

## **EU PRODUCERS AT THE MERCY OF CHINESE COMPETITORS?**

**ABSTRACT:** Like any other WTO member the EU is entitled to use anti-dumping measures to protect its market from certain imports in the case of unfair competition. As far as China is concerned, the EU has extensively been using the ‘analogue country’ method for calculation of anti-dumping margin, as a method applicable for non-market economies, which enabled it to protect domestic producers from low Chinese prices. However, on 16th December 2016 this country will be granted a full market economy status within the WTO, as enshrined in Article 15 (d) of the China’s Accession Protocol. This effectively means that the EU will not be able to charge such a high anti-dumping duty to Chinese products and shield domestic industry from a fierce competition. This article argues that the EU treatment of Chinese exporters was based on trade protectionism, and that, due to the forced change in December 2016, the internal market will face danger after China is granted a full market economy status.

**Key words:** *anti-dumping, EU trade, WTO, Chinese products import*

### **Introduction**

Like any other WTO member, the EU is entitled to use anti-dumping measures to protect its market from certain imports in the case of unfair competition. As far as China is concerned, WTO law and the China’s WTO Accession Protocol give a certain latitude to WTO members to treat China as a non-market economy and, therefore, apply their own methodology when calculating the anti-dumping margin. The EU has extensively been using the ‘analogue country’ method which enabled it to protect domestic producers from low Chinese prices. However, on 16th December 2016 this country will be granted a full market economy status within the WTO, as enshrined in Article 15

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(d) of the China's Accession Protocol. This effectively means that the EU will not be able to charge such a high anti-dumping duty to Chinese products and shield domestic industry from a fierce competition. Consequently, the question is whether we will witness substantial distortions in the internal market after Chinese competitors become able to sell low-priced products or whether the EU will come up with a solution before December 2016. This article argues that the EU treatment of Chinese exporters was based on trade protectionism, and that, due to the forced change, the internal market will face danger after China is granted a full market economy status.

## **The Concept of Anti-dumping**

WTO agreements are based on two essential principles enabling a smooth flow of international trade: the principle of non-discrimination (ND) and the most-favored-nation principle (MFN). Nevertheless, these agreements allow exceptions, such as trade defense instruments. They take three kinds of form: Anti-dumping and Anti-subsidy measures, both aimed at tackling the “unfair trade”, and Safeguards, aimed at providing relief from the impact of the fair trade.<sup>1</sup> In the EU, anti-dumping measures are the most frequently used trade defense instrument.<sup>2</sup>

A product is being dumped if a company exports that product at a price lower than the price it normally charges on its own home market or at the price which is lower than the costs of production plus a reasonable profit. In these cases, WTO agreements allow governments to take actions against such imports and impose an additional temporary burden on importers in order to protect the domestic industry. The underlying rationale behind anti-dumping measures was best described in 1916 by U.S. Assistant Attorney General Samuel Graham:

“Generally accepted principles of political economy hold that it is not sound policy for any Government to permit the sale in its country by foreign citizens of material at a price below the cost of production at the place produced, for the reason that such

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<sup>1</sup> UK Department of Business Innovation and Skills, (2012). Anti-dumping: Selected Economic Issues, Trade and Investment Analytical Papers Topic 18 of 18, page 3.

<sup>2</sup> The National Board of Trade, The Review of EU Trade Defense Instruments in Brief, ( February 28th 2015), available at: <http://www.kommers.se/Documents/dokumentarkiv/publikationer/2013/faktablad/tdibrief-introduction-to-the-eu-trade-defence-instruments.pdf>.

a system, in its final analysis and on a sufficient scale, spells bankruptcy.”<sup>3</sup>

In other words, anti-dumping is a way to shield a country’s market from the adverse effects of unfair price discrimination in the international trade. In practice, an importing company receives a bill from the custom authorities which includes three taxes: conventional custom duty, anti-dumping duties and Value Added Tax (VAT). Until these taxes are paid, goods cannot enter the market.

