DEBUNKING THE MYTH OF 'PARTICULAR MARKET SITUATION': UNFINISHED BUSINESS FROM GATT/WTO TO CHAFTA

WEIHUAN ZHOU AND ANDREW PERCIVAL

(2016) 19(4) *International Economic Law*

[2016] *UNSWLRS* 79

UNSW Law
UNSW Sydney NSW 2052 Australia

A revised version of this article has been accepted for publication in the *Journal of International Economic Law* (Vol. 19 No. 4, 2016) published by the Oxford University Press.

DEBUNKING THE MYTH OF 'PARTICULAR MARKET SITUATION': UNFINISHED BUSINESS FROM GATT/WTO TO CHAFTA

WEIHUAN ZHOU[*] & ANDREW PERCIVAL[**]

ABSTRACT

This article explores the issue of "particular market situation" (PMS) in anti-dumping practice. The issue has become one of the most controversial issues in the bilateral trade activities between China and Australia and in the negotiations of the China – Australia Free Trade Agreement. It is likely to become a problem on the multilateral level under the WTO once the non-market economy assumption (allowed under China's WTO Accession Protocol) expires after December 2016. It is, therefore, important for the WTO tribunals to standardise the law and practice in relation to PMS. The article argues that the existence of a situation in the market, such as government interventions by regulation and financial assistance, does not by itself constitute a PMS. Rather, a determination of PMS must be based on an assessment of the comparability between domestic selling price and export price of subject goods. A PMS should not be found to exist if an alleged price distortion has affected the two prices even-handedly such that a proper comparison of the prices would not be precluded. It is the responsibility of investigating authorities to undertake such an inquiry into comparability. Without such an inquiry, a finding of PMS cannot be justified and would be likely to result in a comparison between undistorted normal value and distorted export price contrary to the requirement of 'proper comparison' or 'fair comparison'. This proposed approach to PMS finds support in the relevant GATT/WTO negotiating records and also in the GATT jurisprudence on PMS and WTO jurisprudence on related issues of antidumping and countervailing investigations. Importantly, it promotes free trade by prohibiting unjustified inflation of dumping margin and discouraging tit-for-tat abuse of PMS.

I. INTRODUCTION

The landmark China – Australia Free Trade Agreement (ChAFTA)[1], signed in June 2015, does not address one of the most important and controversial issues in the two countries' bilateral trade activities – the so-called 'Particular Market Situation' (PMS). On the bilateral level, the issue frequently arises in the context of Australia's anti-dumping actions against China. A finding that a PMS exists in a segment of the Chinese market essentially means that the market segment is regarded as not having operated on the basis of market conditions but having been distorted by undue interventions by the Government of China (GOC). Such a finding would typically result in a positive finding of dumping and an application of higher

[*] Lecturer, Faculty of Law, UNSW Australia. Email: weihuan.zhou@unsw.edu.au
[**] Principal, Percival Legal, Sydney. Email: andrew.percival@percivallegal.com.au

[1] For general information, negotiations and legal text of the free trade agreement, see Australian Government, Department of Foreign Affairs and Trade, China-Australia Free Trade Agreement, available at: http://dfat.gov.au/trade/agreements/chafta/Pages/australia-china-fta.aspx

anti-dumping duties. The frequent treatment of China as having a PMS, therefore, would counteract Australia's tariff concessions made under ChAFTA, create uncertainties for Chinese exporters and undermine their expectations of enhanced market access to the Australian market, and give rise to tensions and contradictions in the bilateral trade relationship. Eventually, it is likely to provoke China's retaliation.

The issue of PMS is seen to become a growing problem in global trade. Under the multilateral trading system established under the auspices of the GATT/WTO, China agreed, upon its accession to the WTO, that until December 2016 the other members may treat it as a non-market economy (NME) in anti-dumping investigations unless market economy is proven to prevail; this is known as NME Assumption.[2] As the NME Assumption is to expire, the concept of PMS is likely to be abused by WTO members to continue to treat China or economies like China as having a NME.[3] This may lead to tit-for-tat antidumping measures and pose serious challenges to the world trading system.

One way to overcome the challenges created by the issue of PMS is to standardise the investigations of PMS by, for example, clearly defining PMS and its scope, specifying the factors to be considered in determining PMS, etc. Unfortunately, neither the WTO Anti-Dumping Agreement (AD Agreement) nor the WTO jurisprudence has provided sufficient guidance for the assessment of PMS. The lack of international standards leaves considerable discretion to each WTO member state to determine whether a PMS exists. In the ChAFTA negotiations, while the issue attracted considerable concern from China and hence intense discussions between the parties, no agreement was reached on it.

The article explores the issue of PMS and offers recommendations on how it should be interpreted and applied. Section II provides an overview of the concept of PMS under the WTO and Australia's anti-dumping law and practice. It highlights a number of interpretative issues arising from the lack of clarifications on the meaning of PMS under both the multilateral framework and the domestic anti-dumping regime in Australia. Section III studies the preparatory work of the GATT/WTO for interpretative guidance on the issue of PMS. While noting that the issue was not specially discussed during the GATT/WTO negotiations, the section submits that the drafting records – especially those in the Tokyo Round and the Uruguay Round negotiations – provide useful guidance for the interpretation of PMS. Section IV offers insights into the ChAFTA negotiations on anti-dumping and particularly the issue of PMS. It discusses why Australia's frequent use of anti-dumping and

---

[2] See *Protocol on the Accession of the People's Republic of China*, WT/L/432 (23 November 2001), para. 15. There are a sheer volume of publications discussing China's NME status, see, for example, Miranda, J., "Interpreting Paragraph 15 of China's Protocol of Accession" (2014)9(3) *Global Trade and Customs Journal* 94-103; Stewart, T.P., Fennell, W.A, Bell, S.M. and Birch, N.J., "The Special Case of China: Why the Use of a Special Methodology Remains Applicable to China after 2016" (2014)9(6) *Global Trade and Customs Journal* 272-279; Weijia Rao, "China's Market Economy Status under WTO Antidumping Law after 2016" (2013)5(2) *Tsinghua China Law Review* 151-168.

[3] See William Watson, "Will Nonmarket Economy Methodology Go Quietly into the Night?: US Antidumping Policy toward China after 2016", Cato Institute Policy Analysis Number 763 (28 October 2014) at 11, available at: http://object.cato.org/sites/cato.org/files/pubs/pdf/pa763.pdf

PMS against China is not addressed in the negotiations and how these issues might be addressed by the two countries as they implement the ChAFTA and as their economic relationship continues to develop. Based on the GATT/WTO negotiating records, WTO rules, and GATT and Australian jurisprudence, Section V offers recommendations on how PMS should be interpreted and applied. Section VI concludes.

II. THE MYTH OF 'PARTICULAR MARKET SITUATION'

In the context of international trade, 'dumping' concerns the sale of goods to overseas markets at prices (i.e. export price) lower than the selling prices of 'like' products in the domestic market (i.e. normal value). [4] The determination of dumping, therefore, involves a calculation of and a comparison between the export price and the normal value of subject goods. The issue of PMS arises in the calculation of normal value. A positive finding of PMS would typically lead to a higher normal value and hence increase the likelihood of findings of dumping and higher dumping margins.

A. The WTO AD Agreement and Jurisprudence

Article 2 of the WTO AD Agreement contemplates a number of ways for the calculation of normal value, the primary one being the use of the actual selling prices of subject goods in the market of export countries. However, Article 2.2 provides:

> When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the *particular market situation* or the low volume of the sales in the domestic market of the exporting country, such sales *do not permit a proper comparison*, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits. (emphasis added)

Accordingly, normal value may also be determined by reference to the selling price of 'like' goods in a third country (known as 'third country price') or by adding up the cost of production, other costs associated with the sale of the goods in the domestic market, and the profit on the domestic sale (known as 'constructed normal value' (CNV)). The circumstances in which these alternative methods may be used include: (1) there are no domestic sales of the subject goods in the ordinary course of trade, (2) there is a PMS in the domestic market, or (3) the domestic sale volume is low, so that a proper comparison between export price and normal value cannot be conducted. The AD Agreement, however, does not clarify what may constitute a PMS. On its face, Article 2.2 merely suggests:

[4] See, for example, Article 2.1 of the WTO AD Agreement. The term 'like products' is defined, under Article 2.6 of the AD Agreement, as identical products (i.e. alike in all respects) or products having closely resembling characteristics.

(1) a PMS does not include the other two situations envisaged therein in relation to 'no domestic sales in the ordinary course of trade' and 'low volume of domestic sales'; and

(2) it is a situation which precludes a proper comparison between export price and normal value.

Nor is there any WTO jurisprudence on the issue of PMS. Since its creation, the WTO adjudicatory bodies have not had a chance to consider this issue until very recently in the first WTO proceedings brought by the Russian Federation against the EU's use of CNV based on findings of PMS in anti-dumping investigations (*EU – Cost Adjustment Methodologies (Russia)*). [5] At the time of writing, this case is still ongoing.

B. Australia's Law and Practice

As a WTO member, Australia is obliged to ensure its antidumping laws and practice is consistent with the AD Agreement. Accordingly, section 269TAC(1) of the *Customs Act 1901* (Act) – the principal Australian anti-dumping legislation – provides that normal value should generally be determined by reference to the actual selling price of subject goods in exporting countries. Under section 269TAC(2)(a)(ii) of the Act, however, normal value can be constructed in the same way as contemplated under Article 2.2 of the AD Agreement when "the situation in the market of the country of export is such that sales in that market are not suitable for use in determining [normal value]". Like the AD Agreement, the Australian legislation does not provide any guidance for the determination of PMS.

