

European issues  
n°389  
19<sup>th</sup> April 2016

# Status of market economy to China: What political answers can be given to this legal straitjacket?

Charles de Marcilly  
Angéline Garde

## Abstract:

The European Union is the world's leading exporter of goods and services and the first export market for 80 countries [1]. Imports and exports combined, trade with China totals 1 billion € per day.

Chinese exports are subject to specific conditions set when it entered the WTO in 2001, with the individual agreement of the Member States and according to the decision making rules of this international organisation. The formal reason behind this at the time was that China did not meet the criteria to be a market economy; this led to the temporary introduction of specifically restrictive anti-dumping measures. These measures will come to an end on 11th December 2016.

With the consultation by the Commission, hearings at the European Parliament, corporate involvement and petitions, the status of China as a market economy is the focus of debate in Brussels. On 17th March the European Commissioner for Trade, Cecilia Malmström recalled that China still does not meet European criteria [2]. All observers agree on this.

However the legal measures adopted by the WTO do provide that the protective measures employed by Europe will no longer be applicable. Hence the main question is not about whether China is a market economy – it is not – but what the effects of the expiry of the measures set out in its WTO accession protocol will be. Two legal systems – that of the WTO and that of the EU – are struggling to work in harmony.

On 12th December 2016 and with the expiry of some legal restrictions a Damocles sword now seems to be hanging over many European businesses. Some 250,000 jobs are directly involved by the lifting of anti-dumping measures specifically linked to the question of China's market economy.

1. Francesco Tenuta and Elfriede Bierbrauer, "The European Union and its Trade Partners" - Fact Sheets on the European Union - 2016.

[http://www.europarl.europa.eu/ftu/pdf/en/FTU\\_6.2.1.pdf](http://www.europarl.europa.eu/ftu/pdf/en/FTU_6.2.1.pdf)

2. Introductory Speech by Cecilia Malmström, "Trade Defence and China: Taking a Careful Decision", 17th March 2016,

[http://trade.ec.europa.eu/doclib/docs/2016/march/tradoc\\_154363.pdf](http://trade.ec.europa.eu/doclib/docs/2016/march/tradoc_154363.pdf)

3. Accession Protocol of China to the WTO on 11th December 2001 <https://docsonline.wto.org/dol2fe/Pages/SS/DirectDoc.aspx?filename=t%3a%2ftw%2f%2f432.doc&>

4. The WTO comprised 143 members, including the People's Republic of China, on 11th December 2001. At present there are 162

## 1. BEHIND THE FORMAL ISSUE OF THE MARKET ECONOMY STATUS, LIES THAT OF TRADE PROTECTION TOOLS

### *The WTO's measures fit badly with those of the EU*

After fifteen years of difficult negotiation, the People's Republic of China joined the World Trade Organisation (WTO) on 11<sup>th</sup> December 2001 as a non-market economy. On this occasion it signed an accession protocol [3] with the 143 other members [4] and accepted several derogations which led to a temporary infringement of the WTO's rules.

Most of these have now expired, such as the one on textiles in 2008. Their main goal was to reduce economic interventionism.

Article 15 of the protocol refers to market economy status (MES), a technical term used with tools to counter dumping, which according to the WTO comprises the sale of a product on a foreign market at a price lower than that practiced on the domestic market and even below the cost price. If a difference between the normal value of goods (their price in the country of origin) and the export value is noted, then this is classed as dumping.

In 2001, a replacement market was created for those WTO member countries which imported Chinese

## Status of market economy to China: What political answers can be given to this legal straitjacket?

goods (article 15-a-ii). It allows these countries to use an alternative method to the one based on a strict comparison of domestic prices or costs in China.

The European Union uses the so-called "analogue country" method [5], in which the normal value is defined on the basis of the constructed price or the value in a third country with a market economy. For example if market economy A exports product B at a higher price than China (country C), then the Union might deem that the Chinese is undertaking dumping. Indeed if product B is cheaper in China, whilst market economy A is based on the mechanism of supply and demand in defining its prices, this means that China is exporting at a lower price than the market and therefore there is a distortion in the normal value. Hence the analogue country method comprises a replacement market enabling the European Union to protect itself from dumping.

