO law.

The Commission has dismissed the claims that the new rules violate the Chinese Accession Agreement.[17] It contains specific antidumping rules in paragraph 15. WTO Members can take a non-market approach towards China unless market economy conditions prevail in the industry. The special rules might be seen as contrasting the overall aim of non-discrimination in WTO law, but as the panel phrased it in *China – Raw Materials*: 'the acceding Member and the WTO membership recognize that the intensively negotiated content of an accession package is the "entry fee" to the WTO system'.[18]

The non-market approach implies that other WTO Members may apply a methodology with no strict comparison of domestic prices and costs unless the producers under investigation can demonstrate that market economy conditions apply. It has been debated in literature whether these rules – or part of them – would terminate in 2016 due to the fifteen year expiry provision in paragraph 15(d).[19] The division in literature illustrates the unclear aspects of the rules.

A few things, however, seem to be clear in law. In *EC – Fasteners (China)*, the AB stated that the footnote re Article VI.1 of GATT 1994, which concerns 'a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State', does not apply to China.[20] China is a transition economy and the rules in paragraph 15 of the Accession Agreement applies. It is also clear that paragraph 15(a)(ii) expired in 2016, cf. paragraph 15(d). However, in *EC – Fasteners (China)*, the AB erroneously stated that paragraph 15(a) expired in 2016.[21] A textual reading of paragraph 15(d) implies that it is only paragraph 15(a)(ii) – not paragraph 15(a) in its entirety – that expired. Furthermore, based on paragraph 15(d), the WTO Members must as a starting point consider China as a non-market economy unless China meets the national market economy conditions. The analysis should take that outset: WTO Members may consider that China is not a full market economy. That is relevant context for a reading of paragraph 15(a) and its sub-paragraphs. Paragraph 15(a)(i) and (ii) are in my view not alternatives. They are rights for WTO Members to choose different options if

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17 *See* e.g., *Steel Road Wheels (Provisional Duty), supra* n. 3, recitals 60–62.

18 *China – Raw Materials*, WT/DS394, WT/DS395, and WT/DS398/R, adopted by the DSB, as modified by the AB, adopted by the DSB on 22 Feb. 2012, para. 7.112.

19 *See* references *supra* n. 1.

20 *EC – Fasteners (China),* WT/DS397/AB/R, adopted by the DSB on 28 Jul. 2011, fn. 460.

21 Paragraph 289.

Chinese producers cannot demonstrate that market economy conditions prevail in the industry.

What generally is missing in the debate about paragraph 15 is the distinction between the levels of analysis. If Chinese producers cannot demonstrate that market economy conditions prevail in the industry, the WTO Member can choose not to use costs or prices for the entire *industry* or under the expired rules not to use 'domestic prices and costs in China':

- *Paragraph 15(a)(i)* provides that if the *Chinese producers* can demonstrate that market economy conditions prevail in the *industry,* 'the importing WTO Member shall use Chinese prices or costs *for the industry* under investigation'. *Industry* can be assumed to imply 'producers as a whole'.[22] If market economy conditions prevail for the producers as a whole, the prices for the producers as a whole must be applied. Thus, paragraph 15(a)(i) concerns the prices and costs *for* the *industry*. If producers can demonstrate that market economy principles prevail in the industry, *the whole industry must be granted MET*. If the producers cannot demonstrate that market economy conditions prevail, the WTO Members still have an option to disregard MET for the whole industry. Nothing in paragraph 15(a)(i) rules out the possibility for a WTO Member to disregard prices or costs for the industry if the market economy conditions in the importing state's law are not met. That is supported by the context of paragraph 15(d).
- *Paragraph 15(a)(ii)* provides that a WTO Member 'may use a methodology that is not based on a strict comparison with domestic prices or costs in China'. The words are broader than 'Chinese prices or costs for the industry'. It includes costs or prices of the industry that may be disregarded, while not ruling out the option of discriminating between producers of the same industry in the normal value determination by disregarding all domestic prices or costs for some of the producers under investigation while allowing it for others. That has been reflected in EU practice where producers could be granted MET on individual level. Such discrimination of granting MET to some producers while *fully reject* it for others of the same industry expired in 2016.

[22] *See* definition in Art. 4.1 of the ADA. *See also* the distinction between 'industry' and 'company' in para. 151(a) of the Working Report although it is not an integral part of the Accession Agreement.

Nevertheless, the interpretation suggested here is just one of many. Paragraph 15 of the Accession Agreement provides a text that can have various meanings.[23] The drafters decided to leave it open to an extent where WTO Members kept the option to continue to treat China with some level of non-market economy treatment after 2016. Otherwise it would be expected that the drafters, including the Chinese negotiators, more explicitly would have terminated paragraph 15(a) in its entirety instead of only paragraph 15(a)(ii). The various types of meanings give the WTO Members a political space to choose a preferred antidumping policy towards China. However, paragraph 15 leaves a high degree of legal uncertainty for businesses, which from that perspective is problematic.

Should the entire paragraph 15 of the Accession Agreement no longer apply, the rules of Article VI of GATT 1994 and the ADA form the legal basis to assess the new rules.[24] The Commission has rejected claims from Chinese exporters that the new rules violate Article 2.2 and Article 2.2.1.1 of the ADA.[25] With reference to *EU – Biodiesel*,[26] where the AB would not preclude the possibility that information of costs can be based on information from sources outside of the country of the producers under investigation, the Commission seems to suggest that Article 2(6a) is compatible with WTO law. However, the scope of applying outside sources must be narrow, and the *EU – Biodiesel* case – which the Commission also seems to suggest – did not concern Article 2(6a) and concerned a different market situation in Argentina.