In conducting anti-dumping investigations, Australia's investigating authorities – the Anti-Dumping Commission (AD Commission) and formerly Australian Customs and Border Protection Service (Australian Customs) – have developed a standard approach to determining whether a PMS exists. This approach is summarized in the AD Commission's Dumping and Subsidy Manual as follows:

> In investigating whether a market situation exists due to government influence, the Commission will seek to determine whether the impact of the government's involvement in the domestic market has materially distorted competitive conditions. A finding that competitive conditions have been materially distorted may give rise to a finding that domestic prices are artificially low or not substantially the same as they would be if they were determined in a competitive market. [6]

---

[5] See *European Union – Cost Adjustment Methodologies and Certain Anti-Dumping Measures on Imports from Russia*, Request for Consultations by the Russian Federation, WT/DS474/1 (9 January 2014). A WTO summary of the case can be found here: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds474_e.htm; and *European Union – Cost Adjustment Methodologies and Certain Anti-Dumping Measures on Imports from Russia (second complaint)*, Request for Consultations by the Russian Federation, WT/DS494/1 (19 May 2015). A WTO summary of the case can be found here: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds494_e.htm

[6] See Anti-Dumping Commission, Dumping and Subsidy Manual (December 2013), at 34, available at: http://www.adcommission.gov.au/accessadsystem/Documents/DumpingandSubsidyManual-December2013_001.pdf

In practice, a PMS has frequently been found to exist in the Chinese market due to alleged intervention of the GOC in the market.[7] Over time, Australian investigating authorities have focused on the GOC's influence on the prices of raw materials used for the production of the final goods subject to investigations. Following a finding of PMS, the authorities have calculated a CNV using a surrogate/benchmark input price instead of using the actual cost of the inputs incurred by the exporters involved. The use of surrogate input prices has consistently resulted in the application of an uplift to the actual input costs and hence a higher CNV. Past findings of PMS have involved a number of major Chinese industries and the relevant raw materials including:

- the steel industry and artificially lowered prices of primary inputs (e.g. hot rolled coil (HRC)) for the production of steel products such as hollow structural sections, galvanized steel and plate steel[8];
- the aluminium industry and artificially lowered price of aluminium a primary input for the production of aluminium road wheels[9];
- the silicon industry and artificially lowered rates of electricity a primary input for the production of silicon metal[10]; and
- the solar photovoltaic (PV) industry and artificially lowered prices of PV cells the major raw material for the production of solar panels and modules.[11]

These findings of PMS were generally based on the consideration of evidence falling within the following categories:

- GOC's macroeconomic policies such as National and Regional Five-Year Plans and implementing measures which provide a policy directive to promote the development of the relevant industries;[12]

---

7 Weihuan Zhou, "Australia's Anti-Dumping and Countervailing Law and Practice: An Analysis of Current Issues Incompatible with Free Trade with China" (2015)49(6) *Journal of World Trade* 975-1010.

8 See, for example, Australian Customs and Border Protection Service, Certain Hollow Structural Sections Exported from the people's Republic of China, the Public of Korea, Malaysia, Taiwan and the Kingdom of Thailand, Report to the Minister No. 177 (7 June 2012) (REP 177); Australian Customs and Border Protection Service, Dumping of Zinc Coated (Galvanised) Steel and Aluminium Zinc Coated Steel Exported from the People's Republic of China, the Republic of Korea, and Taiwan, Report to the Minister No. 190 (30 April 2013) (REP 190); Anti-Dumping Commission, Dumping of Hot Rolled Plate Steel, Exported from the People's Republic of China, Republic of Indonesia, Japan, the Republic of Korea and Taiwan, and Subsidisation of Hot Rolled Plate Steel Exported from the People's Republic of China, Report Number 198 (16 September 2013) (REP 198).

9 See, for example, Australian Customs and Border Protection Service, Aluminium Road Wheels Exported from the People's Republic of China, Report to the Minister No. 181 (12 June 2012) (REP 181).

10 See, for example, Anti-Dumping Commission, Alleged Dumping and Subsidisation of Silicon Metal Exported from the People's Republic of China, Report No. 237 (3 June 2015) (REP 237).

11 See, for example, Anti-Dumping Commission, Alleged Dumping of Certain Crystalline Silicon Photovoltaic Modules or Panels Exported from the People's Republic of China, Report No. 239 (6 October 2015) (REP 239).

12 See, for example, above n 8, REP 177, at 118-148; above n 11, REP 239, at 88-89.

- regulatory instruments and programs which provide financial assistance for the relevant industries (such as feed-in-tariffs for the solar power generation industry[13]) and subsidies made available for entities in the industries;[14] and
- import and export measures such as tariffs and quotas which are considered to have impacted on the domestic sales volume and price in the industries.[15]

In the aggregate, the evidence has been treated as being sufficient to establish the existence of a PMS which causes price distortions in the relevant Chinese market.

C. The Interpretative Issues

Australia's approach to PMS may or may not be consistent with the WTO rules. The lack of clarifications on this issue in the WTO AD Agreement leaves open a number of interpretative questions:

(1) what is the term PMS intended to cover?
(2) whether the existence of regulations or other forms of government interventions in the market necessarily creates a PMS?
(3) whether government's influence on the prices of raw materials/inputs necessarily creates a PMS in the industry producing the final goods made from the raw materials/inputs?
(4) whether a positive finding of PMS necessarily leads to the domestic selling price of subject goods unsuitable for comparison with the export price of the goods for the purpose of determining dumping margins?

To address these questions, it is important to consider the drafting records of the WTO AD Agreement and the preceding Anti-Dumping Codes negotiated under the GATT. The preparatory work of the GATT/WTO has been widely regarded and employed as a valuable source for the interpretation of WTO agreements.[16] In many disputes, the WTO tribunals have made reference to the preparatory work so as to clarify or confirm the interpretations of major legal issues.[17] The section below, therefore, analyses the relevant negotiating records with an aim to seek clarifications on the meaning of PMS.

---

[13] See, for example, above n 11, REP 239, at 94-95.
[14] See, for example, above n 8, REP 177, at 153-154; above n 9, REP 181, at 36-37.
[15] See, for example, above n 8, REP 177, at 148-151; above n 10, REP 237, at 26-32.
[16] See, for example, Douglas A. Irwin, Petros C. Mavroidis & Alan O. Sykes, *The Genesis of the GATT* (Cambridge University Press, 2009); Terence P. Stewart (ed), *The GATT Uruguay Round: A Negotiating History (1986-1992)* (Volume II) (Deventer: Kluwer Law and Taxation Publishers, 1993); John H. Jackson, *World Trade and the Law of the GATT* (The Bobbs-Merrill Company, 1969) at 22; Pieter Jan Kuyper, "The law of GATT as a special field of international law: Ignorance, further refinement or self-contained system of international law?" (1994)25 *Netherlands Yearbook of International Law* 227-257 at 229.
[17] See, for example, Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, pp. 17, 24 (to confirm whether both bound and unbound products should fall within the ambit of the national treatment rule of the GATT); Panel Report,

A revised version of this article has been accepted for publication in the *Journal of International Economic Law* (Vol. 19 No. 4, 2016) published by the Oxford University Press.

III. THE GATT/WTO NEGOTIATIONS ON 'PARTICULAR MARKET SITUATION'

A. Article VI of the GATT

The original form of the WTO AD Agreement is found in Article VI of the GATT which was drafted during the preparation of the GATT between 1946 and 1948[18] and which remains effective today. Article VI:1 on the determination of dumping allows the use of CNV when there is no domestic selling price in the ordinary course of trade. However, this provision does not include the term PMS which was not discussed during the negotiations of the GATT.[19] In the subsequent GATT rounds of negotiations between 1949 and 1961, Article VI was reviewed and amended.[20] While the review did not specifically consider the issue of PMS,[21] it is worth noting the following interpretative note added to Article VI:1 during the review:

> 2. It is recognized that, in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability for the purposes of paragraph 1, and in such cases importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate.

Accordingly, the note provides for a situation where an importing country can deviate from a strict comparison with domestic prices in an exporting country. It was intended to deal with the extreme market conditions in some countries (such as Poland, Romania and Hungary) where the market was dominated by state monopolies.[22] This was confirmed in subsequent negotiations. For example, in the Tokyo Round the representative of the EEC made the following statement:

> … the second interpretative note to Article I:1 … referred to the particular situation which existed in certain types of economies. The note had nothing to do with the special situation for certain enterprises in other types of economies.[23]

United States - Anti-Dumping Act of 1916, Complaint by the European Communities, WT/DS136/R and Corr.1, adopted 26 September 2000, paras. 6.201-6.202 (in confirming the meaning of Article VI of the GATT).

[18] For a detailed analysis of the GATT negotiations, see above n 16, Jackson, *World Trade and the Law of the GATT*.

[19] See above n 16, Stewart, *The GATT Uruguay Round*, at 1404-1408; GATT Analytical Index, Article VI Anti-Dumping and Countervailing Duties, at 222, available at: https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art6_e.pdf

[20] They were the Annency Round in 1949, the Torquay Round in 1950, the Geneva Round in 1956, and the Dillion Round in 1960-1961. The review commenced prior to the Geneva Round.

[21] See above n 16, Stewart, *The GATT Uruguay Round*, at 1414-1417; above n 19, GATT Analytical Index, at 223-227.

[22] See above n 19, GATT Analytical Index, at 228.

[23] See Committee on Anti-Dumping Practices, Minutes of the Meeting held on 4-6 October 1976 (COM.AD/41), 11 March 1977, at 11-12.

A revised version of this article has been accepted for publication in the *Journal of International Economic Law* (Vol. 19 No. 4, 2016) published by the Oxford University Press.

This statement was supported by delegates of other parties,[24] suggesting that the scope and application of the interpretative note is very limited. The transformation and development of transitional economies like China has rendered the note inapplicable in most if not all cases.[25] The note was subsequently incorporated into Article 2.7 of the AD Agreement which states that Article 2 of the Agreement is without prejudice to the note.[26] This indicates a clear differentiation between the situation contemplated in the note and the other situations where domestic prices may not be suitable for comparison with export prices. Therefore, the note provides little guidance for the interpretation of PMS except that PMS is not intended to cover market situations arising from complete or substantially complete state monopolies.