However article 15-d limits this possibility to 15 years after the entry into force of the protocol, i.e. until 11<sup>th</sup> December 2016. As a result, as of 12<sup>th</sup> December 2016 the alternative method chosen by the EU, the so-called "analogue country" method [6], will no longer be allowed and will legally give way to the "normal value" method advocated by article VI of the 1994 GATT agreement.

With this system a "product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, 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." This therefore implies a strict comparison with China's domestic prices and costs. In this case the "traditional anti-dumping" duties are applicable but are clearly not as effective as far as the method applied since 2001 is concerned.

### **What is a market economy?**

Article 15-a-i) provides that if China can demonstrate that all or a part of its economy responds to market mechanisms then WTO members, including the EU, must adapt their rules to use the normal value

method. Hence the question is raised whether China complies with market economy status.

The criteria used to define these market mechanisms are individually set out by the countries since the WTO offers no definition of them. Hence in order to enjoy economy market status within the EU, China has to meet with European criteria. The latter were defined in a regulation dated 27<sup>th</sup> April 1998 [7] then they were set out again in the regulation dated 30<sup>th</sup> November 2009 [8]. However compliance with these criteria is not imposed if a country withdraws from the European list of non-market economies. In 2016 the EU included Vietnam, Kazakhstan, Albania, Armenia, Azerbaijan, Belarus, Georgia, North Korea, Kyrgyzstan, Moldova, Mongolia, Tajikistan, Turkmenistan and Uzbekistan on this list.

European regulations set out five criteria: "decisions made by companies regarding input prices and costs (...) are decided taking on board market signals reflecting supply and demand and without significant intervention by the State in this regard (...); businesses use a single set of basic accounting documents, which are the focus of an independent audit in compliance with international standards and which are used to this purpose; business production costs and the financial situation have not been distorted in any significant manner, caused by the old planned economic system (...); the businesses involved are subject to the laws pertaining to bankruptcy and property, which guarantee legal security and stability to business operations; exchange operations are undertaken at market rates."

According to a European Commission assessment in 2008 [9], China only met one of the five criteria required. The European Parliament's departments were surprised to see that there was no publication updating this information in a study dated December 2015 [10]. Business Europe, which represents European employers, quotes four European Commission reviews (2004, 2008, 2010 and 2011) which establish that progress has been made but that compliance regarding four criteria has still not been achieved [11]. At the same time, Business Europe states that since 2011 China has not provided any new evidence to update the review.

5. Regulation N° 384/96 of the Council 22nd December 1995 regarding defence against imports being dumped by non-European Community members (article 2 § 7)

6. At present the so-called «analogue country» method is used for China and Armenia

7. Regulation N° 905/98 of the Council of 27th April 1998 leading to the modification of regulation (CE) n° 384/96 <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31998R0905&from=EN>

8. Council Regulation N°1225/2009

9. European Commission working document on the compliance of Chinese economy with the five European criteria governing the Market Economy, SEC(2008) 2503 final 19/09/2008

10. Barbara Barone, "In-depth analysis one year to go: the debate over China's market economy status (heats up)", European Parliament DG External Policies December 2015

11. Page 3, Business Europe, "China's Market Economy Status", Position Paper, December 2015

China's non-compliance with European market economy criteria is acknowledged by all economic and political players. Moreover the main issue is not about whether China is a market economy – no one challenges the fact that it is not – but what the consequences of the expiry of the measures contained in article 15-a-ii) in the WTO's accession protocol will be.

### **Behind the issue of the status lies that of the method used to calculate anti-dumping duties**

The issue of MES and the applicable anti-dumping measures is therefore the focus of European debate. According to the European Commission "a modification of the MES under the EU's anti-dumping rules would also change the method used to calculate anti-dumping duties, which in the end would affect the European economy." [12] This is why the Commission is setting up an in-depth review of the potential economic consequences of a modification to the method notably from the point of view of employment in the European Union. From 10th February to 20th April 2016, a public consultation regarding an alternative method has been launched. In its preamble the Commission recalls that even if a new trade defence instrument is developed, its efficacy would be weakened and it would not prevent European businesses from being severely affected. With this the Commission implies that a change in the methodology is connected to granting the status of market economy and that the granting of this is the most probable outcome. [13] A European Commission document dated 2004 entitled "The Market Economy Status in Trade Defence Investigations" explains that "the possibility of treating China as a transition economy in trade defence investigations for a maximum period of 15 years was adopted and included in China's accession protocol to the WTO signed in 2001 (and that) there is therefore a clear legal framework for a common agreement (to be used) to address this issue."