The question of compliance between the new rules and WTO law still needs to be tested in the WTO disputes settlement system. Until then, and in light of the uncertainties of WTO law, it cannot be ruled out that the EU lawfully can apply the new rules.

2.2 The EU concerns over china's trade policies

The EU has used the unclear legal space to amend the old rules into a tight antidumping regime towards China. With China's emerging Belt and Road Initiative, which aims at improving infrastructure and trade conditions, the EU is concerned about unfair competition. That has led the Commission to call China a *systemic rival*.[27] In a 2015 resolution, the European Parliament expressed interest in

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[23] My position is different from a previous one: Henrik Andersen, *EU Dumping Determinations and WTO Law* 289–342 (Netherlands, Boston, Kluwer Law International 2009).

[24] Article 15 of the Accession Agreement cannot form the complete legal basis for the new rules as the new rules cover any country with a distorted market economy.

[25] *See* e.g., *Aluminium Converter Foil (Definitive Duty), supra* n. 3, recitals 51–54; *Certain Utility Scale Steel Wind Towers, supra* n. 3, recitals 93–96.

[26] *EU – Biodiesel*, WT/DS473/AB/R, adopted by the DSB on 26 Oct. 2016, paras 6.70–6.71.

[27] Eric Reguly, *China's Piraeus Power Play: In Greece, a Port Project Offers Beijing Leverage Over Europe*, The Globe and Mail (7 Jul. 2019), https://www.theglobeandmail.com/world/article-chinas-piraeus-power-play-in-greece-a-port-project-offers-beijing/ (accessed 23 Mar. 2022).

the growth of the Chinese economy but underlined its concern about 'practices of dumping and the lack of transparency with regard to Chinese government policies and subsidies (…)'.[28] Furthermore, the Council expressed concern about Chinese over-capacity in certain industries.[29] In 2016, China made its 13th five-year plan, which encourages cooperation between China and countries along the belt and road.[30] China's 13th five-year plan and the concerns of China's trade were central in the Commission's preparation for the new rules.[31]

The concerns about China's market approach reflect a long-time worry of the EU institutions. In 2004, the Commission stated that it was committed to grant China market economy status if it improved significantly in four areas: reduce state influence; improve corporate governance and enforcement of accounting laws; ensure equality in IP rights, property rights, and bankruptcy laws; and bring the banking sector under market rules.[32] China never demonstrated that to the satisfaction of the EU. The old rules expressed the non-market approach. They disregarded Chinese domestic costs and prices. Instead, they based costs and prices on data from producers in analogue countries. However, a Chinese producer could get MET if it demonstrated that it acted under market economy conditions. Before the amendment of the basic regulation, the Commission identified the distorted market economy problems in China.[33] Ultimately, the EU amended the basic regulation to accommodate these problems.

The new rules do not explicitly target China but those countries with a significant distorted market economy. The Commission made in 2017 a China report (the Report) and found that the picture of China: 'is one where the State continues to exert a decisive influence on the allocation of resources and on their prices'.[34]

The Report generally finds that the state and the Communist Party of China (CCP) have a decisive role in the economy through state-ownership of companies,[35] that the rule of law is characterized by CCP's too strong control of

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[28] European Parliament resolution of 16 Dec. 2015 on EU-China relations (2015/2003(INI)), para. 16.

[29] Council of the European Union, *Council Conclusions: EU Strategy on China*, Brussels, 18 Jul. 2016 (OR. en) 11252/16, Appendix 1, para. 11.

[30] Xinhua, *New Five-Year Plan Brings Hope to China's West*, China Daily, 27/12 2016, http://www.chinadaily.com.cn/business/2016-12/27/content_27786244.htm (accessed 23 Mar. 2022).

[31] European Commission, Commission Staff Working Document, Impact Assessment, *Possible Change in the Calculation Methodology of Dumping Regarding the People's Republic of China (and Other Non-market Economies),* SWD(2016) 370 final, Brussels, 9 Nov. 2016, at 17.

[32] *CHINA – Market Economy Status in Trade Defence Investigations,* MEMO/04/163, Brussels, 28 Jun. 2004.

[33] European Commission, *supra* n. 31, at 13–14.

[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*, Brussels, 20 Dec. 2017, SWD (2017) 483 final/2, at 3.

[35] *Ibid.,* at 21.

the judiciaries,[36] that government procurement laws favour domestic over foreign goods,[37] that there are investment restrictions on foreign investments, that the government influences prices of raw materials,[38] and that there is no access to strike for the workers.[39]

The new rules regulate the systemic market problems and provide discretion to the Commission to disregard the data from the producers under investigation if there are significant distortions in the sector or in the country.

3 THE EU DISREGARD OF CHINESE COSTS AND PRICES

The first step concerns the legal basis for disregarding Chinese costs and prices. The following part will briefly introduce the old rules before comparing them with the new rules.