B. Kennedy Round Negotiations (1963-1967)

It was not until the Kennedy Round that GATT Contracting Parties moved on to deal with non-tariff barriers and in that context, considered necessary to develop an international code on anti-dumping.[27] The negotiations were based on a Draft International Code on Antidumping Procedure and Practice (Draft Code) prepared by the UK and distributed in October 1965.[28] The Draft Code was aimed to provide detailed substantive and procedural rules on anti-dumping in line with the principles laid down in GATT Article VI. The term PMS was not mentioned in the Draft Code and hence not considered as a circumstance where a CNV can be used.[29] However, the Draft Code underlined the need to make due allowance for *all* differences which affect the comparability of normal value and export price for the purpose of determining whether dumping has occurred.[30]

To facilitate the negotiations, a draft anti-dumping checklist was distributed setting out a list of broad issues for discussions.[31] While the list contained an item on the determination of dumping margin, subsequent negotiations did not touch upon the concept of PMS.[32] The

---

24 Ibid.

25 Laura Puccio, "Granting Market Economy Status to China: An Analysis of WTO Law and of Selected WTO Members' Policy", European Parliamentary Research Service, November 2015, at 4; 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, December 2011, at 10.

26 Appellate Body Report, *European Communities - Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, adopted 28 July 2011, para. 285.

27 See above n 16, Stewart, *The GATT Uruguay Round*, at 1417-1418.

28 General Agreement on Tariffs and Trade, Draft International Code on Anti-Dumping Procedure and Practice, Note by the United Kingdom Delegation (spec(65)86), 7 October 1965.

29 Ibid., at 12.

30 Ibid., at 10-11.

31 See Group of Anti-Dumping Practice, Draft Revised Anti-Dumping Check List (TN.64/NTB/W/7), 4 March 1966.

32 Negotiating parties made many submissions on the topics identified in the checklist. For example, submissions by the US (TN.64/NTB/W/3, 10 January 1966), (TN.64/NTB/W/10/Add.3, 28 April 1966; submissions by the UK (TN.64/NTB/W/10, 19 April 1966), (TN.64/NTB/W/12, 22 June 1966); submissions by the EEC (TN.64/NTB/W/1C/Add.1, 21 April 1966), (TN.64/NTB/W/12/Add.2, 24 June 1966); submissions by Japan (TN.64/NTB/W/10/Add.2, 22 April 1966), (TN.64/NTB/W/12/Add.6, 1 July 1966); submissions by Australia (TN.64/NTB/W/10/Add.8, 20 May 1966), TN.64/NTB/W/12/Add.9, 8 July 1966;

A revised version of this article has been accepted for publication in the *Journal of International Economic Law* (Vol. 19 No. 4, 2016) published by the Oxford University Press.

negotiations led to the production of a draft Anti-Dumping Code.[33] For no apparent reasons, the term PMS was included in Article A.2(d) of the draft code as follows:

> When there are no sales of the like product in the ordinary course of trade in the domestic market or when, because of the *particular market situation*, such sales *do not permit a proper comparison*, the margin of dumping shall be determined by comparison with a comparable export price …, or with the cost of production in the country of origin plus a reasonable allowance for administrative, selling and other costs and profits…

The text on PMS in the provision is essentially the same as that of the current Article 2.2 of the WTO AD Agreement. This suggests that in subsequent rounds of negotiations there had been no disagreement among the negotiating parties on the inclusion of PMS as a situation where normal value may be determined using constructed method. However, it is unclear why the term PMS was included and what situations it was intended to deal with. It is probably that the Contracting Parties intended to have a residual category to cover all the other circumstances (i.e. other than "no sales in the ordinary course of trade") which may affect the comparability of domestic selling prices with export price. In this connection, the parties shared the view that the determination of dumping must be based on a proper and fair comparison between the two prices. This suggests that a situation should not be treated as a PMS unless it precludes a proper comparison between normal value and export price.

The draft Anti-Dumping Code was subsequently developed into an "Agreement on the Implementation of Article VI" which became effective on 1 July 1968.[34] The agreement is known as Kennedy Round Anti-Dumping Code as it was applicable to parties who signed it only and not to all GATT Contracting Parties. Article A.2(d) of the draft code remained unchanged in the Anti-Dumping Code.

C. Tokyo Round Negotiations (1973-1979)

The subsequent Tokyo Round negotiations of the Anti-Dumping Code focused on a number of controversial issues such as concept of dumping, sales at a loss, allowances relating to price comparability, etc.[35] However, the negotiations did not lead to any changes of the text of PMS in Article A.2(d) of the Kennedy Round Anti-Dumping Code except that the provision was renumbered as Article 2.4 in the Tokyo Round Anti-Dumping Code which

---

submissions by Canada (TN.64/NTB/W/10/Add.5, 5 May 1966), (TN.64/NTB/W/15, 21 February 1967). For a discussion of the negotiations on the other issues, see above n 16, Stewart, *The GATT Uruguay Round*, at 1418-1430.

[33] See Sub-Committee on Non-Tariff Barriers, Report of the Group on Anti-Dumping Policies (TN.64/NTB/W/16), 3 March 1967.

[34] See the Final Act of the Kennedy Round negotiations, at 24-35, available at: https://www.wto.org/english/docs_e/legal_e/kennedy_e.pdf

[35] See GATT, List of Priority Issues in the Anti-Dumping Field (COM.AD/W/77), 10 April 1978.

A revised version of this article has been accepted for publication in the *Journal of International Economic Law* (Vol. 19 No. 4, 2016) published by the Oxford University Press.

entered into force on 1 January 1980.[36] While the text remained unchanged, the negotiations provided a bit more guidance for the interpretation of PMS than the previous negotiations.

In discussing the issue of "sales at a loss", the parties generally did not regard "sales at a loss" as a subset of PMS but as a circumstance which may render domestic sales not in the ordinary course of trade. In the summary of the different positions of the parties on when alternative methods may be used for the calculation of normal value, "sales at a loss" and PMS were explicitly treated as different issues.[37] More importantly, commenting on the circumstances where domestic selling prices may be disregarded, the EEC took the position that it should include circumstances which make domestic price unreliable.[38] On price reliability, the US observed:

> "… in determining … whether a reliable domestic price exists, the authorities may consider whether the economy of the exporting country is State controlled to an extent that sales or offers of sales of such or similar product in that country or to third countries do not permit a determination of normal value on those bases."[39]

Japan took a more extreme view:

> "…[domestic selling] price should be disregarded only in clearly abnormal situations, e.g. in cases of a monopoly control of the domestic market ..."[40]

These views were not disputed or further discussed in the subsequent negotiations of the Tokyo Round.[41] The views may be relevant to the interpretation of PMS. While they implied different positions on the scope of PMS, they were all concerned about the reliability of domestic selling prices. The US' position supported an interpretation of PMS as including impacts of government influence on domestic selling price. The position of Japan suggested that mere government influence might not be sufficient to establish a PMS but the existence of monopoly control of the relevant market would be required. However, the drafting records did not address the issue of whether government influence on the price of production input, rather than the price of finished goods, would necessarily affect the reliability of the price of finished goods and hence justify the use of CNV.

On the issue relating to the comparability between export price and normal value, the parties shared the view that adjustments must be made to price differences resulted from

---

[36] See Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (Tokyo Round Anti-Dumping Code), available at: https://www.wto.org/english/docs_e/legal_e/tokyo_adp_e.pdf

[37] See Committee on Anti-Dumping Practices, List of Priority Issues in the Anti-Dumping Field (COM.AD/W/79), 31 May 1978. For a discussion of the negotiations on "sales at a loss", see above n 16, Stewart, *The GATT Uruguay Round*, at 1440-1444.

[38] See Committee on Anti-Dumping Practices, Minutes of the Meeting held on 24-28 October 1977 (COM.AD/46), 10 March 1978, para. 12.

[39] See above n 37, COM.AD/W/79, at 9.

[40] See above n 38, COM.AD/46, para. 69; above n 37, COM.AD/W/79, at 9.

[41] See, for example, submissions by Australia (COM.AD/W/81/ADD.1, 7 July 1978); submissions by Canada (COM.AD/W/81/ADD.2, 26 July 1978); submissions by Japan (COM.AD/W/81/ADD.3, 11 October 1978), (COM.AD/W/83/ADD.2, 8 January 1979); submissions by the US (COM.AD/W/81/ADD.2, 26 July 1978).

A revised version of this article has been accepted for publication in the *Journal of International Economic Law* (Vol. 19 No. 4, 2016) published by the Oxford University Press.

situations such as differences in circumstances of sale, technical differences, etc.[42] Significantly, they all agreed that the amount of adjustment should include direct material and labor costs, amongst others.[43] As will be discussed in section V, this provides an important context for the interpretation of PMS.

D. Uruguay Round Negotiations (1986-1994)

The Uruguay Round negotiations discussed a wide range of issues raised by the parties with an aim to improve the Tokyo Round Anti-Dumping Code.[44] As shown above, the negotiations did not lead to any changes to the text on PMS in Article 2.2 of the WTO AD Agreement although a new circumstance relating to "low volume of domestic sales" was added to allow the use of CNV.[45]

While there were intense discussions of issues such as establishment of normal value, calculation of CNV, etc., little efforts were made to clarifying the concept of PMS.[46] Japan made an effort to encourage discussions of the definition of PMS.[47] However, such discussions did not take place in the subsequent negotiations.[48] As the negotiations went on, Japan no longer brought up the issue but focused on the other situations where CNV may be employed such as "no sales of the like product in the ordinary course of trade".[49] As a result, the meaning of PMS remained unclarified.

Significantly, efforts were made to the discussions of the issue of "input dumping" which was considered to be a rising problem in international trade. The issue was described as follows:

> "Input dumping is considered to occur when materials or components that are used in manufacturing a product are purchased internationally or domestically at dumped prices and

---

42 See above n 16, Stewart, *The GATT Uruguay Round*, at 1444-1447.

43 Ibid.

44 Ibid., at 1482-1515.

45 For the text of Article 2.2 of the AD Agreement, see page 3 above.

46 See above n 16, Stewart, *The GATT Uruguay Round*, at 1537-1572.

47 See Negotiating Group on MTN Agreements and Arrangements, Communication from Japan (MTN.GNG/NG8/W/11), 28 September 1987, at 2.