Amongst the publications supporting this idea we might quote the Swedish Board of Trade [14] as well as studies undertaken respectively by Rao Weijia [15], Tietje and Nowrot [16], Graafsma and

Kumashova [17] or the Economic Policy Institute [18] thereby placing the MES and its effects in terms of the methodology to be used against Chinese dumping at the heart of the debate. These authors believe that when article 15-a-ii) expires subparagraph i) will no longer be enough to waive article VI of the 1994 GATT agreement. Hence there will no longer be any legal base to be able to use the methodology of comparison with a third country or to treat China as a non-market economy (NME). As a result, regulation 1225/2009 will have to be amended, and China taken out of the list of NMEs established by the European Union. This is Beijing's line of defence.

However the automatic nature of this is the focus of diverging legal opinion. What is expiring in December 2016 is the paragraph that provides that the importer can choose to use a replacement market rather than the normal value market. However Chinese exporters will still have to prove that their economy complies with the five European criteria defining a market economy. [19]

This more subtle position is that defended by the European Parliament's legal department [20]. According to this interpretation, the granting of MES is not automatic, since China still has to prove its compliance with the five European market economy criteria (article 15-a-i) which will not be deleted. However the expiry of article 15 a-ii) will oblige the European Union to change its methodology.

Thanks to article 15-a linked to article 150 in the report of the working group for China's accession to the WTO, the Union retains the possibility – under certain conditions – of using another methodology from the one set by the GATT agreement, which is a strict comparison of domestic costs and prices in China.

We must not confuse the granting of the MES with the end of the so-called "analogue country" methodology. Behind the political-legal debate lies the issue of protecting European businesses: without this methodology around 90% [21] of the anti-dumping measures that have been implemented to date would cease to be. Between 1995 and 2014, the EU has launched 99 anti-dumping procedures

12. European Commission, "Orientation debate by the College into the treatment of China in anti-dumping investigations," 13th January 2016

13. Camille Le Tallec, « La Chine est-elle une économie de marché? », *La Croix*, 17th January 2016

14. Swedish Board of Trade, "Changes in EU Anti-Dumping Practice", 3rd October 2015

15. Rao Weijia, (2013) "China's Market Economy Status under WTO Antidumping Laws after 2016", *Tsinghua China Law Review* vol. 5, 2013; Y. Yu (2013), "Rethinking China's Market Economy Status in Trade Remedy Disputes after 2016: Concerns and challenges", *Asian Journal of WTO and International Health Law and Policy* vol. 8, 2013

16. Tietje C., Nowrot, K., "Myth or Reality? China's Market Economy Status under the WTO Anti-dumping Law after 2016", *Policy Papers on Transnational Economic Law* No 34, December 2011

17. Graafsma, F., Kumashova, E., "In re China's Protocol of Accession and the Anti-Dumping Agreement: Temporary Derogation or Permanent Modification?", *Global Trade and Customs Journal*, no. 4, 2014, pp. 154–59

18. Robert E. Scott and Xiao Jiang, *Economic Policy Institute*, Washington, « Unilateral grant of market economy status to China would put millions of EU jobs at risk », 18th September 2015

19. Speech by Bernard O'Connor, lawyer for NCTM during a hearing with the European Parliament's Committee for International Trade INTA entitled « Market economy status for China after 2016 ? » 28th January 2016

20. European parliament legal opinion on market economy status for China <http://www.viejuws.eu/eutradeinsights/wp-content/uploads/2015/10/Extract-of-EP-legal-opinion-on-market-economy-status-for-China.pdf>

21. Op.cit.

## Status of market economy to China: What political answers can be given to this legal straitjacket?

against China, i.e. 28% of all procedures launched. On average the European anti-dumping duties that have been applied totalled 44%, against 142% in the US and 80% in India. [22] Acknowledging the market economy status or changing methodology could potentially reduce these by between 9% and 17% [23]. However as of December 2016 with or without the MES, from a legal point of view, the EU will no longer be able consistently to use an alternative method to that of the WTO. What are the alternatives open to Europe in the face of anti-competitive behaviour on the part of a subsidised economy?