3.1 The old rules: MET as exception

As mentioned above, China did not qualify as a market economy in EU anti-dumping policies. However, the EU investigating authorities granted individual Chinese producers MET if they met five market economy conditions of the basic regulation. Three of these conditions seemed reasonably clear and did not cause big legal problems. They were *condition 2*, clear accounting records in line with international accounting standards (IAS), *condition 4*, the company concerned is subject to property rights and bankruptcy laws, and *condition 5*, exchange rates conversions are made at market rates.[40]

The third condition, '*significant distortions carried over from the former non-market economy system'*, caused some uncertainty and the law did not clearly define *distortion*. In Commission practice *distortion* covered: favourable bank loan guarantees[41]; limited payment of land-use rights[42]; lack of documentation of purchases of machineries and production facilities[43]; transition from state-owned

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36 *Ibid.,* at 36–39.
37 *Ibid.,* at 168.
38 *Ibid.,* at 325–326.
39 *Ibid.,* at 344.
40 *See* nevertheless some issues in e.g., *Certain Footwear With Uppers of Leather*, Commission Regulation (EC) No. 553/2006 of 23 Marts 2006, OJ L 098, 6 Apr. 2006, at 3–54, recital 74 about the IAS, and *Granular Polytetrafluoroethylene (PTFE),* Commission Regulation (EC) No. 862/2005 of 7 Jun. 2005, OJ L 144, 8 Jun. 2005, at 11–36, recital 39 about bankruptcy.
41 *Granular Polytetrafluoroethylene (PTFE), supra* n. 40, recital 37.
42 *Okoume´ Plywood*, Commission Regulation (EC) No. 988/2004 of 17 May 2004, OJ L 181, 18 May 2004, at 5–23, recital 31.
43 *Granular Polytetrafluoroethylene (PTFE), supra* n. 40, recital 37; *Certain Finished Polyester Filament Fabrics*, Council Regulation (EC) No. 1487/2005 of 12 Sep. 2005, OJ L 240, 16 Sep. 2005, at 1–16, recital 30.

enterprise to a private enterprise does not follow market economy[44]; the company received subsidies[45]; and the company received tax advantages as part of a transition plan.[46] Furthermore, the law did not specify a *former non-market economy system*. In *Commission v. Xinyi PV Products*, the European Court of Justice (ECJ) clarified that it does not only refer to the former state-trading system but also covers a non-market economy 'already in transition'.[47]

The main problem in respect of legal certainty has particularly been the first of the five conditions:

> *[D]ecisions (…) of firms regarding prices, costs and inputs, including for instance raw materials, cost of technology and labour, output, sales and investment, are made in response to market signals reflecting supply and demand, and without significant State interference in this regard, and costs of major inputs substantially reflect market values.*

The first condition gave the investigating authorities a wide discretionary space to reject MET. It is noteworthy that the expression 'including for instance' implies that the list of market economy elements was not exhaustive, and that the investigating authorities were not bound to consider all the market economy elements, like raw materials and labour costs, but could include them in the MET assessment. That gave the Commission a wide discretion to decide which elements to include in the MET assessment of the respective Chinese producers. However, it also made it difficult to predict which elements would be decisive in the MET assessment. Here follows some examples of the reasons for rejecting MET:

- *State interference and trade restrictions*: MET was rejected if the state appeared to control the domestic and/or export prices[48]; if the state influenced output[49]; or if the state interfered into the market through the company, or at least it could not be ruled out that the state interfered. Furthermore, if a company's business licence had trade restrictions, it was state interference.[50]

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44 *Certain Finished Polyester Filament Fabrics, supra* n. 43, recital 29.

45 *Polyester Staple Fibres I*, Council Regulation (EC) No. 428/2005 of 10 Mar. 2005, OJ L 071, 17 Mar. 2005, at 1–33, recital 56.

46 *Solar Glass*, Commission Implementing Regulation (EU) No 470/2014 of 13 May 2014, OJ L 142, 14 May 2014, at 1–22, recital 33.

47 *Commission v. Xinyi PV Products*, Judgment of the Court (Second Chamber) of 28 Feb. 2018, Case C-301/16 P. ECLI:EU:C:2018:132, para. 85.

48 *See Certain Electronic Weighing Scales (REWS),* Council Regulation (EC) No. 2605/2000 of 27 Nov. 2000, OJ L 301, 30 Nov. 2000, at 42–60, recital 46, which was subject to review by the General Court in Case T-35/01, *Shanghai Teraoka Electronic v. Council* [2004] ECLI:EU:T:2004:317, paras 59–73. *See* about export prices; *Glyphosate*, Council Regulation (EC) No. 1683/2004 of 24 Sep. 2004, OJ L 303, 30 Sep. 2004, at 1–18, recital 14.

49 *See* e.g., *Certain Electronic Weighing Scales (REWS), supra* n. 48, recitals 16, 20 and 21.

50 *Certain Footwear With Uppers of Leather, supra* n. 40, recital 73.

- *State ownership*: the Commission rejected MET if the state had a legal right to exercise control,[51] if the state appeared to have de facto control even if it was not majority shareholder, or if there was a close link between the producer under investigation and a state-owned company.[52] Furthermore, if some shareholders could not be identified, it could *imply* that the state was the owner.[53] Although these situations concern the direct influence by the state on business decisions, there can still be problems for an importing company to know whether the state has de facto control of a company. However, in *Council v. Zhejiang Xinan Chemical Industrial Group*, the ECJ stated that a de facto control by State shareholders of general meetings, and the right to appoint board of directors, did not conclusively imply that the state interfered. The decisive aspect was the state's significant influence on prices, costs, and inputs.[54]
- *Corporate framework*: if the Articles of Association did not explicitly reject that a state-owned shareholder could exercise significant influence concerning the business decisions, the Commission rejected MET.[55] Furthermore, the Commission rejected MET if Chinese company law proved ineffective.[56] A lack of strong corporate law could be a loophole for state interference.
- *Financial dimension and subsidies*: the Commission rejected MET if the producer had favourable bank loans or renting of land conditions.[57] Furthermore, access to state subsidies could also influence on business decisions.[58]
- *Labour supply and costs*: the Commission examined the producer's labour contracts and labour costs depending on State approval,[59]

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51 *See* e.g., *Granular Polytetrafluoroethylene (PTFE), supra* n. 40, recital 35, and *Glyphosate,* Council Regulation (EC) No. 1683/2004 of 24 Sep. 2004, OJ L 303, 30 Sep. 2004, at 1–18, recital 13.

