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## Evaluation of China's Nonmarket Economy Status

In its 2001 World Trade Organization (WTO) accession protocol, China agreed to provisions allowing its trade partners to automatically treat China as a nonmarket economy (NME) for 15 years for the purposes of antidumping (AD) enforcement. In other words, countries could use values from a third country in a similarly situated economic position—not Chinese prices or costs—for AD calculations, unless China could demonstrate market economy conditions prevailed in the relevant industry.<sup>1</sup> Since Chinese domestic prices and costs are often artificially suppressed by government subsidies, trading partners use surrogate country data to more accurately show what the price of subject product would be based on market-based principles.<sup>2</sup> The amount by which the Chinese price of a product is lower than what would be considered to be a market-based value of a product is used to calculate the AD duties applied to Chinese exporters.<sup>3</sup> Unlike the claimed price of a product by Chinese exporters, calculations based on proxy-pricing frequently result in higher dumping margins.

Since December 11, 2016, when section 15(a)(ii) of China's WTO accession protocol expired, the Chinese government has argued it is entitled to automatic conferral of market economy status (MES) by all WTO members, including the United States.<sup>4</sup> However, U.S. representatives told Chinese officials during a meeting in July 2016 that the expiration of the accession provision would not require automatic conferral of China's MES.<sup>5</sup> Instead, the U.S. Department of Commerce would review China's status as an NME to determine whether it met the requirements of a market economy.<sup>6</sup> On March 29, 2017, the Commerce Department launched a review of China's MES as part of an AD and countervailing duty (CVD) investigation into Chinese aluminum foil exports.<sup>7</sup> This review would be the first such review conducted by the Commerce Department since 2006.

### U.S. Criteria for NME Status

Under the U.S. AD law in the Tariff Act of 1930 [19 U.S. Code § 1677(18)], the U.S. Department of Commerce is responsible for determining whether a country is a market economy for the purposes of AD investigations, and whether MES will apply to the whole country, for individual sectors, or on an enterprise basis. According to the U.S. AD statute, a "nonmarket economy country" is any foreign country that does not operate on market principles of cost or pricing structures, leading to sales that do not reflect a product's fair value. There are six factors to be considered in the U.S. determination of MES.<sup>8</sup>

<sup>1</sup> Alan Price, Timothy Brightbill, and Scott Nance, "The Treatment of China as a Non-Market Economy Country after 2016," *Wiley Rein LLP*, September 15, 2015, 2.

<sup>2</sup> Christian Tietje and Karsten Nowrot, *Myth or Reality? China's Market Economy Status under WTO Anti-Dumping Law after 2016*, Policy Papers on Transnational Economic Law No. 34 (Transnational Economic Law Research Center, December 2011). <http://tietje.jura.uni-halle.de/sites/default/files/telc/PolicyPaper34.pdf>; U.S. International Trade Commission, "The Year in Trade 2014," July 2015, 61.

<sup>3</sup> U.S. International Trade Commission, "The Year in Trade 2014," July 2015, 61.

<sup>4</sup> Shawn Donnan et al, "China Challenges EU and US over Market Economy Status," *Financial Times*, December 12, 2016. <https://www.ft.com/content/6af8da62-bf5d-11e6-9bca-2b93a6856354>.

<sup>5</sup> Gary Clyde Hufbauer and Cathleen Cimino-Isaacs, "The Outlook for Market Economy Status for China," *Peterson Institute for International Economics*, April 11, 2016. <https://piie.com/blogs/trade-investment-policy-watch/outlook-market-economy-status-china>.

<sup>6</sup> Gary Clyde Hufbauer and Cathleen Cimino-Isaacs, "The Outlook for Market Economy Status for China," *Peterson Institute for International Economics*, April 11, 2016. <https://piie.com/blogs/trade-investment-policy-watch/outlook-market-economy-status-china>.

<sup>7</sup> U.S. Department of Commerce, Certain Aluminum Foil from the People's Republic of China: Notice of Initiation of Inquiry into the Status of the People's Republic of China as a Nonmarket Economy Country under the Antidumping and Countervailing Duty Laws, March 29, 2017. <http://enforcement.trade.gov/download/prc-nme-status/prc-nme-status-initiation-notice-032917.pdf>.