If the EU decides to create a new trade defence tool, legislative acts would have to be adopted jointly by the European Parliament and the Council of the EU on the proposal of the European Commission (article 207 TFEU). In a normal situation this procedure would require several months but if there is true political determination discussions might be speeded up.

### 2. 12<sup>TH</sup> DECEMBER 2016, A NEW ERA?

#### *The fear of economic predation and trade wars*

Symbolically over the last few years, Chinese citizens and businesses have appeared on markets that are not really traditional, thereby highlighting new economic power that has been accentuated by an almost unequalled liquidity stock. With acquisitions in the art world [24] or in Western technologies [25], involvement in the international transfer of football players and the 67% ownership of the Greek port of Piraeus [26], China exemplifies fears of economic predation. Some sectors do not compare favourably: in 2015 it invested in wind power and in strengthening its infrastructures the equivalent of the total capacity of three of the biggest American producer States (Texas, Iowa and California).

The EU has noted, amongst others, two Chinese attitudes that imply a distortion of competition: subsidies enabling the sale of products below their production cost and the manipulation of exchange rates to foster exports. On 10th August 2015, in the face of the Shanghai stock exchange crash, Beijing made sharp reductions to the reference rates of

the yuan against the dollar in order to cancel out the drop in its exports. No existing methods in the creation of anti-dumping measures – whether these are within the WTO or at European level, can directly address these two highly dangerous phenomenon i.e. subsidies and currency manipulation.

Given this kind of contravention of free competition the EU acts by launching procedures and inflicting fines or customs duties. 52 anti-dumping measures are now ongoing against China covering 1.38% of European imports from this country. On 12th February 2016 the European Commission announced the launch of three new investigations involving the Chinese steel sector.

According to some studies if China is granted the MES or if the EU changes its anti-dumping methodology all investigations would have to be based on the premise that the prices practiced follow market mechanisms. Moreover by granting MES to China or if the “analogue country” methodology is abandoned, the EU – 3rd user of trade defence tools in the world – would potentially deprive itself of 90% of its anti-dumping measures.

Hence, Robert E.Scott and Xiao Jiang believe that these developments would lead to a reduction of European output of 114.1 to 228 billion € per year; a reduction of 1 to 2% of the GDP and a threat of 1.7 to 3.5 million job losses. At national level this might lead for example to the destruction of 319,000 to 639,000 jobs in Germany and to 208,000 to 416,000 in Italy.

These forecasts are worrying certain sectors that are already in competition with emerging countries. Concern in the industries varies. Although some are confident and want to take advantage of the opening of a market totalling 1.38 billion inhabitants, others – like steel, electronics, textiles, toys, etc are sounding the alarm.

The European Steel Associations recalled in a press release on 12th January 2016 that Chinese production might reach 400 million tonnes – i.e. nearly double that of European production (170 million tonnes). China has already announced the destruction of some 5 to 6 million jobs over the next three years,

22. INTA Committee, Report « New trade rules for China ? Opportunities and threats for the EU », February 2016

23. EPP Hearing on a Market Economy Status for China, 2nd March 2016

24. On 9th November 2015, a Chinese collector spend 170.4 million \$ on a Modigliani painting. It was the second highest offer ever made for a piece of work sold off in auction

25. On 10th February 2016, Norway's Opera Software (search engine software Opera – 5th in the world) announced that the Golden Brick Silk Road Investment Fund (Chinese) wanted to buy its structure for 1.2 billion \$

26. On 20th January 2016, Cosco (China Ocean Shipping Company) spent 368.5 million € to buy 67% of the Greek port of Piraeus

1.8 million of which are in the steel and mining industries. An opening of the market would clearly threaten 330,000 jobs in the sector. In response to this the Commission presented measures on 16th March 2016 that aim to protect jobs and growth in the steel industry.

Given the mobilisation on the part of the economic players [27], political groups in the European Parliament have become worried about the possible impact if MES is granted to China [28]. Europeans fear that there will be a trade war. Obstacles to prevent entry to the Chinese market might be raised and businesses which are already established there subject to further difficulties. The Member States are not all affected in the same way: 5,000 German businesses [29] are registered in China in comparison with 1,400 French ones [30]. Depending on their industrial network and the size of their exports, their prospects, goals and fears diverge.