52 *Trichloroisocyanuric Acid*, Commission Regulation (EC) No. 538/2005 of 7 Apr. 2005, OJ L 089, 8 Apr. 2005, at 4–31, recitals 51–53.

53 *Barium Carbonate*, Commission Regulation (EC) No. 145/2005 of 28 Jan. 2005, OJ L 027, 29 Jan. 2005, at 4–23, recital 20.

54 Case C-337/09 P, *Council v. Zhejiang Xinan Chemical Industrial Group* [2012] ECLI:EU:C:2012:471, paras 82–83.

55 *Granular Polytetrafluoroethylene (PTFE), supra* n. 40, recital 33.

56 *Ibid.,* recital 33.

57 *Certain Electronic Weighing Scales (REWS),* Council Regulation (EC) No. 692/2005 of 28 Apr. 2005 amending Regulation (EC) No. 2605/2000, OJ L 112, 3 May 2005, at 1–7, recital 16.

58 *Polyester Staple Fibres I, supra* n. 45, recital 56.

59 *Lever Arch Mechanisms I*, Commission Regulation (EC) No. 134/2006 of 26 Jan. 2006, OJ L 023, 27 Jan. 2006, at 13–33, recital 24.

unless the approval of the labour contract only concerned the structure of its template and not the specific terms.[60]

- *Supplier not private*: if the supplier was not private, it could be basis for rejection of MET.[61]
- *State distortion of supplying industry (raw materials)*: if the state distorted the prices of raw material, the Commission considered it state interference.[62]

The old rules provided legal certainty by having five conditions, which the Commission should use in the MET determination. However, the scope of the respective conditions were largely within the discretion of the Commission and could cause uncertainty, in particular the first condition. However, we also saw that the ECJ clarified the scope of law as well as the discretionary space of the Commission.

3.2 The new rules: China as a distorted market economy

The EU does no longer consider China a non-market economy per se. The Commission must instead assess whether there are significant distortions in a country or a sector. If there are significant distortions, and thus it is not appropriate to use domestic costs and prices, the normal value must be 'constructed exclusively on the basis of costs of production and sale reflecting undistorted prices or benchmarks'.[63]

Significant distortion is defined as:

> *those distortions which occur 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*.[64]

The old rules did not clarify the concept of *significant distortion*, whereas the new rules provide some clarity: governmental interference into the market affects the prices and costs to an extent where the prices and costs cannot be considered a result of the free market forces. The provision further provides a list of six elements, of which the Commission *shall* consider one or more in its assessment of distortion on the market:

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60 *Certain Plastic Sacks and Bags*, Council Regulation (EC) No 1425/2006 of 25 Sep. 2006,OJ L 270, 29 Sep. 2006, at 4–41, Recital 108.

61 *Certain Finished Polyester Filament Fabrics, supra* n. 43, recital 22.

62 *Certain Organic Coated Steel Products I,* Commission Regulation (EU) No 845/2012 of 18 Sep. 2012, OJ L 252, 19 Sep. 2012, at 33–54, recitals 26–27, 30.

63 Article 2.6a(a).

64 Article 2.6a(b).

In assessing the existence of significant distortions regard shall be had, inter alia, to the potential impact of one or more of the following elements:

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;*
6.) *access to finance granted by institutions which implement public policy objectives or otherwise not acting independently of the state.*[65]

These elements resembles the five MET conditions under the old rules.[66] The difference is that the new rules have turned some of the elements from the first condition of the old rules (decisions must be made by the firm), into individual elements:

- Costs of raw materials and energy
- Discriminatory public policies against foreign suppliers, and discriminatory corporate law
- Wage costs

However, the six elements are not exhaustive, cf. the inclusion of 'inter alia' in the text. Furthermore, the Commission has discretion to decide if all the six elements are relevant to include in its analysis. The only requirement is that minimum one of the elements *shall* be considered, which makes it uncertain if it would be sufficient to only include one element to establish distortion. Nevertheless, the Commission does include all six elements in its administrative practice. That creates legitimate expectations for future cases. In addition, the new rules add some interpretative elements whose legal scope is unclear. The preamble provides:

When assessing the existence of significant distortions, relevant international standards, including core conventions of the International Labour Organisation (ILO) and relevant multilateral environmental conventions, should be taken into account, where appropriate.[67]

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65 *Ibid*.
66 The Commission uses to a large degree similar arguments as under the old rules. *See* e.g., *Certain Hot Rolled Stainless Steel Sheets and Coils (Provisional Duty), supra* n. 3, recitals 122–154.
67 Recital 4.

The preamble adds indirectly an additional layer to the normal value determination: international labour law and international environmental law. They are relevant to assess the existence of distortion. That implies an indirect requirement on China to adopt core ILO conventions and relevant multilateral environmental conventions. Out of the eight core ILO conventions, China has ratified four.[68] The question is whether the *distortion* will be interpreted in light of all eight core conventions of the ILO. Furthermore, international environmental law contains – besides customary rules of international law – a number of environmental treaties. It is not clear how the Commission is going to decide which environmental treaties are relevant to include in the distortion assessment. The Commission has so far included the ILO dimension in support of the argument that significant distortion exists in China.[69]

Another difference between the old rules and the new rules is the level of analysis. As mentioned above, the Commission assesses distorted market economy on a country or sector basis. Where the old rules placed China as a non-market economy per se with individual MET analyses, the new rules do not consider China as a distorted market economy per se. Instead, the Commission assesses whether a country has a distorted market economy based on the abovementioned conditions. As mentioned above, the assessment of China is reflected in the Report. In the specific antidumping investigations, the Commission relies on the Report in combination with a sector-specific assessment. The Commission repeats the assessment of a sector in subsequent cases