Anti-dumping measures, their effect and investigations have always been a subject of controversy. This is particularly so because in some situations it is difficult to draw the line between anti-competitive behavior, which is legitimate to repress, and pro-competitive behavior that enhances competition and serves the interest of consumers. An obvious example of anti-competitive pricing behavior is the so-called ‘predatory dumping’<sup>4</sup>. During the first phase, an importing company will set the price very low to drive competitors away from the market and to establish monopoly. Subsequently, the importing company will set very high prices, recover all previously incurred costs and continue with making a monopolistic profit. Another type of dumping, the so-called ‘market expansion dumping’, is usually described as pro-competitive. In order to penetrate the market and overcome the effects of uncertainty among consumers, a new company will have to cut prices to win customers. Usually, this type of behavior is considered beneficial for consumers. Therefore, the application of anti-dumping measures would not be legitimate in this situation. Nevertheless, there are only a few types of market behavior always considered to have an anti-competitive effect, such as selling a product at a loss for the company. Even in these cases, it is very difficult to establish whether predatory pricing has been a sufficient strategy to achieve monopolization of the market.<sup>5</sup> Whether certain market behavior is either pro-competitive or anti-competitive depends on different circumstances and the competent authorities have to be engaged in a complex economic analysis to decide on each case.

Like any other WTO member, the EU is entitled to use anti-dumping measures to protect its market from certain imports coming from foreign

<sup>3</sup> Graham S.J., (1916), the letter to the editor, *The New York Times*, July 4th, 1916.

<sup>4</sup> UK Department of Business Innovation and Skills, op.cit., page 14.

<sup>5</sup> According to Bourgeoise and Messerlin, who did a research on EU anti-dumping, in 97% of the cases monopolization of the market would not, even via predatory pricing, be possible, in Bourgeoise, J. and Messerlin, P., (1998). “The European Community’s Experience”, Brookings Trade Forum 1998.

importers in the case of unfair competition. However, the EU should not be permitted to use anti-dumping measures solely for the purpose of trade protectionism. In other words, it is illegitimate to use these measures only to prevent new competitors to penetrate the EU market with low prices. However, neither WTO law nor EU law requires from the European Commission to distinguish between pro and anti-competitive forms of dumping. Even worse, the Commission has no obligation to provide any information on the underlying cause of dumping, which enables the extensive use of anti-dumping measures regardless of their economic justification.

Even though anti-dumping measures affect only a small part of trade<sup>6</sup> and the EU is a relatively modest user<sup>7</sup>, the EU anti-dumping measures have, especially when related to Chinese products, been hotly debated in the EU anti-dumping literature. Given the fact that the EU internal market comprises around 500 million consumers and the fact that anti-dumping measures can drastically impede an effective penetration for the EU's trading partners, this topic is very significant. Moreover, statistics concerning the EU anti-dumping have revealed the fact that Chinese importers are by far the most affected importers by these measures.<sup>8</sup> In the next section, we will analyze relevant provisions of both WTO and EU law, applicable to the EU anti-dumping procedures towards Chinese importers.

## **Legal Framework**

As far as WTO is concerned, anti-dumping has been firmly rooted in the multilateral trade agreements of the Uruguay Round by means of the Article VI of the General Agreement on Tariffs and Trade (GATT) and WTO Anti-dumping Agreement. The definition of anti-dumping is enshrined in Article

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<sup>6</sup> In the EU, less than 1% of goods imports are affected by all three types of trade mechanisms. UK Department of Business Innovation and Skills, op. cit, page 5.

<sup>7</sup> According to Brown Turkey is the most intensive user of trade defense mechanisms while US has the lead among developed countries. In Brown C., (2010). Taking Stock of Antidumping, Safeguards and Countervailing Duties 1990-2009. World Bank Policy Research Working Paper 5436, September 2010.