48 See, for example, submissions by the US (MTN.GNG/NG8/W/22, 14 December 1987), (MTN.GNG/NG8/W/59, 20 December 1989); submissions by the EU (MTN.GNG/NG8/W/28, 21 March 1988), (MTN.GNG/NG8/W/74, 21 March 1990); submissions by Canada (MTN.GNG/NG8/W/65, 22 December 1989); submissions by Australia (MTN.GNG/NG8/W/66, 22 December 1989); submissions by the Nordic countries (MTN.GNG/NG8/W/64, 22 December 1989); submissions by Japan (MTN.GNG/NG8/W/30, 20 June 1988); submissions by Korea (MTN.GNG/NG8/W/40, 22 November 1988); submissions by Hong Kong (MTN.GNG/NG8/W/46, 3 July 1989); submissions by Singapore (MTN.GNG/NG8/W/55, 13 October 1989); Note by the Secretariat (MTN.GNG/NG8/W/7/Rev.1, 4 December 1987), (MTN.GNG/NG8/9, 16 November 1988), (MTN.GNG/NG8/W/11, 14 August 1989).

49 See, for example, Negotiating Group on MTN Agreements and Arrangements, Submission of Japan on the Amendments to the Anti-Dumping Code (MTN.GNG/NG8/W/48), 3 August 1989, at 2.

> their cost advantage has an effect on the price of the product though the product itself is exported at undumped prices."[50]

The negotiations focused on whether specific provisions should be added to the Anti-Dumping Code to authorise the imposition of anti-dumping duties on goods subject to investigations if the input for the production of the goods was purchased at dumped prices.[51] However, it was considered that the issue may arise only when (1) the normal value of the subject goods is established using constructed value, and (2) the relevant input is sold at less than its cost of production and not at arm's length.[52] Further, it was recognised that:

> "Every reasonable manufacturer will endeavour to buy inputs at the lowest possible price…"
>
> "Irrespective of the cost of the inputs, no dumping will occur as long as there is a comparable domestic price of the like product for consumption in the exporting country and that price is not higher than the export price."[53]

Due to various concerns about the concept of input dumping, the negotiating parties could not reach an agreement on the recommended text;[54] eventually, no provisions on input dumping were introduced into the WTO AD Agreement. For example, Singapore pointed out that finished goods and their inputs are not "like products" and hence opposed the use of anti-dumping measures against finished goods merely because the inputs are purchased at a price lower than market value.[55] Japan questioned whether it is realistic "to insist that manufacturers of finished products should know whether" the price of inputs they wish to purchase is below fair market price.[56] While the parties were divided on the issue of input dumping, their negotiations have significant implications for the interpretation of PMS. The negotiations suggest:

- the issues relating to whether the price of raw materials is distorted and how the distortion may affect the calculation of normal value and the assessment of dumping are considered to be completely different from the issue of PMS. This in turn suggests that the term PMS was not intended to deal with input dumping or related issues;
- even assuming that input price distortion was intended to be a circumstance which may create a PMS, it may do so only if the input price is lower than its cost of production. This in turn suggests that government influence on the price of input should not be

---

50 See Committee on Anti-Dumping Practices, Draft Recommendation Concerning Treatment of Input Dumping (ADP/W/83), 3 August 1984, at 1.

51 Ibid.

52 Ibid.

53 Ibid.

54 See, for example, Committee on Anti-Dumping Practices, Minutes of The Meeting Held on 30 October 1986 (ADP/M/18), 16 January 1987, at 16; Committee on Anti-Dumping Practices, Minutes of The Meeting Held on 5 June 1987 (ADP/M/19), 7 August 1987, at 20-21; Committee on Anti-Dumping Practices, Minutes of The Meeting Held on 26 and 28 October 1987 (ADP/M/20), 15 January 1988, at 15-16.

55 See above n 54, ADP/M/19, at 14.

56 See Negotiating Group on MTN Agreements and Arrangements, Communication from Japan (MTN.GNG/NG8/W/30), 20 June 1988, at 15-16.

treated as giving rise to a PMS unless it has rendered the input price lower than its production cost; and

- even assuming that input price distortion caused by government influence has affected domestic selling price of final goods, it is still necessary to consider whether the domestic price is comparable with and higher than the export price of the final goods. This in turn suggests that input price distortion does not necessarily result in the domestic selling price of the subject goods unsuitable for comparison with their export price. Therefore, a CNV should not be used if the comparability of the domestic price of the final goods is not affected.

Accordingly, while the GATT negotiations did not directly touch upon the issue of PMS, they covered some relevant issues and shed some lights on how PMS should be interpreted. It is submitted that the interpretation of PMS should follow the guidance extracted from the preparatory work of the GATT, the GATT Anti-Dumping Codes and the WTO AD Agreement. The guidance also forms the basis of our recommendations on how the term PMS should be interpreted and applied in Section V.

IV. 'PARTICULAR MARKET SITUATION': CHAFTA NEGOTIATIONS AND IMPLIFICATIONS

The protracted ChAFTA negotiations took a decade and 21 negotiating rounds to conclude. [57] While negotiations on issues relating to agriculture, services, investment, government procurement, etc. proceeded with considerable difficulties,[58] the conclusion of ChAFTA reflected the shared interests of China and Australia and the far-reaching benefits and opportunities they expect to gain from the resultant substantial market-opening.[59] These benefits and opportunities have much to do with the high degree of trade complementarity between the two countries and hence the welfare gains they could secure by specialising in "production and trade according to their own comparative advantage". [60] These were all recognised in the joint feasibility study conducted by the two countries for the negotiations of the ChAFTA (Feasibility Study). [61] However, Australia's frequent use of anti-dumping

[57] See Australian Government, Department of Foreign Affairs and Trade, China – Australia Free Trade Agreement, available at: http://dfat.gov.au/trade/agreements/chafta/news/Pages/news.aspx

[58] See Ling Ling He, "On Re-invigorating the Australia – China Free Trade Agreement Negotiation Process" (2013)14 *Journal of World Investment & Trade* 672-696.

[59] See Australian Government, Department of Foreign Affairs and Trade, "Australia – China Free Trade Agreement: Joint Feasibility Study" (Feasibility Study), March 2005, available at: http://dfat.gov.au/trade/agreements/chafta/Documents/feasibility_full.pdf; Australian Government, Department of Foreign Affairs and Trade, "Australia Signs Landmark Trade Agreement with China", available at: http://trademinister.gov.au/releases/Pages/2015/ar_mr_150617.aspx

[60] See Yu Sheng & Ligang Song, "Comparative Advantage and Australia – China Bilateral Trade" (2008)27(1) *Economic Papers* 41-65; Dawei Cheng, "A Chinese Perspective on the China – Australia Free Trade Agreement and Policy Suggestions" (2008)27(1) *Economic Papers* 30-40.

[61] See above n 59, Feasibility Study, at 10-11.

measures against exports from China is incompatible with the spirit of the agreement and is likely to undermine the expected achievements. This raises at least two questions: (1) why did ChAFTA negotiations fail to discipline the use of anti-dumping measures and particularly the use of PMS in anti-dumping investigations, and (2) what are the possible consequences of this failure?

A. ChAFTA Negotiations on PMS

As a pre-condition for the ChAFTA negotiations, Australia granted China full market economy status (MES) via a Memorandum of Understanding (MOU) reached by the two countries in April 2005 to commence the negotiations.[62] Under the MOU, Australia essentially agreed not to apply the NME Assumption envisaged under China's WTO Accession Protocol in anti-dumping investigations against China. In the conclusion of the ChAFTA negotiations, Tony Abbott, Australia's former Prime Minister, confirmed:

> "we now appreciate that most state-owned enterprises have a highly commercial culture. They're not nationalised industries that we used to have in Australia."[63]

Accordingly, Australia's frequent treatment of China as having a PMS runs against one of the agreed and underlying principles for ChAFTA negotiations. In practice, Australia applied significantly more anti-dumping duties against Chinese exports after the commencement of the ChAFTA negotiations, especially in the past five years. Over the decade from 1995 to 2004, while Australia was able to rely on the NME Assumption in anti-dumping investigations against China, only six investigations resulted in the imposition of anti-dumping measures.[64] In comparison, between 2006 and 2014, Australia initiated 25 investigations against China, 14 of which were initiated after 2011.[65] In the 2012/13 and 2013/14 financial years alone, Australia imposed 10 anti-dumping/countervailing measures against China.[66] Currently, China is the target in most of the ongoing investigations and the existing anti-dumping measures in Australia.[67] Apparently, the ChAFTA negotiations did not

---

[62] See *Memorandum of Understanding between the Department of Foreign Affairs and Trade of Australia and the Ministry of Commerce of the people's Republic of China on the Recognition of China's Full Market Economy Status and the Commencement of Negotiation of A Free Trade Agreement between Australia and the People's Republic of China*, 18 April 2005, available at: http://dfat.gov.au/trade/agreements/chafta/Documents/mou_aust-china_fta.pdf

[63] Phillip Coorey, "Finance, Tourism, Health Win China Deal", Financial Review (17 November 2014), available at: http://www.afr.com/news/economy/trade/finance-tourism-health-win-china-deal-20141116-11nwlp

[64] See above n 59, Feasibility Study, at 112.

[65] The numbers are calculated by the authors based on the annual Trade and Assistance Review report provided by the Productivity Commission, available at: http://www.pc.gov.au/research/ongoing/trade-assistance

[66] Productivity Commission, Trade and Assistance Review 2012-2013, at 190; Trade and Assistance Review 2013-2014, at 263.

[67] Anti-Dumping Commission, Current Cases and the Electronic Public Record, available at: http://www.adcommission.gov.au/cases/Pages/default.aspx; Anti-Dumping Commission, Dumping Commodity Registers, available at: http://www.adcommission.gov.au/measures/Pages/default.aspx

stop Australia from using anti-dumping measures against China but provoked it. The same can be said with Australia's reliance on findings of PMS in almost all of the recent investigations against China. Despite the recognition of China's full MES, the ChAFTA negotiations provoked the use of PMS so that more and higher anti-dumping duties can be imposed on Chinese exports. Australia's antidumping practice, therefore, foreshadowed the failure of the ChAFTA negotiations to reach any agreement on anti-dumping and PMS.