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[68] China has not ratified *Forced Labour Convention*, 1930 (No. 29), Convention concerning Forced or Compulsory Labour (Entry into force: 1 May 1932); *Freedom of Association and Protection of the Right to Organise Convention*, 1948 (No. 87), Convention concerning Freedom of Association and Protection of the Right to Organise (Entry into force: 4 Jul. 1950); *Right to Organise and Collective Bargaining Convention,* 1949 (No. 98), Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively (Entry into force: 18 Jul. 1951); *Abolition of Forced Labour Convention*, 1957 (No. 105), Convention concerning the Abolition of Forced Labour (Entry into force: 17 Jan. 1959). The four core conventions ratified by China are *Equal Remuneration Convention*, 1951 (No. 100), (Entry into force: 23 May 1953); *Discrimination (Employment and Occupation) Convention*, 1958 (No. 111), Convention concerning Discrimination in Respect of Employment and Occupation (Entry into force: 15 Jun. 1960); *Minimum Age Convention*, 1973 (No. 138), Convention concerning Minimum Age for Admission to Employment (Entry into force: 19 Jun. 1976); *Worst Forms of Child Labour Convention*, 1999 (No. 182), Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (Entry into force: 19 Nov. 2000). *See* information on China's ratification of ILO conventions on ILO's website, https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:103404 (accessed 23 Mar. 2022).

[69] *See* e.g., *Certain Organic Coated Steel Products, supra* n. 3, recital 77; *Certain Aluminium Foil in Rolls*, *supra* n. 3, recital 94; *Ceramic Tableware and Kitchenware*, *supra* n. 3, recital 100; *Threaded Tube or Pipe Cast Fittings, supra* n. 3, recital 89; *Tungsten Electrodes*, *supra* n. 3, recital 78; *Bicycles II, supra* n. 3, recital 100; *Steel Road Wheels (Provisional Duty), supra* n. 3, recital 136. *Aluminium Converter Foil (Provisional Duty)*, *supra* n. 3, recital 97.

concerning products from the same sector.[70] In all the cases, the assessments of the economic and political context point to the same conclusion: China has an interventionist policy that is not compatible with the free market forces. That is reflected in China's administrative control, the allocation of financial recourses, and in the regulatory environment. The conclusion of the cases is:

> *[T]he Chinese economic model is based on certain basic axioms which provide for and encourage manifold government interventions. Such substantial government interventions are at odds with free play of market forces, resulting in distorting the effective allocation of resources in line with market principles.*[71]

The Chinese government, Chinese producers, and other interested parties have rights to be heard. Furthermore, the producers under investigation have the opportunity to have domestic cost data used in the normal value construction 'but only to the extent that they are positively established not to be distorted, on the basis of accurate and appropriate evidence'.[72] The burden of proof is on the Chinese producers after the Commission in the first place has demonstrated that China has significant market distortions. However, in light of the country-wide starting point – and with focus on the systemic governmental interference in the markets – it is difficult for Chinese producers to have normal value based on individual domestic cost data.[73] In situations with partly undistorted costs, the Commission replaces only the distorted costs.[74] That is a novelty compared to the old rules where the Commission replaced *all* Chinese cost and price data with data from a producer from an analogue country unless MET was granted.

Under the old EU policies, the EU considered China a non-market economy per se without legal basis in EU law to challenge that position. The new system offers a legal basis to challenge the Commission's distortion assessment. However, it seems more difficult now for individual Chinese producers to break out of the systemic governmental market distortion to demonstrate market economy performance to have their own data used in the normal value determination. Furthermore, the new rules seem to be clearer on the elements the Commission must include in the distorted economy assessment compared to the old rules. Even though it might make law more predictable, it also leads to new questions in

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70 *See* e.g., *Certain Grain-Oriented Flat-Rolled Products of Silicon-Electrical Steel*, *supra* n. 3, recitals 127–129; *Certain Tube and Pipe Fittings, of Iron or Steel, supra* n. 3, recitals 41–43 referring to the steel sector assessment of *Certain Hot Rolled Stainless Steel Sheets and Coils (Provisional Duty), supra* n. 3.

71 *Certain Organic Coated Steel Products*, *supra* n. 3, recital 60; *Certain Aluminium Foil in Rolls*, *supra* n. 3, recital 61; *Ceramic Tableware and Kitchenware*, *supra* n. 3, recital 69; *Threaded Tube or Pipe Cast Fittings, supra* n. 3, recital 67; *Tungsten Electrodes*, *supra* n. 3, recital 55; *Bicycles II, supra* n. 3, recital 64; *Aluminium Converter Foil (Provisional Duty)*, *supra* n. 3, recital 86.

72 Article 2.6a(a).

73 *See* e.g., *Certain Woven and/or Stitched Glass Fibre Fabrics, supra* n. 3, recitals 165–166.

74 *Ibid.,* recitals 166 and 232.

particular concerning the role that the ILO and international environmental law will play in the distorted economy determination.

4 CONSTRUCTING NORMAL VALUE

The next question concerns the methods to construct the normal value for Chinese producers. The following part discusses first the old rules before they are compared with the new rules.