<sup>8</sup> At the end of June EU had 124 measures affecting 68 different products, out of which 53 products were coming from China, in UK Department of Business Innovation and Skills, op.cit, page 9. Also, in their research, Vandebussche and Viegelahn, found that there has been a dramatically increasing trend in the EU to impose anti-dumping measures on Chinese products. Between 2004 and 2009 there was over 40% of the cases of imposing anti-dumping measures for China and 60% of them on the rest of the importing countries. In Vandebussche H., and Viegelahn C., (2011). 'The European Union: No Protectionist Surprises' in Bown (ed), The Great Recession and Import Protection: The Role of Temporary Trade Barriers (CEPR/World Bank, 2011).

VI of the GATT and Article 2.1. of the WTO Anti-dumping Agreement. A product is being dumped when there is a difference between the price of the merchandise when sold in an import country (“export price” or EP) and the price of the comparable product in the country where it is produced (known as the “normal price” or NV). The difference between the export and normal price is called a “dumping margin” and it is relevant for the calculation of the anti-dumping duty rate. “The determination of dumping, therefore, is based on the answer to a simple, objective mathematical question: Is EP < NV?”<sup>9</sup>

The usual way to establish the “normal price” is very simple. One only needs to determine the product’s price in the exporter’s home market. However, there will be times when that product is either not sold in the exporter’s home market or when a particular market situation makes it necessary to use another benchmark. In these circumstances, Article 2.2. of the WTO Anti-dumping Agreement allows a “normal price” to be constructed based on (1) third country prices or (2) on the product’s cost of production in the country of origin plus a reasonable amount for administrative, selling, and general costs as well as for profits.

Finally, Article 2.7 of the WTO Anti-dumping Agreement read in a conjunction with the second Supplementary Provision to paragraph 1 of Article VI in Annex I to the GATT 1994 recognizes the fact that certain difficulties in determining a ‘normal price’ may arise when products are coming from a non-market economy country. Notably, those are situations where imports are coming from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by that State.<sup>10</sup> In other words, where market rules are substituted by the state interventionism, WTO Members can adopt their own methodologies to calculate dumping margins.

China is one of the few members of the WTO which is considered to be a non-market economy. According to Article 15(a) of the WTO China Accession Protocol signed in 2001, other WTO member states can escape from using China’s domestic prices and can use their own methodology when imposing the anti-dumping margin. However, WTO members have to leave a certain leeway for an individual Chinese importer to demonstrate that his industry operates on market economy rules. In that case, the burden of proof will be on that particular Chinese producer. If the importer succeeds, the WTO member shall use Chinese prices or costs for the industry under investigation

<sup>9</sup> Stewart, T. and Dwyer, A., (2009). ‘Anti-dumping: Overview of the Agreement’ in Bagwell, Bernmann and Mavroidis (eds), *Law and Economics of Contingent Protection in International Trade* (Cambridge, 2009), page 201.

<sup>10</sup> The Second Supplementary Provision to paragraph 1 of Article VI in Annex I to the GATT 1994.

in determining price comparability.<sup>11</sup> In the opposite scenario, the importing WTO member may use a methodology that is not based on a strict comparison with domestic prices or costs in China.<sup>12</sup> Finally, the most important provision for the topic of this analysis is contained in Article 15(d) of the WTO China Accession Protocol 2001.<sup>13</sup> According to this Article, after the expiry of 15 years from China's accession, there will be no possibility to apply subparagraph (a)(ii). In other words, China's domestic prices will be used when establishing whether dumping has occurred. This means that all WTO members, especially the EU ones, will not be able to apply their own methodologies in the treatment of non-market economies. Instead, Article 2.1. and 2.2. of the WTO Anti-dumping Agreement will become fully applicable.