The Feasibility Study did not put forward an ambitious agenda for the negotiation of trade remedies but merely called for further cooperation between Australia and China via informal consultations, dialogue and technical exchanges on relevant issues.[68] In the first substantive meeting of the negotiations, anti-dumping was tabled as an issue of particular interest to China.[69] However, according to the summary of each round of the negotiations published by Australia's Department of Foreign Affairs and Trade (DFAT), subsequent negotiations did not touch upon anti-dumping.[70] Eventually, the final agreement does not impose any restraints on the taking of anti-dumping actions but merely incorporates the relevant WTO rules and repeats the need for further cooperation and consultation "including through the regular holding of a High Level Dialogue on Trade Remedies" (Dialogue).[71] To the authors' knowledge, a number of sessions of the Dialogue were convened during the ChAFTA negotiations. In the sessions, one of China's priorities was to persuade the Australian counterpart to live up to its commitment under the MOU and stop treating China as having a PMS in anti-dumping investigations. Beyond the Dialogue, the GOC has reiterated its position on the issue of PMS in numerous investigations by way of consultations and written submissions.[72] In essence, the GOC has significant concern about the Australian authorities' findings of PMS in an arbitrary manner and without sufficient evidence, and their use of surrogate input price to inflate CNV. China's efforts have not led to any agreement on the issue of PMS or any changes to the Australian practice. Remarkably in one of the latest

---

[68] See above n 59, Feasibility Study, at 115. For a discussion of the negotiations and impact of trade remedies under ChAFTA, see Yanning Yu, "Trade Remedies: The Impact on the Proposed Australia-China Free Trade Agreement" (2010)18(2) *Michigan State Journal of International Law* 267-296.

[69] China – Australia Free Trade Agreement, Second Round of Negotiations, 22-24 August 2005, available at: http://dfat.gov.au/trade/agreements/chafta/news/Pages/second-round-of-negotiations.aspx

[70] See above n 57, China – Australia Free Trade Agreement.

[71] Article 7.9, Chapter 7 of the China – Australia Free Trade Agreement, available at: http://dfat.gov.au/trade/agreements/chafta/official-documents/Documents/chafta-chapter-7-trade-remedies.pdf

[72] See, for example, Investigation into alleged dumping and subsidisation of hollow structural sections exported from the People's Republic of China – Preliminary affirmative determination and "provisional measures" (19 November 2011); Investigation concerning hollow structural sections from China – Submission in response to Statement of Essential Facts No. 177 (16 May 2012); Investigation concerning aluminium road wheels from China – Submission in response to Statement of Essential Facts No. 181 (18 May 2012); Application for Countervailing Duties and Anti-Dumping Duties on Plate Steel from China, Position Paper of the Government of China (January 9, 2013); Certain coated steel – Statement of Essential Facts 190 – Submission of the Government of the People's Republic of China (17 April 2013); Dumping & Subsidy Investigation – Stainless Steel Sinks – Comments of the Government of China concerning "particular market situation" in PAD 238 (19 December 2014); Alleged dumping and subsidisation of silicon metal from China – Submission of the Government of China concerning SEF 237 (30 March 2015).

investigations where a PMS was found to exist, the AD Commission allowed the Australian industry applicant to submit new evidence on PMS (arguably in breach of procedural fairness) and based on the evidence reversed its earlier finding that a PMS does not exist.[73]

There are a number of reasons why the ChAFTA negotiations failed to tackle anti-dumping in general and PMS in particular. First, anti-dumping is one of the few exceptions allowed under the WTO whereby members can apply import tariff at levels beyond their WTO committed tariff rates. As FTAs further break down tariff and non-tariff barriers and hence expose domestic industries to increasing foreign competition, anti-dumping becomes "practically the only legitimate tool to address industry injuries related to import increases".[74] While anti-dumping counteracts the achievements of trade liberalisation, it operates as a "safety valve" for governments to overcome protectionist pressures and resistance to FTAs. In the context of the ChAFTA negotiations, neither Australia nor China was prepared to constrain their ability to engage in anti-dumping activities. On the Australian side, domestic anti-dumping system reforms went hand in hand with the negotiations.[75] The reforms were consistently aimed at strengthening the anti-dumping regime in response to industry concerns and at "ensuring Australian manufacturers and producers are able to compete on a level playing field with imported goods".[76] The industry concerns have attracted much support from the Australian government and solidified Australia's position on anti-dumping to prevent the ChAFTA negotiations from weakening the ability of its industries to seek anti-dumping protection. China's import-competing industries had similar concerns. At the time of the negotiations, China maintained a significantly higher level of tariff protection than Australia's which was generally between 0-5 percent.[77] This means that the impact of a FTA with Australia on the Chinese industries is likely to outweigh that on Australian industries. While the benefits of ChAFTA are widely recognised in China, protectionist pressure from domestic industries has prevented the GOC from entering into negotiations on anti-dumping.[78] Like its Australian counterpart, the GOC addressed the industry concerns by

---

[73] See above n 11, REP 239. The Chinese industry association argued that the AD Commission should have not allowed the new evidence as it was submitted more than twenty days after the publication of the Statement of Essential Facts, see Anti-Dumping Commission, PV Modules or Panels Exported from China, Submission by Industry Association (Public Record No. 124), 29 May 2015.

[74] See Dukgeun Ahn & Wonkyu Shin, "Analysis of Anti-Dumping Use in Free Trade Agreements" (2011)45(2) *Journal of World Trade* 431-456 at 431-432.

[75] Recent reforms include: Australian Government, "Streamlining Australia's Anti-Dumping System: An Effective Anti-Dumping and Countervailing System for Australia" (Canberra: Australian Customs and Border Protection Service, 2011) (PC Reform); John Brumby, "Review into Anti-Dumping Arrangements" (Canberra: Attorney-General's Department, 2012) (Brumby Review); Australian Government, Department of Industry, Innovation and Science, Levelling the Playing Field – Changes to Australia's Anti-Dumping Laws, November 2015 (2015 Reform), available at: http://www.industry.gov.au/industry/IndustryInitiatives/TradePolicies/Pages/Levelling-the-playing-field-changes-to-Australias-Anti-dumping-laws.aspx

[76] Ibid., 2015 Reform.

[77] See above n 59, Feasibility Study, at 15-18.

[78] See Razeen Sappideen & Ling Ling He, "Observations on the Australia-China Free Trade Agreement Negotiation Process" (2010)38 *Australian Business Law Review* 257-264. For a survey on Chinese views on

maintaining the status quo in which the right of domestic industries to resort to antidumping is not diminished.[79]

Second, the current China – Australia economic relationship falls short of the conditions required for additional disciplines or abolishment of anti-dumping as shown in other existing FTAs. The major conditions envisaged by Prusa[80] and Farha[81] include:

(1) the size of bilateral or regional trade – i.e. where the volume of intraregional trade is fairly small, anti-dumping tends to be unnecessary as a practical matter (e.g. the Economic and Monetary Community of Central Africa);
(2) the level of integration and unique relationships between FTA parties. While Prusa argued that "deeper integration are more likely to do away with trade remedy measures", Farha added that besides deeper integration, geographical proximity, cultural similarity and economic and political connections would also be required (e.g. the European Free Trade Association, the Mainland and Hong Kong Closer Economic and Partnership Arrangement); and
(3) insignificant use of anti-dumping laws by FTA partners (e.g. the Australia New Zealand Closer Economic Relations Trade Agreement).

None of the conditions apply under ChAFTA. It is well-known that (1) the bilateral trade between Australia and China has been overwhelmingly significant with China being the largest two-way trading partner with Australia;[82] (2) the two countries have not achieved the level of integration as that in the EU; nor do they share the same geographical proximity, cultural similarity and economic and political connections as those between Australian and New Zealand or China and Hong Kong; and (3) both countries have been frequent users of anti-dumping measures.[83] Given the fact that the use of anti-dumping is qualified or restricted only in a small number of FTAs[84], it should not surprise that it is not tackled under ChAFTA but is subject to further negotiations as the China – Australia economic relationship continues to develop.

---

a FTA with Australia, see Parikshit Basu *et al.*, "Chinese Attitudes to Trade Agreements in the Context of the Proposed Australia-China Free Trade Agreement" (2005)24(4) *Economic Papers* 294-308.

79 See Ministry of Commerce of the PRC, Response to Questions on the China-Australia Free Trade Agreement, 18 June 2015, available at: http://www.mofcom.gov.cn/article/zhengcejd/bq/201506/20150601019585.shtml.

80 Thomas Prusa, "Trade Remedy Provisions" in Chauffour & Maur (eds) *Preferential Trade Agreement Policies for Development: A Handbook* (The World Bank, 2011) 179-196.

81 Ryan Farha, "A Right Unexercised is A Right Lost?: Abolishing Antidumping in Regional Trade Agreements" (2012)44 *Georgetown Journal of International Law* 211-248.

82 Australian Government, Department of Foreign Affairs and Trade, Australia's Trade in Goods and Services, 20 October 2015, available at: http://dfat.gov.au/about-us/publications/trade-investment/australias-trade-in-goods-and-services/Pages/australias-trade-in-goods-and-services-2014.aspx

83 See WTO, Statistics on Anti-Dumping, Anti-dumping measures: reporting Member vs exporting country, available at: https://www.wto.org/english/tratop_e/adp_e/AD_MeasuresRepMemVsExpCty.pdf

84 See, for example, Yanlin Sun and John Whalley, "China's Anti-Dumping Problems and Mitigation through Regional Trade Agreements", CIGI Papers No. 70, May 2015, at 6.

Finally on the issue of PMS, the Australian government's recognition of China as a full market economy at the outset of the negotiations incited a spate of criticisms by domestic industries.[85] It has been the industries' concern that free market has yet to prevail in some of the major Chinese industries and hence granting China full MES would weaken their ability to fight lower-priced Chinese imports. Therefore, the industries insisted that whether a PMS exists in the Chinese market must be assessed on a case-by-case basis and convinced the government to do so. While China has been significantly concerned about being treated as an economy with PMS, it did not appear to have insisted that the issue must be addressed in the text of ChAFTA but merely sought to persuade the Australian side not to engage in arbitrary and unjustified investigations of PMS via diplomatic channels and in individual anti-dumping matters.