4.1 The old rules: Analogue country data

If Chinese exporters did not meet the five MET conditions, the Commission based the normal value on the domestic costs and prices from a producer in an analogue country, or – if it was not possible – on any other reasonable basis. The first point is that the constructed price should be one reflecting China's market, 'if [China] were a market economy'.[75] However, the Commission's wide discretion made it difficult to predict which analogue countries the EU investigating authorities would select. Some of the factors included in the selection were: same economic level; competition on the market in the analogue country,[76] although the Commission accepted markets with only one producer if there was substantial import of like products[77]; sales must be representative[78]; production processes must be similar,[79] unless there is competition on the domestic market,[80] or production methods are more advanced[81]; access to raw materials where the line taken by the ECJ and the Commission has not been consistent[82]; and labour costs.[83] Furthermore, the Commission accepted that the product of the analogue country could have a different quality compared to the Chinese producers.[84]

However, the EU institutions did not consistently apply these factors. For example, the EU institutions could select an analogue country with a different

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75 Case T-255/01, *Changzhou/Zheijiang v. Council* [2003] ECLI:EU:T:2003:282, para. 59.

76 *Chamois Leather*, Commission Regulation (EC) No. 439/2006 of 16 Mar. 2006, OJ L 080, 17 Mar. 2006, at 7–22, recital 22.

77 *Lever Arch Mechanisms I, supra* n. 59, recital 37.

78 *Bicycles I,* Council Regulation (EC) No. 1095/2005 of 12 Jul. 2005, OJ L 183, 14 Jul. 2005, at 1–36, recitals 49–67.

79 *Chamois Leather, supra* n. 76, recital 22.

80 *Tartaric Acid*, Commission Regulation (EC) No. 1259/2005 of 27 Jul. 2005, OJ L 200, 30 Jul. 2005, at 73–90, recital 31.

81 *Barium Carbonate, supra* n. 53, recital 36.

82 Compare Case C-16/90, *Nölle* [1991] ECLI:EU:C:1991:402, para. 26, and *Granular Polytetrafluoroethylene (PTFE), supra* n. 40, recital 52. *See* comment by Andersen, *supra* n. 23, at 329–330.

83 *Hand Pallet Trucks and Their Essential Parts*, Council Regulation (EC) No. 1174/2005 of 18 Jul. 2005, OJ L 189, 21 Jul. 2005, at 1–14, recital 23.

84 *Granular Polytetrafluoroethylene (PTFE), supra* n. 40, recital 53.

level of economic development than China.[85] Furthermore, the EU institutions would not necessarily consider differences in labour costs as a relevant factor.[86] Nor was it clear which factors the EU institutions would apply if it were to choose between two potential analogue countries. For example, in *Polyethylene Terephthalate*, the Council rejected arguments about cultural development and economic development when the US was selected over Pakistan and Korea. The level of competition had a stronger weight in the selection process.[87]

If the Commission could not find a producer from an analogue country, producers from the EU could be used. In *Lever Arch Mechanisms II*, where the Commission considered India, Thailand, and Iran as a potential analogue country, only one Iranian company provided a partial reply. Without sufficient data from the Iranian producer, the Commission based the normal value on prices paid in the EU by the EU producers.[88] However, the use of EU producers was under constraints: in *GLS*, the Commission had based the prices on EU producers' data, as it had not been possible to get data from the suggested producers from Thailand. The ECJ invalidated the regulation because the Commission had not made a sufficient effort to try other alternative analogue countries.[89]

One particular problem with the old rules concerned the situation where some Chinese producers were granted MET while others were not. Should the prices used for comparison be based on producers from analogue countries or on the Chinese producers granted MET? The General Court got the opportunity to test it in *Changzhou/Zheijing v. Council.*[90] The complainants, which had not been granted MET, claimed that it was unequal treatment to base the normal value on data from a producer in an analogue country instead of data from the MET producers. One could assume that data from these MET producers would be closer to a Chinese market economy, had China been one, compared to data from a Mexican producer. The General Court adopted a narrow interpretation. Data from an analogue country could only be disregarded 'where it is impossible to apply that general rule. (…) [S]uch impossibility arises only where the data required in order to determine normal value are not available or are not reliable'.[91] From a legal perspective, the textual approach can be accepted. However, the question is whether the law reflects the purpose of the non-market economy rules:

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85 *Barium Carbonate, supra* n. 53, recital 36; *Polyethylene Terephthalate*, Council Regulation (EC) No 1467/2004 of 13 Aug. 2004, OJ L 271, 19 Aug. 2004, at 1–17, recital 46.

86 *Polyethylene Terephthalate*, *supra* n. 85, recital 46.

87 *Ibid*., recitals 41–46.

88 *Lever Arch Mechanisms II,* Commission Implementing Regulation (EU) 2018/1684 of 8 Nov. 2018, OJ L 279, 9 Nov. 2018, at 17–32, recitals 34–40.

89 Case C-338/10, *GLS* [2012] ECLI:EU:C:2012:158, para. 34.

90 *Ibid*.

91 *Ibid*., para. 59.

to establish a price, on a reasonable basis, as closely to a Chinese market economy price if China had been a market economy.[92]

The old rules made it difficult for producers to predict the analogue country as the law did not provide factors to be applied in the selection process. Nor would the rules be clear on how factors would be weighed, in particular if two or more countries could be used as the analogue country.