Turning to the EU level, Article VI of the GATT and WTO Anti-dumping Agreement are implemented by the Council Regulation 1225/2009 (the Basic Regulation).<sup>14</sup> By and large, the EU's anti-dumping law specifies three conditions that must be fulfilled before imposing the anti-dumping measures on imported products. Firstly, imported products must be dumped. Secondly, dumping causes "injury" to a domestic industry. Thirdly, the imposed anti-dumping measures have to be in a community interest. As far as non-market economy treatment is concerned, Article 7 (a) of the Basic Regulation prescribes that, in the case of imports from a non-market economy country, a normal value will be determined on the basis of the price in an 'analogue country' unless a certain producer succeeds in proving market economy treatment criteria (MET criteria). There are five criteria listed in Article 7 (c) of the Basic Regulation. Of course, it is in the importer's interest to be treated under a "special market economy" regime since, in that case, Chinese prices will be used for establishing the 'normal price'. As such, anti-dumping duties being imposed on exporters which were rejected by the market economy treatment are often as much as ten times higher than the ones applicable to the market

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<sup>11</sup> Article 15(a) (i) of the WTO China Accession Protocol 2001.

<sup>12</sup> Article 15(a) (ii) of the WTO China Accession Protocol 2001.

<sup>13</sup> According to Article 15 (d) of the WTO China Accession Protocol 2001: "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."

<sup>14</sup> The Council Regulation 1225/2009 and European Commission (Commission) on 10th April 2013.

economy treatment.<sup>15</sup> In the next section, we will focus on the EU application of these relevant provisions in the case of Chinese importers in the EU.

## EU Treatment of Chinese Importers

The thesis of this article requires the answer to the question whether the EU Commission has been using a non-market economy treatment of Chinese producers in a protectionist way. If the answer to this question is affirmative, December 2016 (the moment when 15 years from the date of China's accession expires) will not bring joy to the EU producers. As it was mentioned in the previous section, an importer coming from China is normally treated as an importer of a non-market economy country. For the anti-dumping procedure domestic Chinese prices are deemed to be an unreliable indication of real prices. In classical centrally controlled economies market forces are suspended via a centrally controlled system. Since domestic prices are inapplicable, it is used a comparable price from another country, the so-called 'analogue country'. However, there is a certain leeway. Each individual Chinese importer can escape the general rule for China if the criteria set out in Article 7 (c) of the Basic Regulation - market economy treatment criteria (MET criteria) – are met. If this can be established, the Commission will use Chinese prices in the anti-dumping procedure, which will result in a lesser anti-dumping duty. If a Chinese manufacturer fails to meet MET criteria, it will "remain stranded in the desert of the non-market economy system".<sup>16</sup> Nevertheless, reality depends on the way the Commission applies these basic elements in practice. So far, the application of the market economy treatment has in most of the cases failed and "successful MET applications by Chinese enterprises are relatively infrequent."<sup>17</sup> Consequently, the anti-dumping margin is primarily determined by a comparison to an analogue country, in accordance with Article 7 (a) of the Basic Regulation. This Article stipulates the manner in which an analogue country is selected:

<sup>15</sup> Trommer S.M., (2007). 'Special Market Economy: Undermining the Principles of the WTO?', 6 Chinese Journal of International Law 565, page 16.

<sup>16</sup> MacLean, R., (2012). 'Adored and Despised in Equal Measure: An Assessment of the EU's Principle of the Market Economy Treatment in Anti-Dumping Investigations Against China' in 3 European Yearbook of International Economic Law 189, page 2.

<sup>17</sup> Ibid, page 3.

“An appropriate market economy country shall be selected in a not unreasonable manner, due to the account being taken of any reliable information made available at the time of selection”.<sup>18</sup>

However, reality reveals a completely different picture. There are cases where the analogue country had no similarities with a certain Chinese market. For example, in *Steel Ropes and Cables case*<sup>19</sup>, during the initial part of the anti-dumping investigation, Poland was used as an analogue country. As investigation was progressing, Poland joined the EU and could no longer be used for that purpose. Subsequently, after USA, South Korean, Norwegian and Thai producers refused to participate, the Commission had to use Turkey as an ultimate choice. This led some commentators to conclude that *de facto* choice of the analogue country depends “on the willingness of the analogue industry to participate in the anti-dumping exercise.”<sup>20</sup> Moreover, in *Silicon Carbide*<sup>21</sup> the analogue country was Brazil for China, Russia and Ukraine. Effectively, this means that three countries have the exact same market structures and characteristics. It is little to say that such a conclusion is just wrong. MacLean also criticized this EU practice:

“In the case of Chinese exporters, this regularly means that domestic prices charged by totally unrelated manufacturers are inserted into their calculation and these enterprises can be located in the United States, Canada, Japan, Indonesia, Taiwan and even, somewhat bizarrely, the European Union.”<sup>22</sup>

The consequence of using the ‘analogue country method’ instead of the market economy treatment is that the duty is up to ten times higher. This happens because in many investigations the analogue country is one of the

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<sup>18</sup> The Council Regulation, above n.21, art. 2(7)(a) para 2, 1st sentence.

<sup>19</sup> The Council Regulation (EC) 1858/2005 of 8th November 2005 imposing a definitive anti-dumping duty on imports of steel ropes and cables originating in People’s Republic of China, India, South Africa and Ukraine following an expiry review pursuant to art. 11(2) of the Regulation 384/96, OJ L 299, 6, at recitals 43–45.

<sup>20</sup> Trommer, op.cit, page 18.

<sup>21</sup> The Council Regulation (EC) 2496/97 of 11th December 1997 imposing a definitive anti-dumping duty on the import of silicon metal originating in People’s Republic of China, OJ L 345, 1.

<sup>22</sup> MacLean, op.cit, page 3.

most developed countries in the world, such as the US, Norway, Canada and Japan.<sup>23</sup> This is the underlying reason why many critics of the EC's anti-dumping practice claim that the analogue country method leads to artificially elevated dumping margins.<sup>24</sup> Liu finds that this EU practice towards China “denies all of the most obvious advantages enjoyed by Chinese producers, such as an access to natural resources and cheap labor, since these benefits will not be used to assist the penetration of the exporters of non-market economy countries through an analogue country with high or relatively high production costs”.<sup>25</sup>

The analogue country principle is applicable in the cases where a Chinese exporter failed to meet MET criteria set out in Article 7 (c) of the Basic Regulation. Nevertheless, it appears from the Commission's practice that Chinese producers rarely have succeeded in fulfilling MET criteria. This is a result of sometimes the inconsistent application of MET criteria to China in a comparison to other countries. For example, the second MET condition in Article 7 (c) requires from an importer to have a clear set of basic accounting records which are independently audited in compliance with international accounting standards. In the case of *Ironing boards*<sup>26</sup> Chinese importers were refused MET due to the “clear breach of the International Accounting Standards”. This Commission's decision is hard to justify. Firstly, the permissibility of this criterion itself is disputable since it is generally accepted that accounting records must be in accordance with the national principles of the country concerned. Thus, a national accounting standard is applicable to enterprises in the EU. Secondly, the Basic Regulation itself takes local accounting principles as relevant in Article 2(5). Thirdly, in relation to other countries the Commission used national accounting principles. For instance, in *Cotton-Type Bed-linen*<sup>27</sup> case, the Commission expressly commented on the failure of the audited accounts of Pakistani importers to meet Pakistani accounting principles. Therefore, one could conclude that Chinese producers have more strict conditions to fulfill in a comparison to other countries. The other applications for MET were refused solely on very strict procedural rules. For instance, in the case of *Electronic weighing scales* originating from

<sup>23</sup> Source: The European Commission Anti-dumping statistics covering the full year of 2006 (2007) ([trade.ec.europa.eu/doclib/docs/2006/october/tradoc\\_128626.pdf](http://trade.ec.europa.eu/doclib/docs/2006/october/tradoc_128626.pdf)).

<sup>24</sup> Trommer, op. cit, page 16.

<sup>25</sup> Liu, Y., (2005). Anti-dumping Measures and China, 12(3) J Financial Crime, 277.