B. Implications for China and Australia

As the negotiations on the issue of PMS have been fruitless, China is likely to continue to be subject to affirmative findings of PMS by the AD Commission. The AD Commission's position on this seems clear: while Australia recognises China as a full market economy, it is highly inclined to engage in assessment of PMS in anti-dumping investigations against China. Given the Australian authorities' consistent findings of PMS in almost all of the recent investigations, Australia seems to have effectively applied the NME Assumption. That is, for some years it has been the practice of Australian authorities to treat China as a NME in anti-dumping investigations as they consistently considered China as having failed to establish the contrary. In the absence of any disciplines on the application of PMS and as Australia commences the implementation of ChAFTA commitments, it is likely that the AD Commission will yield to growing needs of domestic industries for treating China as having a PMS. Australia's practice sets a bad example for WTO members (e.g. the US and the EU) on how they may continue to treat China as a NME once their right to rely on the NME Assumption expires in December 2016.

The position of the AD Commission suggests that the GOC may have been fighting a losing battle in anti-dumping investigations. Having realised this, China made clear its position in one of the latest investigations as follows:

> The GOC is implacably opposed to the persistent misuse of the concepts of "particular market situation" and "competitive market costs" by the Australia side against Chinese exporters in normal value calculation.

---

[85] See, for example, Parliament of Australia, Department of Parliamentary Services, "Anti-Dumping Rules and the Australia-China Free Trade Agreement", research note no. 38 2004-2005 (DPS Research), 14 March 2005, available at: http://www.aph.gov.au/binaries/library/pubs/rn/2004-05/05rn38.pdf; Australian Manufacturing Workers' Union, Submission to the Department of Foreign Affairs and Trade Concerning A Possible China-Australia Free Trade Agreement (AMWU Submission), June 2005, available at: http://dfat.gov.au/trade/agreements/chafta/Documents/4NMA_07_AMWU.pdf.

A revised version of this article has been accepted for publication in the *Journal of International Economic Law* (Vol. 19 No. 4, 2016) published by the Oxford University Press.

> In spite of the above positions, the GOC has still insistently answered the Commission's questionnaire concerning "particular market situation" in previous cases … with an aim to assist the Commission to understand the operation and characteristics of China's economic system, so that it could make correct conclusions in its investigations. These practices have projected fully GOC's cooperation and good will.
>
> From now on, the GOC would not continue to answer questions concerning unprincipled allegations of "particular market situations". Neither would the GOC continue to analyse the compliance of the Commission's practice to WTO rules and Australia's WTO obligations…
>
> Now it's the turn of the Australian side to make a determination whether to honour its international commitments, exhibit its good faith and take a mutual-respect position towards the Chinese side… The GOC would remind the Commission to kindly take WTO rules, Australia's international obligations and China-Australia bilateral economic relationship into consideration.[86]

The statement has a number of implications. The clearest one is that China will no longer spend time and resources on defending its position on PMS in future anti-dumping cases initiated by Australia. Instead, it is likely that China will continue to negotiate with Australia on the issue through the Dialogue, informal consultations, and other diplomatic channels. However, it is hard to see how these approaches are to produce an outcome favourable to China since China has failed to achieve such an outcome during the ChAFTA negotiations where it had a lot to offer back to its Australian counterpart. Given its ChAFTA commitments, China now has significantly less to offer.

Another possibility is China may take retaliatory actions by, for example, imposing anti-dumping duties on Australian exports. By the end of 2015, China has not used anti-dumping measures against Australia. However, China is not unknown for its willingness and abilities to retaliate hostile anti-dumping activities taken by other countries against it. For example, in the widely-reported anti-dumping investigations initiated by the EU against China's solar panel industry, China's Ministry of Commerce (MOFCOM) showed a clear and firm stance to take any necessary measures in return.[87] Further, a recent WTO case brought by the US against China also arose out of China's taking of WTO-unlawful measures to retaliate against the US' imposition of 35% anti-dumping duties on Chinese tires.[88] Accordingly, it is not unlikely that retaliatory actions may be taken by China against Australia.

Finally, China may well initiate WTO proceedings to challenge the abuse of PMS. So far, China has challenged the use of NME methodologies in several WTO disputes.[89] As the *EU* –

---

[86] See Alleged dumping and subsidisation of silicon metal from China – Submission of the Government of China concerning Government Questionnaire (18 April 2014), at 5.

[87] See Kenneth Rapoza, "On European Solar Dispute, China Will Retaliate", Forbes (25 March 2013), available at: http://www.forbes.com/sites/kenrapoza/2013/03/25/on-european-solar-dispute-china-will-retaliate/

[88] See Jim Puzzanghera, "U.S. Prevails in WTO Dispute with China Over Auto Tariffs", Los Angeles Times (23 May 2014), available at: http://www.latimes.com/business/la-fi-wto-autos-china-20140524-story.html

[89] See, for example, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* (DS379), case summary available at:

Cost Adjustment Methodologies (Russia) case suggests, China's attempt has been and may continue to be followed by other WTO members having similar concerns. To the authors' knowledge, since 2014 MOFCOM has been conducting assessment of the possibility of using the WTO dispute settlement mechanism to combat Australia's use of PMS. The reasons why China has not done so may be two-fold. First, China is currently focused on potential disputes over its NME status a more imminent issue given the upcoming expiration of the NME Assumption. On 13 November 2015, China warned that it will not be hesitant to take WTO actions against the use of NME methodology after 11 December 2016.[90] As the GOC might see it, NME and PMS give rise to some common issues, e.g. the use of surrogate input price for the calculation of CNV, such that a WTO case on NME is hoped to resolve some of the issues relating to PMS as well. Second, the GOC is not absolutely certain about whether its claims against the use of PMS will prevail and hence is concerned about the ramifications of loss. It may be, therefore, awaiting the outcome of the *EU – Cost Adjustment Methodologies (Russia)* case. In short, China has taken a strategic and cautious approach to the issue of PMS with WTO proceedings clearly one of its policy choices.

V. DEBUNKING THE MYTH OF 'PARTICULAR MARKET SITUATION'

The remaining question is how the term PMS should be interpreted and applied in a way that is compatible with the relevant WTO rules. As mentioned in Section II, a textual interpretation of Article 2.2 of the AD Agreement merely suggests that PMS does not concern situations relating to 'no domestic sales in the ordinary course of trade' or 'low volume of domestic sales'. Thus, PMS may be considered to be a residual category which encompasses all of the other situations in the market which render domestic selling prices unsuitable for comparison with export prices. This interpretation is supported by the negotiating records discussed in Section III. While the negotiating records also suggest that PMS is not intended to deal with the issue of "input dumping", that is, price distortion of raw materials used for the production of final goods subject to investigations, the issue should nevertheless fall within the ambit of PMS if the price distortion of raw materials has caused price distortion of the final goods.

While there has been no WTO jurisprudence on PMS, the issue was considered in the last GATT dispute – *EEC – Cotton Yarn*[91]. In that case, Brazil challenged the EC's determinations of normal value for failing to consider the PMS prevailing in Brazil at the time. In particular, Brazil argued that the EC should have taken into account the exchange

https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds379_e.htm; *European Communities — Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China* (DS397), case summary available at: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds397_e.htm

[90] Inside US – China Trade, "China Warns of Potential WTO Fight Over NME Methodology in AD Cases", 13 November 2015.

[91] GATT Panel Report, *EC – Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil*, 42S/17 (adopted 30 October 1995).

rate freeze and high inflation in its domestic market, and more importantly, "whether the method selected [for determining normal value] would permit a 'proper comparison' with the export price".[92] The EC countered that the circumstances identified by Brazil did not constitute a PMS as they had no impacts on domestic sales.[93] The panel held:

> the wording of Article 2:4 [now Article 2.2 of the WTO AD Agreement] made it clear that the test for having any … recourse [to use of CNV] was not whether or not a "particular market situation" existed *per se*. A "particular market situation" was only relevant insofar as it had the effect of rendering the sales themselves unfit to permit a proper comparison. In the Panel's view, therefore, Article 2:4 specified that there must be something intrinsic to the nature of the sales themselves that dictates they cannot permit a proper comparison. [94] (original emphasis)

In rejecting Brazil's claim, the panel found that Brazil had failed to demonstrate that the alleged situation in the market actually distorted the cost of raw materials used for the production of cotton yarn and that that distortion actually affected the domestic selling price of cotton yarn.[95] However, the panel found it unnecessary to address the issue how the 'fair comparison' requirement under Article 2.6 of the Tokyo Round Anti-Dumping Code (now Article 2.4 of the WTO AD Agreement) would affect the interpretation of 'proper comparison'.[96]

Accordingly, the issue of PMS may be interpreted in two ways. The first way would be that a PMS would arise only if the situation in concern has resulted in price distortions of the goods subject to investigations. The mere fact that the situation exists is not sufficient to constitute a PMS and hence justify the use of CNV in the determination of dumping margin. In other words, the whole issue of PMS does not concern an alleged market situation *per se* but concerns whether the consequence of the existence of the situation has been distortions of normal value. This approach to the interpretation of PMS is consistent with the Appellate Body's rulings in *US – Hot Rolled Steel*, which suggests that whether domestic price of subject goods should be disregarded for the purpose of determining normal value depends on whether the price has been distorted.[97] This interpretation was also adopted by the Full Court of the Federal Court of Australia (FCA) in *Enichem*[98] where the court was requested to consider whether domestic sales in Italy, where a natural monopoly was claimed to exist, were suitable for the determination of normal value. The court held that the mere existence of a monopoly is not sufficient to substantiate that domestic prices are distorted and hence

---

92 Ibid., paras. 468-469.
93 Ibid., para. 472.
94 Ibid., para. 478.
95 Ibid., para. 479.
96 Ibid., para. 482.
97 Appellate Body Report, *United States — Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* (*US – Hot Rolled Steel*), WT/DS184/AB/R, adopted 23 August 2001, paras. 145-150.
98 *Enichem Anic SRL & Anor v The Anti-Dumping Authority & Anor.* (1992) 29 ALD 431.

unsuitable for use as normal value.[99] Therefore, where price distortion is claimed to have occurred due to government intervention in the relevant market, the government intervention does not amount to a PMS unless it has actually caused distortions in the selling price of the subject goods. Different from the NME Assumption whereby price distortions are deemed to exist[100], the burden of proving a *prima facie* case that price distortions and hence a PMS does exist is on the investigating authorities. Further, in cases where the alleged price distortions are in the raw materials/inputs market, it would be insufficient to show that the price of raw materials is distorted; rather, a PMS would arise only if the price distortion of raw materials has passed through to, and hence caused distortions in, the price of the final goods. The "passing-through" issue has been considered by the WTO tribunals in the context of assessing the application of countervailing duties to tackling "input subsidy" under the Agreement on Subsidies and Countervailing Measures (SCM Agreement). For example, in *US – Softwood Lumber IV*, the Appellate Body held:

> [w]here the producer of the input is not the same entity as the producer of the processed product, *it cannot be presumed … that the subsidy bestowed on the input passes through to the processed product*. In such case, it is necessary to analyse to what extent subsidies on inputs may be included in the determination of the total amount of subsidies bestowed upon the processed products …[101] (emphasis added)

This ruling applies to the determination of PMS to the extent that it mandates investigating authorities to establish that price distortions of inputs have flowed through to the price of the goods made from the inputs. In the absence of such an assessment and affirmative determinations, a PMS cannot be presumed to exist so that normal value must be established by reference to the actual selling price of the final goods (and not to a surrogate or constructed price). This is especially so where the producer of the final goods and the supplier of the inputs are unrelated entities and their transactions relating to the purchase of the inputs have taken place on market conditions.[102] If the inputs are supplied by government or governmental agents or an affiliated entity, price passing-through effect may be relatively easier to establish. However, this does not relieve the investigating authorities of the burden to analyse and establish that passing-through and price distortions have actually occurred on a case-by-case basis.[103]

---

[99] Ibid., at 439.