<sup>8</sup> Tariff Act of 1930, Pub. L. No. 103-465, 1930, codified at 19 U.S.C. § 1677(18).

1. The extent to which the currency of the foreign country is convertible into the currency of other countries;
2. The extent to which wage rates in the foreign country are determined by free bargaining between labor and management;
3. The extent to which joint ventures or other investments by firms of other foreign countries are permitted in the foreign country;
4. The extent of government ownership or control of the means of production;
5. The extent of government control over the allocation of resources and over the price and output decisions of enterprises; and
6. Such other factors the administering authority considers appropriate.

The Commission's review of China's current economic conditions—compared against the U.S. statutory test for determining whether an economy can be classified as a market economy—reveals China is not currently a market economy and is not on the path to become one in the near future.<sup>9</sup> In its *2016 Report to Congress on China's WTO Compliance*, the Office of the U.S. Trade Representative found the Chinese government maintains extensive controls over foreign investment, which, in tandem with industrial policies, restrict the ability of foreign investors to participate in key sectors of the economy or demand major concessions as a price of admission.<sup>10</sup> The government maintains—and is even strengthening—its control of the means of production through central and provincial state-owned enterprises, and the state exerts extensive control over resource allocation.<sup>11</sup> Furthermore, a review of China's economic policy reveals that currency is not fully convertible, with the 13th Five-Year Plan outlining goals to increase the RMB's convertibility by 2020.<sup>12</sup> In addition, human rights and labor organizations around the world, including China Labour Bulletin, the AFL-CIO, and Amnesty International, note Chinese workers have no freedom of association and no system for collective bargaining exists between employers and employees in China.<sup>13</sup>

## Recommendation

In its *2016 Annual Report to Congress*, the Commission made the following recommendation designed to ensure Congress's direct involvement in any decision to confer MES on China:

- Congress enact legislation requiring its approval before China—either the country as a whole or for individual sectors or entities—is granted status as a market economy by the United States.

## Further Reading

- U.S.-China Economic and Security Review Commission, Chapter 1, Section 2, “State-Owned Enterprises, Overcapacity, and China's Market Economy Status,” in *2016 Annual Report to Congress*, November 2016, 114–119. [https://www.uscc.gov/Annual\\_Reports/2016-annual-report-congress](https://www.uscc.gov/Annual_Reports/2016-annual-report-congress).

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<sup>9</sup> U.S.-China Economic and Security Review Commission, Chapter 1, Section 2, “State-Owned Enterprises, Overcapacity, and China's Market Economy Status,” in *2016 Annual Report to Congress*, November 2016, 114–119. [https://www.uscc.gov/Annual\\_Reports/2016-annual-report-congress](https://www.uscc.gov/Annual_Reports/2016-annual-report-congress).

<sup>10</sup> Office of the U.S. Trade Representative, *2016 Report to Congress on China's WTO Compliance*, January 2017, 100–106.

<sup>11</sup> U.S.-China Economic and Security Review Commission, *Hearing on China's Shifting Economic Realities and Implications for the United States*, oral testimony of Alan Price, February 24, 2016; U.S.-China Economic and Security Review Commission, *Hearing on China's Shifting Economic Realities and Implications for the United States*, written testimony of Wentong Zheng, February 24, 2016.

<sup>12</sup> People's Republic of China, *13th Five-Year Plan on National Economic and Social Development*, March 17, 2016. Translation. [http://www.gov.cn/xinwen/2016-03/17/content\\_5054992.htm](http://www.gov.cn/xinwen/2016-03/17/content_5054992.htm).

<sup>13</sup> China Labour Bulletin, “Labour relations FAQ.” <http://www.clb.org.hk/content/labour-relations-faq>; American Federation of Labor and Congress of Industrial Organizations, “Labor Rights in China.” <http://www.aflcio.org/Issues/Trade/China/Labor-Rights-in-China>; Amnesty International, “China 2016/2017.” <https://www.amnesty.org/en/countries/asia-and-the-pacific/china/report-china/>.