<sup>26</sup> Ironing Boards from China [Provisional Disclosure Document dated from 26th February, 2007], not public, from MacLean, op. cit, page 51.

<sup>27</sup> The Regulation (EC) No. 397/2004, OJ [2004] L 66/1, Recital 38.

China, the importer's claim was refused because it was submitted late and incompletely.<sup>28</sup>

Some concerns exist also in relation to the first criterion in Article 7 (c) of the Basic Regulation. While it is reasonable to require that commercial decisions are taken without a significant state interference, it seems unjust to take the same approach towards raw materials, since the exporters have no control over the pricing at the upstream market. In certain *Iron and Steel Fasteners*<sup>29</sup> all Chinese producers were refused MET. The domestic Chinese price for the principal input merchandise, iron and steel wire rod, was considered below the market prices charged in Europe, India, North America and Japan. Since China has no natural resources of this raw material, the Commission assumed there was the state interference and denied MET. In *Melamine* from China, the Commission went even further. Chinese exporters of melamine were denied MET because the price of natural gas, which was used not for melamine but for an intermediate product – urea, was controlled by the Chinese government. MacLean criticized this “reverse engineering” and expressed concerns that it might be challenged in the future.<sup>30</sup>

In some of its decisions the Commission's reasoning was astonishing:

*“Although measures would be expected to increase the price of imports, importers have not expressed any concern about possible measures and it is therefore considered that they would not be significantly affected.”*<sup>31</sup>

Similarly, in other cases, the Commission assumed that anti-dumping measures against Chinese products would have an adverse affect on consumers, but nevertheless it imposed the duty because none of the economic operators cooperated in the Commission's investigation.<sup>32</sup> Therefore, one might conclude from these statements that the Commission is often aware of the adverse effects of anti-dumping measures, but still decides to impose them.

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<sup>28</sup> The Notice of initiation of an anti-dumping proceeding concerning imports of certain electronic weighing scales originating in People's Republic of China, Republic of Korea and Taiwan, C1999/262/07, OJ C 262, 8.

<sup>29</sup> The Regulation (EC) No. 1331/2007, OJ [2007] L 296/1, Recital 23; and the Regulation (EC) No. 862/ 2005, OJ [2005] L 144/11, Recital 33.

<sup>30</sup> MacLean, op.cit, page 58.

<sup>31</sup> Certain finished polyester filament fabrics, China. OJ L240, 12th September 2005, p.1; paragraph 130.

<sup>32</sup> Compressors, China, OJ L81, 20th March 2008.

The usual counter-argument of those who argue that the application of MET criteria by the EU is not arbitrary in the case of *Zhejiang*.<sup>33</sup> This is one of the rare cases where Chinese producers challenged the Council's decision on anti-dumping measures and won before the CJEU.<sup>34</sup> In this case, the Commission found that there was a significant state interference in the producer's industry solely based on the fact that the state owned shares in the importing company, and the Council imposed a high anti-dumping duty refusing the market economy treatment. Chinese exporters appealed to the CJEU. According to its decision, the Court opined that the state control couldn't be *ab initio* equated to the requirement of significant state interference and annulled the Council's Regulation. The Court did stress that the State ownership in the company could raise serious doubts about its independence, but held that the Commission's margin of discretion did not extend as far as to enable that EU body to disregard all the evidence suggested without any consideration.<sup>35</sup>

Since Chinese exporters have won this case, one can argue that the CJEU does not allow the Commission and the Council to impose anti-dumping measures in an arbitrary way. Even though we could agree with such a statement up to a point, there are many counter-arguments. Firstly, cases such as *Zhejiang* are rare because either the Council's decision is not challenged at all or it is the fact that CJEU is reluctant to annul measures. For example, during the period from 1998 to 2008 there were 40 cases taken before the CJEU and only in eight of them the ruling was in favor of the applicant.<sup>36</sup> Davis, who did a research on CJEU anti-dumping cases in that period, concluded that "exporters alleging investigatory errors surrounding the anti-dumping duties imposed on them stand little chance of convincing the European Court that its sister institutions are guilty of misconduct."<sup>37</sup>