### **Status quo regarding the proposals made in 2011**

In 2011, European trade defence was already on the agenda. In September 2011 the European Parliament adopted a resolution on a new trade policy for Europe [31] followed by a Commission proposal on 10th April 2013 [32]. The text provided for the codification of the European Court of Justice (ECJ) and the WTO's jurisprudence, since the belief that threats of retaliation were enough to launch an anti-dumping investigation, the reimbursement of duties during the review investigation and the cancellation of the lesser-duty-rule [33] in the event of evasion. On 21<sup>st</sup> January 2014, the European Parliament's "International Trade" Committee adopted a position encouraging the Union to "improve its method in the calculation of anti-dumping duties to take on board environmental and social aspects and development and to help SME's experiencing difficulties to take advantage of these tools." [34]. Following the amendments approved in February 2014 [35], the text included the aim to increase social and environmental dumping duties, the cancellation of prior investigatory opinions and the introduction of assistance services for SMEs.

A split then emerged between the Member States which continues to this day: during the debate in the Council on 21<sup>st</sup> November 2014, 11 States supported it, three others did so but with more restrictive definitions and 14 were against it. [36] Austria, Belgium, Cyprus, Denmark, Estonia, Finland, Ireland, Latvia, Malta, the Netherlands, the Czech Republic, the UK, Slovenia and Sweden [37] based their rejection on the deletion of the lesser-duty-rule. This prevents the EU from levying higher duties on the raw materials markets in view of preventing damage to European industry. Finally 14 countries opposed the creation of distortions going beyond what is necessary to palliate market failures. Since then no consensus has been found.

In addition to this, some States have privileged a bilateral approach to their trade relations. In May 2013 Germany refused, in spite of the Commission's opinion, to sanction China in the photovoltaic sector. Hence it positioned itself in a Berlin-Beijing partnership with, in exchange, access to the Chinese market for its production machine manufacturers of the said solar panels and trade facilities in several areas such as logistics and research. [38]

### **Interrelated interests**

EU-China relations justify a certain amount of reserve and those involved are extremely cautious. Cecilia Malmström recalls that three million jobs in Europe depend on the sale of goods and services on the Chinese market. It is also the fourth destination for European foreign investments (127 billion €), whilst Chinese investments only represent 3% of all investments in Europe [39]. Relations with the EU are also vital for China since the EU is its main importer totalling 300 billion € in 2014.

Since 2012 the European Union has been negotiating a bilateral investment agreement with China. This is supposed to "boost bilateral investments by opening the markets and establishing a legal framework to protect investments to improve legal security and predictability regarding long term investor relations between the Union and China." [40] On 28th September 2015 an agreement on the development of 5G networks and the formalisation of China's

27. Business Europe's position, « China's Market Economy Status », December 2015, or the coalition of industries standing against MES: [www.aegis.eu](http://www.aegis.eu)

28. EPP hearing on 2nd March 2016 ; S&D position 8th March 2016

29. File on Sino-German trade relations <http://www.auswaertiges-amt.de/EN/Aussenpolitik/Laender/Laenderinfos/01-Laender/China.html#doc474918bodyText3>

30. File on Franco-Chinese trade relations <http://www.diplomatie.gouv.fr/fr/dossiers-pays/chine/la-france-et-la-chine/>

31. European Parliament resolution of 27th September 2011 on a new trade policy for Europe

32. Commission proposal 10th April 2013 for a new European trade policy 2013/0103 (COD)

33. The lesser-duty-rule provides that authorities impose a reduced anti-dumping duty if this is enough to cancel out the damage

34. Parliament press release following the INTA Committee's adoption of the EU's trade defence instrument project 21st January 2014.

35. Parliament press release "Strengthening the EU's trade defence instruments", 5th February 2014

36. The European Parliament's Legislative Monitor, summary of the Council debate on 21st November 2014 on trade defence instruments <http://www.europarl.europa.eu/oeil/popups/printsummary.pdf?id=1367910&l=en&t=E>

37. Europaforum <http://www.europaforum.public.lu/fr/actualites/2014/11/consell-cae-commerce/index.html>

38. Patrick St Paul, « Guerre commerciale UE-Chine : Berlin ordonne la fin des hostilités », Le Figaro, 27th May 2013

39. Institut Egmont, Insa Ewert, "The EU-China Bilateral Investment agreement, between high hopes and real challenges" February 2016, <http://www.egmontinstitute.be/wp-content/uploads/2016/02/SPB68-Ewert.pdf>