4.2 The new rules: Wider range of sources

The new rules have a degree more clarity than the old rules. The new rules provides:

> *[T]he normal value shall be constructed exclusively on the basis of costs of production and sale reflecting undistorted prices or benchmarks.*

The normal value must reflect market based prices and costs. In order to establish the normal value, the new rules provide which sources the Commission may apply:

> *The sources the Commission may use include:*
>
> *— corresponding costs of production and sale in an appropriate representative country with a similar level of economic development as the exporting country, provided the relevant data are readily available; 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).*

The word *'may'* implies that the Commission may use other sources. However, it must be expected that any move beyond the sources identified in Article 2.6a(a) requires cogent reasons, as the sources provided in the legal text create legitimate expectations for the states and producers. In EU case law, the ECJ has consistently held that the principle of protection of legitimate expectations is a general principle of EU law and a 'superior rule of law',[93] and its application presupposes that the individual has received 'precise, unconditional and consistent assurances originating from authorised, reliable sources'.[94] The principle of protection of legitimate expectations also applies in antidumping law.[95]

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92 *See* opinion of AG Van Gerven in Case C-16/90, *Nölle,* 4 Jun. 1991, ECLI:EU:C:1991:233, point 15.

93 *See* e.g., Case 74/74, *CNTA v. Commission* [1975] ECLI:EU:C:1976:84, para. 44; Case C-17/03, *VEMW and Others* [2005] ECLI:EU:C:2005:362, para. 73.

94 Case C-349/17, *Eesti Pagar* [2019] ECLI:EU:C:2019:172, para. 97.

95 Case T-132/18, *Roland SE v. Commission* [2021] ECLI:EU:T:2021:329, para. 107.

The first source, *use of data from a representative country*, is similar to the analogue country rule in the old system. However, where the old rules offered wide discretion to the Commission to find an analogue country,[96] the new rules have specified that the country *must* have a *similar level of economic development* as the exporting country and that the *relevant data are readily available*. Under the old system, the Commission would often – but not consistently – include 'similar economic development' in its analogue country determination. In its new similar economic development assessment, the Commission uses the classification system of the World Bank to find a country with similar economic development as China.[97] The Commission then looks at producers with a similar *production* as the Chinese producers under investigation. It will in a range of potential producers use data from the producer with the most complete and reliable set of data.[98] However, the Commission has in some cases more controversially written in footnotes:

> *If there is no production of the product under review in any country with a similar level of development, production of a product in the same general category and/or sector of the product under review may be considered.*[99]

The question is whether it would be more appropriate to disregard the representative country option as a source of data to construct the normal value and resort to the two other sources mentioned in Article 2.6(a); undistorted international prices and undistorted domestic prices, and only in the event that such sources are not available or incomplete then apply the wider category of products as suggested by the Commission.

Furthermore, the new rules provide that the Commission must consider the availability of relevant and public data in the country.[100] The Commission will in the comparison between two or more potential representative countries select the country with the best quality of and details in publicly available financial data.[101] If the Commission cannot get sufficient readily available data from the producers of the representative country, the Commission will fill in data from the sources mentioned below.[102]

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96 The requirement was 'an appropriate market-economy third country shall be selected in a not unreasonable manner'.

97 *See* e.g., *Certain Aluminium Foil in Rolls, supra* n. 3, recital 113; *Certain Hot Rolled Stainless Steel Sheets and Coils (Provisional Duty), supra* n. 3, recital 160*; Certain Tube and Pipe Fittings, of Iron or Steel, supra* n. 3, recital 157.

98 *See* e.g., *Certain Aluminium Foil in Rolls, supra* n. 3, recital 117; *Steel Road Wheels (Provisional Duty*), *supra* n. 3.

99 *See* e.g., fn. 59 in *Tungsten Electrodes, supra* n. 3, or footnote 78 in *Certain Organic Coated Steel Products, supra* n. 3; fn. 66 in *Steel Road Wheels (Provisional Duty), supra* n. 3.

100 *See* e.g., *Certain Aluminium Foil in Rolls, supra* n. 3, recital 118.

101 *See* e.g., *Certain Welded Pipes and Tubes of Iron or Non-alloyed Steel, supra* n. 3, recitals 157–159.

102 *See* e.g., *Certain Woven and/or Stitched Glass Fibre Fabrics, supra* n. 3, recital 192.

Finally, the new rules add a selection criterion in case two or more representative third countries are appropriate. In that situation, preference *shall* be given to countries with an adequate level of social and environmental protection. The preamble to the new rules provides that the Commission must take into account whether the analogue countries comply with ILO standards and multilateral environmental treaties.[103] That is regardless of China's own international obligations. It implies a greener side to the antidumping investigation in case two or more countries are appropriate as representative country. It takes EU law a step away from the reasonable test under the old rules as the *greener* or *higher social protective* representative country shall be preferred. From a social and environmental perspective, it is clearly an advantage,[104] and it provides some clarity to the legal uncertainties under the old rules. For example, in *Certain Organic Coated Steel Products*, the Commission selected Mexico over Malaysia, as Mexico had signed and ratified more of the core ILO conventions and environmental treaties than Malaysia.[105] However, the other side of the coin is that these new rules raise new questions. Is social protection or environmental protection more important if two representative countries are even but one is stronger in its social protection level while the other is stronger in its environmental protection?

The second source, if appropriate, is *undistorted international prices and costs*. That allows the Commission to apply a methodology beyond prices, costs etc. from a producer in a representative analogue country. However, it is not clear how an international price must be established. The Commission has in particular relied on Global Trade Atlas to establish undistorted costs of production,[106] but also referred to inter alia the National Minerals Center of the US Geological Survey,[107] statistics of the ILO,[108] and if data in the Global Trade Atlas were incomplete used Eurostat.[109] The cases do not reveal the underlying methodology behind the selection of these specific sources to establish costs.

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[103] Recital 6 of the preamble of Regulation (EU) 2017/2321 of the European Parliament and of the Council of 12 Dec. 2017 amending Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European Union and Regulation (EU) 2016/1037 on protection against subsidised imports from countries not members of the European Union, OJ L 338, 19 Dec. 2017, at 1–7.