<sup>33</sup> The Judgment of the Court of Justice (Grand Chamber) of July 19th, 2012 in the Case C-337/09 P, *The Council of the European Union v. Zhejiang Xinan Chemical Industrial Group Co. Ltd.*

<sup>34</sup> As far as a procedure is concerned, the Commission conducts investigation, but the Council adopts final duties on importers in the form of the Regulation. Subsequently, the Council's regulation can be challenged before the CJEU. An ongoing modernization project, which was launched in 2011, made a significant progress in 2013 when a legislative proposal, a communication and draft guidelines on four subjects were adopted by the Commission. Currently, the legislative proposal is following the ordinary legislative procedure. Available at: [http://trade.ec.europa.eu/doclib/docs/2015/february/tradoc\\_153085.pdf](http://trade.ec.europa.eu/doclib/docs/2015/february/tradoc_153085.pdf).

<sup>35</sup> The Judgment of the Court of Justice (Grand Chamber) of July 19th, 2012 in the Case C-337/09 P, *The Council of the European Union v. Zhejiang Xinan Chemical Industrial Group Co. Ltd.*

<sup>36</sup> Davice, L. (2009), "Anti-dumping investigation in the EU: how does it work?", ECIPE Working Paper, No. 04/2009.

<sup>37</sup> Ibid, page 17.

Secondly, some authors find that even this decision is ‘a victory of a Pyrrhic kind’.<sup>38</sup> One could agree with such a statement. Firstly, the Court’s reasoning said that a Chinese state-owned company is very likely not to operate under market economy conditions, which imposes an additional burden to refute this presumption in the future. Secondly, the only reason why the Council’s Regulation was annulled in *Zhejiang* was the Commission’s obvious mistake. The Commission failed to look at any evidence provided by the company and *ab initio* refused to grant MET, which was considered to be unjust. It is important to note that the CJEU did not suggest a more flexible interpretation of MET criteria.

The Commission’s practice, *inter alia*, has led some commentators to claim that there is a direct link between the refusal to grant MET and the exclusion of Chinese products from the EU market rather than a restoration of fair competition.<sup>39</sup> The others have even suggested that the anti-dumping procedures against China are “unfair and undesirable”, and, that they should be challenged before the WTO Dispute Settlement system.<sup>40</sup> On a more general level, the EU aspiration to reduce Chinese competitiveness in the internal market can be seen in the rather illogical fact that Russia and Ukraine were recognized as market economies by the EU long before the second economy in the world, China, will be. Trommer finds that substantial economic changes in China lasting for over twenty years make the non-market economic treatment inaccurate.<sup>41</sup> Thus, other countries, such as Australia, Malaysia, New Zealand, Singapore and Thailand, have recognized China as a market economy in anti-dumping procedures.<sup>42</sup> Therefore, it is hard to accept that, in the case of China, anti-dumping laws represent a technical issue, as it is often claimed by the Commission. This highly contested debate produced two opposite views. On one hand, China and its manufacturers despise the EU’s approach toward the application of the MET criteria claiming that the European Commission applies the principle too rigidly, harshly and with excessive vigor. In most cases the EU market is completely foreclosed to them when high anti-dumping margins are imposed, which results in a decrease of export volumes and loss

<sup>38</sup> Melin, Y., (2012). ‘Market Economy Treatment in the EU Anti-dumping Investigations Following the Judgment of the Court of Justice of the EU in Xinanchem’ Global Trade and Customs Journal 504, page 506.

<sup>39</sup> Wang, J., (2006), A Critique of the Application to China of the Non-market Economy Rules of Anti-dumping Legislation and Practice of the European Union.

<sup>40</sup> Liu, Y, op.cit, 285–86.