[100] Appellate Body Report, *European Communities — Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China (EC – Fasteners)*, WT/DS397/AB/R, adopted 28 July 2011, paras. 286-288.

[101] Appellate Body Report, *United States — Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted 17 February 2004, para. 140.

[102] Sherzod Shadikhodjaev, "How to Pass a Pass-Through Test: the Case of Input Subsidies" (2012)15(2) *Journal of International Economic Law* 621-646 at 635-636.

[103] Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* (*US – Anti-Dumping and Countervailing Duties (China)*), WT/DS379/AB/R, adopted 25 March 2011, paras. 445-446.

A revised version of this article has been accepted for publication in the *Journal of International Economic Law* (Vol. 19 No. 4, 2016) published by the Oxford University Press.

The second way of interpretation would be a PMS would arise only if the situation in concern precludes a *proper comparison* between export price and normal value. This way of interpretation necessarily requires an assessment of whether the situation at issue has actually affected the comparability of the two prices. Such comparability would be affected if the situation has caused distortions in domestic selling prices of subject goods but not in their export prices. However, the comparability should not be treated as being affected if both of the prices are distorted *even-handedly* by the situation. This approach to the interpretation of PMS was adopted by Australia's Trade Measures Review Officer (TMRO) in its review of Australian Customs' dumping investigation of hollow structural section exported from China.[104] The TMRO considered a number of findings of the FCA and observed that to reach a positive finding of PMS,

> … there must be a degree of distortion in the market that renders arms length transactions in the ordinary course of trade unsuitable to give a true normal value, but that this unsuitability will not necessarily be brought about by any factor that simply depresses or inflates domestic prices.[105]

The TMRO then provided several examples – including extreme weather conditions, government environmental measures, and domestic versus export subsidies – to illustrate the point that the suitability of domestic price for comparison with export price would be affected only if the alleged market situation has affected the two prices to different degrees.[106] However, the TMRO's observations were not followed by its successor the Anti-Dumping Review Panel (ADRP). In its review of the AD Commission's dumping investigation into galvanized steel from China, the ADRP stated:

> … the situation in the market identified for the purpose of subparagraph 269TAC(2)(a)(ii) [equivalent to Article 2.2 of the AD Agreement] does not have to affect the domestic prices differently to the export price. Adjustments are made under subsections 269TAC(8) and (9) [equivalent to Article 2.4 of the AD Agreement] for differences affecting the comparability of the export price and normal value.[107]

In a recent FCA case, Nicholas J also rejected the proposition that a PMS can be found to exist only when domestic price and export price are unequally influenced by the same government interventions. The rejection was based on the broad language used in

---

[104] Decision of the Trade Measures Review Officer, Hollow Structural Sections, Review of Decisions to Publish A Dumping Duty Notice and A Countervailing Notice (14 December 2012). (HSS Review) The TMRO is the former administrative review body in Australia responsible for reviewing decisions made by Australian investigating authorities on antidumping and countervailing investigations. It was replaced by the Anti-Dumping Review Panel (ADRP) in 2013.

[105] See above n 104, HSS Review, para. 58.

[106] Ibid., paras. 60-63.

[107] Decision of the Anti-Dumping Review Panel, Review of Decisions Regarding Dumping Duties and Countervailing Duties for Zinc Coated (Galvanised) Steel and Aluminium Zinc Coated Steel Exported from the People's Republic of China (15 November 2013), para. 56.

s269TAC(2)(a)(ii) of the Act which merely requires the authorities to consider whether domestic prices are *suitable* for use in determining normal value.[108]

It is submitted that the second way of interpretation is a preferred approach to PMS. The first interpretation has its merits only if one considers Article 2.4 of the AD Agreement (which will be discussed below) as a context for the interpretation of Article 2.2. Thus, the ADRP's view above makes sense in that it suggests adjustment of any differences between CNV and export price be made under Article 2.4 so that it is unnecessary to consider the comparability between the two prices under Article 2.2. However, this view overlooks the fact that Article 2.2 also incorporates a test of "proper comparison" between the two prices. That the Australian legislation modified the test to a test of "suitability" does not relieve the Australian authorities of the responsibility to apply the test mandated under the WTO rules. It must be reiterated that an inquiry as to PMS hinges on whether price distortions of subject goods would preclude a proper comparison between normal value and export price. A market situation causing distortions in domestic price but not in export price may well undermine a proper comparison as the use of the distorted domestic price for the determination of dumping margin would either inflate or deflate the margin. However, if domestic price and export price are both distorted by the same market situation and to the same extent, a proper comparison would not be precluded as the dumping margin would remain at the same level as it would be if the two prices are both undistorted. A typical example concerns a situation where the price of raw materials used for the production of subject goods is artificially lowered due to government intervention in the relevant market. Applying the analysis above, a PMS should not be found if the price distortions of raw materials have affected the export price and domestic price of the final goods even-handedly. In this regard, it has been observed that input price distortions are likely to affect or flow through to both of the prices.[109] Further, in *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body, in considering the issue of "double remedies" (which will be discussed later), has relevantly ruled:

> … domestic subsidies will, in principle, affect the prices at which a producer sells its goods in the domestic market and in export markets in the same way and to the same extent. Since any lowering of prices attributable to the subsidy will be reflected on both sides of the dumping margin calculation, the overall dumping margin will not be affected by the subsidization.[110]

This ruling also lends support to the observation that if input costs are artificially-lowered by government intervention, the distorted costs are likely to affect both the domestic price and the export price of the final goods such that the comparability of the two prices would not

---

[108] *Dalian Steelforce Hi-Tech Co Ltd v Minister for Home Affairs* [2015] FCA 885, at [30].

[109] Thomas Prusa and Edwin Vermulst, "United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China: Passing the Buck on Pass-Through" (2013)12(2) *World Trade Review* 197-234 at 217-219.

[110] See above n 103, Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 568.

be affected and the overall dumping margin would not be affected. Thus, a finding of PMS would not be based on positive evidence and objective assessment if it is based on a finding of price distortion in domestic price only. This is because such a finding of PMS would be based on an unreasonable assumption that export price has not been equivalently distorted while it may well have. If this assumption is made and hence a CNV (which purges the input price distortion) is used for comparison with the export price (which is likely artificially lowered due to the input price distortion), then the comparison would not be a proper one for the purpose of Article 2.2 of the AD Agreement as it would likely inflate dumping margin. In short, to ensure a proper comparison between normal value and export price and hence a dumping margin free of any unjustified inflation or deflation, an inquiry as to PMS must involve an assessment of whether or not a claimed market situation has caused distortion in both domestic price and export price of the goods subject to investigations.

In the authors' view, in the absence of an assessment of the comparability between domestic price and export price in determining PMS, the only way to avoid the above-mentioned potential distortions in the calculation of dumping margin would be to correct the distortions under Article 2.4 of the AD Agreement. Article 2.4 requires investigating authorities to ensure "fair comparison" between normal value and export price by making adjustments:

> in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and *any other differences which are also demonstrated to affect price comparability*. (emphasis added)

In *US – Hot-Rolled Steel*, the requirement that adjustment be made for "any other differences" has been interpreted by the Appellate Body as not precluding any differences affecting price comparability from being the object of an 'allowance'.[111] Accordingly, in cases where a PMS is found to exist on the sole basis that domestic prices of subject goods are distorted by, for example, artificially-lowered input prices, one would reasonably expect that the difference between CNV and export price – to the extent the former is not affected by the input price distortions but the latter is – would be adjusted to ensure fair comparison and hence no inflation of dumping margin. However, recently in the compliance proceedings of the *EC – Fasteners* dispute, the WTO tribunals observed that such adjustments may not be required. In considering whether the EC was required to make due allowance for alleged cost differences when the NME Assumption had been applied, the panel held:

[111] See above n 97, *US – Hot Rolled Steel*, Appellate Body Report, para. 177.