40. European Commission press release on negotiations for the bilateral investment agreement, "Negotiations on Investments between the EU and China before the visit of President Xi Jinping to Brussels" 24th March 2014

## Status of market economy to China: What political answers can be given to this legal straitjacket?

intention to take part in the Juncker Plan were announced. China was the first third country to formalize its contribution to a total of 10 billion € to the investment plan of 315 billion € put forward by the European Commission. [41]

### 4 scenario

Finally various interpretations of the situation can be put forward with four of these featuring in the analysis drawn up by the DG External Policy at the European Parliament in December 2015.

1) China does not automatically acquire MES and the EU continues to use its "analogue country" methodology. This interpretation deems that China's compliance with the five European criteria of what a market economy is, is a condition *sine qua non* for the attribution of MES and of a change in methodology.

By adopting this approach the Union would put its own political and economic interests first and run a certain legal risk. If the WTO is consulted a third party would be able to decide which trade defence instruments apply.

However the time span involved in a possible complaint and its processing would in terms of being able to define new instruments, since WTO decisions are not implemented retroactively. However this might lead to deadlock at the Council.

From a diplomatic point of view it would be difficult to accuse China of not respecting an agreement that Europe was not respecting itself.

2) China does not automatically achieve MES but the EU can only continue to pursue a different method according to certain conditions and in all events it has to adapt its legal and administrative framework. The occasional application of the analogue country method is justified via the combination of the opening of article 15-a and article 150 in the report by the working group for China's accession to the WTO.

This scenario is the most logical from a legal and also a political point of view, since the expiry of article 15-a-ii) does not involve the granting of MES, the EU has no reason do so either.

However it has to comply with its legal obligations and stop using the analogue country method. Moreover the EU must create a parallel trade defence tool thereby limiting the inevitable opening of the market.

3) China acquires MES: the possibility of treating China like a non-market economy (NME) as a whole is cast aside. As a result regulation n°1225/2009 is modified and China is withdrawn from the list of NMEs. Granting market economy status to China is not obligatory legally, politically it is unthinkable and economically it is reckless.

Effectively as long as article 15-a-i) is valid China has to prove its compliance with the five European market economy criteria before asking for the status. In any event granting MES will not settle the economic situation since the expiry of the "analogue country" methodology does not depend, as it stands, on this designation.

4) China's MES is determined case by case, depending on the sectors/businesses involved. If price distortions are proven then adjustments can be made. However this method is being contested at present by several trade partners [42]. The litigation settlement department at the WTO has to deliver a decision on this.

This scenario means that the general problem is brought down to the specific. Given the time needed to decide in a case by case situation, but also the legal limitations that this option entails, it is not very likely that the EU will save itself this way.

For its part the Commission notes three scenario [43] :

- 1) Leave legislation as it stands and continue using the so-called "analogue country" method.
- 2) Change the method of calculation and withdraw China from the list of non-market economies without any further conditions.
- 3) Change the method of calculation and update the legal-administrative framework of trade defence instruments.

From a legal, political and economic point of view the last proposal – equal to scenario 2 put forward by the European Parliament - seems to be the most

41. Jorge Valero, "Bruxelles et Pékin s'accordent sur la contribution chinoise au plan Juncker", Euractiv.fr, 14th April 2016.

42. Tamara Perišin, "Pending EU disputes in the WTO, Challenges to EU energy law and policy", p379, <http://www.academia.edu/8743240/Pending-EU-Disputes-in-the-WTO-Challenges-to-EU-Energy-Law-and-Policy-Report>

43. Introductory speech by Cecilia Malmström, "Trade Defence and China: Taking a Careful Decision" 17th March 2016

reasonable if this process is implemented on 12th December 2016. This requires a real joint European action to be deployed within just a few months. This seems unlikely.

\*\*\*

The present European trade legislation dates back to 1995. Twenty years later it only responds in part to the demands of international trade. The optimism linked to the postponement of the MES question by negotiators in 2001 faces a State which does not meet – and which does not want to meet – the criteria of a market economy. Moreover thought into this and as a consequence the reform of tools is legitimate, whilst bearing in mind that none of the possibilities that are open to the EU will be neutral: there will be either a legal cost and an increase in litigation at the WTO, or an economic cost in terms of trade and investment with China.