<sup>41</sup> Trommer, op.cit, page 14.

<sup>42</sup> Xinhua News Agency, China Presses the EU on the Market Economy Status (30th June 2004).

of profits. On the other hand, the EU producers argue that the application of the MET principles is too liberal and the conditions are too easily satisfied.

In light of what has previously been said, one could conclude that the EU has been extensively using the latitude offered by Section 15 of the WTO China Accession Protocol, as far as the requirements for obtaining MET for Chinese producers are concerned. Effectively, this has enabled the EU to offset the advantage of Chinese products on the market in terms of lower prices and protect a domestic industry. In any case, this article argues that the whole debate about the MET criteria and analogue country should come to an end on 16<sup>th</sup> of December 2016. On this date, Chinese importers will have to be treated as the rest of market economy importers, which will result in lower prices of Chinese products in the EU market. Finally, the conclusion is that EU producers will be in a real danger facing a fierce Chinese competition.

Nevertheless, it appears to be logical to assume that the EU will invest immense efforts to prevent such a consequence. One possibility for the EU is to try to invoke the Second Supplementary Provision and prove that there is “a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State”. However, without relying on WTO China’s accession documents, this will probably be extremely difficult. Another possibility is to argue that a literal reading of the Protocol is not clear and to construe another meaning from Article 15. Whatever the EU chooses, the odds of China initiating a dispute before the WTO are high. In any case, it is not disputable that the “elephant is in the room.”<sup>43</sup>

Finally, despite the potential adverse effect on the EU market, at least in the short run, consumers might benefit from the low prices of Chinese products which may influence lowering the prices of the EU competitors, as well. To some extent these circumstances may even have a pro-competitive effect forcing the EU producers to increase their efficiency and lower their production costs in order to compete with the Chinese “normal value”.

## Conclusion

In conclusion, the Commission’s practice and the relevant literature have revealed that the EU has heavily relied on China’s non-market economy status within the WTO in order to protect the EU competitors from low-priced products. Since the EU has extensively been using the latitude offered by Section 15 of the WTO China Accession Protocol, to offset the price advantage of

<sup>43</sup> The expression for China’s market economy status coined by Berrisch G., (2012). **The EU Anti-Dumping and Anti-Subsidy Policy: Interesting Times Ahead**, Law Business Research.

Chinese products in the internal market, it appears quite obvious that the EU producers will be at danger after 16th December 2016. One does not need a crystal ball to predict that the EU will try to find the way to shield a domestic industry. This will be a great challenge since the EU needs to find an effective solution compatible with the WTO principles, unless it decides to take a risk of potential dispute arising in the future with China. One thing is certain – we will witness some very interesting developments in the EU anti-dumping law very soon.

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### ***Evropski proizvođači u milosti svojih konkurenata iz Kine?***

**REZIME:** Kao i sve druge članice Svetske Trgovinske Organizacije, EU ima pravo da koristi antidamping mere protiv nelojalne konkurenčije. Kada je Kina u pitanju, EU je do sada prevashodno koristila metod ‘analogne države’ koji se odnosi na države netržišne ekonomije i koji omogućava naplatu visoke antidampinške tarife. Time je EU štitila domaće proizvođače od niskih cena kineske robe. Međutim, 16. decembra 2015. Kini će u okviru STO biti priznat status tržišne ekonomije u skladu sa članom 15 (d) Protokola Kine o pridruživanju STO, što praktično znači da EU neće moći više da koristi ovaj metod obračuna. Posledično, antidampinška tarifa će u budućnosti morati da bude manja, a kineski proizvodi u EU jeftiniji, što predstavlja veliku opasnost za proizvođače iz EU. Ovaj članak dokazuje tezu da metod koji EU koristi ima svrhu tržišnog protekcionizma i da će tržište EU biti u opasnosti od poremećaja kada Kini bude priznat status tržišne ekonomije.

***Ključne reči:*** *antidamping, EU trgovina, STO, uvoz kineske robe*

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