[104] However, these perspectives must nevertheless be dissatisfied with the ranking of these concerns. They may justifiably ask if environmental and social concerns should be part of the selection of a representative country in the first place and not only as a selective condition in case of two or more countries satisfy the conditions of economic development and availability of public data.

[105] *Certain Organic Coated Steel Products*, *supra* n. 3, recital 110–112.

[106] *See* e.g., *Certain Organic Coated Steel Products, supra* n. 3, recital 118; *Certain Aluminium Foil in Rolls, supra* n. 3, recital 130; *Ceramic Tableware and Kitchenware*, *supra* n. 3, recital 154; *Threaded Tube or Pipe Cast Fittings, supra* n. 3, recital 127; *Bicycles II, supra* n. 3, recital 127; *Certain Woven and/or Stitched Glass Fibre Fabrics, supra* n. 3, recitals 192 and 229; *Steel Road Wheels (Provisional Duty), supra* n. 3, recital 136.

[107] *Tungsten Electrodes*, *supra* n. 3, recital 110.

[108] *Steel Road Wheels (Provisional Duty), supra* n. 3, recital 136; *Certain Welded Pipes and Tubes of Iron or Non-alloyed Steel, supra* n. 3, recital 165.

[109] *Bicycles II, supra* n. 3, recital 149.

The third source is *domestic costs if they are undistorted*. As mentioned above, the rule can be applicable to the producer under investigation if the producer can demonstrate that costs are undistorted. The Commission accepts, for example, cost data of purchases bought on foreign markets if there is no evidence of distortion on those markets.[110] The Commission may also apply domestic costs of specific components/raw materials if the costs of the specific components/raw materials only represent a negligible share of the total costs of the final product.[111] However, it is difficult for Chinese producers to demonstrate that their costs are not distorted, and even if the Commission uses data from Chinese producers, it may be necessary to recalculate the numbers if the data provided by a cooperating Chinese producer is not complete.[112] The rule of using domestic costs if they are undistorted is important compared to the old rules. It must be assumed that the Commission can apply the new rule to eliminate the problem identified in the *Changzhou/Zheijiang v. Council* case where the investigating authorities applied data from producers from analogue countries instead of data from the Chinese MET producers.

One question remains: To what extent may the Commission use data from EU producers? As we saw above under the old rules, the Commission used data from EU producers in situations where it could not find an appropriate analogue country. However, in the legislative process, the European Parliament had suggested that one of the sources could be costs 'from markets in the Union',[113] which did not get through to the final text of the basic regulation. That indicates that the negotiators ultimately did not consider such costs as appropriate for the normal value determination. However, there is still scope for the Commission to apply EU prices and costs as the sources are not exhaustive. Nevertheless, it must be assumed – in light of the principle of protection of legitimate expectations – that the Commission can only resort to EU prices and costs if the three sources are not available – wholly or partly – or unreliable.

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110 *Certain Woven and/or Stitched Glass Fibre Fabrics, supra* n. 3, recital 232.

111 *Optical Fibre Cables, supra* n. 3, recital 320.

112 That is in accordance with Art. 18 of the Basic Regulation. *See* e.g., about incomplete number of working hours: *Certain Grain-Oriented flat-Rolled Products of Silicon-Electrical Steel, supra* n. 3, recital 207.

113 Amendment 3 (Recital 4) and Amendment 5 (Art. 2.6a(a)), Report on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European Union and Regulation (EU) 2016/1037 on protection against subsidised imports from countries not members of the European Union (COM(2016)0721 – C8-0456/2016 – 2016/0351(COD)), A8-0236/2017, 27 Jun. 2017.

5 FINAL COMMENTS

The new EU rules slightly improve legal certainty. However, there is room for improvement. One place to start could be to clarify the legal space to disregard Chinese costs and prices under WTO law.

In contrast to the old rules, the new rules do not consider China as a non-market economy per se. The Commission must demonstrate that China has a distorted market economy based on the rule of law and subject to judicial review. Some of the elements in the distorted economy analysis reflect the old MET rules. They also reflect some of the factors the EU investigating authorities applied within their discretion to determine MET under the old system. The new rules give the Commission wide discretion to decide which of the elements it will include in its distorted economy determination. In its practice, the Commission considers all the elements.

The preamble of the new rules refers to international labour law and environmental law as relevant standards in the distorted economy assessment. It is unclear how strong a legal weight these additions will get. In its analysis of distortion, the Commission has referred to the ILO conventions in support of finding that China has a distorted market economy.

Furthermore, in contrast to the old rules, where the Commission rejected Chinese producers MET if they were not able to demonstrate that all five MET criteria had been met, the new rules offer the opportunity that the Chinese producers' cost data partly can apply if the costs are undistorted. Nevertheless, with the country as the starting point of the distorted market economy analysis and its focus on the systemic problems in China's market economy, it is difficult for the individual Chinese producers to have their own cost data used in the normal value determination. The expectation for EU importers of Chinese goods should generally be that the Commission constructs the normal value for Chinese producers based on data from a representative country combined with data from international sources.

The new rules have clearer selection criteria of the representative country. It must be on the same economic level as China. The Commission also included 'same economic level' within its discretion under the old rules, but it was not always a decisive factor. Furthermore, the new rules provide criteria for the selection of the representative country if more than one country is appropriate. In that respect, the new rules slightly improve legal certainty.

Even though there on overall might be slight improvement of legal certainty, it does not change the artificial construction of the normal value. Any construction of the normal value implies uncertainty about the dumping determination and the level of the antidumping duty. The EU importers and Chinese producers should take these uncertainties into account in their business decisions.