It is a pity that the States blocked the Commission's 2011 proposal. It seems that the individual situation of each Member State, its trade balance, its industrial fabric and its sensitivity to foreign investments play against European interest.

However new thought into trade defence tools is now underway. The Commission is working on this with a new public consultation linked to the problem raised by China, since the most recent one dates back to 2008. The details communicated by the Chinese authorities in response to the market economy criteria are due to be made public. Transparency of debate and processes is a vital element in any decision that is essential to the European economy. But control over the agenda is uncertain. Any new proposals will be submitted to the European Parliament and the Council. National sensitivities will again emerge and the stalemate observed over the last few years does not speak in support of finding consensus rapidly.

However the change in methodology as of 11th December 2016 makes a clear, quick choice vital, especially since most of the anti-dumping and anti-subsidy investigations launched by the Commission involve China.

In January 2014, MEPs suggested that the EU might respond more rapidly to unfair trade practice, that anti-dumping investigations be limited to 9 months (against 15 in the initial proposal), and that anti-dumping duties be imposed six months after the launch of the inquiry. With this in mind some States asked for more rapid response to unfair imports. The French Minister for the Economy advocated this for example on 30th March 2016 hoping for a reduction from 9 to 2 months in terms of the time limits of anti-dumping measures and an increase in tariffs if necessary.

In addition to this, assessing the risk of dumping rather than noting it once it has happened would change the approach and provide legal predictability and security, notably for SMEs. Anti-dumping procedures are long and costly. Very few small structures can afford this. Aggressive State strategies can integrate this cost and choose to be condemned if they have the chance and in the meantime they can conquer the market. In the case of the photovoltaic sector for example the anti-dumping procedure lasted 18 months. Launched in July 2012, the complaint lodged by the EU collective ProSun ended in December 2013 with the review of import tax rates. Hence China's trade policy ruined many European (in 2013 Siemens and Bosch relinquished the photovoltaic sector) and American (in 2011, Solyndra, Evergreen Solar, SpectraWatt) companies. In spite of the condemnation Chinese businesses succeeded long term in changing the structure of the market to the detriment of European industrialists.

More than 80 countries have granted China market economy status since 2005, like Australia for example which uses cost adjustments to establish the value of Chinese imports in cases of anti-dumping. Its margins are now much lower than those found by other WTO import countries. In terms of car tyres Australia achieved a dumping margin of 10% whilst other WTO countries achieved between 40 and 60%. [44] Australia is therefore having problems with the adjustment system: half of its anti-dumping measures no longer work.

In the USA 129 anti-dumping investigations and compensatory measures were registered against

44. *Op. cit.*

## Status of market economy to China: What political answers can be given to this legal straitjacket?

---

China on 1<sup>st</sup> September 2015. They do not plan to grant MES to China in the near future [45]. Moreover they do not have a list of countries that do not enjoy market economy status.

In a situation in which there are more and more questions regarding Europe's ability to protect its businesses, and notably SMEs, the answers put forward will be analysed in terms of protecting the European model in the face of unfair competitors. Also maintaining the *status quo* would be worrying. The answer can only be collective and Europe wide. The transparency of debate will show that national fears oppose the will of the European institutions.

Although the perspectives of each Member State are specific, trade defence tools and methodology can only be shared.

---

**Charles de Marcilly,**

Manager  
of the Robert Schuman Foundation's Brussels office

---

**Angéline Garde,**

Sciences Po

You can read all of our publications on our site :  
**[www.robert-schuman.eu](http://www.robert-schuman.eu)**

Publishing Director : Pascale JOANNIN

---

45. "Report to Congress of the U.S.-China Economic and Security Review Commission", 20th November 2014  
[http://origin.www.uscc.gov/sites/default/files/annual\\_reports/Executive%20Summary.pdf](http://origin.www.uscc.gov/sites/default/files/annual_reports/Executive%20Summary.pdf)

**THE FONDATION ROBERT SCHUMAN**, created in 1991 and acknowledged by State decree in 1992, is the main French research centre on Europe. It develops research on the European Union and its policies and promotes the content of these in France , Europe and abroad. It encourages, enriches and stimulates European debate thanks to its research, publications and the organisation of conferences. The Foundation is presided over by Mr. Jean-Dominique Giuliani.