> … in an investigation against an NME where the analogue country methodology is used, claiming adjustments for alleged differences in costs would undermine the [investigating authority]'s recourse to that methodology.[112]

While noting the general applicability of the "fair comparison" rule, the Appellate Body agreed with the panel and ruled:

> Article 2.4 of the Anti-Dumping Agreement has to be read in the context of the second *Ad* Note to Article VI:1 of the GATT 1994 and Section 15(a) of China's Accession Protocol. We recall that the rationale for determining normal value on the basis of [the surrogate prices] was that the Chinese producers had not clearly shown that market economy conditions prevail in the fasteners industry in China. [footnote omitted] Costs and prices in the Chinese fasteners industry thus cannot, in this case, serve as reliable benchmarks to determine normal value. In our view, *the investigating authority is not required to adjust for differences in costs between the NME producers under investigation and the analogue country producer where this would lead the investigating authority to adjust back to the costs in the Chinese industry that were found to be distorted*.[113] [emphasis added]

However, the Appellate Body rejected the panel's findings that adjustment for any cost differences would undermine the EU's right to employ the analogue country methodology and held that adjustments must still be made to cost differences unrelated to the distorted costs such that investigating authorities must assess whether making an adjustment would have the effect of reintroducing distorted costs or prices in the normal value.[114] Thus, the Appellate Body was essentially concerned that making adjustment to distorted elements of domestic price would result in reintroducing the elements into the price, thereby affecting the comparability of the price with export price. As we have argued above, the Appellate Body's rulings may be criticised as having ignored the likelihood that if the distorted element relates to cost of production such as input costs, then that distortion may have affected both domestic price and export price. Without an adjustment of the differences between CNV and export price, "fair comparison" may not be achieved as the export price may well have been established on the basis of the distorted costs while the CNV has been calculated based on undistorted costs. In other words, the absence of the adjustment would likely result in a comparison between undistorted normal value and distorted (and typically artificially-lowered) export price and hence an inflated dumping margin. Despite China's agreement to the NME Assumption, it is doubtful whether that agreement is intended to allow unjustified dumping margin inflation. The Appellate Body may have been aware of this issue and attempted to minimise such inflation by requiring investigating authorities to adjust cost

---

[112] Panel Report, *European Communities — Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China (Recourse to Article 21.5 of the DSU by China)*, WT/DS397/RW, adopted 12 February 2016, para. 7.245.

[113] Appellate Body Report, *European Communities — Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China (Recourse to Article 21.5 of the DSU by China)*, WT/DS397/AB/RW, adopted 12 February 2016, para. 5.207.

[114] Ibid., paras. 5.213-5.234.

differences unrelated to distorted costs. However, the correct approach, as we have submitted, should be to assess whether distorted costs have actually affected both domestic price and export price and hence their comparability for the purpose of determining dumping margin. The Appellate Body's approach would be unlikely to avoid unjustified dumping margin inflation as it may well allow comparison between undistorted normal value and distorted export price. We are mindful that the Appellate Body's approach may have been influenced by the operation of the NME Assumption under which it is up to China to substantiate that market economy prevails in the relevant market so that its domestic price should be used for the determination of normal value. However, such assumption does not apply to the determination of PMS in which it is the responsibility of investigating authorities to establish that a claimed distortion in prices of final subject goods or raw materials used for the production of the goods have affected the comparability between the domestic price and the export price of the goods. Given the Appellate Body's ruling that adjustment of cost differences is not required for distorted costs under Article 2.4, an assessment of the comparability between domestic price and export price concerning the impact of cost distortions on both of the prices should be undertaken under Article 2.2 so as to avoid any unjustified dumping margin inflation.

Finally, the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* has cautioned against the practice of "double remedies" in the application of the NME methodology. The Appellate Body has ruled that the application of concurrent duties (i.e. antidumping and countervailing duties) must not amount to the imposition of "double remedies" to offset the same situation where, for example, a subsidy has only affected the export price of goods but not their domestic price such that "the subsidy will lead to increased price discrimination and a higher margin of dumping".[115] In such circumstances, the situation of subsidization and the situation of dumping are the "same situation", and the application of concurrent duties would constitute an application of "double remedies" to compensate for that situation. The Appellate Body further observed that if methods other than actual domestic selling price of goods are used for the calculation of normal value, then "there is any possibility that the concurrent application of anti-dumping and countervailing duties on the same product could lead to 'double remedies'."[116] The Appellate Body's rulings could be applied to the issue of PMS. That is, in a dumping and countervailing investigation where a PMS is found to exist due to input price distortion caused by an input subsidy and consequently a CNV (not affected by the distortion) is compared with the export price (likely affected by the distortion) in determining dumping margin, the dumping margin would have already captured the effect of the subsidy. To avoid "double remedies", investigating authorities must ensure the subsidy margin attributable to the input subsidy be deducted from the dumping margin.

[115] See above n 103, Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 568.
[116] Ibid., para. 569.

We note that a determination of PMS would eventually depend on the factual circumstances of each case. As noted in Section II.B, Australian Customs' and the AD Commission's findings of PMS have consistently relied on the existence of government policies and regulations in the relevant market, subsidies or other forms of financial assistance to the relevant industries, and/or certain import and export measures. These forms of government intervention, we believe, may be insufficient to substantiate the existence of a PMS and if they are, a PMS may well be found to exist in market economy countries such as Australia, the US or the EU. Taking Australia as an example, both the Australian Federal Government and the various State and Territory Governments provide financial assistance to manufacturers and producers of end products as well as to producers of inputs to manufacture. According to the Productivity Commission, government assistance to Australian firms, projects and industry through an array of measures was over $17 billion in FY 2013/14.[117] Such financial assistance may be available to all industries or may be specifically targeted to particular industries such as the steel industry[118], the automotive industry[119], and the manufacturing industry[120]. Further, industries key to the production of products, such as the energy industry, are heavily regulated.[121] Both such financial assistance and government regulation no doubt will have an impact on pricing of products supplied into the Australian market. Using the criteria that Australian Customs and the AD Commission have used to determine whether a PMS exists in countries such as China, it is equally arguable that a PMS may exist in Australia and other developed countries that have similar forms of financial assistance and government regulation of key industries.

VI. CONCLUSION

The issue of PMS has become one of the most controversial and sensitive issues in the China-Australia trade relations. While Australia committed to grant China a full MES as a precondition for the ChAFTA negotiations, Australia's interpretation and application of PMS in anti-dumping investigations against China has reneged on that commitment. By consistently treating China as having a PMS and requesting the Chinese government to prove

[117] See above n 66, "Trade & Assistance Review 2013-14", at 2. Also see Australian Government, Grants & Assistance, available at: http://www.business.gov.au/grants-and-assistance/Pages/default.aspx

[118] See, for example, Australian Government, "Steel Transformation Plan", available at: http://www.business.gov.au/grants-and-assistance/closed-programs/STP/Pages/default.aspx;

[119] See, for example, Australian Government, "Automotive Transformation Scheme", available at: http://www.business.gov.au/grants-and-assistance/manufacturing/ats/Pages/default.aspx

[120] See, for example, Australian Government, "Manufacturing Transition Programme", available at: http://www.business.gov.au/grants-and-assistance/manufacturing/Manufacturing-Transition-Programme/Pages/default.aspx; also see Yolanda Redrup, "Revealed: Which Sectors Get the Most Government Help", SmartCompany (12 June 2013), available at: http://www.smartcompany.com.au/finance/economy/32140-revealed-which-sectors-get-the-most-government-help/

[121] See, for example, Australian Government, Energy Industry Regulation, available at: https://aer.gov.au/industry-information/energy-industry-regulation

that market economy prevails, Australia has incorporated the NME Assumption into the assessment of PMS. Whether it is the NME Assumption or PMS being applied, the concern for China has been the treatment of it as a NME. With the upcoming expiration of the NME Assumption, protectionist attempts to continue to treat China or economies like China as a NME would most likely be realised via the application of PMS. Consequently, the issue of PMS may replace the NME Assumption as one of the central issues under the world trading regime; hence how PMS should be interpreted and applied would become increasingly important to WTO members and tribunals.

The lack of guidance on the meaning of PMS under the WTO AD Agreement and jurisprudence necessitates consideration of the negotiating records of the Anti-Dumping Codes negotiated during the GATT and of the WTO AD Agreement. While no such records are found to be directly relevant to the issue of PMS, there are materials providing a context for the understanding of PMS. The most important interpretative guidance derived from the drafting records is that PMS was intended to cover all situations (other than 'no domestic sales in the ordinary course of trade' and 'low volume of domestic sales') which affect the comparability between domestic selling prices of subject goods and their export prices. This is not only consistent with a textual reading of Article 2.2 of the AD Agreement, but also finds support in the GATT jurisprudence on PMS and WTO jurisprudence on related issues of antidumping and countervailing investigations. Thus, an assessment of PMS should concentrate on whether any alleged price distortions in the end goods or in the inputs for the production of the goods would actually preclude a proper comparison between the domestic selling price and the export price of the final goods. Central to this assessment are issues of whether input price distortions have actually flowed through to the domestic selling price of the end goods; and if so, whether the distortions have also affected the export price; and if so, whether the two prices have been distorted to the same degree. The existence of a situation in the market, such as government interventions by regulation and financial assistance, does not by itself constitute a PMS and hence justify the disregard of the domestic price of the end goods and the use of CNV for the calculation of dumping margin. As the thrust of the issue lies in price comparison, there should be no finding of PMS if the comparability of domestic price would not be affected, or in other words, if a proper comparison between domestic selling price and export price would not be precluded. Without an inquiry into whether domestic price and export price are affected even-handedly, a finding of PMS and the resultant use of CNV cannot be justified and would be likely to result in a comparison between undistorted normal value and distorted export price and hence in unjustified inflation of dumping margin. A determination of PMS based on the above-proposed approach would eventually depend on the facts and evidence in each case. In this connection, Watson has sharply pointed out (in relation to the US treating China as a NME) that "[m]any of the nonmarket aspects of China's economic policies that [the US Department of] Commerce points to are, in fact, common in other countries comfortably recognized as market

A revised version of this article has been accepted for publication in the *Journal of International Economic Law* (Vol. 19 No. 4, 2016) published by the Oxford University Press.

economies."[122] We have argued that if Australia's approach to PMS were adopted, then countries like the US and Australia itself may easily be found to have a PMS. As far as Australia is concerned, a positive finding of PMS in an Australian industry is not impossible given the lack of disciplines on PMS and the significant regulation and financial assistance the Australian government has been providing to a variety of domestic industries. It is not a secret that such government regulation and assistance exist in almost all jurisdictions. To fill the gap of FTAs such as ChAFTA which fails to constrain the use of PMS and to avoid any tit-for-tat application of PMS, the WTO tribunals, in their adjudication of *EU – Cost Adjustment Methodologies (Russia)*, are now in a good position to standardise the law and practice in a way that carries on the spirit of free trade.

[122] See above n 3, Watson, "Will Nonmarket Economy Methodology Go Quietly into the Night?", at 8. For arguments against the distinction between market and non-market economy, see Lisa Toohey & Jonathan Crowe, "The Illusory Reference of the Transitional State and Non-Market Economy Status" (2014)2(2) *Chinese Journal of Comparative Law* 314-336.